The Law Firm Caste System

Tiffani N. Darden, Case Western Reserve University
THE LAW FIRM CASTE SYSTEM:
CONSTRUCTING A BRIDGE BETWEEN WORKPLACE EQUITY THEORY & THE INSTITUTIONAL ANALYSES OF BIAS IN CORPORATE LAW FIRMS

Tiffani N. Darden*

ABSTRACT

Diversity eludes the most prestigious legal employers—the federal judiciary, academia, and elite law firms—despite enlightened scholarship diagnosing the quandaries of workplace equity in professional settings. While recruitment efforts stream attorneys of color into the lower ranks of corporate law firms, management and the profession still grapple with retention challenges. How can the legal profession, including law firms, resolve this problem? In addressing this question, I examine the uncharted intersection between two bodies of legal scholarship: workplace equity theory and the institutional analyses of law firm diversity.

The primary data collection method for this study consists of personal interviews with diversity personnel, partners, and associates at three large law firms. Based on this data, the Article sets forth an associate evaluation process meant to address the unique issues confronting racial and ethnic minority associates in large law firms. The Article also provides a comparative critique of the three program models implemented by the firms participating in this study.

In the law firm context, antidiscrimination law applies most directly to recruitment and promotion practices. The probationary period between these distinctive marks in an associate’s career fall within a space not readily susceptible to Title VII, the federal accountability mechanism enacted to deter unlawful discrimination. Therefore, the proposed evaluation process combines the theories of transformative mediation and workplace equity to resolve individual conflict, reveal structural biases, and build a repository of crucial data to inform diversity efforts on the organizational and professional levels. The expanded review also addresses cross-cultural mentoring and monitoring challenges, which dampen a minority associate’s prospects for success in the apprenticeship model implemented at large law firms.

In this Article, I also argue that minority associate retention requires the attention of several institutional stakeholders in the legal profession, including law schools, law firms, corporations, and bar associations. The momentum needed to pursue equity as an attribute of legal professionalism requires a shift in value systems permeating throughout these interdependent institutions. If pertinent information regarding the experiences of minority associates flows throughout the profession, then the effort not only gains sustainability but also benefits from the expertise and inherent accountability pressures emanating from a professional norm of workplace equity.

* Visiting Professor of Law, Case Western Reserve University. I would like to thank Professor Susan Sturm and the Workplace Equity Seminar at Columbia Law School for invaluable insights on earlier draft of this paper. I would also like to thank Elizabeth Chambliss, Jessie Hill, Sara Cames, Jacqui Lipton, Ray Ku, William “Chip” Carter, Cassandra Robertson, Juliet Kostritsky, and Jonathan Entin.
# Table of Contents

I. Introduction ..................................................................................................................................................3

A. The Current State of Affairs: Statistics and Explanations ......................................................................6
   1. Minority Associate Retention: Testing the Advocate’s Virtue of Patience ........................................6
   2. The Institutional Analysis of Minority Associate Retention in Law Firms ........................................8

B. Behind the Scenes: An Insider’s View on Law Firm Diversity Programs .............................................11
   1. Law Firms Use Different Approaches to Diversity .............................................................................11
   2. Diversity Personnel, Partners, and Associates Speak Out on Diversity ........................................12

C. A United Front: Title VII, Mediation, and Workplace Equity .................................................................19
   1. An Overview of the Proposed Interactive Evaluation Process ..........................................................19
   2. Remediating Structural Bias: Contemporary Title VII Litigation ....................................................25
   4. One Step Further: Alternative Dispute Resolution & Workplace Equity Theory ............................32

D. A Critique of Law Firm Diversity Reform Efforts ....................................................................................33
   1. Make Me, Break Me: Reevaluating the Value of Associate Evaluations ........................................34
   2. Breaking News in Law Firm Management: Diversity Managers (not another committee) Spread the Message and Ensure Execution ..........................................................38
   3. Diversity Consultants: Educate, Activate, and Advocate ..................................................................41

E. The Pathology of Pluralism: Monitoring and Holding Participants Accountable on Two Levels—the Organization and the Profession .................................................................44
   1. Monitoring the Firm’s Progress .........................................................................................................46
   2. How Will Firms Hold Attorneys Accountable? ....................................................................................49
      a. Organizational Challenges to Accountability ..................................................................................49
      b. It’s Not a Solo Mission: Institutional Challenges to Accountability ..............................................52

F. Blowing Out Candles (one-by-one) at the Diversity Vigil .......................................................................55
   1. The Normative Argument for Law Firm Diversity ............................................................................55
   2. The Reputational Theory of Deterrence as Applied to Law Firm Diversity ....................................59
   3. The Profession’s Obligation of “Defending Liberty, Pursuing Justice” ..........................................60

II. Conclusion .................................................................................................................................................63
“Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity . . . .”

- Justice Sandra Day O’Connor,

INTRODUCTION

The following narrative reflects anecdotes from several interviews conducted to understand the experiences of racial and ethnic minorities in large law firms.

Jordan returned home after the first day of work with an unexpected story to tell–no one prepared for her arrival. This reality proved especially worrisome, because she witnessed one associate talking on the telephone with his assigned mentor at every break during orientation; and her lunch conversation with another entering associate and two senior attorneys revolved around her peer being immersed quickly in a major case. Jordan pondered her situation: no work and no response after three days of calling repeatedly her assigned mentor. Jordan spent the next week working on a short memo and contacting litigation partners. She felt like a bug scurrying under the heated lamp of a microscope. The litigation manager reassured her that getting “into the pipeline” takes time.

No one offered more than cryptic advice during her critical transition stages. At a counseling session, in response to lagging hours, the administrative partner cited one example of how his office neighbor believed that Jordan didn’t understand the “magnitude of a case.” When Jordan questioned the negative feedback, he fumbled in disbelief to learn that this partner had never revealed his dissatisfaction. The litigation manager, appearing slightly uncomfortable, had also been made privy to the unfavorable assessment. Jordan asked for clarification regarding the statement, but neither could go any further—how did such a simple question silence two top-flight litigation partners? She then asked whether they received any other complaints about her work product. The administrative partner responded, “nothing else more than rumor.” The litigation manager contributed, “Well Jordan, someone spoke to me, but I can’t remember who it was, I’ll let you know when I get back to my office.” She never heard anything more on the subject. As to work assignments, Jordan’s mentor advised that, “in this game, you need to make buddies. Then when work comes up, people will remember their buddy Jordan and ring your bell.” This suggestion provided nothing to enhance an established routine: Jordan knocked on multiple doors every month. At her annual review, she received similarly obscure advice to show more “fire in the
belly.”

One partner, who tried above all others to empathize, kicked off a conversation by sharing the rampant depression rate among first-year associates. He next inquired, “How are you doing?” In Jordan’s opinion, she wasn’t suffering from depression but something more akin to anxiety. No one understood her situation, and those with a faint clue could not wield enough influence to change her plight.

Whom could she trust to give honest, comprehensible advice? At a complete loss for direction, Jordan skimmed the entire attorney directory for someone that looked like her, another black female. She happened across the bio of the only black female partner in the entire firm. The potential ally practiced in a different office, but she responded amiably to Jordan’s plea for help. This partner offered candid insight and counter-intuitively helped solidify Jordan’s resolve to escape the firm. The partner shared her isolation as a young associate in the early nineties and struggle to ascend the firm’s hierarchy, a journey that already seemed intolerable to Jordan within less than a year. Jordan felt unsure whether the partner’s strand of determination deserved praise or criticism. And shortly thereafter, Jordan left the firm.

Jordan’s story depicts many of the issues plaguing retention efforts in large firms. Her formal mentor’s belated entrance, months after her arrival, demonstrates one symptom of the broken system. The lack of concrete advice regarding how to attain quality work assignments and critical feedback constitutes another symptom. And finally, recruitment without a track record of minority retention is a most fundamental feature of the broken system.

This Article examines the unexplored intersection between workplace equity theory and the institutional analyses of diversity in corporate law firms. Professor Susan Sturm defines workplace equity as “a condition, a complex system, a set of relationships and structures that foster on-going reflection about and responses to unfairness and exclusion.”1 These relational issues may be resolved internally by “systems [that] develop the information and capacity necessary to understand the nature of the problem, respond at the appropriate organizational level to remedy it, and learn from previous problem-solving efforts.”2 Sturm suggests that

---

1 Susan Sturm, Lawyering for a New Democracy: Lawyers and the Practice of Workplace Equity, 2002 Wis. L. Rev. 277, 290 [hereinafter Sturm, Lawyering for a New Democracy].

organizational catalysts “mobilize institutional change” across stakeholders within the organization and throughout communities of practice. She then describes communities of practice as including “individuals who share common interests, experiences, or concerns but otherwise lack opportunities to connect.”

In comparison, although the scholarship on law firm diversity provides an institutional analysis in explaining the disproportionate attrition rates of racial and ethnic minority associates, the literature in this area has not offered a comprehensive proposal for disabling the patterns of structural bias that affect adversely minority associates.

In the following six Parts of the Article, I consider the principles of workplace equity theory as applied to the corporate law firm. Part I briefly reviews pertinent statistics regarding law firm diversity. It advocates the inclusiveness goal of equal participation as contemplated in a democratic citizenry and discusses the institutional analysis of minority associate attrition. Part II summarizes the data collected through personal interviews with diversity personnel, partners, and associates at three large law firms. Such interviews provide a mechanism to collect “personalized, reflective, and complex data about experiences of lawyers.”

This section sets forth attorney responses about how their firm’s diversity program operates, and their impressions on specific features of the firm’s initiative and its effectiveness.

Part III details an associate evaluation process incorporating lessons from transformative mediation theory. In conceding the limits of mediation, Professor Carrie Menkel-Meadow states that, “‘transformative’ mediation is possible (and indeed desirable)—but only if we define our terms more clearly, state our goals more modestly and inclusively, and remain sensitive to the social and political situations and institutions in which we do our work.”

This Part discusses Title VII’s deficiencies in addressing the structural bias present in law firms, and how cultural norms specific to the law firm context prevent associates from relying on Title VII as a remedy. For these reasons, I argue that alternative dispute resolution provides a more reasonable approach to building an equitable law firm and

---


encouraging minority associate retention. This Part also explores the Equal Employment Opportunity Commission’s efforts creating an employment mediation program for administrative reasons; and the United States Postal Office’s efforts developing an employment mediation program in response to a class action discrimination lawsuit. In moving beyond the individual’s dispute, this Part further analyzes recent research on alternative dispute resolution in the employment discrimination context, which supports incorporating mediation as a pathway to workplace equity.

Part IV critiques the diversity programs of the law firms participating in the interviews conducted for this project. I explain why associate evaluations are an appropriate intervention point in bringing to fruition workplace equity in the law firm context. I then situate the central role of diversity managers and consultants, as opposed to diversity committees, in executing innovative programs. Part V examines the need for monitoring and accountability measures on the organizational and the professional levels. This Part incorporates interview responses as illustrative examples of the weak accountability systems in place currently at law firms. Finally, Part VI provides a general discussion on how the profession may establish an equity norm able to extinguish the need for diversity initiatives in the future.

A. The Current State of Affairs: Statistics and Explanations

1. Minority Associate Retention: Testing the Advocate’s Virtue of Patience

Today, more minority students are entering large law firms after graduation. But who will employ these newly minted attorneys of color after three to four years of practice in the private sector?

In the last five years, students of color represented approximately twenty percent of law school graduates. The overall percentage of minority associates practicing at firms is markedly below the total proportion of those minorities graduating from law school—attorneys of color compose 15.62% of associates or staff/senior attorneys, and 4.3% of partners. Of the minority attorneys entering private practice, nearly forty-four percent decide to practice at large firms with more than one hundred attorneys.

---


7 Id.

8 Id.
Currently, racial and ethnic minorities are more proportionately represented in the summer associate and associate categories than at the partnership level.\(^9\) The number of minority partners across the country increased barely from 4.63% in 2005 to 5.0% in 2006,\(^10\) and only 1.48% of partners working in major law firms are minority women.\(^11\) According to the National Association for Law Placement ("NALP"), 9.2% of firms with greater than five-hundred attorneys reported employing not one associate of color, and 32% reported employing not one partner of color.\(^12\) Based on these statistics, an observer may conclude that recruitment solves only a portion of the puzzle.

A corporate law firm may certainly be a treacherous workplace to navigate for an associate of any color, race, or national origin, but the attrition rates for minority associates demonstrate a special problem. In a national survey, over 50% of minority associates leave the firm within the first three years, and two-thirds leave within the first four years of practice, as compared to an overall attrition rate of 43% and 55.6%, respectively.\(^13\) Before the sixth year, 64.4% of female associates belonging to a racial or ethnic minority group left their law firm as compared to 54.9% of women as a whole.\(^14\) More than 85% of black females leave the firm before reaching their seventh year as compared to an overall attrition rate of 74.6%.\(^15\)

---

\(^9\) "Women account for 44.33% of associates, minorities for 16.72% of associates, and minority women for 9.16% of associates. Each group lags in their representation by 3 to 5 percentage points compared to the population of recent law school graduates. . . . With an increase from 22.85% in 2005 to 23.05% in 2006, minority representation in summer programs slightly exceeded their representation among law students for the second year in a row." Press Release, Nat’l Ass’n for Law Placement, Partnership at Law Firms Elusive for Minority Women—Overall, Women and Minorities Continue to Make Small Gains (Nov. 8, 2006), www.nalp.org/press/details.php?id=64 (last visited Jan. 7, 2008) [hereinafter Partnership at Law Firms Elusive for Minority Women].


\(^11\) Partnership at Law Firms Elusive for Minority Women, supra note 9.

\(^12\) Id.


\(^15\) Chambliss, supra note 13, at 11.
A diversity campaign cannot endure over time until the legal profession resolves the retention issue. When asked whether women and minorities had an equal chance to their white male counterparts of moving up the ranks, “[o]f men, 81% said that white males did not have better opportunities for success than did women and minorities, but only 58% of women gave that response. Among white lawyers (male and female), 78% perceived that women and minorities enjoyed equality of opportunity (or better), but only 44% of black lawyers had the same perception.”

A representative number of minority senior associates and partners signal to new recruits that the firm provides upward mobility for attorneys of color. But most importantly, increasing the number of minority associates and partners prompts the structural adjustments necessary to “change the criteria by which minorities are evaluated by both majority and minority group members.” Increased diversity benefits the social status of minority groups within the legal profession and changes the litmus test for an effective diversity program from recruitment to retention.

2. The Institutional Analysis of Minority Associate Retention in Law Firms

Even though law firms are not the guardians for minority associate careers, management should take responsibility for eradicating the policies and practices grounded in the cultural doctrines of inequality from past generations. Nancy Fraser, in Law, Justice, and Power, describes inequality as the “misrecognition” of group status, stemming from “social subordination in the sense of being prevented from participating as a peer in social life.” And misrecognition “arises when institutions structure interaction according to cultural norms that impede parity of participation . . . as a consequence of institutionalized patterns of cultural value in whose construction [minority groups] have not equally participated.” Jennifer Gordon and R.A. Lenhardt also define equality in terms of participation,

---


17 Professors Chambliss and Uggen concluded from their study that the number of minorities in the partnership affected the distribution of rewards to minority associates throughout the organization. Elizabeth Chambliss & Christopher Uggen, Men and Women of Elite Law Firms: Reevaluating Kanter’s Legacy, 25 Law & Soc. Inquiry 41, 63 (2000).

18 Id. (concluding that “senior-level minorities tread the path for younger racial and ethnic minority associates”).

19 Nancy Fraser, Recognition as Justice?: A Proposal for Avoiding Philosophical Schizophrenia, in Law, Justice, and Power: Between Reason and Will 139, 141, 144 (Sinkwan Cheng ed., 2004).
suggesting the need for individuals and groups to have “genuine participation in the larger political, social, economic, and cultural community,” but proposing that a group’s “status complicate[s] the full achievement of citizenship in this sense.” Based on these conceptions of equality, as applied to the law firm context, the procedures surrounding associate evaluations and mentoring (two inextricably linked factors to full participation and realization of one’s goals) and the attendant effect of bias need immediate attention.

Law firms today expect younger attorneys to “hit the ground running.” According to preliminary findings from one study, minority law students perceive that large firms set the entrance bar lower than the retention bar. These same students assumed (maybe an accurate assumption) that once associated with a law firm, building relationships and accessing professional development would prove more difficult based on their race or ethnicity. Law firm success depends greatly on the ability to develop informal relationships with senior associates and partners. Minority associates express an awareness of negative stereotypes adverse to their interests, which have persisted in corporate law firms long before their arrival. The perceived advantages of their white peers included the ability to excel in technical legal skills, fit into the dominant work culture, and connect with mentors. Based on these perceptions, at the beginning of their careers, attorneys of color develop work habits differing from those of their white counterparts who are ambivalent to or take for granted mentoring

21 HEINZ ET AL., supra note 16, at 293.
23 Id. at 1248.
24 David B. Wilkins, From “Separate is Inherently Unequal” to “Diversity is Good for Business”: The Rise of Market-Based Diversity Arguments, 117 HARV. L. REV. 1548, 1614 (2004) [hereinafter The Rise of Market-Based Diversity Arguments] (“The goods, however, are all mediated through personal relationships—relationships structured not just by race, but by class, mutual interest, economic advantage, and downright luck. Lawyers who understand this essential truth, and therefore refuse to buy into the myth permeating elite law firms that hard work will automatically be rewarded, are more likely to succeed in building the kinds of relationships required for advancement”).
relationships and professional development support. The legal profession and firms need to unearth these hidden mines and replant seedlings of firm culture inclusive of all persons, including racial and ethnic minority associates.

In their seminal piece, *Why Are There So Few Black Lawyers In Corporate Law Firms? An Institutional Analysis*, David B. Wilkins and G. Mitu Gulati explain how organizational features unique to elite law firms affect adversely black attorneys. In a subsequent piece, *Reconceiving the Tournament of Lawyers*, Wilkins and Gulati further refine their theory of the law firm tournament system. *Reconceiving the Tournament System* exposes the tension between law firm management needing to retain selected associates with the skills desired for partnership and needing to motivate other associates to work diligently under little supervision even though not qualified for partnership. First, the large number of associates, as compared to partners and the relatively small number of associates identified as partnership material, allows firms to invest scarce training resources into average white associates over average black associates without any economic harm to the firm. Second, once aware of these disadvantages, black attorneys over-invest in either steering clear of negative signals or conveying positive signals indicative of a super star associate. In executing these strategies, a black associate may not accumulate the skills necessary to ascend through the corporate law firm.

---


27 These characteristics include (1) the large attorney pool attracted by high salaries; (2) the high partner to attorney ratio maintained at most big firms; and (3) the tracking system used to train associates for partnership. David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?: An Institutional Analysis*, 84 CAL. L. REV. 493, 499, 521-23 (1996) [hereinafter Wilkins & Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?*].


29 The longer an associate remains at a law firm, the more valuable this associate becomes to the organization. Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567, 571-72 (1989) (arguing that during the apprenticeship period of being an associate, the firm learns “which associates can be trusted, which are adept at what types of work, which can deal directly with clients, and the like,” thus the associate requires less supervision and can handle more complicated task.)
Overtime, the firm’s tournament system creates two tiers of associates: the “training” track and “paperwork” track.\textsuperscript{30} The training track associates receive the best work assignments and build invaluable partner relationship. This top tier receives better work, training, supervision, and mentors—all the ingredients necessary for an associate’s promotion to partnership.\textsuperscript{31} On the other hand, paperwork associates perform the mundane tasks required in handling a corporate matter, such as document review and legal memoranda. Attorneys on the lower tier either leave the firm, attempt to elevate their status, or work toward building non-firm specific skills that may help them attain another position.\textsuperscript{32}

According to the authors, some associates are even prescreened and appointed to the training track before arriving at the law firm in an attempt to efficiently allocate scarce training resources and encourage firm loyalty despite the perceived low odds of reaching the partnership level.\textsuperscript{33} As attributed specifically to minority associates in their earlier article, Wilkins and Gulati assert that associates not destined to partnership remain at the firm “to keep their high wages, protect their reputational bonds, or acquire general (as opposed to firm-specific or relational) capital.”\textsuperscript{34} In discussing organizational reforms implemented by firms, such as formal training, assignments, and evaluations, the authors suggest that these programs are “unlikely to rectify the most important problems facing black associates.”\textsuperscript{35}

\textbf{B. Behind the Scenes: An Insider’s View on Law Firm Diversity Programs}

\textbf{1. Law Firms Use Different Approaches to Diversity}

Relying upon the assessments of legal associations, trade journals, and law reviews, I identified three large firms recognized for their diversity efforts. I then conducted interviews of partners, associates, and diversity

\textsuperscript{30} Wilkins & Gulati, \textit{Reconceiving the Tournament of Lawyers}, \textit{supra} note 28, at 1608-09, 1644.

\textsuperscript{31} Wilkins & Gulati, \textit{Why Are There So Few Black Lawyers in Corporate Law Firms?}, \textit{supra} note 27, at 539-40.

\textsuperscript{32} \textit{Id.} at 567.

\textsuperscript{33} Wilkins & Gulati, \textit{Reconceiving the Tournament of Lawyers}, \textit{supra} note 30, at 1651-52.

\textsuperscript{34} \textit{Id.} at 1650.

\textsuperscript{35} Wilkins & Gulati, \textit{Why Are There So Few Black Lawyers in Corporate Law Firms?}, \textit{supra} note 27, at 592. Evaluations are “perfunctory” and “vague” despite the time and effort dedicated to the review process on an annual basis. Wilkins & Gulati, \textit{Reconceiving the Tournament of Lawyers}, \textit{supra} note 30, at 1601.
personnel involved with the diversity programs at each firm. Firm C appointed a full-time professional to oversee the firm’s diversity initiative. Throughout this Article, I quote excerpts from these conversations as illustrations of the obstacles and triumphs associated with progressive diversity policies. The three law firms studied for this project demonstrate the complexity and challenges of firm-wide reform, thus shedding light on how to make structural changes.

Each diversity initiative attempts the organizational shifts necessary to increase retention through a distinct approach. Firm A and Firm B manage their diversity programs through partner committees. Firm A stands on its reputation of sustaining a strong diversity initiative over the past several years, thus, setting an exemplary standard. Only within the last few years has Firm B pushed toward improving the firm’s diversity program, yet already ranks highly on many surveys as a leader in diversity issues. Whereas Firms A and C have identified reliable strategies to combat the symptoms of traditional diversity programs, Firm B struggles to overcome beginner challenges for improving its diversity initiative.

2. Diversity Personnel, Partners, and Associates Speak Out on Diversity

A diversity committee member of Firm C explains that:

what makes us different from other firms is that ours has a lot of meat to it, it’s more an institutional program than it is a theoretical one. . . . Our program, I think, is institutional in the respect that we truly believe and the firm management truly believes that if a firm is going to continue to grow and going to survive, [then] it must make some adjustments to the way that business was done before. I think that is very true in our case.36

The chief diversity officer adds that, “[diversity] is intrinsic; it is inextricably interwoven into the fabric of the law firm, and it is very important. If diversity is simply an add-on to the law firm, it will never get the kind of support or movement that is necessary for the law firm to move from being a diversity spectator to a diversity player.”37

A junior partner explains that the most valuable element of Firm A’s diversity program is that the diversity initiative

has the support of management... when you have a program

36 Interview with Member of Diversity Committee of Firm C, in Dallas, Tex. (Mar. 22, 2006).

that is not supported by management, it puts you in the position where all minority attorneys together [are] trying to work it out, [with] no way to translate goals and aspirations into improving results at the firm.... [It's a] key attribute of having a successful diversity program—absent management buy-in, unless the firm has minority partners that are rainmakers, then it’s difficult to make any progress.\textsuperscript{38}

The situation unfolding at Firm B illustrates the importance of management support. Its program appeared galvanized by a few senior associates and partners working as lone rangers. In Firm B, senior associates in one office mentor younger associates by taking them to lunch, checking in on their workload, and giving advice when necessary. One of these associates also attends a weekly meeting with the diversity committee chairperson and keeps in contact with the diversity consultant. Sounding frustrated, she expressed that diversity is “moving slowly, not as quickly as needed or should be—a lot of attorneys don’t take [diversity] as seriously because the firm is so slow to move on it. They say it’s important, but actions on implementation give a different vibe to attorneys.”\textsuperscript{39} Her colleague across the country observes that firm management “needs to do a better job of advancing diversity within its ranks. I’m not sure what the committee is doing to result in more diversity, because there is a disconnect in reality and action by the committee.”\textsuperscript{40} At Firm B, associates and partners wanting to get these messages across are not at a complete loss, but the expression of diversity concerns is achieved on a more ad hoc, informal basis. Certain associates, and the chairman of the diversity committee, have a continuing relationship with the firm’s diversity consulting firm. In this way, the associates and partner can relay the matter of concern to the firm’s diversity expert and consider ways to resolve the situation.

A first year associate at Firm B described their affinity group as dead “in the water” and then questioned, “Is this a lack of monitoring?”\textsuperscript{41} He concluded that, “it’s tough to run [a diversity program] in a firm environment when folks are trying to make clients, bill hours, and do the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{38} Telephone Interview with Jr. Partner of Firm A, in Washington, D.C. (June 27, 2006).
\item \textsuperscript{39} Telephone Interview with Sr. Associate of Firm B, in Washington, D.C. (Jan. 23, 2006).
\item \textsuperscript{40} Telephone Interview with Sr. Associate of Firm B, in San Francisco, Cal. (July 13, 2006).
\item \textsuperscript{41} Telephone Interview with Associate of Firm B, in Washington D.C. (June 9, 2006).
\end{enumerate}
\end{footnotesize}
work.” At the present time, Firm B depends solely on the general associate’s committee and the fortitude of individual associates to bring forward their concerns regarding diversity-related issues to designated partners and associates. A senior associate describes the committee as “a gripe situation, not necessarily a constructive, creative thinking session... not sure anything [else is] in place.” At Firm A, one associate expresses a concern that many things fall on deaf ears. Formal committees to address the issues involve lots of complaints and chatter, and even when an associate leaves with an exit interview, the issues go unaddressed. The firm may hire someone to replace them, but there’s only room for so many people on certain committees. And they aren’t necessarily people that have challenges that other associates are having. Lots of discontentment and dissatisfaction does not dip to those people, they’re only the upper crust of those doing great. There’s huge disconnect between levels of experience, and committees are filled with those with little complaints and they don’t want to make waves because they’re in the position to make partner.

In moving away from the typical dependence on diversity and associate committees, when Firm C rededicated itself to diversity, management hired a full-time diversity officer to find answers and develop a new approach. Firm C’s experience with its chief diversity officer brings to light pivotal attributes for this position. Firm C charged its chief diversity officer with a two-part mission: first, to be “a change agent in terms of the culture within the law firm”; and second, to be a “change agent in the legal profession.” To achieve this first goal, the chief diversity officer strives to acquire, to promote, and to maintain diversity “firm-wide and firm-deep.” The firm also appointed their chief diversity officer to the management committee. The chair of the management committee ensures that the chief diversity officer is present for every policy-making decision,

---

42 Id.
43 Telephone Interview with Sr. Associate of Firm B, in San Francisco, Cal. (July 13, 2006).
44 Telephone Interview with Associate of Firm A, in Washington, D.C. (July 18, 2006).
major discussion, and management committee meeting. The chief diversity officer reports directly to the chair of the management committee, and he holds the authority to recruit attorneys at all levels and implement programs meant to recruit a more diverse attorney workforce. The chief diversity officer does not keep billable hours but instead sets benchmarks based on defined goals.

Upon his arrival, Firm C’s diversity officer conducted a survey of the minority associates regarding the diversity program. Associates did not respond. There seemed to be an old-fashioned trust issue preventing the participation of associates. Diversity advocates, in whatever capacity, must garner the trust of attorneys of color and formulate a system of program assessment. Once associates were assured of confidentiality and with persistence, the survey answers began to roll into his office and changes were made accordingly to the mentor program. Also, in Firm C, the diversity officer speaks to each minority associate and partner one-on-one. Through both approaches, the end result would be for concerns to make their way up the chain to management for evaluation and resolution.

The chief diversity officer finds that it is “difficult to get people to speak about diversity. . . . It’s still a hot button topic, there are still contrary views... the way I’ve gone about getting people to talk to me candid and honest is a very labor-intensive method of one-on-one. . . . I’m literally always going to every single office trying to meet with all 1,000 lawyers . . .” He astutely realizes that he “can’t change everyone’s mind, but I am giving people the opportunity to give me the feedback and pushback that they have about diversity.” Along with the chief diversity officer, one member of the professional development staff also travels throughout the country to remain abreast on the firm’s efforts in this category.

For any comprehensive diversity initiative focused on retention, mentoring is an essential element for entering associates and a challenge for diversity advocates. In corporate law firms, the number of minority partners is not in any way proportionate to the number of minority associates needing assistance through the firm network. One senior associate at Firm B appeared bemused in discussing this topic, commenting that, “in terms of diversity, [I’m] not sure who could mentor me because

---

46 *Id.*

47 *Id.*

very few other minority partners or associates are in the office—it’s nonexistent in terms of diversity.”49 For this reason, majority group members at the partnership level must get involved with the effort to mentor minority associates.

As a senior associate, the attorney-mentoring needs shift for purposes of the promotion-to-partnership challenge. A fourth year associate explains that Firm A

cares about diversity and associates generally, but once you hit the senior level, I’ve noticed the most dramatic drop off, because people aren’t able to help you in terms of guidance toward good assignments. You might know that things are not right, but a minority partner may tell you that’s just the way that it is. While being told that, others are not being told that and it’s clear that someone shouldn’t be doing certain types of work. People have left the firm because they felt like no one was looking out for them—and not able to open a substantive dialogue.50

A junior partner at the same firm comments that having a minority partner mentor

is very useful, but not as critical as having a good mentor in your practice area that has enough business as to support you for partnership—the ideal circumstance—someone that can take you the full distance. The advantage of a book of business is that if you’re able to develop a relationship that’s more than transactional, then you can get good assignments that are good for your career—not having to advocate to someone else that you should have more opportunities.51

At Firm C, the chief diversity officer believes that the most important feature in the firm’s retention plan is the mentoring program. Firm management identified ineffective mentoring as one of the primary reasons for why attorneys of color were “coming in and revolving back out.” Accordingly, immediate attention was given to improving the mentoring arm of the diversity program. One partner frankly described the

49 Telephone Interview with Sr. Associate of Firm B, in San Francisco, Cal. (July 13, 2006).

50 Telephone Interview with Associate of Firm A, Washington, D.C. (July 18, 2006).

law firm environment as 
very competitive, very cut throat, and almost survival of the fittest… most people that had partners and senior associates that work closely with them and teach them the ropes so to speak are those that are going to succeed—other people are left to dangle and don’t have somebody that they talk to and show them the ropes.\textsuperscript{52}

On the organizational level, he observes that, “if you don’t have that process built in, you’re not going to have a good success rate in retention because people are going to be unhappy… and you’re going to have a high turnover rate.”\textsuperscript{53} In the chief diversity officer’s opinion,

if you go to a law firm that does not have a strong mentoring program and you are not totally self-sufficient, you may be in trouble within two years. Oftentimes, you are in trouble within two years, and you do not even know it. Mentoring is the ability to give both developmental guidance and critical feedback for growth… a program is needed that nurtures and guides new associates through the maze and the political process.\textsuperscript{54}

Firm C observed a mentoring program in disrepair and met this need by incorporating a specialized training as one component of a redesigned diversity effort. As with other revitalized initiatives, Firm C hired diversity consultants for the purpose of studying and evaluating the organization’s state of diversity. Between 1999 and 2001, the law firm nearly doubled in numbers to 750 attorneys in ten offices. At the conclusion of its expansion, the firm’s management created a diversity committee to begin implementing the consultant’s recommendations. The first order of business was to develop a three-year strategic plan partly focused on what happens after attorneys of color enter the firm: were they “fully integrated and assimilated” into the process?

To gather information for how the program should improve over previous models, as mentioned above, the firm sent out surveys asking minority associates to comment on the existing program and how to make the mentor system better tailored to their needs. A firm-wide survey

\textsuperscript{52} Interview with Member of Diversity Committee of Firm C, in Dallas, Tex. (Mar. 22, 2006).

\textsuperscript{53} \textit{Id}.

\textsuperscript{54} Interview with Chief Diversity Officer of Firm C, in Pittsburgh, Pa. (Feb. 14, 2006).
addressing mentorship was being circulated at the same time. After getting as much input as possible, Firm C used the results of both surveys to gain useful insights. First, all associates believed that mentoring was “essential to their survival and success.” Second, there was a consensus that a mentor must be someone with a client roster and vested interest in the success of her associate.

In response to the survey, the firm held a cross-cultural mentoring session for all partners and attorneys. A typical training engages attorneys and staff on important topics such as appreciating various interpersonal styles and perspectives or subconscious perceptions in the workplace. At Firm C, both partners and associates sat together in the training and exchanged feedback. The chief diversity officer amusingly recalls that “partners got a revelation, because there’s a different breed of student that’s coming to the law firms in the twenty-first century than that came in the twentieth century… and you need a different type of partner to mentor this associate than was the case in previous years.”

Most associates are lukewarm as to the utility of diversity training. On one hand, there is the feeling that someone stands in the room for two to three hours talking “at them” about diversity. On the other hand, diversity trainings are another way to make people aware of the challenges and inadvertent comments or actions that place minority associates at a disadvantage in the firm organization.

Mandatory diversity sessions, at Firm B, received mixed reactions. An associate commented that diversity training is not perfect, because the “guy talks at you for three hours;” however, the session “serves as a springboard” and shows that the firm is “on the right track.” Firm A uses diversity consultants to gather information and provide advice on coping in the law firm environment. At Firm A, every associate mentioned the diversity retreat as one of the highlights to the diversity program, because attorneys were able to voice their concerns on issues unique to minority associates. At the diversity retreat, Firm A makes time for associates to “honestly, and anonymously (if desired) express grievances and talk through different issues.”

---

55 Id.
56 Telephone Interview with Associate of Firm B, in Washington, D.C. (June 9, 2006).
57 Id.
C. A United Front: Title VII, Mediation, and Workplace Equity

1. An Overview of the Proposed Interactive Evaluation Process

The following provides an overview of the proposal for reforms on the organizational level. By incorporating transformative mediation theory, I propose that law firms could expand the traditional associate evaluation process to include discussion between associates and partners in the event of a negative performance review or other objective indicia of unsatisfactory performance.\textsuperscript{59} The law firm structure embodies concrete advantages: to truly account for the unique attributes contributed by partners and associates, firm management usually implements an evaluation rubric that combines objective and subjective performance categories. On the other hand, this same structure must somehow detect the institutional norms that allow for bias and inequitable employment practices to negatively affect racial and ethnic minority attorneys.\textsuperscript{60} By enacting mediated feedback sessions through the evaluation process, law firms fill a void on the subjectivity side of law firm evaluations by providing reasons for the lackluster evaluation and critical feedback to associates, and simultaneously, the process educates partners on formerly unrecognized structural barriers and individual cognitive biases.

Here’s a sketch of Firm C’s current evaluation process:

Each associate receives a mid-year progress report on her skill

\textsuperscript{59} John Lande, \textit{Getting the Faith: Why Business Lawyers and Executives Believe in Mediation}, 5 \textit{Harv. Negotiation L. Rev.} 137, 186 (2000) (asserting that “preservation and rehabilitation of relationships is often cited as one of the distinctive potential advantages of mediation as compared with other disputing methods.”).

development; at the end of the year, the firm conducts formal associate evaluations. Simultaneously with the annual formal review, the associate develops a written plan regarding her skill and professional aspirations for the coming year. This plan is jointly reviewed by the associate and a partner, then serves as a reference for the associate’s progress. In the democratic spirit of checks and balances, associates are allowed the opportunity to evaluate the evaluator by reporting on a partner’s performance to the associate development committee.

When an associate’s billable hours fall off due to a bad work experience, and if Firm C’s chief diversity officer receives notice, then he immediately moves into action. Under these circumstances, he first speaks with the associate and the partner, on an individual basis, to determine what went wrong. He also rallies on behalf of the associate to get them work assignments from other partners within the office. Next, the chief diversity officer facilitates a conversation, if necessary, between the associate and the partner to overcome the stalemate that triggered the breakdown in their professional relationship. And finally, the chief diversity officer determines whether the associate needs additional assistance in a particular skill set to continue progressing in the area of concern.

An attorney’s ability to receive guidance from senior associates and partners relates closely to an associate’s evaluations. In attaching the interaction between partners and associates to the already established procedures of performance evaluations, the interactive evaluation process builds a database of information for a diversity manager to understand the complexities of why minority associates are not thriving in the law firm environment. 61 For individuals, an interactive evaluation process serves the functions of repairing relationships, professional development, and a fail-safe institutional mentor. The program relieves pressure from an associate to initiate conversations of constructive criticism, opens communication lines, and faciliates monitoring and accountability. Finally, confidentiality policies instantaneously attach to employee evaluations.

A mediation-inspired program further allows management to construct a system that acknowledges equity issues not readily redressed under the law but specific to the firm context and minority associates.

61 ANNE SIGISMUND HUFF & JAMES ORAN HUFF ET AL., WHEN FIRMS CHANGE DIRECTION 65 (2000) (“If new ideas appear promising and require relatively small adjustments, . . . [firms] will find ways to accommodate them within the bounds of current cognitive, social, and political frameworks”); Susan Sturm & Howard Gadlin, Conflict Resolution and Systemic Change, 2007 J. DISP. RESOL. 1 (“Systems change requires that information about systemic problems come from stakeholders operating at the points of breakdown, where changes in practice are most needed”).
When internal mediation procedures incorporate broader equity goals, the organization benefits from the non-restrictive solutions. In considering law firm evaluations and structural bias, the commonplace definition of conflict may not come to mind. The typical mediation process involves a third-party neutral and two opponents attempting to resolve an identifiable disagreement. In law firms, an undetected conflict could manifest through poor work product, work assignments beneath the associate’s skill level, and low billable hours. Jordan fell victim to confronting these issues without the benefit of airing her concerns with evaluating partners.

An interactive evaluation process invests an institutional representative and outside neutral in (1) activating the knowledge gained through trainings and (2) controlling for biases on the organizational and individual levels, which affect directly the retention issue. The program reveals whether the issue springs from institutional barriers, the partner acting within the constraints of the firm’s institutional culture, or complications on the associate’s behalf.62 The process does not automatically assume that a partner suffers from cognitive biases. Instead, via an established institutional practice, the diversity officer intervenes for critical review of the situation. As attorneys work their way through the law firm apprenticeship model, these attorneys internalize the cultural norms unique to their work environment and the profession, sometimes without a conscious recognition of these external controls influencing independent judgment.63 Diversity and sensitivity trainings merely provide a foundation for diversity managers and consultants to broach these taboo topics. When the opportunity arises, diversity managers should communicate the firm’s equitable norms to partners demonstrating blind

62 For example, the diversity officer and the consultant must be careful to detect attribution biases in mediating an associate’s interest. Russell Korobkin, Psychological Impediments to Mediation Success: Theory and Practice, 21 OHIO ST. J. ON DISP. RESOL. 281 (2006) (explaining how “attribution biases” cause a stalemate in mediation because “when acts of others harm us, we are more likely to conclude that “they” are bad people who have acted with malice or indifference... when we are the harmdoer we are more likely to believe, on average, that our actions are response to unalterable situational constraints”). Sturm & Gadlin, supra note 61, at 22-23 (asserting four matrices of institutional problem-solving addressed in the ombudsman office based on whether the dispute necessitates an individual or institutional intervention).

63 Laura Empson, Your partnership, Surviving and thriving in a changing world: the special nature of partnership, in MANAGING THE MODERN LAW FIRM: NEW CHALLENGES NEW PERSPECTIVES 10, 16 (Laura Empson ed., 2007); see also Jean E. Wallace, Corporatist Control and Organizational Commitment Among Professionals: The Case of Lawyers Working in Law Firms, 73 SOCIAL FORCES 811, 813-14 (1995) (arguing that firms build loyalty to the organization through “normative and symbolic inducements, rather than through coercive or utilitarian means”).
acquiescence to the status quo or partners exhibiting signs of implicit bias against a minority associate.\textsuperscript{64} If law firms adopt the normative equity goal that all associates should receive equal resources and access to the knowledge and skill development required to ascend the ranks, then the interactive evaluation process allows the firm a method for discovering whether associates are actually receiving equal treatment in comparison to their colleagues.\textsuperscript{65} In sum, law firms should use an interactive evaluation process as an extension to diversity programs, which are more akin to passive educational models, in order to realize institutional reforms and retain associates.

Law firms achieve structural reforms through the diversity manager, and maybe the consultant, critically analyzing these sessions over time and proposing policies designed to address repeated patterns of behavior adverse to the retention of racial and ethnic minority attorneys.\textsuperscript{66} Therefore, an interactive evaluation process itself does not necessarily have to bring about a resolution to the individual’s problem. On the individual level, partners and associates should seek to understand why the associate either perceivably or in actuality failed to meet the expected outcome measure. The goal for individuals in this evaluation process looks similar to the transformative mediation style wherein the mediator focuses on “empowering parties to define issues and decide settlement terms for themselves and on helping parties to better understand one another’s perspectives.”\textsuperscript{67}

\begin{footnotesize}
\begin{enumerate}
\item See supra note 60 and accompanying text.
\item Michael Z. Green, Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-nots?, 26 BERKELEY J. EMP. & LAB. L. 321, 346 (2005) (asserting that “[i]nstead of law, free-standing normative standards govern in mediation, and parties actually affected by a dispute decide what factors should influence the efforts to resolve that dispute”); Wilkins & Gulati, What Law Students Think They Know about Elite Law Firms, supra note 22, at 1248. In The NALP Foundation study of associate evaluations, minority associates identified statements regarding bias in the evaluation process as accurate at a much greater rate than non-minority associates. THE NALP FOUNDATION, HOW ASSOCIATE EVALUATIONS MEASURE UP: A NATIONAL STUDY OF ASSOCIATE PERFORMANCE ASSESSMENTS 88 (2006) [hereinafter HOW ASSOCIATE EVALUATIONS MEASURE UP].
\item Sturm & Gadlin, supra note 61, at 10 (explaining how “ombuds offices typically combine individual conflict resolution with some responsibility for identifying complaint patterns and trends and providing ‘upward feedback’ to the organizational leadership about systemic problems”).
\item ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION 5-10 (1994); see also Lon Fuller, Mediation: Its Forms and Functions, 44 S. CAL. L. REV. 305 (1971).
\end{enumerate}
\end{footnotesize}
The shift in emphasis away from coercing a resolution aligns with the law firm reality that no one can aptly coerce a partner to work with an associate. Moreover, depending on the experience, the situation may necessitate that the parties part ways, a feasible option in a big law firm environment. In a corporate department, a supervisor and subordinate at odds must come to an amicable solution of their issues in order to continue the working relationship. This dynamic does not apply to the law firm. Accordingly, the diversity manager’s best aspiration may be to empower the associate through the process and help both parties locate the collapse in their relationship.

In accomplishing this goal, the diversity manager overcomes a major hurdle in law firm culture that allows negative experiences to go unaddressed if a partner chooses other associates to handle prime work assignments. An interactive evaluation process also sets aside time for critical feedback. Time represents a scarce commodity in the law firm workplace; both partners and associates covet the time spent on non-billable activities. These time pressures work against partners and associates sitting down to hash out performance issues, when instead, based on the disproportional partner-to-associate ratio, the partner may simply move on to another entry-level associate.

An interactive evaluation process would also serve as a fail-safe institutional mentor for racial and ethnic minorities unable to secure imperative cross-cultural mentoring relationships with majority-race partners and senior associates. An associate’s perceived legal ability in the first two to three years of practice greatly affects his or her ability to move on in the tournament system of large law firms, and lawyers perfect their legal skills based on the ability to make mentoring relationships. Any

---

68 Menkel-Meadow, supra note 5, at 239 (suggesting that the positive results of mediation—parties discussing their problems to reach a solution—supports the democratic process); Green, Workplace Context, supra note 60, at 712-13; Aimee Gourlay & Jenelle Soderquist, Mediation in Employment Cases is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes, 21 HAMLIN L. REV. 261, 272-73 (1998) (discussing institutional conflict cultures that are adverse to settling disputes, including time pressures and a culture of silence with no formal dispute resolution procedures.).

69 Gourlay & Soderquist, supra note 68, at 263; see also Wilkins & Gulati, Why Are There So Few Black Lawyers in Corporate Law Firms?, supra note 27, at 521-23 (discussing the high partner to associate ratio and its negative affects on mentoring).

70 Robert H. Frank, Winner-Take-All Markets and Wage Discrimination, in THE NEW INSTITUTIONALISM IN SOCIOLOGY 208, 215 (Mary C. Britton & Victor Nee eds., 1998) (“Success in the early rounds of the tournament for these positions is necessary for success in the later rounds”).
associate deemed below the mark during these critical years of practice suffers major setbacks in reaching the next level of the hierarchy. Diversity experts cite cross-cultural mentorship as a problem in professional workplaces, which affects the learning curve of minority associates because pertinent learning occurs through quality work assignments and critical feedback from senior attorneys. In light of the cross-cultural mentoring problem, however, minority associates may miss critical insight on their work product not based on a lack of legal acumen but due to the institutional practice permitting the continuation of individual biases. Although an augmented review may indeed prove less effective at the senior associate and partner level, younger associates could gain valuable insights on professional development in their formative years, rectify performance issues, and restore relationships. An institutionalized mentor could not substitute but possibly supplement the problem of weak cross-cultural communications, because these conversations will inevitably occur through the interactive evaluation process.

A transformative evaluation program in law firms suits the loosely jointed, individualistic nature of this hierarchal workplace. Through a phenomenal and successful civil rights movement, overcoming the established norm of racial separation, Title VII not only prohibited racial discrimination in the workplace but also abruptly cut a communal cord that once connected minorities through a shared experience of race prejudice. Psychological research supports the more refined notion that minority group members perceive differently indicia of latent race discrimination. Not every minority associate perceives racial cues to the same extent; and even if one recognizes negative racial cues in the workplace, not every minority associate will adopt counterproductive responses. This research demonstrates the inevitably varied shifts, in attitude among minority group members, as de jure and de facto segregation become a matter of the past. The interactive evaluation process proposed in this Article permits every associate in a law firm to participate in the program. The proposed changes also permit the remediation process to accommodate differing levels of tolerance for diversity initiatives held by majority group members and

71 Id. at 208, 215 (explaining the cumulatively adverse affects of being passed over in the tournament system and thus deprived the opportunity to compete on the next level).

72 Yifat Bitton, Equality and the Virtues of Discrimination, 2006 Mich. St. L. Rev. 593, (discussing the divergent socio-political views held by blacks during the formal equality era); Kimberle Crenshaw, Race, Reform & Retrenchment, 101 Harv. L. Rev. 1331 (1988) (referring to this differing of ideas as the “loss of collectivity” among African Americans when upper-class and assimilationist group members parted ways from the status identity after the civil rights movement).
differing levels of sensitivity toward bias held by minority group members. The next section discusses the inadequacy of Title VII in eliminating structural bias and creating an equitable law firm environment.

2. Remedying Structural Bias: Contemporary Title II Litigation

Congress enacted Title VII as an attempt to place black citizens on economic parity with white Americans through the elimination of discriminatory employment practices. The House Report reads in relevant part that

[A] comparison of median annual incomes of whites and nonwhites . . . reveals the economic straitjacket in which the [black] has been confined. The effect of this severe inequality in employment is felt both on the personal level and on the national level. On the personal level an entire segment of our society is forced into a condition of marginal existence. . . .

The effect of this is to deny to the Nation the full benefit of the skills, intelligence, cultural endeavor, and general excellence which the [black] will contribute if afforded the rights of first-class citizenship. . . .

National prosperity will be increased through the proper training of [blacks] for more skilled employment together with the removal of barriers for obtaining such employment.  

Institutionally-conscious revisions to Title VII or a shift in the jurisprudential interpretation of Title VII appear to be the least likely path for expeditiously effectuating the reforms believed to improve minority associate retention rates. “The implicit contract governing associate promotion is not enforceable by formal legal methods.” Prior to partnership, associates move through the firm’s internal career ladder without much formal fanfare, but they are very aware of their rank in the organization. The firm’s promotion track requires an associate to work within the firm for seven to ten years before discovering whether she will

74 Matthew J. Lindsay, How Antidiscrimination Law Learned to Live with Racial Inequality, 75 U. CIN. L. REV. 87, 94 (2006).
76 Wallace, supra note 63, at 818.
become a partner.\textsuperscript{77} During this time, the firm’s partners evaluate the associate’s legal skills and more subjective personal attributes based on the firm’s desire for incoming partners. Notably, the skills desired in junior partners are not easily defined in objective terms.\textsuperscript{78} While civil rights leaders secured the passage of anti-discrimination laws and succeeded in enforcing social equality through the legal system, prejudice and discrimination transformed, chameleon-like, into hidden barriers that could not be redressed through the conventional means of legislative and judicial activism. Thus, Title VII is most relevant to recruitment and promotion in professional workplaces. To prove an adverse employment action outside these two intervention points would be highly difficult, and such an action would not remedy the source of the problem.

Lawrence Mungin, a black male, earned an undergraduate degree from Harvard University and a law degree from Harvard Law School. Mungin entered private practice with the respectable goal of attaining partnership through hard work and skill development. In the end, Mungin filed suit against his employer, a corporate law firm, claiming race discrimination.\textsuperscript{79} Mungin’s trial against his former employer for intentional race discrimination at the time of his partnership consideration provides examples of evidence excluded on the basis of relevance, which would be highly relevant to understanding the structural barriers leading to his resignation.\textsuperscript{80} First, the trial judge prevented Mungin from testifying to the details about a then-ongoing discrimination lawsuit filed by a black female attorney against his former law firm.\textsuperscript{81} Second, Mungin attempted to recruit three black candidates while serving as the only black attorney on the hiring committee. Two of the potential hires expressed concerns to Mungin about


\textsuperscript{78}Gilson and Mnookin suggest, however, that as the requirements for partnership become more objective, the degree of subjectivity involved in promotion decisions also declines. Gilson & Mnookin, \textit{supra} note 75, at 567, 571-72, 578-79, 588; \textit{see also Galanter & Palay, supra} note 77, at 5, 100 (arguing that a large pool of inexperienced attorneys to assume entry-level positions is “one of the key ingredients of the big law firm” and firms eventually judge these associates on their legal skills and human capital).


\textsuperscript{80}Michael J. Yelnosky, \textit{Title VII, Mediation, and Collective Action}, 1999 U. ILL. L. REV. 583 (arguing that Title VII’s “doctrinal paradigm and its focus on unearthing discriminatory motive often diverts attention from problems posed by workplace structures and practices, thus foreclosing the best solutions”).

\textsuperscript{81}\textit{Barrett, supra} note 79, 187.
race prejudice at the firm; however, the trial judge limited Mungin’s testimony to exclude any discussions regarding their negative experiences. When Mungin’s attorney called the attorneys to personally attest to their impressions, the questioning was limited by the judge’s ruling that “he wouldn’t tolerate general aspersions about the firm’s difficulties with blacks.” 82 Finally, in describing his role on the minority recruitment committee, the judge sustained an objection to Mungin’s perspective that, “I believe I took more of a leadership role in it since I was black, the token—the token on the committee and in the office.” 83 Although Mungin won a jury verdict in his case, which an appellate court later overturned, preserving the relational bonds necessary to advance in the professional context of law firms may lead equity advocates to discover methods for realizing Title VII’s overall purpose while avoiding litigation.

In remediying Title VII violations, a trial court may “enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate . . . or [grant] any other equitable relief as the court deems appropriate.” 84 The Civil Rights Act of 1991 extended the remedies available to plaintiffs, including compensatory and punitive damages for intentional discrimination, and declaratory and injunctive relief for adverse employment actions motivated by both lawful and unlawful factors. 85 According to some appellate courts, the trial court has broad discretion to fashion an appropriate remedy for Title VII violations should serve the interests of the aggrieved party and the public. The Fifth Circuit has held that

The trial judge in a Title VII case bears a special responsibility in the public interest to resolve the

82 Id. at 208-09.
83 Id. at 187-88.
85 § 1977A, 42 U.S.C. § 1981A, as added by CRA of 1991, Sec. 102 (distinguishing an unlawful discriminatory employment practice premised on intentional discrimination as opposed to evidence of a disparate impact against protected classes). The statute establishes a right to relief for plaintiffs demonstrating unlawful discrimination based on race, color, religion, sex, or national origin regardless of whether the employer also proves legitimate, nondiscriminatory reasons also motivated the adverse employment action. Title VII, § 703(m), 42 U.S.C. § 2000e-2(m), as added by the Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a). If the employer indeed proves a legitimate, nondiscriminatory reason motivated the adverse employment action, then the employee’s remedies are limited to declaratory and injunctive relief. The plaintiff may not recover damages or affirmative action. Title VII, § 706(g)(2)(b), 42 U.S.C. §2000e-5(g)(2)(B), as amended by the Civil Rights Act of 1991, Pub. L. 102-166, § 107(a).
employment dispute, for once the judicial machinery has been set in train, the proceeding takes on a public character in which remedies are devised to vindicate the policies of the Act, not merely to afford private relief to the employee.\textsuperscript{86}

During the past decade, class action lawsuits have provided a viable outlet for remedying discriminatory employment practices grounded in seemingly gender- and race-neutral institutional policies. The groundbreaking case, \textit{Butler v. Home Depot, Inc.}, involved a class action lawsuit premised on myriad allegations of gender discrimination brought on behalf of female employees and applicants against the national home improvement retailer.\textsuperscript{87} In settling the lawsuit, Home Depot not only paid monetary damages and attorneys’ fees, but more importantly, the agreement included modifying employment procedures aimed at reducing the affects of gender bias in the company’s hiring and promotion practices.\textsuperscript{88} Professor Tristin Green argues that the settlement agreement in Home Depot and similar class actions demonstrate a pathway “of making antidiscrimination enforcement litigation relevant to some of the more subtle forms of discrimination common in the modern workplace.”\textsuperscript{89} She also observes, however, in contrast to class action lawsuits brought immediately after the enactment of Title VII, these more recent actions are typically settled before the court adjudicates the matter, which may undermine the public interest goal of Title VII’s remedial scheme.\textsuperscript{90}

\textsuperscript{86} \textit{Hutchings v. United States Indus., Inc.}, 428 F.2d 303 (5th Cir. 1970). \textit{See also Alexander v. Gardner-Denver Co.}, 415 U.S. 36, 45 (1974) (“In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices”); \textit{Thomas v. Washington County School Bd.}, 915 F.2d 922, 925 (4th Cir. 1990); \textit{Perryman v. Johnson Products Co., Inc.}, 698 F.2d 1138, 1146 (11th Cir. 1983).

\textsuperscript{87} The plaintiffs alleged gender discrimination under Title VII based on Home Depot’s personnel decisions, including “(1) hiring and patterns of gender-based segregation of segregation of jobs and departments in initial job placement; (2) training; (3) transfer opportunities to merchandizing positions; (4) promotional opportunities to supervisory and management positions; and (5) compensation.” The district court certified the class. 1996 WL 421436 (N.D. Cal. Jan. 25, 1996)

\textsuperscript{88} Susan Sturm fully outlines the settlement agreement reached in the Home Depot class action and its relation to developing an equitable work environment. Sturm, \textit{Second Generation Employment Generation}, supra note 2, at 509-19.

\textsuperscript{89} Green, \textit{Targeting Workplace Context}, supra note 60, at 688.

\textsuperscript{90} \textit{Id.} at 716-17.
lessen in this context.

Without dismissing the option of litigation, either as a mechanism for vindicating individual rights or serving as the catalyst for institutional reforms, Title VII’s remedies and the need to even file a lawsuit are not aligned with furthering an associate’s career in the private sector. In a study of Chicago lawyers, Arin Reeves found that minority attorneys prefer to either not address instances of race discrimination or speak directly with the associate or partner causing them discomfort. The reluctance of associates to formally report discrimination seems natural in a work environment so heavily dependent on subjective evaluations of worthiness and relationship building as the key to ascension. In The Good Black, Mungin found himself working legal temp jobs after filing suit against his law firm for race discrimination. This same reluctance also hinders minority associates from disputing internally performance evaluations when perceived as unfair due to racial and/or gender bias. According to Visible Invisibility, one respondent stated that

You certainly don’t want to become bitter, so you acquiesce somewhat. You don’t want to be seen as difficult so you don’t refuse assignments, you don’t say I’m not dealing with this person or whatever, because then you’re [perceived as] not being a team player, you’re [perceived as] not motivated, angry.

Reeves determined that the associates’ preference for these options “was rooted strongly in their perceptions and interactions with the informal group norms in their workplaces that pointed to severe informal, yet career-damaging, sanctions that were imposed on attorneys who pursued trilateral forms of social control.” For these reasons, I propose a mediation model attached to the evaluation process.

The following section reviews the federal government’s experience in resolving discrimination employment disputes through mediation. The Equal Employment Opportunity Commission established an employment mediation program for administrative reasons; however, the United States Postal Office implemented its mediation program in response to a class

91 Reeves argues that an associate’s desire to not violate informal group norms informs the decision to avoid “trilateral actions,” which involve redressing the problem of discrimination through the courts. REEVES, supra note 25, at 278.

92 AMERICAN BAR ASSOCIATION, VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 27 (2006) [hereinafter VISIBLE INVISIBILITY].

93 REEVES, supra note 25, at 290.
action employment discrimination lawsuit.


Beginning in the early- to mid-nineties the federal government, in its capacity as the administrator of federal employment antidiscrimination laws and as an employer, implemented mediation programs to help resolve discrimination disputes before the employee filed a lawsuit. In 1999, the Equal Employment Opportunity Commission (“EEOC”) fully implemented a voluntary, free mediation program for employee discrimination complainants.95 The EEOC established this program to decrease a burgeoning backlog of federal discrimination complaints, to increase the efficiency of dispute resolution for employees and employers, and to help reallocate the time spent on casework based on the level of complexity. The mediation process is a confidential proceeding, and statements may not be used as evidence in an official investigation or in subsequent litigation between the parties. In a report on the program’s progress, the EEOC observed that “participants, regardless of their satisfaction with the outcome of mediation, overwhelmingly indicated their willingness to return to mediation.”96 The EEOC emphasizes, as a reason for high participant satisfaction, the need for employees to express their concerns as indicia of procedural justice.

The United States Postal Service established the Resolve Employment Disputes Reach Equitable Solutions Swiftly (REDRESS) in partial settlement of a class action lawsuit. Employees may voluntarily submit to mediation any disputes arising under Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.97 If an employee chooses to mediate her dispute, then supervisors are required to participate in the mediation. In constructing the program, the Post Office experimented with different formats through pilot programs


95 The grievance process begins when a federal employee files an informal complaint with an in-house EEO counselor to discuss the potential claim of discrimination. The EEO counselor then conducts an informal investigation with the goal of resolving the dispute. If the counselor cannot bring about a resolution, the employee next files a formal complaint with the EEOC.

96 AN EVALUATION OF THE EEOC MEDIATION PROGRAM, supra note 94.

established throughout the country. For example, program coordinators tested the effectiveness of distributive mediation as compared to a transformative mediation approach, and whether to use outside neutral mediators as opposed to inside mediators. The Post Office chose to follow the transformative model described below:

The transformative model of mediation as described by Professors Baruch Bush and Joseph Folger does not have settlement as its objective. Empowerment entails a sense of personal control and autonomy engendering the self-confidence necessary for disputants to take responsibility for addressing their own conflict. Recognition entails achieving a new understanding of the other disputant’s views, motives, goals, or actions and somehow acknowledging this change. Recognition can take the form of statements acknowledging the legitimacy of the other participant’s concerns or judgments, and it can result in an apology.

The Post Office also learned during the experimental period that participants were more satisfied with the process when the mediation involved an outside, neutral mediator. To consistently improve the program, the Post Office partnered with Indiana University to study participant satisfaction at regular intervals. Moreover, the Post Office measured the program’s success based on levels of employee participation.

In line with well-documented research on the importance of procedural justice, participant satisfaction has remained particularly high since the program’s inception. Lisa Bingham attributes sustained interest in the program to how mediation permits (1) employees “an opportunity to present their views” and “participate in the process”; and (2) their treatment during the process with regards to “respectfulness, impartiality, fairness, and performance.” According to participants, the mediator more often than not helped the parties communicate their goals and understand the viewpoints expressed by both sides. Also of significance, supervisors reported an organizational benefit of the program in that they felt better equipped to handle future employment disputes prior to reaching the mediation stage. Bingham concludes that, “over the long term [the Postal

98 Id. at 13-15, 20.
99 Id. at 13.
100 Id. at 15.
101 Id. at 23.
Service] will build conflict management capacity in the workforce."\textsuperscript{102}

4. One Step Further: Alternative Dispute Resolution & Workplace Equity Theory

Susan Sturm and Howard Gadlin argue that alternative dispute resolution can be a component in realizing more generalized norms across an organization.\textsuperscript{103} They identify the tools for achieving this quest as a boundary-spanning institutional intermediary; root cause methodology; legitimacy in relevant communities of practice; and participatory accountability.\textsuperscript{104} The unique methodology, referred to as root cause analysis, allows intermediaries (such as an ombudsman) to connect an individual’s conflict and its systemic underpinnings. Thus, the intermediary better understands the conflict’s origins, and when appropriate, an institution can implement preventive programs and policies.\textsuperscript{105}

Although Sturm and Gadlin identify racial inequities as a recurring systemic problem, the authors use this issue as a cautionary example against viewing alternative dispute resolution programs as the cure-all for systemic challenges. When confronted with an individual conflict stemming from such structural obstacles, Sturm and Gadlin suggest that an individual intervention may be needed when the institutional intermediary, such as a diversity manager, has "unsuccessfully attempted a systemic intervention as well as in situations where the person whose complaint brought the problem to [the intermediary’s] attention was unwilling to have the specific details of their case used as a link to the systemic issues."\textsuperscript{106} They describe a sword

\textsuperscript{102} Id. at 15.

\textsuperscript{103} Sturm & Gadlin, supra note 61, at 3 (discussing the potential for norm elaboration through entities outside the courts and formal adjudicative bodies through “an accountability process of principled and participatory decision making”, namely, alternative dispute resolution).

\textsuperscript{104} Id. at 39-51 (describing the integral function of each element needed to build capacity for connecting individual conflict resolution and systemic change).

\textsuperscript{105} Sturm and Gadlin demonstrate the interdependency of individual conflict and systemic change through a four-quadrant matrix, which distinguishes analysis and intervention on either the individual or systemic levels. They elaborate on these interconnections through case studies emerging from the Office of the Ombudsman at the National Institutes of Health’s Center for Cooperative Resolution. Id. at 13, 17, 22.

\textsuperscript{106} The authors use the example of a minority employee receiving a poor work evaluation to visualize the difficulties in addressing structural problems involving race through a systemic intervention. They suggest that systemic problems involving race, gender, disability, age, and national origin recur because the groups share common problems and persons in these categories have legal remedies at their disposal. Id. at 20, 30; see also Equal Employment Opportunities Commission v. Sidley Austin Brown &
and shield scenario:

Sometimes the structural analysis is helpful in enabling individuals to de-personalize their problems and to find ways to work around the dynamics of management and race in their particular context. Sometimes identifying the structural problems only deepens the sense of frustration about the inability to respond.\textsuperscript{107}

In certain instances, however, the ombudsmen office identified organizational practices as a “co-conspirator” in perpetuating such inequities. For these situations, as opposed to focusing on the individual conflict, the intermediary focuses on work group processes in reframing an issue, resolving conflicts, and improving future relations.\textsuperscript{108} Similar to the ombudsmen office, analyzed by Sturm and Gadlin, a full-time diversity manager and consultant would guide partners, associates, and the associate evaluation committee through resolving work related issues.\textsuperscript{109} The next section critiques the diversity programs studied during this project and demonstrates how the proposed changes to the evaluation process may result in greater retention rates.

\textbf{D. A Critique of Law Firm Diversity Reform Efforts}

During a preliminary interview for this project, I received a bleak answer to my most straightforward question: How can law firms better retain minority women? The diversity committee chairperson of a state bar association answered, “I don’t know. It’s an intractable problem.” Is retention a difficult problem? Yes. Is retention an intractable problem? No.

The traditional diversity program misses the retention benchmark, Wood, 315 F.3d 696 (7th Cir. 2002) (holding that partners of retirement age bringing an age discrimination lawsuit should be considered employees of the law firm despite their partnership status, because the “small, unelected, and self-perpetuating executive committee which could fire them, promote them, demote them, raise their pay, lower their pay, and so forth” rendered the partners “defenseless . . . .”).

\textsuperscript{107} Sturm & Gadlin, \textit{supra} note 61, at 20, 30.

\textsuperscript{108} According to Sturm and Gadlin, although tailored to a particular work group, such solutions qualify as a successful intervention, because work group dynamics vary and “solutions generated often need to be tailored to a particular micro-culture within the larger organization.” \textit{Id.} at 31.

\textsuperscript{109} \textit{Id.} at 10 (Ombuds offices typically combine individual conflict resolution with some responsibility for identifying complaint patterns and trends and providing upward feedback to the organizational leadership about systemic problems”).
because the problem and solution emanate from organizational structures left wholly intact after implementing passive, superficial initiatives. Most modern-day diversity programs focus on sensitivity training, formal mentoring, community outreach, recruitment, and marketing the firm’s diversity initiative to clients. A firm’s diversity report may include a well-crafted diversity statement and chronicle diversity luncheons, conference sponsorships, diversity scholarships, affinity groups, and foundation projects. These activities, however, are merely tangential to retaining attorneys of color. As a result, corporate law firms recruit a representative number of entry-level minority associates but struggle to retain, and eventually promote to partnership, these same associates.\footnote{The NYC Bar conducted its first diversity benchmarking study in November of 2004. This study also measured the number of minority associates in the entering class of 2003 as compared to the number of minority associates hired in previous years remaining at the firm: black associates composed 6.8% of 2003 hires and 4.2% of black associates hired in 1996 remained at the firm; Hispanic associates—3.9% and 2.9% respectively; Asian and Pacific Islander associates—14.9% and 11.8% respectively; white associates—73.1% and 80.9% respectively. The studies show that time alone will not reconcile the disparate retention statistics. \textit{ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, BENCHMARKING STUDY: A REPORT TO SIGNATORY LAW FIRMS} 3-4, 14 (2005) [hereinafter \textit{DIVERSITY BENCHMARKING STUDY}].} The law firms studied in this project displayed many attributes of innovation in the diversity arena. For example, hiring a full-time diversity professional, a diversity retreat to discuss specialized issues, and experimentation with cross-cultural mentoring programs. The legal profession and law firms must dismantle deep-seeded institutional barriers and seek equitable participation for minority attorneys in the corporate legal market, which requires changes at the organizational and professional level.\footnote{Supra note 2 and accompanying text; \textit{supra} note 1 and accompanying text.}

1. Make Me, Break Me: Reevaluating the Value of Associate Evaluations

This Article identifies associate evaluations as a prime opportunity to intervene on behalf of a minority associate’s interests. According to law firm management, associate evaluations serve three functions: “to provide positive feedback and encouragement to associates; to assess the training and development needs of associates; and to improve associate performance.”\footnote{\textit{HOW ASSOCIATE EVALUATIONS MEASURE UP}, supra note 65, at 23.} Most large law firms designate an associate evaluation committee to recommend areas needing further development for individual associates, determine an associate’s compensation, bonus, and advancement; to select an evaluation instrument, and recommend an
evaluation process.\textsuperscript{113}

Evaluations provide a timely window for associates needing to express their opinions in a protected space; a diversity manager and consultant should make associates feel as though an influential, neutral actor in the organization understands her position.\textsuperscript{114} Associates can voice concerns through a formal venue, which minimizes the possibility of being labeled a troublemaker by interrupting the status quo.\textsuperscript{115} On the other hand, generally speaking, partners should express their expectations, whether voluntarily or through the interactive evaluation process, in a manner that communicates norms unknown to the associate. In minding the importance of procedural justice, whether the negative performance evaluation remains in the associate’s employment file, or whether the associate works with the partner again, should become much less relevant to the retention question than whether the associate felt as though the law firm responded to the situation fairly.\textsuperscript{116}

Of some concern, the firms studied in this project made no mention of connecting the duties of a diversity officer or committee to the responsibilities doled out to the associate evaluation committee. As firms move away from informal management models, such as the partnership, and opt for more formalized divisions of labor performed by professionals, law firms must remain wary of bureaucratic traps.\textsuperscript{117} As a practical matter, the

\begin{flushright}
\textsuperscript{113} Id. at 31-34.
\textsuperscript{114} Nancy A. Welsh, \textit{Stepping Back Through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and its Value}, 19 OHIO ST. J. ON DISP. RESOL. 573 (2004); Gourlay & Soderquist, \textit{supra} note 68, at 276 (stating that an effective approach to implementing a mediation program must incorporate stakeholders’ interest, participation, and support, along with sufficient knowledge and skills to the participants).
\textsuperscript{115} Jonathan M. Hyman & Lela P. Love, \textit{If Portia Were a Mediator: An Inquiry Into Justice in Mediation}, 9 CLINICAL L. REV. 157, 172 (2002) (arguing that disputants affirm “the perception of fairness is linked to having a meaningful opportunity to tell one’s story, to feeling that the mediator considers the story, and to being treated with dignity and in an even-handed manner”).
\textsuperscript{116} Welsh, \textit{supra} note 114, at 629.
\textsuperscript{117} The authors describe two characteristics of a bureaucracy that inhibit organizational change: a “norm of deference,” which entails subordinates not questioning the decisions of superior employees; a “norm of autonomy,” wherein “each player is supposed to be left alone within a defined sphere, and with dedicated resources, to do a defined job.” Charles Heckscher & Nathaniel Foote, \textit{The Strategic Fitness Process and the Creation of Collaborative Community}, in \textit{THE FIRM AS A COLLABORATIVE COMMUNITY: RECONSTRUCTING TRUST IN THE KNOWLEDGE ECONOMY} 479, 482 (Charles Heckscher & Paul S. Adler eds., 2006).
\end{flushright}
professional development and mentoring functions assigned to diversity personnel are related directly to associate evaluations. At present, the diversity function seems to be in a subordinated, reactionary position to whatever comes from the associate evaluation committee. Based on the notable benefits flowing from associate performance evaluations these two arms of the firm should work together even beyond the proposed interactive evaluation process. The diversity committee and evaluation committee could pool resources in developing attorney measurement instruments and improving the training procedures for evaluating associates.

The ABA’s study, Visible Invisibility, found that “close to one-third of women of color in the survey (31%) said that they have had at least one unfair performance evaluation, as did 25% of white women and 21% of men of color. Less than 1% of white men reported ever having received an unfair performance evaluation.”\textsuperscript{118} In her study, Gender Matters, Race Matters: A Qualitative Study of Gender & Race Dynamics in Law Firms, Arin Reeves found that the black attorneys consistently battled two stereotypes relevant to performance evaluations: “general incompetence and substandard writing skills.”\textsuperscript{119} According to one of her interviewees,

Black associates are not told what they are doing wrong because you’re seen as competent if you are not making egregious mistakes. You are not critiqued the same way as your White colleagues so you don’t develop in the areas in which you are supposed to develop. Next thing you know, you’re up for partnership, and you are being told that you don’t have the experience or expertise in all these areas that you were never told to develop an expertise in.\textsuperscript{120}

A study conducted by the NALP Foundation showed that minority associates are much more likely to report negative effects as a result of biased, unfair performance evaluations. For example, minority associates felt as though their non-minority peers received more internal recognition and monetary compensation either through a raise or bonus, and were more often advanced by title or level based on performance evaluations.\textsuperscript{121} Minority associates also reported that after receiving performance evaluations, they were less likely than their non-minority peers to receive

\textsuperscript{118} Visible Invisibility, supra note 92, at 26.

\textsuperscript{119} Reeves, supra note 25, at 237.

\textsuperscript{120} Id.

\textsuperscript{121} Id. at 104.
more challenging work.  

For every associate, the evaluation process may seem a bit obscure and impartial. At the same time, law firms implement no checks-and-balances system to minimize the concerns expressed by minority associates. First, in large law firms, only a small percentage of associate evaluation committees conduct a blind review of an associate’s written work product. Moreover, only fifty percent of large firms train supervising attorneys on how to evaluate associates. Second, as for the informal feedback needed to do well on an annual review, approximately twenty percent of minority associates report receiving no constructive criticism on assignments. Third, in the NALP Foundation study, whereas seventy percent of firms reported having an appeals process to contest evaluations, nearly the same percentage of associates reported having no appeals process available to contest their evaluations. Finally, many firms overlook building a collaborative effort in the evaluation process. Specific to large firms, forty percent allowed associates the opportunity to evaluate their supervising attorneys, approximate 59% of associates reported having engaged in the process, and of these associates, 92% reported no change and only 5% reported a change for the better in their relationship with the supervising attorney.

Wilkins and Gulati hypothesize that corporate law firms purposely “keep the evaluations of associates in their first few years vague and generally upbeat” to maintain high-productivity levels from associates on the “paperwork” track. Moreover, law firms suppress information regarding the type of work assignments being given to associates on the “training” track and provide encouragement below the radar. Both motives directly conflict with the stated goals of performance evaluations, and more importantly, the evaluation process allows cultural norms adverse

\[122\] Id.

\[123\] How Associate Evaluations Measure Up, supra note 65, at 26.

\[124\] Id. at 46-47.

\[125\] Id. at 56.

\[126\] Id. at 108.

\[127\] Id. at 74.

\[128\] Wilkins & Gulati, Reconceiving the Tournament of Lawyers, supra note 28, at 1672.

\[129\] Id. at 1671-72 (arguing that this approach to encouraging candidly associates on the training track helps retain the favored associates deemed partnership material).
to minority associates to continue without detection. The dissatisfaction expressed in minority associate impressions on associate evaluations, and the firm’s documented oversight in providing substantive feedback (informally or formally), demonstrates the need to address this feature of the associate experience in large law firms.

2. Breaking News in Law Firm Management: Diversity Managers (not another committee) Spread the Message and Ensure Execution

As law firms continue to grow, management committees resort more frequently to creating administrative positions, which resembles a bureaucratic model.130 During the last three years, Firm C and other firms across the country are depending more on diversity professionals as a supplement to diversity committees.131 Surely, any candidate selected to perform this task must bring certain credentials, but the law firm should seek to drain the position of a personalized identity to the extent that partners and associates view this role as the voice of the law firm—objective and external. The attorney chosen as Firm C’s first chief diversity officer came to the table with experiences in varied fields ranging from government to academia to private practice; and he has cultivated

130 In a study of ethics advisors, Professors Chambliss and Wilkins reported that firm partners designated to handle ethics issues felt overburdened and unable to ensure that attorneys brought forward ethical concerns. On the other hand, law firms hiring a full-time, compensated ethics advisors created space for this position to involve establishing preemptive strategies and opening vital lines of communication. Elizabeth Chambliss & David B. Wilkins, The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Firms, 44 ARIZ. L. REV. 559, 574, 580 (Fall/Winter 2002). HEINZ ET AL., supra note 16, at 107-08, 293; see also Empson, supra note 63, at 16; Rayston Greenwood, Your ethics, Redefining professionalism? The impact of management change, in MANAGING THE MODERN LAW FIRM: NEW CHALLENGES NEW PERSPECTIVES 190 (Laura Empson ed., 2007) (observing the shift from a traditional model of informal decision making to a more bureaucratic, hierarchical control system as firms grow larger with more partners, which includes full-time managers dependent but separate from the full partnership model of management); see also Robert L. Nelson, Practice and Privilege: Social Change and the Structure of Large Law Firms, 6 AM. B. FOUND. RES. J. 95, 118-19, 129 (1981) (noting that law firm leadership at one time “lack[ed] the clear-cut structure and lines of authority of major corporations and large professional organizations” but is becoming more refined and inclusive of professional administrators as firm size increases); GALANTER & PALAY, supra note 77, at 52.

131 Foley & Lardner retained the services of a professional development specialist already working in the firm for the role of diversity manager. Between the years of 2005 and 2006, the firm observed reduced attrition rates at the associate level and an increased number of women and ethnic minorities promoted to the partnership level. Institute of Management and Administration, Foley & Lardner: A Strategy to Accelerate Diversity in the Firm’s Partnership Ranks, Law Office Management and Administration Report, Sept. 2007.
throughout his career a wealth of networks that enable him to open doors throughout the country. In an interactive evaluation process, the diversity manager would gather information, mediate the organizational and associate interests, and propose structural changes based on his accrued knowledge. With respect to representing minority group interest, the diversity officer’s role in coalescing group interest and mediating performance evaluations could prove highly beneficial; however, associates may perceive that the diversity manager favors the organization or partner’s interest, similar to the risk of caucusing in formal mediation. The redefined roles set forth in this proposal nominate consultants to address these partiality concerns. An effective diversity manager needs to draw upon varied forms of knowledge to promote change, develop collaborative networks in strategic locations, and maintain pressure and support for action.

The diversity officer’s position, if carefully defined as the catalyst for structural reforms, symbolically (even though maybe not in practice) institutionalizes the firm’s reinvigorated retention efforts. Although an individual partner or senior associate may possess the skills necessary to fulfill the diversity officer’s role, the firm should opt to institutionalize these attributes in an effort to sustain the position’s contributions beyond the tenure of one person. By institutionalizing diversity norms through the chief diversity officer position, Firm C has placed less emphasis on formal diversity trainings and more faith in the ability to spread a culture of diversity throughout its workforce. The chief diversity officer coordinates diversity newsletters, diversity workshops at firm retreats, and meets with every attorney in the firm to discuss diversity. This hands-on approach through an organizational representative, a mobile human resource, may prove more effective in the long run than a scripted training conducted every three to five years.

Without a representative on the management committee, diversity programs will not take root. And once the program stalls, as with Firm B, recruitment may continue, but the firm’s ability to meet the needs of minority associates through the diversity program greatly diminishes. In contrast to Firm B, the attorneys at Firms A and C recognized support from management as an indispensable component of the program’s success in improving diversity. Although law firms appear to be self-governing

---


partnerships, in larger firms, the partners with the most profitable clients typically hold the greatest influence. Law firm work groups are not stable; instead, work groups rearrange themselves from one transaction to another. The destabilization of work groups in the modern firm structure strengthens the influence of central management committees and nonpracticing administrators. For this reason, the management committee should reserve a seat for the diversity manager.

In a survey of law firm diversity programs, at least ninety percent of the firms assigned the following duties to their program coordinator: develop and promote diversity goals and strategies; implement long term and short term strategies, monitor objectives and strategies, promote awareness of diversity issues in management, operations, and governance; develop programs that foster a firm environment of inclusiveness and support for all lawyers to encourage retention; ensure firm support of law school minority organizations and national minority bar associations; manage external outreach programs, collaborate with corporate clients regarding diversity initiatives; and work with the recruiting committee. But only five of the seventy-two survey respondents reported that the individual responsible for the diversity program served on the firm’s governing committee. The law firm that excludes its diversity manager from the executive committee, which reviews, revises, and approves the firm’s policies and procedures, is immediately at a disadvantage in executing the organizational reforms necessary to increase retention of racial and ethnic minority attorneys.

The limitation of affinity groups and associate committees, if the only means to discuss diversity issues, is that (once again) no path exists for identified issues to be systematically addressed at the management level. In many firms, there are affinity groups bringing together minority group members, such as black, Hispanic, and women associates. Affinity groups are valuable to the extent that associates and partners air their concerns in a

---

134 HEINZ ET AL., supra note 16, at 109-10; Nelson, supra note 130, at 118 (observing that law firm leadership arises from “ambiguous origins, operate with considerable informality, and for the most part, do not exclusively occupy a lawyer’s time.”); GALANTER & PALAY, supra note 77, at 53.

135 In a stable work group, social norms arise to order work ethic, assignment distribution, and varying personalities, which are specific to the group dynamic. HEINZ ET AL., supra note 16, at 304-05, 306.


137 Id. at 6.
presumptively non-threatening environment—similar to diversity retreats and speaking with a designated diversity professional. Individuals with truly innovative ideas may receive a voice through their participation in the affinity group, an advantage not to be taken lightly in effectuating institutional change. Participation in affinity groups may also neutralize outlier opinions solicited from minority group members. With a diversity manager, however, affinity groups get an institutionalized link to management.

Many firms also have in place a general associates committee. Associates at Firms A and B expressed concerns with the effectiveness of these committees to appropriately handle diversity issues. Two practical considerations undercut the utility of associate committees to ferret out the issues confronting minority associates. First, these committees typically are composed of associates uninterested in bringing forth or giving serious consideration to controversial issues such as diversity. These associates may also feel an understandable reluctance to question institutional practices affecting more than associates, but an issue indicative of the firm culture established through the partnership. Second, a minority associate willing to express concerns about diversity to the associate committee or management takes the risk of being misrepresented as a troublemaker and one that does not ‘fit in’ to the firm’s culture.

Firm A attempts to counteract this effect through diversity retreat sessions, addressing the unique concerns of minority associates. In time, Firm B will move hopefully toward a formalized ability to remain abreast of minority issues within the organization. Even though informal networks are the key to success within and outside law firms, they don’t provide the bases for evaluating a firm’s diversity weaknesses and making the appropriate adjustments.

3. Diversity Consultants: Educate, Activate, and Advocate

The study of diversity programs in this project showed each firm using diversity consultants in a variety of ways—some more effectively than others. In one qualitative study of Chicago lawyers, associates viewed diversity trainings as the law firms attempt to avoid liability and “ineffective in facilitating any changes within the workplace.” Firm C

\footnote{HUFF & HUFF ET AL., supra note 61, 66 (“In fact, the group context can begin to amplify rather than suppress individual concerns”).}

\footnote{Id. at 63. (“Individual interpretations are moderated by interaction with others, and consensus on advantageous activities is often the desired outcome of group argument, negotiation, and exchange”).}

\footnote{REEVES, supra note 25, at 285.}
used diversity consultants in a series of attempts to improve the firm work environment. The firm retained a consulting group to study the mentoring program; and the consulting group led cross-cultural mentoring trainings in response to the surveys. The chief diversity officer only resorts to the assistance of diversity consultants for trainings every two to three years. During this time period, the diversity officer’s two professional development staff members help him monitor the mentoring program and carry out other functions of his job. On the opposite extreme, Firm B remains in regular contact with their diversity consultant but only a few partners and associates may take advantage of this fluid line of communication. Firm A’s diversity efforts are controlled by the diversity committee with a clear commitment from management. Firm A uses consultants for isolated diversity events, such as town hall meetings and diversity retreats.

Diversity trainings alone merely educate partners and associates without any incentive to implement the encouraged practices or to hold parties accountable for exhibiting discouraged behaviors. From any perspective, diversity and sensitivity trainings alone do not accomplish the task of creating a work environment conducive to the retention of minority associates. 141 Professor Diane Vaughn describes programmatic interventions, like diversity trainings, as focusing solely on individualistic conduct; thus, programs produce an “incomplete” understanding of institutional behaviors because “[these strategies] leave the social context untouched, tending to systematically reproduce misconduct.” 142 A cookie-cutter diversity training will not cue the correct remedial action to cure structural harms. An expanded evaluation process, on the other hand, allows the diversity officer and participating parties to explore the complex factors giving rise to structural barriers, which result in attrition problems. In practice, interactive evaluations would actualize the knowledge gained through traditional diversity and sensitivity trainings. The open expression facilitated through a mediation-inspired evaluation procedure also permits the participating parties to acknowledge and validate concerns.

Usually, once the law firm attains adequate information on its diversity profile, the responsibility to act upon the information falls to either

141 Diane Vaughn, Rational Choice, Situated Action, and the Social Control of Organizations, 32 LAW & SOC’Y REV. 23, 34-37 (discussing the ineptness of a decontextualized rational choice model for institutionalized behaviors stemming from common solutions, which in time become “institutionalized, remembered, and passed on as the rules, rituals, and values of the group”). See also supra note 35 and accompanying text.

142 Id.
a diversity committee or a full-time diversity professional. Diversity consultants provide an array of services, ranging from sensitivity seminars to strategic plans for diversity, based on an analytical study of the firm’s hiring, retention, and promotion patterns. Consultants can prove most helpful to institutional reforms, however, when diversity trainings for the majority group are discounted to only one component of eradicating structural barriers. Consultants should be utilized, in both group and individual settings, to help attorneys of color overcome the obstacles arising from their status membership. In an interactive system, diversity consultants can disseminate information to associates about structural and individual cognitive biases, gather information, and provide coping mechanisms.

A make-n-break challenge stems from how a firm moves from the proposed evaluation process to reforms resulting in greater retention rates. At any given point, the program requires stakeholders from the associate and management levels to participate in the retention effort. An interactive evaluation process merely serves as a catalyst and learning tool for identifying firm-wide changes and testing the effectiveness of implemented reforms. The diversity retreat implemented by Firm A, and the hands-on approach implemented by Firm C’s diversity officer, provide a platform for learning what minority associates are thinking and where the firm can improve on its diversity efforts. At least once a year, each of these firms is able to put their finger on the pulse of minority associates and partners in an environment accommodating frank conversations. Undoubtedly, gathering information requires the cooperation of both sides. Whereas management must facilitate the opportunity for associates to talk, associates must be willing to take advantage of this forum.

The mediation process not only provides information from the associates ranks but elevates their position to participants in self-determining their career trajectory while contributing to the firm’s progress toward an equitable workplace. Associate feedback on the evaluation process and mentoring program fill the arsenal of diversity committees and diversity officers with objective legitimacy in advocating for institutional reforms based on supported data as opposed to any perceived identity-based or personal interests.

---

143 Patrick Lynch & Elaine Arabatzis, Recruiting Diverse Attorneys: Some firms are partnering with law school programs and hiring full-time diversity professionals., NAT’L L.J., April 18, 2005, at R1.

144 Heckscher & Foote, supra note 117, at 486.

145 Heckscher & Foote, supra note 117, at 492 (asserting that the process of using a
E. The Pathology of Pluralism: Monitoring and Holding Participants Accountable on Two Levels—the Organization and the Profession

The capability to monitor the progress of a diversity program and hold participants accountable is essential to institutional reform. Whereas management may delegate monitoring to the diversity manager, connecting the monitoring system to an accountability system determines whether structural reforms will produce the intended increase in minority associate retention. The development of sustainability, monitoring, and accountability procedures need not rest solely upon the shoulders of law firms. A concerted monitoring and accountability regime connected beyond the firm organization to the professional level, including law schools, in-house counsels, and bar associations, may produce continuity while the data combat complacency and ignites movement.

The similarity across law firms in day-to-day practices, promotion tracks, and diversity programs represents a settled business model—entrenched, institutionalized, and legitimated through years and years of reiteration. At this point, the reader may envision all law firms as cut from the same mold. But the law firm is not a single-dimensional, monolithic workplace. To further complicate matters, corporations and bar associations also enact policies and develop initiatives aimed at improving law firm diversity. Therefore, even though law firm practice shares similarities from one firm to another, a firm’s location and clients may also affect diversity.

information gathering process to promote institutional reforms builds an “ethic of contribution”); see also Sturm, The Architecture of Inclusion, supra note 3, at 293.

Sturm argues that “the public intermediary role could be played by a far wider range of institutions, including other government agencies, accrediting bodies, monitoring bodies, professional associations, and foundations. In some situations, these organizations are in a position to build institutional capacity, pool information, and leverage accountability and change.” Sturm, The Architecture of Inclusion, supra note 3 at 327.

D.J. GALLIGAN, LAW IN MODERN SOCIETY 183 (2007) (arguing that social relations are regulated by social conventions and understanding, independent of law).

GALANTER & PALAY, supra note 77, at 47, 54. As competition grew in the corporate sector, law firms responded by exponential growth and personnel expansion. Scholars attribute this growth to an overall increase in the number of attorneys practicing corporate law, increased demand for corporate attorneys, the promotion-to-partner tournament, and the merger of established law firms. HEINZ ET AL., supra note 16, at 286-87; see also Greenwood, supra note 130, at 187 (observing that today’s law firm is much larger and geographically dispersed than firms of previous eras).

Moreover, leadership affects the firm’s values even though a firm’s success or failure steers policies and may cause the replacement of management. Nelson, supra note
During the initial balloon of law firm growth, and still today, law firms primarily expanded by merging with established firms or with entire practice groups leaving an established firm in the new location. When meshing distinct institutional cultures, the momentum collected in one organization for progressive reforms in a diversity program will either suffer setbacks or gain reinforcements. The divergent cultures could affect a diversity initiative in three ways: (1) a fledgling diversity initiative or the attempted integration of two initiatives with similar goals but different approaches may dilute support for the stronger program and bring management back to the drawing board to consider alternatives; (2) the new stakeholders may challenge the established view concerning the “appropriateness of organization action[s],” previously deemed legitimate, and thus rehash the competition between conflicting beliefs; and (3) the merging of organizational cultures involves “cognitive, cultural, and political interests that serve to shape and are, in turn, shaped by organization action.”

Diversity advocates need a unified strategic plan to accomplish diversity across the country. Otherwise, the fractured visions will create a splintered diversity scene: corporate law firms that service diversity-conscious clients and establish offices in particular regions will have greater diversity than law firms not responding to these pressures. As a self-regulating profession, a more effective route to diversity would present itself through creating a strong, non-adversarial governance regime to focus on the years during the promotion-to-partnership period. From the professional perch, law schools, bar associations, and corporations should and have served as the check-and-balance on whether private law firms adequately address diversity. Hopefully, the resurgence of diversity as a

130, at 101.


151 Professor Crosby explains that equal opportunity “requires nothing of an organization—no plans, no monitoring system, no remedial actions” and focuses on individual discriminating actors. But “affirmative action requires that an organization be proactive” and “elevates requisite reforms to the systems level.” Faye J. Crosby, Understanding Affirmative Action, BASIC AND APPLIED SOC. PSYCHOL., 13, 18 (1994).

152 Paul J. DiMaggio & Walter W. Powell, The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 63, 64, 75 (Walter W. Powell & Paul J. DiMaggio eds., 1991); Walter W. Powell, Expanding the Scope of Institutional Analysis, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, 183, 188 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (“They construct and legitimate organizational goals, standardize and distribute resources, and develop and maintain systems of bureaucratic
priority, prompted through external and internal pressures, will breakdown homogeneity in diversity programs, leading to a heterogeneous period sustained through experimentalism in diversity practices.\footnote{Powell, supra note 152, at 196; HUFF & HUFF ET AL., supra note 61, at 69-74 (arguing that insufficient incremental change prompts groups to experiment the utility of increasingly more “more dramatic alternatives.”).}

1. Monitoring the Firm’s Progress

The cost to monitor a diversity program does not fit into a firm’s profit structure.\footnote{The growth of large law firms makes monitoring young attorneys during their associate years all the more difficult for partners due to (1) high leverage; (2) decrease in the quality of new recruits; and (3) an increased likelihood for evaluation mistakes of the less capable and top ranking associates. Gilson & Mnookin, supra note 75, at 567, 590. Gathering information and monitoring performance constitute high transactional costs to law firm management. GALANTER & PALAY, supra note 77, at 93.}

Large law firms cannot afford to closely monitor associates because lawyers work in teams, legal work requires time intensive research and professional judgment, and attorneys work under short deadlines.\footnote{Wilkins & Gulati, Reconceiving the Tournament of Lawyers, supra note 28 at 1600.}

Moreover, clients do not pay for hours spent to discuss firm politics, provide feedback on an assignment, and give insight on client development. For these reason, monitoring the success of a law firm’s diversity program and whether minority associates are receiving mentoring, work assignments, and client contact too often does not happen. The accumulated effect surfaces when someone considers leaving the firm and during promotion time.\footnote{Elizabeth Chambliss, Organization Determinants of Law Firm Integration, 46 AM. U. L. REV. 669, 694 (1997) (arguing that differential access to work and training eventually produces differences in ability, which arises when it comes time for promotion).}

Data collection not only informs institutional change to improve a program’s effectiveness but also helps sustain the program in its infancy.\footnote{HUFF & HUFF ET AL., supra note 61, at 84 (“In the interim, those who are most enthusiastic about the new strategy act as if the strategy were achieving its potential, while even those who are not convinced often allow a period for evidence to accumulate”); Jack Knight & Jean Ensminger, Conflict Over Changing Social Norms: Bargaining, Ideology, and Enforcement, in THE NEW INSTITUTIONALISM IN SOCIOLOGY, 105, 121 (Mary C. Brinton & Victor Nee, eds., 1998) (offering that “long time lag between the change in the norm and the realization of the costs and benefits of that change” and “decentralized versus centralized enforcement” may affect enforcement of institutional reforms). Data constitutes an objective source of support for the initiation and sustainability of the firm’s efforts. HUFF & HUFF ET AL., supra note 61, at 66-68, 74 (“Because astute supporters also recognize that exit, negative voice, and underperformance by the dissatisfied can increase,}
equity need to “gather information that identifies and explains problematic patterns, to prompt the development of systems to hold companies accountable for addressing these patterns, and to collaborate with internal and external stakeholders needed to sustain on-going change.”  

Firm A monitors retention issues through its Retention, Advancement, and Development Committee of the Minority Attorney Program. Firm C’s chief diversity officer reports on a quarterly basis to the management committee; reports monthly to the diversity committee; and reports weekly to the chair of the management committee. Diversity statistics are quarterly reported by every office’s administrative partner to the management committee. At Firm C, the diversity initiative considers qualitative and quantitative measures. As further explained by a diversity committee member, Firm C has reached its diversity goals if

at the end of the day, partners and associates feel a part of the team… numbers are very telling too, you can’t have a good diversity program and say that unfortunately, we haven’t been able to recruit… not hiring for the sake of hiring, a true measure would be the success of those lawyers in the numbers that they represent within the firm.

Law firms are not alone, however, in collecting data on diversity. The American Bar Association’s (“ABA”) Commission on Racial and Ethnic Diversity in the Profession publishes the Miles to Go Report, and more recently, the ABA’s Commission on Women in the Profession published a study of minority women in law firms entitled Visible Invisibility: Women of Color in the Law Firms. These studies report demographic information on the legal profession, qualitative survey data, and responses from focus groups.

it is wise to quickly devise new structures, routines, and control procedures”); Nancy Fraser, Recognition as Justice? A Proposal for Avoiding Philosophical Schizophrenia, in LAW, JUSTICE, AND POWER 139, 151 (Sinkwan Cheng, ed., 2004) (“Unanswered questions require new data, which often must be sought from people not encountered in day-to-day task performance”); Sturm, Second Generation Employment Discrimination, supra note 2, at 479 (“Responsive employers have instituted internal systems for preventing and remedying problems stemming from complex workplace relationships. . . . These pathbreaking organizations demonstrate that internal dispute resolution and problem-solving systems can be robust, if they are designed to provide for accountability and effectiveness”).

158 Sturm, Lawyering for a New Democracy, supra note 1, at 291.

159 Interview with Member of Diversity Committee of Firm C, in Dallas, Tex. (Mar. 22, 2006).
Local bar associations across the nation also look to bolster minority participation through minority committees and studies. Both the Bar Association of San Francisco (“BASF”) and the Association of the Bar of the City of New York (“NYC Bar”) implemented citywide diversity initiatives for the legal profession. A component of these initiatives gathered data from area firms, both qualitative and quantitative, and then presented statistical patterns based on the progress of local legal employers. The BASF initiated a benchmarking study at various sized law firms, adopted as the Goals and Timetables for Minority Hiring and Advancement.\textsuperscript{160} The study published by the NYC Bar affirms the BASF’s observation that minority representation in entering classes has outpaced the percentage of minorities at the senior associate and partnership levels.\textsuperscript{161} Moreover, the studies show that simply waiting for these new associates to be promoted up the ladder will not reconcile retention rates.

The National Association of Law Placement (“NALP”), founded in 1971, regularly publishes statistics and press releases regarding law firm diversity.\textsuperscript{162} The NALP Foundation also conducts qualitative survey studies about special issues of interest in the profession, including attrition rates at law firms and associate evaluations, and commissioned a longitudinal study of careers in the profession.\textsuperscript{163} University of Michigan Law School and Harvard Law School also track the careers of minority graduates.\textsuperscript{164}

These studies provide a repository of qualitative and quantitative data to be used on the professional level to inform organizational reforms. An interactive evaluation process, as a coordinated effort, would provide annually up-dated qualitative insights to supplement the statistical information already published across the nation. The question then becomes, what should law firms along with the profession do to ensure action on the issue?

To gather information, implement a program, and monitor the results may prove futile without holding anyone accountable. Not only subtle discriminatory patterns, but even more blatant acts of discrimination

\textsuperscript{160} \textbf{GOALS AND TIMETABLES FOR MINORITY HIRING AND ADVANCEMENT}, BAR ASSOCIATION OF SAN FRANCISCO 1-2 (2005).

\textsuperscript{161} \textbf{DIVERSITY BENCHMARKING STUDY}, supra note 110, at 3.

\textsuperscript{162} The Association for Legal Career Professions, www.nalp.org (last visited Mar. 12, 2008)

\textsuperscript{163} Id.

\textsuperscript{164} ELIZABETH CHAMBLISS, AMERICAN BAR ASSOCIATION, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 23, 24 (2004).
may occur in the absence of an accountability structure. In the strictest form, experts suggest that organizations make an “explicit evaluation of managers and supervisors on their contributions to an organization’s EEO [equal employment opportunity] goals;” or connect one’s involvement with promoting diversity to their compensation.\(^{165}\) No matter the method retention efforts hinge on a “fit between the organizational culture and the system of accountability.”\(^{166}\) The collective group of law firm management, the diversity officer, and the diversity and evaluation committees must find internal enforcement methods able to keep one another dedicated to executing their roles in the diversity initiative and incentives for supervising attorneys participation.\(^{167}\) Otherwise, once the hierarchy loses top-down commitment, the reform effort will in time lose legitimacy.

2. How Will Firms Hold Attorneys Accountable?

a. Organizational Challenges to Accountability

Diversity and associate evaluation committees relieved of extraneous obligations, and with the support of the executive committee, could hold partners accountable for participating in the interactive evaluation process. The accountability systems built into the diversity programs studied for this project were not sufficient to produce firm-wide participation. Interview questions regarding accountability, more often than not, inspired a moment of silence from respondents. A partner at Firm A admitted that the program has “no accountability for a flailing mentor—nothing institutionalized” but within the minority group exists an informal accountability system where, minority partners “take stock of how people are doing and take steps to ensure that [associates] meet those goals.”\(^{168}\) A second-year associate at this firm notes that the program will “continue, as long as key people in power at the firm will continue.”\(^{169}\)

One form of accountability identified was the need to build a strong firm with the best legal talent on the market. Every associate entering Firm

\(^{165}\) Bielby, supra note 60.

\(^{166}\) Bielby, supra note 60.

\(^{167}\) Knight & Ensminger, supra note 157, at 109, 117-20 (“The success of reform efforts will depend in large part on the ability of such groups to establish and maintain these alternative enforcement mechanisms”).


\(^{169}\) Telephone Interview with Associate of Firm A, in Washington, D.C. (July 18, 2006).
C is assigned an associate and partner mentor. Partner mentors volunteer for this duty and are persuaded using the firm’s core value of “inter-generational excellence.” It was expressed to partners that “the firm’s core value was intergenerational excellence and as a result of that core value every partner was expected to mentor, so if you didn’t mentor it was looked upon as you not upholding your family responsibility.” The chief diversity officer supervises two administrators responsible for the mentoring program. Also, each office staffs a mentor coordinator.

Once partners receive a mentor assignment, the system provides minimal incentive or accountability measures to ensure that the mentor performs to standard. If not satisfied with one’s mentor, an associate may request a reassignment from either the recruiting or mentor coordinator. Therefore, even within Firm C’s elaborate initiative, it would be incumbent upon an associate to risk fracturing a partner relationship in order to get another, more attentive mentor.

As an accountability measure, inter-generational excellence pales in comparison to more formal structures that may be established to hold senior associate and partner mentors true to their commitment. Moreover, the incentive of inter-generational excellence relies upon someone taking an interest in the future success of an organization—a condition that may or may not ever affect their interest, especially in the modern era of lateral movement among associates and at the partnership level. Applying a general goal of firm excellence to drive a diversity program could at best maintain the status quo or at worst simply reinforce the discriminatory practices already in place.

One “in the works” program involved the development of an accountability system for partners that mirrors the accountability check implemented by some corporate clients. In essence, the law firm proposes to track the work assignments that partners distribute to minority associates. The ability to track such information, in light of sophisticated billing, does not seem unreasonable. The firm must use the information to enforce the expectation of partners to involve minority associates in quality work assignments. This enforcement measure, of basing one’s compensation on their ability to provide opportunities for minority associates, would strengthen an ideal of inter-generational excellence.

The evaluation committee and the diversity committee is the most advantageously positioned body to fulfill the accountability function, because members are dispersed throughout the firm based on geography,

---

departments, and hierarchy. In a typical diversity program, the diversity committee either supports the manager’s position or assumes these duties along with their billable-hours requirement. The diversity committee coordinates all aspects of the program, externally and internally, from recruitment to retention, outreach programs, and trainings. Realistically, this expectation could prove over-burdensome for partners left holding the responsibility to supervise associates, develop clients, bill hours, and mentor minority associates. The program modifications discussed in this Article attempt to streamline the committee’s duties for fulfilling one required element of institutional reform: accountability. The diversity manager and consultants, through attending group interests and coordinating interactive evaluations, replace the high expectation for diversity committee members to orchestrate programs for minority associates. In fashioning an accountability system, a heterogeneous diversity committee may negotiate varying institutional interests to create workable mechanisms and collaborate with the associate evaluation committee to perform these tasks.

As law firms institutionalize an interactive evaluation process, partners will not discontinue writing negative performance evaluations; however, partners and associates may preempt the inevitable by addressing informally work issues before evaluation season. Any attempt to circumvent the process in bad faith can be detected using objective measures such as billable hours and a skill metric. Firms may also compare consistency in evaluations provided for a particular associate. None of the large firms in the United States use compensation as an incentive for partners and associates to complete associate evaluations. The Postal Service uses participation rates in defined districts as the measurement of success for its mediation program. According to Bingham, this “created an incentive structure for program administrators to become champions of the process and maintain a fair, credible, and responsible process that would, in turn, attract employees to the program.”

Despite the inherent buy-in challenges on the part of minority associates, the confidential procedures established for performance evaluations should attach to protect the

---

171 Vaughn, supra note 141, at 50 (arguing that “structural secrecy” grows with the size of the organization through division of labor and to overcome this problem, organizations must revamp the lines of authority and information flow).

172 Stephen B. Goldberg, How Interest-Based, Grievance Mediation Performs Over the Long Term, 59 DISP. RESOL. J. 8 (2004); Bingham, supra note 97, at 15.

173 HOW ASSOCIATE EVALUATIONS UP, supra note 65, at 46-47.

174 Bingham, supra note 97, at 29.
professional interests of participants, and organizational attitudes should congratulate participants for supporting the firm’s diversity mission and overall improvement.

b. It’s Not a Solo Mission: Institutional Challenges to Accountability

On the professional level, the usual suspects for poor law firm diversity include firm management and corporate general counsel. These economic powerhouses of the legal profession receive the brunt of impatient scowls insisting, “Just get it done.” Corporations serve an influential role in promoting law firm diversity. Diversifying the attorney pool at elite law firms requires the cooperation of firm management and corporate clients.

The chief diversity officer of Firm C observes that, “I need to have some power. And what gives me power is if these general counsels of those large firms were to say that we’re going to do this because of the chief diversity officer, that’s power—and that’s what this kind of position needs, it needs both authority and power.”

According to the diversity officer, the strongest hope for accountability—corporations will only work with diverse law firms—is still yet to be seen. When corporations award law firms with progressive diversity programs by sending over greater volumes of work, this gives “credibility” to diversity advocates inside the firm. It’s difficult to ask partners to invest money in hiring new associates at any level when “there’s no work for the people to be brought into” from institutional clients.

He exudes impatience while waiting for corporate America to put some teeth into their claims that legal service providers need to include minority attorneys on their matters.

A Firm A partner observes that the firm

175 Since the 1980s, as corporate in-house legal departments expanded, these departments exert more control over law firms in way of budgets, supervision of cases, and requesting more reporting. GALANTER & PALAY, supra note 77, at 50.

176 Large law firms dominate the business law practice and the earnings from business clients. Between 1975 and 1995, the yearly income tripled for attorneys at firms of one hundred or more attorneys. HEINZ ET AL., supra note 16, at 99; see also GALANTER & PALAY, supra note 77, at 40-41 (observing the growth of legal services commanded by corporate clients between the years of 1967 to 1986); Marc Galanter, “Old and in the Way”: The Coming Demographic Transformation of the Legal Profession and its Implications for the Provision of Legal Services, 1999 Wis. L. Rev. 1081, 1088.

177 Interview with Chief Diversity Officer of Firm C, in Pittsburgh, Pa. (Feb. 14, 2006).
is already in a good position, the next level that will be critical in developing strong diversity results is going to be in client development. As time progresses, business relies more on free agency... [There’s] pressure on associates to demonstrate the ability to develop business in the future, and if they don’t have that indicia, then they will not make partner and the firm will get someone with a client book. [Minority associates] are not looked upon institutionally as being good business developers. [Helping associates to] develop business at earlier points in their career will make us more successful in keeping associates beyond beginning years. [But minority associates] must see that others are making partner and surviving.\footnote{Telephone Interview with Jr. Partner of Firm A, in Washington, D.C. (June 27, 2006).}

Accordingly, the next diversity retreat will “emphasize trying to build relationships inside and outside of the firm.”\footnote{Id.} Law firms alone, however, cannot push corporations to aid diversity efforts. Corporate clients must take responsibility for supporting the economic feasibility of making diversity happen.

For each corporation, the law firm negotiates different expectations for attorney diversity, and firm management must interface the firm’s policies with the diversity procedures either imposed or undervalued by corporate clients. Some corporations endeavor to encourage law firm diversity through coercive tactics eerily similar to the quota systems held impermissible under the Constitution.\footnote{Wal-Mart’s general counsel requires the top one hundred firms servicing its company to assign at least one attorney of color and one woman as one of five relationship attorneys for its business. In a June 2005 letter, its associate general counsel threatened to “end or limit relationships with law firms who fail to demonstrate a meaningful interest to the importance of diversity.” Merideth Hobbs, \textit{Wal-Mart Demands Diversity in Law Firms}, \textit{FULTON COUNTY DAILY REP.}, July 6, 2005.} Other corporations search for diversity in terms resembling equal opportunity tactics, which may prove ineffective but better than corporations showing no interest at all.\footnote{Whereas Wal-Mart, Del Monte, and Pitney Bowes examine the firms’ numbers in their determination on whether to hire a firm, Cox Communications’ general counsel weighs in against qualitative benchmarks. James Hatcher solicits diversity information through interviews in firm meetings. He reasons that his qualitative approach detects “inclusiveness” as opposed to “diversity,” and the concept of inclusiveness and seeking firms with diversity “as part of the culture” avoids breeding a new competition of white men against women and minorities. \textit{Id.}}

\footnote{Telephone Interview with Jr. Partner of Firm A, in Washington, D.C. (June 27, 2006).}

\footnote{Id.}

\footnote{Wal-Mart’s general counsel requires the top one hundred firms servicing its company to assign at least one attorney of color and one woman as one of five relationship attorneys for its business. In a June 2005 letter, its associate general counsel threatened to “end or limit relationships with law firms who fail to demonstrate a meaningful interest to the importance of diversity.” Merideth Hobbs, \textit{Wal-Mart Demands Diversity in Law Firms}, \textit{FULTON COUNTY DAILY REP.}, July 6, 2005.}

\footnote{Whereas Wal-Mart, Del Monte, and Pitney Bowes examine the firms’ numbers in their determination on whether to hire a firm, Cox Communications’ general counsel weighs in against qualitative benchmarks. James Hatcher solicits diversity information through interviews in firm meetings. He reasons that his qualitative approach detects “inclusiveness” as opposed to “diversity,” and the concept of inclusiveness and seeking firms with diversity “as part of the culture” avoids breeding a new competition of white men against women and minorities. \textit{Id.}}
collaborative approach, seeking to locate common interests between internal and external stakeholders, is more apt to foment diversity efforts capable of producing consistent results. In a survey of 862 general counsel and 135 law firm attorneys, the respondents ranked a law firm diversity program as one of the least important factors in choosing a law firm.\textsuperscript{182} In 2005, of AmLaw 200 firms, less than half employ a diversity manager and of these managers, only fifty percent are employed full-time in the diversity manager position.\textsuperscript{183} If law firms and corporations could bridge diversity efforts based on their mutual interests, then these numbers could potentially increase.

Accordingly, the legal profession should reassess the firm’s pressure points with regards to diversity. There exist examples of the legal profession pooling resources to combine the influential reserves in law schools, corporations, law firms, and bar associations to positively affect the diversity outlook of private practice. These efforts entail more than the corporation’s coercive financial incentives and the law firm’s opportunistic gravity toward diversity in the profession. The initiative detailed below, Diversity in Practice, builds on the geographic commonality between nineteen Fortune 500 companies and law firms in the Minneapolis/St. Paul area to address the client development obstacle to firm diversity.\textsuperscript{184}

Diversity in Practice, a non-profit organization located in Minneapolis, involves area corporate law firms and twelve major companies in its efforts to increase retention in law firms. Unlike the carrot and stick tactic of firing law firms struggling in the diversity area, Diversity in Practice channeled the lucrative profits of corporations and law firms to fund its diversity initiatives, ranging from recruitment to retention. In acknowledging the pluralism challenge, one local judge states that, “[o]n an individualized basis, the legal community has tried to address the issue of reaching out, and retention, and promotion. But what we have lacked in the past is a collective effort to pull resources together so that we can really approach diversity in a systematic way.”\textsuperscript{185}

\textsuperscript{182} \textit{Inside Counsel}, 18th Annual Survey of General Counsel: Survey Snapshots (July 2007).


\textsuperscript{185} \textit{Id.}
Specific to retention and promotion, Diversity in Practice seeks to open new pathways to client contact, as opposed to threatening firms, as a means to meeting diversity benchmarks. The organization hosts structured networking opportunities for senior associates and partners of color. As a long-term strategy, Diversity in Practice aims to increase the partners of color “with the type of clout that only comes with a book of business.” The organization also hosts speakers and social events arranged for minority associates and corporate members to share best practices with law firms. In supporting the professional development of minority attorneys, the organization believes that corporations have a vested interest in that they typically recruit in-house counsel from law firms. Finally, to complement its diversity efforts, Diversity in Practice works in conjunction with eight local minority bar associations, four Minnesota law schools, and other state bars. The organization also supports a website about the Twin Cities legal market.

Diversity in Practice fills the need of addressing diversity issues beyond the individual and organizational level. Such a collective effort reframes stakeholder interests in a creative, practical fashion in order to remove the adversarial blame-game of diversity effectiveness and congregate the requisite entities. A diversity manager’s institutional positioning as a link between the management, partnership, associates, and external community, helps bring to fruition the requisites for systemic change between the firm and external efforts.

As the equity goals and measures implemented at the organizational and professional levels within a local community are shared through these channels of communication, the outlook for diversity strengthens. Internally, law firms should continuously experiment with new practices and gather information on these efforts. Externally, an organization similar to Diversity in Practice serves as neutral ground for corporations, law firms, law schools, and bar associations, to brainstorm the ever-changing conditions of diversity, disseminate new information, and advocate effective policies.¹⁸⁶

F. Blowing Out Candles (one-by-one) at the Diversity Vigil

1. The Normative Argument for Law Firm Diversity

One academic observes that, “corporate law jobs sit atop both the income and status hierarchies of the bar and serve as a gateway to

¹⁸⁶ Most importantly, institutional reform under this formula is an ever-evolving endeavor that must continually addresses the obstacles to workplace equity. Sturm, *Lawyering for a New Democracy*, supra note 1, at 291.
prominent positions in government, business, and civil society.\textsuperscript{187} Specific to retention, according to a Chicago partner, “corporations and government have come to benefit from the crucible that success in a law firm represents, and use law firm partnership as a proxy for intelligence, imagination, and perseverance and other leadership qualities.”\textsuperscript{188} These statements succinctly explain why racial and ethnic minority groups, not only attorneys of color, would strive to diversify corporate law firms and encourage promotion to partnership. As populations throughout the country shift demographically, the upper echelons of professional society and the channels to these positions should invite participation from minority group members. Diversity in large law firms would reflect ideally, at a minimum, the number of racial and ethnic minority attorneys graduating in the legal profession.\textsuperscript{189} Whereas the individual law firm associate making a six-digit salary may be deemed as an unsympathetic victim, the greater effects upon minority group ascension in society accentuate the urgency of this problem.

Specific to the workplace, in her recent work, Susan Sturm explains that institutional citizenship combines the “democratic values of participation and voice by insisting on creating the conditions enabling people of all races and genders to realize their capabilities as they understand them.”\textsuperscript{190} “Sixty-two percent of women of color in the survey reported being excluded from informal or formal networking opportunities, as did 60% of white women. Thirty-one percent of men of color and only 4% of white men reported similar problems.”\textsuperscript{191} Minority attorneys feel as though they lack access to informal networks and sponsorship opportunities, which affects an associates assignments, client contact, associates reputation, and associate evaluations.\textsuperscript{192} “The structural barriers in law firms affect some minority associates in ways that should be considered unconscionable in light of the firm’s touted meritocratic and

\textsuperscript{187} Wilkins, \textit{The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar}, supra note 24 at 1600.

\textsuperscript{188} J. Cuyon Gordon, \textit{And, Um, Let’s Have a Black Lawyer Sit at our Table}, 71 \textit{Fordham L. Rev.} 1257, 1266 (2003).

\textsuperscript{189} “If lawyers do not make significant progress to hire and promote minorities proportionate with their representation in the profession, lawyers run the risk of losing the prestige--the relative preference--associated with becoming a member of this noble profession.” Alex M. Johnson, Jr., \textit{The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist’s Perspective}, 95 \textit{Mich. L. Rev.} 1005, 1062 (1997).

\textsuperscript{190} Sturm, \textit{The Architecture of Inclusion}, supra note 3, at 324.

\textsuperscript{191} \textit{Visible Invisibility}, supra note 92, at 17.

\textsuperscript{192} Reeves, supra note 25, at 226-29.
professionalism values. When entering unfamiliar institutions with a historical background of racial exclusion and marginalization, some racial and ethnic minorities exhibit a high sensitivity to adverse social cues when perceived as based on their group identity. Psychologists define status-based rejection as “a cognitive affective processing dynamic whereby people anxiously expect, readily perceive, and intensely react to rejection in situations in which rejection is possible.” Over extended periods of time, minorities with a high sensitivity to status-based rejection experience difficulty forming relationships with people belonging to the “high-status group.” Persons in the high-status group are perceived to embody, and thus control, the “norms, standards, and culture” of the institution.

Well-qualified minorities may fail the fitness test due to high sensitivity to the institutional barriers in a law firm, and thus, these associates under-perform during the first few years of practice. On one hand, the study suggests that minority group members may “harness[] [their sensitivities] as a key component of a culturally taught self-regulatory mechanism that fosters successful coping in domains dominated by members of the majority group.” An associate experiencing low status-based sensitivity may overlook potentially harmful social cues indicative of institutional biases. Status-based rejection manifests in three ways: isolation, blending, and finding consolation with one’s identity group. Legal scholars have documented these affects on minority employees working in professional environments. For every stereotype not positively aligned with the workplace’s institutional norms, an employee of color must overcome invisible hurdles by conforming their identity to fit the established culture. The burden of conforming one’s identity to a work culture predicated on white male attitudes means twice the effort for racial and ethnic minority associates. The time and energy expended to “perform identity” is a form of discrimination unknown to those inside the dominant

193 Nelson, supra note 130, at 122 (arguing that merit is and tradition in law firms despite the inherent complications stemming from subjective evaluation systems); see also GALANTER & PALAY, supra note 77, at 73 (asserting that the mystique once beholden to the legal profession no longer exists due to the information age).


195 Mendoza-Denton & Downey et al., supra note 194, at 915. Carbado & Gulati, supra note 60, at 1270; see also Kenji Yoshino, Covering, 111 YALE L.J. 769 (2002).
identity group. Law firms resistant to implementing effective reforms risk alienating the most talented racial and ethnic minority associates, and instead, the firm retains associates with a high tolerance for institutional bias but not necessarily the most promising legal and client development skills.

Structural barriers also thwart the professional goals of young minority associates and steer these attorneys toward alternate careers for reasons unrelated to their potential to master the intricacies of corporate law.196 According to Mungin’s autobiography, his professional goals “by Harvard standards . . . [were] relatively modest: a job with a solid, not necessarily dazzling, law firm that would pay well, not be all-consuming, and lead to a secure partnership.”197 As his faith in the firm began to wane, Mungin revised his career goals and inquired about working as a staff attorney at a civil rights outfit, because “[t]he money, while nice, didn’t make up for a sense of emptiness he had been feeling.”198 Mungin eventually traded both aspirations for his pride. He felt disillusioned after dealing with the obscure, bureaucratic labyrinth of management that he perceived as racially biased. After leaving the firm, Mungin worked as a temporary employee for the federal government. His professional goals redirected drastically by his experience, Mungin spoke instead about plans to move down South and write his family history.

Not everyone completely abandons the profession upon departing the big law firm. A significant number of racial and ethnic minority attorneys practice in small groups or with the government.199 In reality, many associates have no interest in remaining at the law firm through the

196 The authors suggest that women and minorities experiencing discrimination in private law firms turned to corporations and government work as a refuge from inequitable treatment. HEINZ ET AL., supra note 16, at 127.

197 BARRETT, supra note 79, at 111.

198 Id. at 252.

199 Fewer minority law school graduates enter private practice although the numbers are increasing; instead, these graduates are more likely than non-minorities to enter government positions and public interest organizations. NAT’L ASS’N FOR LAW PLACEMENT, EMPLOYMENT PATTERNS—1982-2004, http://www.nalp.org/content/index.php?pid=385 (last visited Jan. 7, 2008) [hereinafter EMPLOYMENT PATTERNS]. Nearly one-third of attorneys of color and women leave law firms to become an in-counsel in a corporate legal department. VISIBLE INVISIBILITY, supra note 92, at 30 (“Most women of color, men of color, and white in the survey who left law firms became in-house attorneys in a corporate legal department (31%, 33%, and 36%, respectively.”)
partnership promotion stage.\textsuperscript{200} This Article does not venture to rank the relative prestige attached with practicing in one legal environment over another, but the advantages of ascending through a large firm should not be an unattainable dream for racial and ethnic minorities choosing this path.

2. The Reputational Theory of Deterrence as Applied to Law Firm Diversity

Moreover, discrimination against gifted or average minority candidates could work against the reputation of firms seeking to somehow attract exceptional minority candidates. As discussed earlier, law firms may overlook average minority candidates without suffering any economic harm due to the large number of associates in the attorney pool. Professor Robert Frank suggests that a damaged public reputation may deter law firms from discriminating against attorneys of color.\textsuperscript{201} Scholars dispute whether this form of accountability based on information disclosure actually serves to prevent unfair behavior in the promotion-to-partnership phase.\textsuperscript{202} Today, however, the diversity issue receives a respectable amount of publicity, which results in a heightened public awareness (beyond the legal profession) of diversity in major law firms. For example, on an annual basis, the Dallas Morning News runs an above-the-fold special report on the diversity scores for the city’s largest law firms.\textsuperscript{203} A group of Stanford

\textsuperscript{200} Wilkins & Gulati, Reconceiving the Tournament of Lawyers, supra note 28, at 1606; Visible Invisibility, supra note 92, at 35.

\textsuperscript{201} Professors Frank and Wilkins argue that firms can overlook average minority associates without feeling an economic impact from the discriminatory practice. To lose the most talented minority associates based on an inadequate diversity program and inability to institute equity norms in the workplace presents a different problem. Frank, supra note 70, at 217, 221 (“If discrimination is to be viable under competition it must be confined to the marginal members of the entering class. Yet minority graduates might be reluctant to join a firm that discriminated against relatively less-qualified women and minorities. The extent to which such social forces might constrain discrimination remains an empirical question.”); but see Gilson and Mnookin suggest that a reputation model may not be sufficient in order to ensure that firms treat associates fairly at the time of promotion. This regulation method could fail because promotion does not involve a repeat transaction, and the model requires that “past breaches of the implicit contract be effectively communicated to those who will deal with the breaching party in the future.” In the firm context, a neutral party is not in the position to adequately monitor the firm’s evaluation of an associate’s performance. Gilson & Mnookin, supra note 39, at 579-80.

\textsuperscript{202} Wilkins and Gulati argue that “to the extent that existing associates have difficulty detecting whether firms are behaving opportunistically, law students, whom Glanter and Palay rely on to boycott firms who fail to fulfill their partnership commitments, are likely to be even less well informed.” Wilkins & Gulati, Reconceiving the Tournament of Lawyers, supra note 28, at 1625.

\textsuperscript{203} Sheryl Hall, Law Firms Remain White Bastions, THE DALLAS MORNING NEWS,
students recently published a diversity report card based on NALP’s statistical reports on diversity. These students were featured on a popular legal blog and released their results at a press conference.\textsuperscript{204} Such public acts showcase the prioritized emphasis to be given diversity, and why, even though a reputation model may not deter other firm practices, diversity stands on a different plane.

3. The Profession’s Obligation of “Defending Liberty, Pursuing Justice”

The public’s nostalgia with the legal profession reveres a historical time when lawyers defended social justice interests.\textsuperscript{205} From a Critical Race Theory perspective, Alex Johnson asserts that dominant group members hold a dual commitment: (1) to the profession; and (2) to identity-based interests. “The individual may espouse one thing in one group in order to gain esteem and espouse something completely different in the other group.”\textsuperscript{206} In the Visible Invisibility study commissioned by the ABA, “attorneys in the survey were asked how important it was to them to increase the racial and gender diversity in law firms. 87% of women attorneys of color, 58% of men of color, 61% of white women, and 27% of white men felt strongly that law firms should increase racial diversity.”\textsuperscript{207} Thus, white male attorneys may speak about social justice to the public as representatives of the profession but not act upon those ideals in law firms, because an equitable workplace would threaten their advantage in law firms.\textsuperscript{208} Johnson argues that the law firm’s inability to increase diversity may affect the legal profession’s public reputation.\textsuperscript{209}

The issue of law firm diversity undoubtedly exacerbates the potential conflict between the economic and social justice goals of legal

\textsuperscript{204} See Law Students Building a Better Legal Profession, \url{http://reformationwordpress.com} (last visited March 12, 2008).

\textsuperscript{205} Galanter, supra note 176, at 1110-11 (asserting that the “perceived lack of devotion to justice” hurts the profession’s reputation in the public eye).


\textsuperscript{207} Visible Invisibility, supra note 92, at 19.

\textsuperscript{208} “An individual’s membership and allegiance to one group may be trumped or negated by the membership and allegiance to one group may be trumped or negated by the membership in another group, although this individual’s dual membership status does not have the effect of negating the subordinate’s group membership and identification.” \textit{Id.} at 1031-32.

\textsuperscript{209} \textit{Id.} 1011.
In law school, students learn work ethic, the language and frameworks of legal inquiry, gain a sneak peak into the different sectors of the profession, and begin to develop professional networks. But do students learn about the principles of equity in terms of professional normative behavior? As to not confuse equity and diversity, although law schools received the green light in *Grutter* to promote a diverse learning environment, the image seen in law school demographics needs to somehow mimic itself in large law firms. This carry over requires an emphasis on the core component to diversity—equity in the workplace. As students enter the law firm, a different incentive undergirds equity goals. Economic bottom line arguments attempt to exploit the firm’s goal to increase profitability; however, the public interest goals thought to inhere throughout the profession clearly support the need to address diversity concerns regardless of whether an economic justification exist for these changes.211

In past years, the profession has witnessed major shifts in philosophical norms based on modifications in social attitudes and demographics.212 For example, during the 1960s, law students demanded a greater emphasis on public interest work in the profession. To accommodate this request, after law firm recruitment declined, firms

---

210 Greenwood, *supra* note 130, at 193. The rules and regulations developed within the firm, however, often reflect the behavioral norms of the profession at large. Wallace, *supra* note 63, at 820 (arguing that “the external system of control serves as a foundation for the more specific rules internal to professional bureaucracies.”).

211 The business case for diversity in large law firms fails to account for the business landscape requiring the services of diverse attorneys. Europe and Asia are the areas of new business most sought after by American large law firms. In the minority communities, individuals and small business are not usually able to afford the legal services of large corporate firms. Wilkins, *Your people, Valuing Diversity*, *supra* note 26, at 60.

212 “Social stratification divides the bar and weakens its coherence—lawyers with differing personal characteristics live in different social worlds and play different roles both in the bar and outside it.” HEINZ ET AL., *supra* note 16, at 318.
allowed associates to spend a number of hours on pro bono assignments.\textsuperscript{213} The attitude of individual accountability, however, remains engrained in the law firm culture. As discussed earlier, the number of minorities graduating from law school and accepting employment at large law firms continues to grow; this demographic shift could serve as the synergy point needed to prioritize diversity to the level of a professional norm.\textsuperscript{214}

Marc Galanter observed a reformation in the organizational norms of large law firms following an influx of younger attorneys during the 1970s and 1980s.\textsuperscript{215} Galanter concluded that destabilization in the bar was due to the age disparities among partners and entry-level attorneys. As the age gap deepened, younger attorneys were able to realize their goals for the direction of the bar and firm organization. As summarized in another work,

A preponderance of younger lawyers, with less experience, less thorough assimilation, and narrower networks of relationships, meant that a smaller percentage of the bar was committed to the established ways of recruiting clients, hiring lawyers, making partners, dividing profits, and (generally) managing their firms. The change in the age distribution was, in itself, an additional source of instability in the profession.\textsuperscript{216}

Professor John Heinz and his co-authors, in affirming Galanter’s foresight, predicted that the profession will soon undergo another disruption based on an aging group of senior attorneys. In this same vein, Professor Michael Powell has argued that regulation in the legal profession not only reflects movement in social values but was, “in some cases, initiated by emergent segments of the profession seeking either to redefine the nature and reach of professional ethic or to create their own niche in the market for legal services.”\textsuperscript{217} He argues that “[t]he content and direction of professional ethics at any one time will reflect the interests of the dominant

\textsuperscript{213} Galanter & Palay, supra note 77, at 56.

\textsuperscript{214} Since the 1980’s, the number of racial and ethnic minorities graduating from law school has nearly doubled due to antidiscrimination laws and the breakdown of social barriers. NALP, Heinz et al., supra note 16, at 152.

\textsuperscript{215} Marc Galanter, supra note 176, at 1081.

\textsuperscript{216} Heinz et al., supra note 16, at 305, 307.

\textsuperscript{217} Michael J. Powell, Developments in the Regulation of Lawyers: Competing Segments and Market, Client, and Government Controls, 64 Social Forces 281, 283, 297 (1985).
segment, or of a dominant coalition of segments, within the profession. Even though general bar participation may be on the decline, the increased involvement in specialty bars, including minority bar associations, combined with the increased number of minorities entering the profession, provides an indication that the profession’s commitment to diversity will deepen to address the structural barriers hindering minority associate retention. Thus far, the American Bar Association has attempted to cast doubt on the diversity initiatives implemented by elite law firms and sought the assistance of the in-house counsel departments of major corporations to pressure law firms into compliance. Most women of color, men of color, and white in the survey who left law firms became in-house attorneys in a corporate legal department (31%, 33%, and 36%, respectively). This shift in the demographics of in-house, in light of the rise in business clients and their influence over choosing outside counsel, may expedite the professional equity norms discussed above.

CONCLUSION

Diversity in the legal profession will continue to improve at a slow pace unless large law firms recognize the structural barriers within their organizations. In today’s global market, large law firms need to retain the best legal talent. The standards for excellence need not change, but the process used to identify and nurture excellence needs re-examination. The problem is not confined to the actions of law firms and corporations, but extends to the entire legal profession. Law schools, law firms, corporations, and bar associations form the concentric institutional layers giving the legal profession capacity to caucus around the pivotal axis of effective reform.

The traditional law firm approach, focusing on recruitment and mandatory diversity training, cannot fix the retention problem. Instead, law firms need to conduct a particularized analysis of the organization to detect latent discriminatory patterns. These inequitable practices stem from stereotypes and cognitive bias allowed to manifest through the discretionary, informal structure for distributing work and professional-development opportunities. To resolve the retention issue will require information gathering used to inform a transformative process that never

218 Powell uses the legal clinicians’ reliance on the courts and partnership with consumer rights group in order to modify the regulation of fee schedules and advertisements to illustrate the influential power of coalitions within the profession. Powell, supra note 148, at 283, 297.


220 VISIBLE INVISIBILITY, supra note 92, at 30.
stops evolving—communication, data, activation, and collaboration.

Whereas *Grutter* sanctions race-conscious preferences at one of the nation’s elite law schools, the Supreme Court’s holding provides no segue way for the implementation of needed race-conscious policies in the employment context after graduating these students. The schism in race-conscious policies in the legal profession breaks the chain in promoting diversity interests. With regards to the well-intentioned arguments of colorblindness asserted during the civil rights movement, advocates could now reflect with dismay on how in today’s jurisprudence, this rallying cry proves under-inclusive of excluded groups or unduly narrow to allay unforeseen snares.

To accomplish structural changes, the law must be seen as merely delineating the contours of a comprehensive framework designed to facilitate an equitable workplace. One associate greatly appreciated the diversity efforts at Firm A because the program provided a safety net for when the formalized firm processes did not work in his favor. To gain access to work assignments, he relied upon his assignment partner, but he also received work through the partners involved in the diversity program. He appreciated the advice of his assigned mentor but learned about unique challenges through the relationship formed with his minority program mentor. Because the firm established a mechanism to voice concerns, he doesn’t feel trapped when things are not going his way. And most important, as he continues to associate with the firm, the program will adjust to meet next-generation concerns.

The waxing and waning toward race-conscious remedies on the part of the Court, however, should present an inconveniently located detour in reaching the destination of workplace equity. At this juncture, psychological, management, sociological, and legal research about the factors hindering minority success in professional environments provide invaluable insight to crafting alternative measures in achieving diversity. Accordingly, in conjunction with pressing the courts for a more amenable of Title VII, advocates can use this interdisciplinary knowledge to institute race-neutral reforms aimed at combating the institutional barriers known to inhibit minority group ascension.