

Fixing What's Broken: Strategies for Increasing Diversity in Law Firms

Cultural Competence

Corporate, Securities, and Governance





CHEAT SHEET

- ***Recruitment.*** It is important that your company retains firms that will continue to have an excellent pipeline for talent.
- ***Responsibilities of heads of practice.*** The most highly compensated lawyers and the heads of practice areas lead the firm and control its decisions, which include diversifying staff.
- ***Responsibilities of corporate directors.*** One responsibility involves holding senior management accountable for populating the organization with talented people.
- ***Helpful questions.*** The answers to these questions should give a quick snapshot of whether firms are serious about diversity.

Something is clearly broken in big law. Despite the business imperative for diversity, law firms that corporations retain for significant issues just aren't meeting the need to increase the number of diverse attorneys.

The mismatch between law firm demographics and those found in the leadership of client corporations, law schools, universities and the general population prompts concerns that businesses will have to become more active in helping these firms understand that diversity is indispensable to the success of companies. Corporate achievement depends heavily on talent and teams. A high-performing company must look at the broadest possible talent pool for its attorneys, and this must include women and minorities.

In addition, diversity plays a critical role in US law, where the decision makers (e.g., judges, juries and regulators) reflect the general population, not the partnership makeup at large firms. It is fair to say that well over one out of every three matters that go to trial will be presided over by a woman or minority. Of the active federal court judges, 32 percent are women and 23 percent are minorities while 27 percent of the state court benches are women and minority judges vary by state, with Hawaii the highest and California at 23 percent.

A director's involvement with outside counsel often occurs when a significant legal matter comes to the board's attention or a director is individually named in litigation. In addition, the importance of external legal services to a large enterprise and the substantial expenses associated with these services prompt many boards, like MassMutual, to assign a board committee to review the management of external counsel.* Given the strategic importance of diversity to sustainable corporate success, corporate directors may want to know how to help their companies make meaningful progress with respect to their external legal resources. We offer our perspective and a few practical suggestions.

* For example, the MassMutual Corporate Governance Committee Charter provides in part that the committee shall, "receive periodic reports from the general counsel with respect to policies for retention and supervision of legal services, including a review of the company's most highly used firms."

Why a diverse external legal team matters to your company

In-house and external counsel will universally contend that stable, long-term relationships with firms that understand their business and core values are vital. There is much less of a “learning curve” with a firm that knows your business and its personnel. A firm with knowledge of your business can act more swiftly, efficiently and produce better results. Unlike in-house counsel who tend to lack depth of knowledge in particular specialty areas of law, large law attorneys provide their services to a broad array of clients. Thus, the external legal team may become aware of legal issues or opportunities relating to your business that in-house attorneys may not otherwise see. Moreover, if your outside counsel understand your company’s strategy, their advice and counsel become even more valuable and personalized, and they can provide this valuable information to advance the company’s objectives. Unlike other vendors whose goods and services can be purchased at an auction or through regular requests for proposals, the long-term relationship does matter and does improve results.

The National Association of Women Lawyers (NAWL) noted in *Report on Retention and Promotion of Women in Law Firms*:

> The business case for increasing gender diversity among the ranks of equity partners and in leadership positions at law firms is crystal clear. The continued attrition of women from law firms and the concomitant under-representation of women equity partners and firm leadership adversely affect not only law firms, but also their clients. … [T]he attrition of women partners from firms adversely affects clients, as they lose the services of talented and skilled attorneys with whom they have developed a close working relationship and who possess knowledge and expertise concerning the client’s business and legal matters.

Unfortunately, many legal matters take years to resolve. As a result, your legal team will need to evolve over time. Although the person leading your work today may be excellent, it is important that your company retains firms that will continue to have an excellent pipeline for talent. Demographic trends strongly suggest that a firm that has not effectively integrated diversity into its long-term business plans simply will not have an excellent pipeline for talent. Ultimately, they will cease to exist and fail to serve the long-term needs of your company. Without immediate and sustained commitment to diversity, the same challenges of talent, demographics and quality of results that your company has likely already been addressing for several years will overtake them.

As women and minorities who have enjoyed distinguished academic and professional careers continue to have significant influence as corporate counsel, it will become more unlikely they will hire law firms that cannot demonstrate they will remain relevant for a planning horizon that looks several decades into the future. Notably, the life experience of all young lawyers entering the profession will immediately inform their judgments about opportunities for professional growth and fulfillment at law firms fostering inclusiveness versus those that do not. Having experienced diverse and inclusive environments in previous employment and throughout their educational and extracurricular careers, white male lawyers entering the profession will also recognize as readily as women and minorities the limited prospects for career growth and professional fulfillment offered by law firms that have not accepted the importance of diversity to their long-term success.

Finally, the failure to be consistent with other public statements in the decisions relating to the retention of outside counsel can damage the company’s brand. Most companies include in their advertising, internal hiring and marketing decisions a focus on diversity and inclusion as a mechanism to increase market share and ultimately increase profits. In order to be true to this brand promise, all of the company’s hiring decisions, whether internal or external, must maintain the same

ethos.

Additional Potential Questions and Considerations

1. Per the organization chart requested question mentioned later: Be sure to identify the number of attorneys over whom that partner is responsible in his/her management position.[1]
2. What is the average/median compensation of equity partners who fall within a diversity category versus those who do not?[2]
3. Does your firm tie equity partner compensation to diversity initiatives? If so, how is that measured and what impact does it have on compensation?
4. Does your firm have a succession plan? What are the number of women and people of color included in that plan? Does your firm have a leadership development and training program as part of its succession plan? If so, is the curriculum designed to address leadership challenges specific to women and people of color? Based on the plan, how many women and people of color were actually elevated to the position of partner, who were identified in the plan (or lateral hires)?
5. What is the makeup by diversity category of the equity partners identified as having "engagement partner responsibility" for the firm's top 50 clients?
6. Have there been any significant trends as they relate to the above data, including:
    1. Of the recently promoted partners, what are the percentages by diversity category?
    2. Of the recently promoted equity partners, what are the percentages by diversity category?
    3. What are the retention and attrition statistics for equity partners?
    4. What is being done to ensure diverse associates are being given prominent roles?
    5. Which lawyers are recognized within the firm for significant results achieved for your company? What is the diversity of this group?

1 This can vary among firms, and among office managing partners themselves, e.g., the office managing partner of the 200-attorney New York office probably wields far more power than the office managing partner of the 4-person Omaha office. Similarly, being the practice group leader for a 10-attorney group in a non-core strategic area is far different than being the practice group leader for a 200-attorney group that is considered the heart of the firm's core business.

2 This may need to be split between the "equity" partners and the non-equity partners, since the compensation calculation between the two groups may vary widely so you want to try to be as apples-to-apples as possible. Using the Am Law definition of "equity partner" is a good proxy for this one.

Who at law firms are really responsible for your matters?

As a director, it is important for you to understand: (1) the make-up of the team you are using from a particular law firm, and (2) whether the law firm demonstrates that diversity is indispensable to its business plans. With respect to both categories you should know where the real power and responsibility for client matters resides in law firms. For any significant matter, it will be an equity partner who ultimately has the responsibility and significant authority for your legal work.

Although other titles have emerged, the equity partners "own" the firm and generally make their

money on the billable hour rate and leverage. The most highly compensated lawyers and the heads of practice areas lead the firm and control its decisions. Firms that fail to achieve diversity in this elite group will fail to serve the longer-term needs of corporate clients.

At the highest level within the corporate power structure, namely the board level, although there remains much room for improvement, diversity is increasing. This may be driven by data that indicates companies with diverse boards perform better because they have used the broadest talent pool. For example, Catalyst's 2011 study, "The Bottom Line: Corporate Performance and Women's Representation on Boards," found that companies with the most women board directors out-performed those with the least on return of sales by 16 percent and return on invested capital by 26 percent.

The Spencer Stuart Board Index reflects that 19 percent of S&P 200 boards are women and approximately 15 percent are black, Latino or Asian. Likewise, approximately 19 percent of S&P 500 directors are women. With respect to board searches, in 2014 64 percent of the Spencer Stuart searches looked for minorities and 71 percent of the searches included a desire for new women directors. Of those placed in 2014, 30 percent were women and 12 percent were minorities (18 percent minorities in 2013). So change is occurring — not as fast as we might like, but the face of the corporate board is changing.

Around the year 2042, the white majority in the United States will become the minority — never to be reversed. Of the 2011-2012 bachelor's degrees conferred by postsecondary institutions in the United States, 57 percent went to women and 30 percent were awarded to minorities. Women comprised 47 percent of the law students in the 2009-2010 class and 32 percent of the 2012 law school enrollments were non-white. Thus, considerable progress is being made in both the supply of qualified and diverse lawyers and in the top ranks of the companies that will use their services.

Although we have a long way to go, it is clear that there is a focus on improving the diversity of boards and executive management. At law firms, however, the power structure remains a relic of the 1950s. Women and people of color have made little progress into the leadership ranks. According to the *Seventh Annual NAWL National Survey on Retention and Promotion of Women in Law Firms*, in 2012, for the American Lawyer (Am Law) 200 firms, only 15 percent of the equity partners were women. The 2013 National Association of Legal Professionals' survey reflects that, "among equity partners 83.5 percent were men, 16.5 percent were women, and 5.4 percent were racial/ethnic minorities." This data mirrors the recent survey by the NAWL that found "the typical firm in the Am Law 200 reported that women made up approximately 17 percent of the equity level of partnership." The *2013 Am Law survey* found that only 1.9 percent of partners at the 223 firms that submitted data to the survey were black, and that percentage has not changed in the last five years. For equity partnership "the true brass ring of compensation and power … 31 firms — more than a third of the 77 Am Law 100 firms that reported equity status … either had no black partners or just one." In some cities this data is even worse. In Boston in 2013, of the 693 partners of the top 10 firms, there were four blacks (0.6 percent), seven Latinos (0.9 percent) and 10 Asians (1.4 percent).

Women and people of color are increasingly appearing at the associate level in firms. According to the NAWL survey, 46 percent of associates at the 200 Am Law firms are women, but much less so at the equity partner, managing partner or high compensation levels. Over the last several years, the percent of women that are equity partners has remained essentially flat. While "[t]he number of women promoted to partner continued to increase significantly in the late 1980s and early 1990s, yet the male-to-female ratios soon leveled off and have remained relatively stagnant since 1992, hovering at just over 15 percent for equity partners for the last fifteen years." And *Law360* recently

reported in “Only 7 BigLaw Firms have Women Running the Show,” that “[o]f the roughly 160 leadership positions at the top 100 firms on the *Law360* 400, just seven women currently hold the top leadership positions at their respective firms.” The septet of firm leaders serve in either a chairman, managing partner or comanaging partner role, according to *Law360* research.

Despite corporations’ need for more diversity in the attorneys responsible for their matters, the large law firms have not shown any signs that they plan to address or satisfy this need. Corporate clients may not know this because the information provided by firms to their clients on their diversity and progress, as reflected on their billing statements, obscures the reality.

Percentages of the total firm’s representation simply do not reflect who occupies the power positions in the firms or the actual representation in the offices that serve your enterprise. Likewise, diversity seemingly reflected on a client in the power positions in the firms or the actual representation partner and a pool of junior associates rotating in-and-out of the matter. For this reason, the data furnished by law firms provide no real insight into diversity with regard to who is really responsible for your work or who will be in a position to add value to your company. Nor will the data inform you about who is getting the credit for your legal work or the overall power structure, leadership or equity partners at the firm.

Responsibilities of corporate directors

Corporate directors understand that two of their primary responsibilities involve holding senior management accountable for pursuing the right strategies and populating the organization with talented people capable of executing those strategies. In this context, directors regularly receive reports and presentations about their companies’ policies, practices and performance concerning diversity. Companies generally understand the important role diversity plays in talent management, leadership development, C-suite succession planning and the increasingly competitive environment for recruiting and retaining a high-performing complement of employees who sustain the company’s ability to satisfy customers and win the marketplace.

Law firms play important roles related to the board’s effort to monitor management’s effectiveness in aligning strategies with a pipeline of talent for not only corporate counsel but also leadership in other aspects of the business. A well-traveled career path to the role of corporate counsel often started in a major law firm. Many organizations also look to the versatility of lawyers for executive talent to lead important segments of business outside of the legal functions. For example, Kenneth Chenault of American Express, John Chambers of Cisco and Frank Blake of The Home Depot are all lawyers. If major law firms fail to develop a diverse complement of lawyers, they will lose value to their clients as well as talented lawyers who are seeking professional advancement.

Accordingly, we recommend that corporate directors extend discussion of familiar inquiries about strategy and talent management to provoke focused consideration of diversity by asking what law firms are doing to ensure that they will have sustainable leadership and subject matter experts necessary for the company’s relevant planning horizon. After all, the external lawyers will have to interact effectively with the diverse teams found within corporations. They must also be effective advocates in persuading a diverse group of judges, juries and regulators.

The link between law firm representation and sustainable strategic success for the company requires that the office of general counsel articulates clear expectations for achieving meaningful diversity in the law firms as a key element of the relationship with each firm. Even if the big firms are slow to recognize and act upon the importance of diversity, the general counsel must insist, for the good of

the company, that law firms exhibit meaningful improvement over a well-defined time period. Ultimately, the general counsel has the fiduciary responsibility and the authority to choose law firms based on the company's decades-long planning horizon.

Helpful questions for the general counsel

As a director, if you really want the law firm partners who are responsible for your matters to be diverse, we suggest you start with collecting relevant data. We have drafted a concise and straightforward set of questions your general counsel should ask of the most used law firms. By evaluating the answers and observing if the firms improve over time, you should be able to determine if the law firms your company is using are taking meaningful steps toward achieving diversity that will support the long-term needs of your enterprise.

Generally, information on the top 10 law firms in billings, or those that represent 80 percent of billings (this could be a lot less than 10), should become the focus. In the United States, responses to the request should be broken down by women, Asian, black, Latino and openly LGBT (diversity categories).* The answers to these questions will take little effort because the information is at the law firm's fingertips.

* Do not include diverse attorneys outside of the United States (e.g., do not include a Chinese lawyer in a Shanghai office).

The first set of questions goes to the services currently provided to your enterprise.

- Provide the following information, specific for the services provided to the enterprise:
    - Who is the relationship partner(s) by diversity category?
    - For significant matters (the top 10 matters handled in the last year [three years] — based on amount billed), who is the lead partner(s) by diversity category?
    - What is the annual percentage of "equity partner" billings by diversity category?
    - What is the percentage of the annual total billings by diversity category?

Once you have the data on the services provided to your enterprise, data for the whole law firm should reflect the priority that the firm places on diversity. The following three questions should provide insight into to whether the firm, as a whole, values diversity and whether women, people of color or LGBT people are progressing at the firm:

- Among the "equity partners" for *Am Law* reporting purposes, what is the percentage by diversity category? If you use certain offices, you want that data for those specific offices. It is easy to check the number of equity partners against the number published by Am Law in its annual survey to make sure the numbers are correct.
    - How many of the top 100 compensated partners fall within each diversity category? Same question for the top 20 and top 50.
    - What is the firm's management organizational chart (chair/management committees/area leaders/practice group leaders/office heads) and identify the makeup within the organization chart by diversity categories?

"Compensation," means all forms compensation (bonus, deferred compensation, etc.); more firms are moving to multi-faceted compensation systems including, in particular, bonuses or deferred compensation.

Actions you can take to help your company

Directors need to be satisfied that the attorneys responsible for the company's matters are diverse. Your general counsel can easily obtain and provide the information directors need to understand to be informed about how the law firms are addressing the corporation's diversity needs. Your general counsel can easily explain to the firms why the board needs the data. The answers to these questions should give a quick snapshot of whether firms are serious about diversity and will add long-term value to your enterprise. Whether or not you are satisfied with the answers, you should ask your general counsel to explain how this information is used to express performance expectations for law firms chosen to serve the company. Given the low starting point, you should ask for a plan of improvement (the general counsel can push for improvement or change firms) and review results annually.

Show your general counsel that you view law firm diversity as an important part of firm-retention decisions.

We hope all directors who want to see the diversity in the firms that represent their companies will simply rip out this article and give it to their general counsel with a sticky note on it that reads: "Please gather this information to share with me at the next board meeting."

Further Reading

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