

# For The Defense™

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## DRUG AND MEDICAL DEVICE

page 44

*Also in This Issue*

## DIVERSITY AND INCLUSION

page 82

### 2018 DRI Elections

page 14

### Making Your Way Through the Wilderness of e-Discovery

page 32

### A Comparative Analysis of Regulation on Marijuana and Other Controlled Substances

page 26

### Advanced Depositions Skills

page 38

### How to End a Legal Brief with a Bang

page 94

### A Duty that Gives You an Edge: Technology Competence

page 98

*And More*

## Law Firm Diversity

By Gary L. Howard

**A** new business case for diversity seems to be emerging: build a diverse team to work on a client's matters or kiss those clients goodbye.

# An Attainable Goal or a Mythical Illusion?

Folklore tells us that a leprechaun can be found at the end of every rainbow, guarding a pot of gold. But the reality is that any effort to find the treasure by walking along the rainbow's path to its apparent end would be futile;

rainbows only refract light and do not have true ends. A pot of gold waiting to be found by some lucky rainbow chaser is nothing but pure fantasy.

But what is not a myth is that diversity in United States law firms remains as elusive as any mischievous leprechaun's pot of gold waiting at the "end" of a rainbow. The topic of diversity (or the lack of it) in U.S. law firms has been bantered about, mulled over, debated, and discussed for decades. And while some noble efforts have been undertaken to reach the ultimate goal of diverse and inclusive law firms, those efforts have produced only moderate improvements or they have failed altogether. Most law firms still lack the level of diversity necessary to reflect the in-house legal departments of their clients or of society as a whole. Diversity in law firms, therefore, is akin to the folkloric pot of gold: something that would be ideal to have but that remains out of reach no matter how hard you may try to grab it.

### What Is the Current State of Diversity?

Every law firm is different. Likewise each region of the country has different demographics. So while no single set of statistics on diversity can be deemed definitive for all firms or all geographic regions, the reports published by the National Association for Law Placement (NALP) and the Minority Corporate Counsel Association (MCCA) seem to provide the most comprehensive insight on the current state of diversity in U.S. law firms.

The statistics in the 2017 Vault/MCCA Law Firm Diversity Survey, when compared with United States Census Bureau 2017 estimates for the general population, illuminate today's sobering state of diversity in U.S. law firms. According to the report (1) Hispanic/Latino attorneys account for just 3.69 percent of all law firm attorneys (compared with 18.1 percent of the general population); (2) African-American/black attorneys account for just 3.14 percent of all law firm attorneys (com-



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pared with 13.4 percent of the general population); and (3) female attorneys account for just 35.03 percent of law firm attorneys (compared with 50.8 percent of the general population).

Unlike the data related to race, ethnicity, and gender, the data related to LGBTQ attorneys cannot be compared with census data because questions related to sexual orientation or gender identity are not included as part of the census. But the MCCA's survey shows that 2.5 percent of all attorneys are openly LGBTQ. This percentage is below 3.8 percent of respondents who self-identified as LGBTQ in a 2015 Gallup survey. The NALP *2017 Report on Diversity in U.S. Law Firms* makes clear that geographic diversity in regard to LGBTQ attorneys in law firms is drastically limited. Four cities—New York, Washington, Los Angeles and San Francisco—account for the places of employment for more than half of all LGBTQ attorneys in U.S. law firms.

Additional information can be gleaned from the MCCA and NALP reports that paint an even bleaker picture regarding the state of diversity for women of color and attorneys with disabilities. The number of African-American/Black and Hispanic partners also remains shockingly low. Overall the statistics contained in both the NALP and MCCA reports belie any assertion that diversity in U.S. law firms is anywhere close to being a goal attained.

### **Why Has There Been No Better Success at Increasing Law Firm Diversity?**

Assuming that law firms had good intentions over the years when they expressed a desire to increase diversity, why, then, has no more progress been made on the hiring, development, and elevating to partner those attorneys from traditionally underrepresented categories the numbers reveal? Myriad excuses have been proffered to explain why law firm diversity has remained stagnant. A few of the reasons are the following: (1) there are no “qualified minority” candidates in certain geographic markets or in certain specialized practice areas; (2) diverse candidates are more attracted to work in the corporate or public service sectors than they are in law

firms; or (3) diverse attorneys lack a sufficient client base to make them profitable.

Excuses without introspection ring hollow and too often serve as cover for an unwillingness to do the work necessary to find solutions. Firms must be willing to drop the excuses and to ask potentially difficult questions. *Does our “diversity” program lack any true inclusion component? Are underrepresented attorneys given neither a reason to stay nor the tools to succeed as a diverse attorney in our majority firm? Is “diversity” merely a term used on our website or in our recruiting material and not truly a part of every facet of our organization?*

If firms are willing to conduct this self-analysis, depending on the answers, they may be required to make wholesale changes regarding what they thought all along had been the right approach to increasing diversity and inclusion. But change can be hard. Some firms may find themselves grappling with not only how to transform their methods and ways of thinking but also how to do it in a rapidly evolving legal environment. Too often it seems that talk is easy and firms may not really be serious about implementing the changes necessary to achieve real change. Are firms conducting the necessary self-analysis to determine the right path to find the diversity pot of gold? Are firms not only “talking the talk” but also “walking the walk”?

### **Are Law Firms Serious About Diversity and Inclusion?**

Certainly, many firms are making a legitimate effort to promote diversity even in situations when it may not be creating rapid change. Even though change may be happening, albeit slowly, firms still can improve by analyzing what is preventing their efforts from bearing diverse fruit more quickly. For instance, if these firms are able to recruit diverse talent but are not able to keep those attorneys, consideration should be given to why they are leaving. Is there an issue with lack of inclusion? Is a firm selling the diverse attorneys on something on the front end that it can't deliver when the diverse attorneys get there?

Without thoughtful consideration of how to include diverse attorneys once they are recruited to a law firm, real success at diversifying the firm will likely

remain elusive. One harsh reality that we have to consider is whether some firms are not ready to celebrate and embrace full diversity because they are not comfortable with a truly inclusive environment; a firm may not want diverse attorneys to express racial, gender, and other differences and to fully express their uniqueness while at work. Protestations by firms that any

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effort to expand diversity must not do anything to disturb the firm “culture” or “history” must be examined to make certain that those statements are not just a polite or veiled way to demand that those who are “different” *blend in* as much as possible with how the majority of the firm looks, thinks, and acts. Culture and history can sometimes be bastions of the past that do not reflect a diverse and inclusive future.

### **What Does Lack of Inclusion Look Like?**

Diversity without inclusion can manifest in a variety of ways, such as these: (1) when a non-Christian feels uncomfortable attending some firm events because a Christian prayer is offered, and while the prayer is not “mandatory,” any display of non-participation would be frowned upon; (2) when a woman of color feels compelled not to wear her natural hair to work and to make efforts to have her appearance conform to white norms; or (3) when a gay man feels that his husband would not be welcomed at law firm social functions—despite the fact that heterosexual attorneys bring their spouses and even non-married opposite-sex dates or partners to the events without scrutiny. These are examples of instances in which an underpre-



sented attorney may sense that she or he is not truly accepted for who she or he is.

But the most insidious ways in which inclusion is denied to diverse attorneys are in the context of work. While these denials of inclusion may not be intentional, it is this work-related lack of inclusion that has the potential to do the most damage to a diverse attorney's chances of advancement

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in the profession. For instance, firms may not provide diverse attorneys with the opportunity to have meaningful contact with firm clients or to work on those clients' matters. Firms may reserve the most high-profile and coveted projects for those attorneys with whom they feel the most comfortable. Finally, firms may not ensure that diverse attorneys work on files received by way of a request for proposal (RFP) or "pitch," even though the diverse attorneys' data was used as a means of making a firm's diversity numbers appear satisfactory. Ultimately, lack of opportunity in terms of work and quality of work at a firm can send a message that a diverse attorney is not likely to succeed in the long run.

### **Have There Been Efforts to Promote Diversity and Inclusion?**

Over the years there have been various calls for and initiatives to increase diversity in U.S. law firms. These efforts largely have been championed by the leaders of corporate law departments. In 1999, Charles Morgan, who was at that time the general counsel of BellSouth Corporation, took the

laboring oar on an initiative called "Diversity in the Workplace—A Statement of Principle." Ultimately, the chief legal officers of approximately 500 major companies signed onto the "Statement of Principle." By agreeing to the statement, the chief legal officers were pledging that they would give significant weight to a law firm's commitment to diversity when they made decisions on which law firms to hire. But despite these assurances, progress was minimal, if at all.

With no real no advancement in law firm diversity from the 1999 "Statement of Principle," a 2004 "Call to Action" was endorsed by the Board of Directors of the Association of Corporate Counsel. The "Call to Action" asked chief legal officers to pledge to "reaffirm our commitment to diversity in the legal profession." As with the 1999 "Statement of Principle," the "Call to Action" asked that decisions on "which law firms represent our companies [be] based in significant part on the diversity performance of the firms." However, the "Call to Action" asked companies to take additional steps and *to seek opportunities affirmatively* for firms that distinguish themselves in regard to diversity. As they had done with the 1999 "Statement of Principle," some of the largest and most prestigious corporations in the country signed on to abide by the principles of the 2004 "Call to Action."

Was the concern related to diversity in U.S. law firms resolved by the 2004 "Call to Action"? If it had been, the action taken in August 2016 by the American Bar Association (ABA) House of Delegates would have been unnecessary. In 2016, the ABA House of Delegates adopted Resolution 113, which deals specifically with diversity in the legal profession. The resolution states:

RESOLVED, That the American Bar Association urges all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys; and

FURTHER RESOLVED, That the American Bar Association urges clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys; and

FURTHER RESOLVED, That for purposes of this resolution, "diverse

attorneys" means attorneys who are included within the ambit of Goal III of the American Bar Association [minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities].

The resolution has a message of both diversity and inclusion. The focus is not only on diversifying the ranks of underrepresented attorneys but is also on including those attorneys by providing them with opportunities to do the legal work directed from the clients that wish to abide by the resolution's principles.


After the adoption of Resolution 113, correspondence followed from the ABA to the chief legal officers of the Fortune 1,000 companies to encourage those companies' chief legal officers to sign on to support and implement the resolution. To further the resolution, the chief legal officers were asked to have law firms hired by their companies to complete the ABA Model Diversity Survey and for the companies to use the information from this survey as a factor in deciding which law firms to retain to work on the companies' matters. The ABA Model Diversity Survey asks very pointed questions and is designed to elicit data detailing how the answering law firm is doing on a wide variety of diversity-related topics. Currently 90 companies have signed the pledge to hold law firms accountable for diversity based on information contained in the survey.

Because the ABA Model Diversity Survey has been in place for a few years and because it has begun to see widespread use, many law firms have been asked to complete it. Regrettably, despite providing correct answers on the survey, some firms may be able to work around the real goal of providing opportunities to and promoting the work of diverse attorneys. For instance, the survey asks law firms to detail how many diverse attorneys are in the law firm, but it does not guarantee that those diverse attorneys will receive any credit for or the opportunity to work on any files brought into the firm as a result of the data in the main body of the survey. However, the "Non-mandatory 'Client Matters' Supplement" to the survey elicits specific information on how firms staff matters and provide credit on that company's matters specifically; this information can be invaluable

in making certain that law firms are truly including underrepresented attorneys and fulfilling the stated purpose of Resolution 113.

### What's Next?

Some corporate legal departments that are not satisfied with the largely stale state of diversity in law firms are taking the next steps even beyond Resolution 113 to advance diversity. These companies are beginning to be more proactive to make certain that numbers on a survey translate to numbers of diverse attorneys working on the clients' files. Facebook, Walmart, Macy's, MetLife, HP, Microsoft, Oracle, Starbucks and Northwestern Mutual are just a few of the companies that have received media attention for their efforts to make certain their teams of outside attorneys more closely resemble the diversity of the general population. A variety of "carrot" or "stick" methods are being used to help prod law firms to promote diversity and inclusion better; these include bonuses for those firms that meet diversity goals and penalties or reduction in fees for those firms that do not. The old business case for diversity (*make an effort to put a diversity policy into practice and clients will be satisfied*) is likely to be replaced with what appears to be the emerging business case for diversity (*build a diverse team to work on a client's matters or kiss those clients goodbye*).

Law firms are in business to make a profit and are not likely to continue expending resources on diversity programs and initiatives that do not reap rewards. If more companies hold firms accountable for not only their diversity numbers overall but also the diversity of the teams that work on the company's matters, firms will by necessity take a closer look at their diversity and inclusion efforts and make changes to meet their clients' demands. If firms do not, they may find themselves losing business to firms that celebrate the uniqueness of their attorneys and that are willing to showcase teams that more closely reflect the diversity of most in-house legal departments and society as a whole. Those firms that change may find that diversity can be reality and not a myth, and in the end, they may be rewarded with the equivalent of the pot of gold at the end of the rainbow. 

### Marijuana, from page 31 Prevention of Marketing Marijuana to Minors

In California, the prohibition against marketing marijuana to minors takes form in regulation of design, labeling, and packaging. California prohibits the design of the edible product to resemble humans (realistic or caricature), animals, insects, or fruit. Additionally, the California Department of Food and Agriculture reserves the right to evaluate products on a case-by-case basis to ensure that a product does not closely resemble an alternate, available product that does not contain cannabis.

Labeling prohibitions in California include prohibitions against any content that is designed to be attractive to individuals under the age of 21, including but not limited to, "cartoons, any likeness to images, characters, or phrases that are popularly used to advertise to children, any imitation of candy packaging or labeling, and the term 'candy' or 'candies'."

Packaging of an edible marijuana product must be child resistant, satisfying the standards for "special packaging" as set forth in the Poison Prevention Packaging Act of 1970. Included in these regulations are requirements for resealable bags if a package contains more than one serving, so that it maintains its childproof qualities throughout the duration of its use. Lastly, the California regulations on packaging require that a package be opaque and not imitate packaging of any product typically marketed to children.

### New York Case Study

A Rockland County, New York, father was arrested and charged with endangering the welfare of a child in May 2017, after leaving the child unattended in a vehicle cabin in which the child found and consumed edible marijuana before becoming ill and hospitalized. The officer at the scene described the package as appearing "identical to a normal candy package" but compared the severity of exposing a child to edible marijuana to the same caliber as exposing a child to Vicodin or oxycodone, which he considered to be similar prescription drugs. Despite covert packaging designed to look exactly like candy, liability for the child's consumption ultimately fell on the parent. See Peter Haskell, *New York State Boy Overdoses On Cannabis-Infused Gummy*

*Candy*, CBS New York (May 14, 2017): <http://newyork.cbslocal.com>.

Though the father did not pursue litigation against the manufacturer, wholesaler, or retailer of the edible marijuana consumed by his son, it could be argued that his criminal intervening act of leaving the child alone in the car with access to a controlled substance, deemed as endangering the welfare of a child, would break the chain of distribution in product liability. See *Alston v. Advanced Brands and Importing Co.*, 494 F.3d at 562 (2007).

### Future of Mitigating Marijuana Liability

Mitigating marijuana liability will probably involve dram shop laws and daily purchase limits.

### Dram Shop Laws

In an industry as recent and complex as the marijuana industry, it can be difficult to foresee every risk of liability or the methods that could mitigate such liability. However, a comparative analysis of marijuana to other controlled substances reveals one evident opening for potential marijuana-related liability in the form of an altered version of dram shop laws. *Vesley v. Sager*, 5 Cal.3d 153 (Cal. 1971), a case in which a tavern owner was charged with a misdemeanor for violating the owed duty of care to the public by serving alcohol to an obviously intoxicated person, was the first of several dram shop cases to establish an extension of liability. *Bernhard v. Harrah's Club*, 16 Cal.3d 313 (Cal. 1976), extended liability against vendors based on common law negligence. Finally, though eventually reversed by the California State Legislature, *Coulter v. Superior Court of San Mateo County*, 21 Cal.3d 144 (Cal. 1978), extended liability for the actions of an intoxicated individual to a non-commercial furnisher of alcohol, such as a host at a party.

Presently, dram shop laws extend liability of an intoxicated individual's actions to the seller of alcohol to a minor, an obviously intoxicated individual, or a knowingly or habitually addicted individual. Though dram shop-style laws do not yet exist for marijuana, it is a topic that is garnering an increasing amount of attention as progressively more states begin to allow legal marijuana dispensaries to operate.