

## Diversity: Why does it matter?

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Recently, a colleague was sharing a ride with in-house counsel. The topic of diversity came up. The in-house counsel asked, “why does it matter?” I imagine a lot of people think like this, they’re just not as blunt. I’m not naïve enough to believe that the question came from a sincere belief that we have reached a point in America where all people are judged simply by “the content of their character.” There are plenty of studies, anecdotal stories, and hate crimes to prove otherwise. On the other hand, it is a reminder that awareness and inclusion is a process, and that every sincere question should be heard as an opportunity to educate. In that spirit, I’d like to offer the following thoughts.

**People have feelings.** Everyone has had the experience of feeling different, out of place, unwelcome, isolated, or alone. There’s a great diversity exercise where people close their eyes and shout out the first thing that comes to mind to describe their reaction to the word “different”. Few generally associate it with positive feelings. The gifted author Maya Angelou observed, “I’ve learned that people will forget what you said, people will forget what you did, but people will never forget how you made them feel.” Isn’t that the truth?

I’d like to say that all lawyers are nice people. They’re not. But, as lawyers, we are communicators, for our companies, our firms and clients, our colleagues, products or services. If we begin any relationship by making the other person feel badly, no matter what we say later, we will have to find a way over or through the wall we built. Two examples make the point.

First, a number of years ago, I was representing a large “household name” corporation. While working together on a case, a company engineer told me the story of another attorney in the south who introduced himself over the telephone and “broke the ice” by telling a joke. The joke was racist. The engineer was African American. The engineer was still telling the story years later. He still wasn’t laughing. Nothing the lawyer could say would have opened that gate. But, after the engineer reported the incident to his diversity-sensitive corporate team, it didn’t matter; I don’t think they had the opportunity to work together again.

My second example also comes from personal experience, but from the flip side. During a grueling seven week trial, I cross-examined the Plaintiff over the course of days during which she cried several times. We didn’t have much in common. Yet, while we were waiting in the empty courtroom for the jury to return their verdict, she came over and thanked me for treating her “like a person” while doing my job. Yes, I had caused pain (probably made worse by the later defense verdict) but, as Justice Oliver Wendell Holmes, Jr. noted, “Even a dog distinguishes between being stumbled over and being kicked.”

We all come from different backgrounds and perspectives. Everybody has their own story, their own challenges, their own set of memories and feelings. As a professional, your goal is to form a

relationship --hopefully long term-- with each potential client. They, too, come with their own set of stories and feelings. When you meet and interact with them, you will walk a mine field littered with those feelings, memories and biases. We can't possibly know the sensitivities of everyone with whom we come in contact and we will certainly occasionally inadvertently say something that someone finds dismissive or offensive. Do your best, and remember this: the clumsy foot guided by a decent heart will often be forgiven, while the lead who steps on toes because he assumes (or insists) that everyone should dance like him will soon find himself without dance partners.

**Business demands diversity.** I'm not going to bore you with the multiple sources of reliable data which shows that we are becoming a more diverse nation. Or that customer bases reflect that diversity. Instead, I'll simply offer some common sense advice: If you want to reach a customer base, whether you're selling widgets or legal services, you're going to have to convince them you have something in common with them, or at least find a common denominator. As lawyers in that increasingly diverse world, the more you can communicate and relate to people, the more solid and diverse your client base will become. The more you are able to understand your clients, the more satisfied your clients will be. The more satisfied your clients are, the more likely they are to hire you, return to you, and recommend you.

A 2017 report by McKinsey & Company, aptly titled "Why diversity matters",<sup>1</sup> looked at a data set of more than 1,000 companies covering 12 countries, including the United States. It found that companies in the top quartile for gender diversity on their executive teams were 21% more likely to experience above-average profitability than companies in the fourth quartile. Companies with the most ethnically diverse executive teams are 33% more likely to outperform their peers on profitability. Additionally, McKinsey reported:

Our research confirms that gender, ethnic, and cultural diversity, particularly within executive teams, continue to be correlated to financial performance across multiple countries worldwide. In our 2015 report, our hypotheses about what drives this correlation were that more diverse companies are better able to attract top talent; to improve their customer orientation, employee satisfaction, and decision making; and to secure their license to operate – all of which we believe continue to be relevant.<sup>2</sup>

In short, "The business case for diversity continues to be compelling and to have global relevance."<sup>3</sup>

Still skeptical? Listen to the General Counsel of 170 corporations who, in January of this year signed an open letter published in *The American Lawyer* which concluded: "We, as a group,

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<sup>1</sup> [www.mckinsey.com/business-functions/organization/our-insights/delivering-through-diversity](http://www.mckinsey.com/business-functions/organization/our-insights/delivering-through-diversity), last visited May 21, 2019.

<sup>2</sup> Id. at page 11.

<sup>3</sup> Id. at page 13.

will direct our substantial outside counsel spend to those law firms that manifest results with respect to diversity and inclusion, in addition to providing the highest degree of quality representation. We sincerely hope that you and your firm will be among those that demonstrate this commitment.”<sup>4</sup> That’s pretty clear.

Since January, another 60 companies have signed on. Additionally, its author, Michelle Fang, Chief Legal Officer of Turo, commissioned Diversity Lab, “a group promoting diversity in the legal industry through data” to devise specific strategies and tactics for in-house counsel to improve outside counsel diversity, including, for example, “collecting outside counsel metrics on diversity and prioritizing spend on firms with strong D&I programs, partnering with law firms to promote diverse talent at every stage of the pipeline, and hiring women-and minority-owned firms.”<sup>5</sup>

Don’t get me wrong, the recent letter is but the latest attempt to awaken and sustain a commitment to diversity by corporate America. Charles Morgan, then Executive Vice President and General Counsel of BellSouth, garnered signatures for the 1998 “Statement of Principle” extoling diversity and inclusion. In 2004, Rick Palmore, then Chief Legal Officer of Sara Lee followed with a “Call to Action” by General Counsel telling laws firms that they value diversity among their outside counsel. The latest letter suggests that General Counsel either don’t mean what they say, or that law firms are not getting their message.

To be sure, there are vestiges of the “old boys network” alive and well, and business is still quietly done on golf courses, at bars, and over drinks with people who look alike, sound alike, and think alike. That may be where you want to put your efforts. But, if you believe that changing demographics, laws, and social norms which have virtually extinguished exclusory private clubs will also eventually replace the “old fashioned way” of doing business, then you might take heed of the warnings issued by some of the largest “legal spend” checkbooks in the country and be part of the change they want. Now.

**What does diversity look like?** Diversity is much more than what a person looks like. Yes, if you are a woman or your skin tone is dark and you walk in a room, without saying a word, people are going to make assumptions about you. But, not all diversity is apparent. For example, persons who are LGBTQ, practice a faith outside the “mainstream” (or part of the estimated 1.1 billion people worldwide who practice none), or have a non-visible disability, bring their own perspectives. Sometimes we don’t know who we are seeing.

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<sup>4</sup> <http://www.abajournal.com/news/article/170-top-in-house-lawyers-warn-they-will-direct-their-dollars-to-law-firms-promoting-diversity>, last visited May 21, 2019.

<sup>5</sup> <https://www.law.com/corpcounsel/2019/05/21/200-general-counsel-pushing-for-law-firm-diversity-outline-next-steps/>, last visited May 21, 2019.

The Institute for Inclusion in the Legal Profession (IILP) looks across a broad spectrum of diversity and inclusion, which, while not all-encompassing, demonstrates how our perception of “diversity” has evolved:

- Native Americans
- African Americans and Blacks
- Asian Pacific Americans
- Hispanics and Latinos
- Caucasians
- Women
- Men
- Disabled and Non-disabled
- Sexual Orientation and Gender Identity
- Religion
- Senior lawyers
- Young lawyers

Honestly, I don’t think most corporations are tracking how many “Senior lawyers” are at a firm. Indeed, some transparency (and evolution) about what diversity means in the context of corporate client goals is needed.

I attended a diversity conference in New York City about 15 years ago and asked which corporations included the LGBTQ community in their tracking metrics and not a single person raised their hand. Instead, they asked me to speak about the issue the following year. I guess that’s progress.

A few years later, I was asked by a major bank to speak about diversity and inclusion to one of the groups it supported. I did. In return, I asked the Bank’s Chief Diversity Officer to introduce me to her legal counterpart who selected outside counsel. She did. I flew to the corporate headquarters. My meeting was a short working lunch. As we ate our Caesar salads, he explained that he had too many outside lawyers already, and, that as far as diversity was concerned, he didn’t get any “credit” for hiring LGBT lawyers, so he really didn’t see how he could use me. I picked up the tab and left.

When I reported my experience to the Chief Diversity Officer, she sensed my exasperation and asked “was he mean to you?” I told her he was brutally honest but I didn’t have the time or resources to change an entire corporate mindset just to be considered for a slip and fall case. I hope they have made progress.

**Diversity adds strength.** Ok, so you don’t want me to pull out the *e pluribus unum* platitudes, but there is plenty of evidence to suggest that different perspectives provide a broader, deeper analysis of problems than a single one even though that single one is shared by a number of people on a team. The solution derived from well-rounded points of view almost always finds creative connections to one another and to the challenge at hand.

A large “big box” store reportedly expanded into South Korea using its way of business in its home market only to find that locals found the shelf heights inappropriate and were unaccustomed to pre-packaged fish. Both financial debacles could have been avoided by simply having someone on the team who understood local customer satisfaction. What manufacturer would design baby products without input from the parents who will be using them? Similarly, what in-house counsel today would assent to a trial team in a particular jurisdiction without regard to the local venire and how to effectively communicate with its particular makeup?

### Conclusion

It is important to remember that the concept of diversity is like an iceberg with most characteristics hidden below the surface. From a practitioner standpoint, I suggest that you: 1) embrace diversity and inclusion because it's the right and smart thing to do; and 2) be nice to everyone you meet.