



# The Power of Accountability to Achieve Diversity and Inclusion

By Christopher A. Pickett

Large law firms are the least diverse sector of the legal industry. Diverse teams have been shown to outperform those that are homogeneous, but law firms consistently fail to implement policies or practices that promote it. Many other industries are realizing positive impacts in diversity and inclusion by implementing policy changes, setting measurable goals, and focusing on top-down culture changes that push companies to achieve their goals, but those successes have not moved to the legal industry, which remains remarkably homogeneous.

Though many law firms are aware of their lack of diversity, and have implemented diversity and inclusion initiatives and hired diversity professionals, the legal industry is still overwhelmingly white and male. According to the Institute for Inclusion in the Legal Profession, 1.77 percent of large law firm partners in the United States are African-American, 2.89 percent are Asian American, and 2.19 percent are Hispanic. The statistics for women of color are similarly dismal, with African-American women representing 0.64 percent, Asian-American women representing 1.07 percent, and Hispanic women representing 0.3 percent of large law firm partners.

The reasons are too many to review in their entirety here, but at a high level there are systemic issues that negatively impact women and attorneys of color and prevent them from advancing to partner and leadership positions. At the micro level, the issues include hiring, work assignment, succession planning and credit allocation policies that may disfavor attorneys of color. In addition to formal policies, often there are informal policies and practices that disfavor attorneys of color and female attorneys. They may not impact the recruitment of top students of color, but over time they create work environments where women and attorneys of color do not feel valued and are not treated fairly or equally, and that negatively impacts retention.

It is not only the policies that impact diversity and inclusion, but also their application. The issue often is not intentional unfairness or inequality, but rather implicit or unconscious bias, and significant research illustrates its impact.

In one study, a consulting firm sent a legal memorandum to 60 large law firm partners for their review and analysis. Half were told the memorandum was written by a white male attorney, and the other half were told it had been written by a black male attorney. The memos were identical. Reviewers who believed it was written by a black man criticized the memorandum as “average” and “needing a lot of work,”

rated the memo 3.2 out of 5, and found three more typographical errors than those reviewers who believed it was written by a white male. The reviewers who believed it was written by a white male rated the memo 4.1 out of 5, praising the author for his potential and good analytical skills. This study helps show why, even though many firms have diversity and inclusion committees and managers who work toward diversity and inclusion goals, there has not been significant positive impact. Law firms, unlike large companies, are not held accountable by shareholders, board members and the public. They operate privately and are insulated from public pressure. However, legal departments are now beginning to hold law firms accountable for their lack of diversity, and it's that accountability and pressure that may ultimately result in the positive impact many of us would like to see.

When companies began focusing on diversity and inclusion, they often measured the diversity of their law firm partners by simply counting the attorneys of color and/or women working at the firm. Over time, companies began requiring attorneys of color and/or female attorneys to work on specific matters, but the emphasis remained on the number of attorneys at the firm, working for a client, or working on a matter.

This analysis resulted in law firms focusing only on recruiting, rather than recruiting and retaining, attorneys of color. It also allowed firms to analyze diversity goals only in the context of numbers, without confronting systemic barriers that impact the ability of women and attorneys of color to advance to partnership or leadership positions.

Furthermore, with companies focusing solely on numbers, law firms also viewed diversity through the lens of tokenism, believing they needed only to have enough attorneys of color within their ranks to satisfy clients. This mindset further harmed attorneys of color, who were viewed within the firm as necessary but not equal in quality to their counterparts, and often had the burden of not just attempting to succeed as an attorney, but also of acting as the “face” of diversity. Lastly, partners often saw attorneys of color as fungible, easily replaced by another attorney of color should he or she leave employment. This method of analyzing diversity demeaned their contribution and was an additional impediment to their advancement within the firm.

Legal departments are in a unique position to help law firms achieve true diversity and inclusion.

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Law firms are accountable to one outside entity: their clients. If companies make diversity and inclusion a significant part of what they consider when engaging new law firm partners or reviewing current law firm partners, then the firms will be forced to better analyze their diversity and inclusion initiatives. History has shown, however, that this will occur only if companies analyze diversity and inclusion in a complex manner, with a true understanding of diversity and inclusion goals. By connecting real accountability to their company's expectations for diversity and inclusion, law firms will have no choice but to comply if they want to maintain that relationship, and consequently they will be motivated to work towards removing the institutional barriers and biases that keep diverse employees from being hired, retained and advanced.

Recently, some companies have received credit for their diversity and inclusion mandates. Some began reducing fees if law firms did not meet certain diversity metrics, while still others offered fee bonuses if firms met certain diversity metrics. These are excellent first steps, but there are additional steps companies can take in order to push the legal industry in the direction of true diversity and inclusion.

To better measure the culture of a law firm, legal departments should ask for a variety of information, including:

- Information about promotion opportunities (number of attorneys of color and/or female attorneys who successfully moved from associate to equity partners).
- Information about female equity partners and partners of color.
- Attrition rate among attorneys of color and female attorneys.
- Numbers of attorneys of color and women working in firm leadership (demographics of management committees, compensation committees, practice group leaders).
- Information about succession planning and how the firm ensures that it includes attorneys of color and female attorneys, and how the firm assists attorneys of color to become the relationship attorneys for firm clients.
- How "credit" at the firm is allocated.

Knowing these things can lead to a clear understanding of a firm's culture and true dedication to diversity and inclusion. Furthermore, as you

request the information, in addition to becoming part of the fabric of your legal department, these concerns will become entrenched in the law firms that want to do business with you. This information, however, will impact the diversity and inclusion work only if there are consequences for not "measuring up" to the goals your department determines as important. In addition to requesting information, law departments and companies should set requirements that firms must comply with in order to satisfy diversity and inclusion goals.

First require that, for new work, credit allocation will not be focused entirely on the lawyer responsible for the first engagement, but also includes lawyers working on the file. Second, you can require that an attorney of color or a woman not only work on a file, but also be included on communications with the client. Third, if you are a longtime client of a law firm, you can identify attorneys of color or female attorneys and offer them secondments to increase their visibility within the company and enlarge their role within the firm. Fourth, your department can identify attorneys of color and work to mentor those associates/young partners (both those who work on your files and those who do not), to not only increase their visibility within the company, but also to help them develop a network that will help with business development as their career advances.

Though following these suggestions can cause uncomfortable conversations or may seem like inappropriate intrusions into a law firm's operation, they are identical to a client suggesting that the law firm needs a lawyer with a specific expertise, that it begins developing a practice area, or that it consider alternative fee arrangements. If the legal industry is going to see real positive change, these conversations must occur and accountability must come from clients. If companies identify real goals, ask real questions, and seek real change, law firms and the legal industry will finally change for the better.

This list of suggestions is not complete. Strategies are limited only by the determination of your company and its legal department to work to achieve real positive change in diversity and inclusion initiatives within the legal industry. ■

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