

Diversity and inclusion in the legal profession: Trends shaping the discussion

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As 2018 comes to a close, three trends have emerged that are likely to continue affecting how the legal profession addresses diversity and inclusion in 2019.

Law firms, like all businesses, recognize that fostering a diverse and inclusive workplace culture is not only the right thing to do; it also helps them compete in today's marketplace. Diverse and inclusive companies perform better.¹

Ten years after the 2008 recession, despite repeated pledges to increase the diversity of the legal profession, the industry has moved the needle only slightly.

Since 2007, racial and ethnic minorities have increased by just 3.18 percent among partners and only 4.17 percent among associates.² The percentage of partners and associates who identify as LGBTQ has increased by just 0.79 percent and 1.75 percent, respectively, since 2007.³

While the representation of some groups, such as Asian-American attorneys, has increased more than others, the progress has been slow. Since 2009, the number of women associates has remained virtually unchanged, while the number of women partners has increased from 19.21 percent to 22.7 percent.⁴

The attrition rate for women remains much higher than it is for men.⁵ Attrition rates for women of color are higher still.⁶ While there have been some gains, less than 9 percent of law firm partners are attorneys of color, and less than 23 percent are women.⁷

As the profession tries to find ways to better reflect the country's ever-increasing diversity, its efforts are being shaped by three trends.

TREND NO. 1: #METOO

With the frequent reports of high-profile figures being accused publicly of engaging in sexual assault and sexual harassment and the increased willingness of women to speak out individually and collectively about their experiences, discussions about sexual harassment and sex discrimination in the workplace became commonplace.

As the discussion continued in 2018, however, a growing divergence in opinion on the effect and impact of the #MeToo movement on the workplace emerged.

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Some observers note that the movement raised awareness of the fact that sexual harassment is an ongoing issue and concern.

With the increased focus on the issue, law firms, like other businesses, have redoubled their training efforts and refocused them to help ensure that not only victims, but witnesses, know that they can and should come forward and report their concerns about harassment and discrimination.

Law firms want employees to know these complaints will be taken seriously. By creating an environment in which people are more willing to raise concerns, such workplace misconduct will decrease, and more opportunities will be open to women who will not be judged on something other than their workplace performance.

Studies show that diverse teams are more creative but will have more conflict unless there is some form of personal connection among team members.

Other observers express concern that the movement has gone too far and that employment decisions are being made and professional reputations are being tarnished unfairly, without due process to the accused, by public accusations that have not been proven in court.

They also worry that the movement may lead to fewer opportunities for women. Earlier this year, in a survey of 3,000 working adults in U.S., one in six male managers reported that they are now uncomfortable mentoring a woman, and almost one in three male managers reported that they are afraid of working alone with a woman.⁸

Some observers note that if such fears are seen as valid and mentoring and development opportunities for women decrease, gender inequities will be perpetuated, particularly in fields in which women have been historically underrepresented in leadership roles.⁹

Over the course of six months, two polls revealed an increase in this sentiment that men need to be wary of working too closely with women, particularly among men who identify as Republican.¹⁰ Because of this perception, an increasing number of men and women expressed concern that navigating workplace interactions has become more difficult.¹¹

If more men are hesitant about mentoring women out of the fear they may be falsely accused or be perceived to be engaging in inappropriate behavior, this belief may have a detrimental effect on firms' ability to retain talent and develop the next generation of leaders if women do not receive the career guidance mentoring provides.

Firms rolling out implicit-bias training must make an upfront commitment to be open to changing the way they operate.

The fact that polls show a divergence of opinion that is split more along political lines than gender lines increases the likelihood of division in the workplace and complicates firms' efforts to ensure that their workplaces are inclusive for all.

TREND NO. 2: THE DECLINE OF CIVIL DISCOURSE

In 2018 we continued to see a decline in the level of civility in civic discourse. This decline may be due to the increased desire to generate news coverage, a focus on sound bites and click bait, the increasing partisanship in national politics, the rise of social media or other causes.

Regardless of the cause, the result is the same: it is getting harder to find platforms for reasoned debate of the issues. The decrease in civility cannot help but spill over into the workplace.

At the same time, the country has seen an increase in reported hate crimes. A report released earlier this year by the Center for the Study of Hate and Extremism at California State University, San Bernardino reported that hate crimes increased for the fourth consecutive year in the country's 10 largest cities.¹²

The Anti-Defamation League reported a 57 percent increase in anti-Semitic hate crimes from 2016 to 2017.¹³ The country experienced the worst anti-Semitic attack in U.S. history with the mass shooting at the Tree of Life Synagogue in Pittsburgh in October. Words have meaning and can lead to tragic consequences.

TREND NO. 3: IMPLICIT-BIAS AWARENESS AND TRAINING

In 2018 more corporations and law firms talked about implicit or unconscious bias and sought out implicit-bias training. With public attention on high-profile events, firms looked to raise awareness of implicit bias.

The idea behind such training is that if people become more aware of their implicit biases, they can check themselves before they act and change their behavior. Many firms' expectations appear to be that such training alone will lead to a culture change that will make their firms more inclusive.

Workplace diversity trends

- #MeToo
- The decline of civil discourse
- Implicit-bias awareness and training

Unfortunately, many firms appear to view implicit-bias training as both a means and an end unto itself. While a training session on implicit bias may raise people's awareness of how their biases may affect their decisions and the way they work, too often people leave the training session, comment on how interesting it was and proceed with business as usual.

For such training to be effective, firms first should lay some groundwork. Firms will want to ensure they have a culture in which people from different backgrounds know each other and have some personal connection so that participants will feel comfortable making candid self-assessments.

Indeed, a number of studies have shown that diverse teams are more creative but will have more conflict unless there is some form of personal connection among team members.¹⁴

Law firms committed to diversity and inclusion will want to take deliberate, thoughtful approaches to bring about the change they want to see in their workplaces.

Firms rolling out implicit-bias training must make an upfront commitment to be open to changing the way they operate. While learning about and developing an awareness of bias is laudable, without follow-up and a pledge to examine and change practices and policies, implicit-bias training will not lead to change.

HOW WILL THESE TRENDS AFFECT LAW FIRMS IN 2019?

Law firms committed to diversity and inclusion must take into account the very real possibility that some people will question the need for or value of these initiatives.

Firms will want to consider how to address the differing views of the gender dynamics of the workplace. They may need to reinforce the ground rules for civil discourse in the workplace.

If firms are considering rolling out implicit-bias training, they should make sure they have laid the groundwork and are prepared to make changes. They should also introduce bias interrupters along with or after the training.

In short, law firms committed to diversity and inclusion should take deliberate, thoughtful approaches to bring about the change they want to see in their workplaces.

Making changes to improve the diversity of the profession and to make workplaces more inclusive can be challenging and will take time — but not doing so poses a much bigger threat.

As Edmund Burke reportedly said, "Nobody made a greater mistake than he who did nothing because he could do only a little."

NOTES

¹ See, e.g., Vivian Hunt, Dennis Layton & Sara Prince, *Diversity Matters*, McKinsey & Co. (Feb. 2, 2015) (finding that companies in the top quartile for gender diversity in leadership were 15 percent more likely to have financial returns above the industry norm, and companies in the top quartile for racial/ethnic diversity were 35 percent more likely to have financial returns above the industry norm); Vivian Hunt, Sara Prince, Sundiatu Dixon-Fyle & Lareina Yee, *Delivering Through Diversity*, McKinsey & Co., at 10-14 (Jan. 2018) (reaffirming the findings about the correlation of higher gender and racial/ethnic diversity in leadership with better financial performance made in "Diversity Matters" and reporting that companies in the bottom quartile for both gender and racial/ethnic diversity are 29 percent more likely to underperform their industry peers on profitability).

² Vault/Minority Corporate Counsel Ass'n, 2018 Vault/MCCA Law Firm Diversity Survey Report, at 20 (2018).

³ *Id.* at 20.

⁴ Nat'l Ass'n of Law Placement, 2017 Report on Diversity of U.S. Law Firms, at 9 (Dec. 2017).

⁵ *Id.* at 24-25; Marc Brodherson, Laura McGee & Marian Pires dos Reis, *Women in Law Firms*, McKinsey & Co., at 2 (Oct. 2017); 2018 Vault/MCCA Law Firm Report, at 7-8.

⁶ 2018 Vault/MCCA Law Firm Report, at 7-8.

⁷ *Id.* at 7, 23; Report on Diversity, at 9; Women in Law Firms, at 2-3.

⁸ *Sexual Harassment Backlash Survey: Key Findings*, LeanIn.org (2018), <https://bit.ly/2EwkBt2>.

⁹ See, e.g., Sophie Soklaridis, Catherine Zahn, Ayelet Kuper, Deborah Gillis, Valerie H. Taylor & Cynthia Whitehead., *Men's Fear of Mentoring in the #MeToo Era — What's at Stake for Academic Medicine?*, NEW ENG. J. OF MED. (Oct. 3, 2018).

¹⁰ Compare *Sexual Harassment at Work in the Era of #MeToo*, Pew Research Ctr., at 4 (Apr. 4, 2018) (34 percent of Republican men believe false accusations by women are a major problem) with Press Release, Ipsos, NPR/Ipsos Examine How Views on Sexual Harassment Have Changed in the Past Year, at 3 (Oct. 31, 2018) (74 percent of Republicans believe false accusations by women are common).

¹¹ Compare *Sexual Harassment at Work in the Era of #MeToo*, at 6 (55 percent of men claim workplace interactions are more difficult).

¹² Brian Levin & John David Reitzel, *Hate Crimes Rise in U.S. Cities and Counties in Time of Division & Foreign Interference*, Ctr. for the Study of Hate and Extremism, Cal. State Univ., San Bernardino, at 3 (May 2018).

¹³ Anti-Defamation League, *Audit of Anti-Semitic Incidents – Year in Review 2017*, at 4 (Feb. 27, 2018).

¹⁴ See, e.g., Michael E.A. Jayne & Robert L. Dipboye, *Leveraging Diversity to Improve Business Performance: Research Findings and Recommendations for Organizations*, HUMAN RES. MGMT., Vol. 43, at 409-24 (2004).

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