User Name: Sybil Dunlop
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ARTICLE: A CALL FOR ACTION: HOW CLIENTS AND JUDGES CAN DO MORE TO ADDRESS THE LEGAL PROFESSION'S DIVERSITY PROBLEM

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Author: ***SYBIL DUNLOP***

Text

[*78] "Law is the least diverse profession." [1]In 2020, people of color accounted for 10.23 percent of all partners in major US firms, and women accounted for 25.05 percent of the partners in these firms. [2]But even more troubling is how static these numbers have been over time--especially for women of color. In 1993, people of color accounted for 2.55 percent of partners, and women accounted for 12.27 percent of partners. Today, "Black and Latinx women each still account for less than 1% of all partners, at 0.80% and 0.90% respectively." [3]

For years, the legal profession has struggled to do better. Firms have created diversity committees and initiatives. Clients have called for improvement. And judges have criticized the lack of diverse representation in their courtrooms. But our efforts to date are not moving the needle. This immutability suggests that more and different action is necessary to drive change. More of the same is not going to improve these statistics.

In 2019 and 2020, my law partner, Jenny Gassman-Pines, and I interviewed diverse firm attorneys and identified ways that law firms can improve their hiring, promotion, and retention of diverse talent. [4]Our article discussed the ways law firms could do better. This article posits that law firm action isn't enough. The entire profession must commit to solving our collective diversity problem. Accordingly, this piece is a call for action by two other groups with the power to effectuate change: clients and judges. This is a call for those groups to join with firms in addressing and solving **[*79]** this problem. Unless each of us does more and better, our profession will remain the least diverse. And this fact has severe implications for the legitimacy of our entire judicial system and even our democracy.

I. A CALL FOR CLIENT ACTION

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[1] Deborah Rhode, *Law is the Least Diverse Profession in the Nation*, Wash. Post (May 27, 2015), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/.

[2] Nat'l Ass'n for L. Placement, 2020 REPORT ON DIVERSITY IN U.S. LAW FIRMS (Feb. 2021), https://www.nalp.org/uploads/2020_NALP_Diversity_Report.pdf.

[3] *Id.*

[4] ***Sybil Dunlop*** & Jenny Gassman-Pines, *Why the Legal Profession is the Nation's Least Diverse (And How to Fix It)*, 47 MITCHELL HAMLINE L. REV. 129 (2021).

A. Clients Benefit from Diverse Teams

At the threshold, clients should be demanding diverse teams with the same force that they are demanding custom fee arrangements, lower rates, and partner engagement. This isn't just a morally-correct position; it is in each clients' best interest to do so.

That's because a tremendous body of research suggests that diverse teams outperform homogenous ones. For example, a recent McKinsey study concluded that diverse boards perform better than their less diverse counterparts. [5]The study found that companies with top quartile diversity [6]on their executive boards generated returns on equity that were fifty-three percent higher on average than the companies in the bottom diversity quartile. [7]The more diverse businesses also generated fourteen percent higher earnings before interest and tax on average. [8]Another study, conducted by Credit Suisse, found similar results--businesses with women on the board outperformed male-only boards on multiple fronts. [9]The boards with women had higher returns on equity, lower debt-to-equity ratio, higher book values, and higher average net income growth. [10]

Why are diverse groups outperforming homogenous ones? Studies suggest that it might be because they consider more and different approaches to problem-solving. Indeed one such study conducted by Tufts, [11]showed that White [12]people behave differently in diverse groups. [13]When mock juries include both Whites and Blacks, individuals "deliberated **[*80]** longer, raised more facts about the case, and conducted broader . . . deliberations" than panels that included only Whites. [14]"The research also showed that Whites were . . . more willing to talk about race in a diverse setting." [15]In all-White panels, when one juror raised the topic of race, "another member would try to change the subject, minimize discussion, or suggest that race was irrelevant." [16]The study's authors hypothesized that their results have implications in a variety of contexts "wherever a premium

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[5] Thomas Barta, Markus Kleiner & Tilo Neumann, *Is There a Payoff From Top-Team Diversity?*, MCKINSEY & CO. (Apr. 1, 2012), https://www.mckinsey.com/business-functions/organization/our-insights/is-there-a-payoff-from-top-team-diversity (examining the earnings of 180 publicly traded companies across France, Germany, the United Kingdom, and the United States over the period from 2008 to 2010).

[6] *Id.* (focusing on women and foreign nationals in order to score a company's diversity).

[7] *Id.*

[8] *Id.*

[9] Imran Javaid, *CS Gender 3000 Report Shows One Fifth of Board Positions Globally Now Held by Women*, CREDIT SUISSE (Oct. 10, 2019), https://www.credit-suisse.com/about-us-news/en/articles/media-releases/cs-gender-3000-report-shows-one-fifth-of-board-positions-globall-201910.html.

[10] *Id.*

[11] Tufts Univ., *Racial Diversity Improves Group Decision Making in Unexpected Ways*, SCIENCEDAILY (Apr. 10, 2006), https://www.sciencedaily.com/releases/2006/04/ 060410162259.htm.

[12] *NABJ Statement on Capitalizing Black and Other Racial Identifiers*, Nat'l Ass'n of Black Journalists (June 2020), https://www.nabj.org/page/styleguide.

[13] Tufts Univ., *supra* note 11.

[14] Tufts Univ., *supra* note 11.

[15] Tufts Univ., *supra* note 11.

[16] Tufts Univ., *supra* note 11.

is placed on fact-finding and reaching a good decision." [17]While we can only hypothesize as to why this is happening, it may be that the pressure of a diverse audience encourages individuals to "show their work" and explain their reasoning, leading to better thought process. In a homogonous group, it may be easier to rely on collective biases about a defendant's anticipated or expected behavior and thus make faster (and more biased) decisions. [18]

Notably, homogeneous groups tend to feel more confident in their decisions. [19]If there is a lack of thought diversity, a group can leave a discussion convinced that there are a limited set of right answers, and their group picked the right one. [20]But they would likely be mistaken. One research study, for example, demonstrated that adding a diverse voice doubles a group's chance of arriving at a correct solution, but the group feels less secure in the outcome because their decision process was challenged by diverse voices. [21]This, of course, is actually a benefit. When a group feels less secure in its decision, it is more willing to pivot when circumstances change, or its initial path isn't successful. These non-homogenous groups know that they have other strategic options to choose from.

Diverse teams are also more likely to be innovative. In a study published in *Innovation: Management, Policy & Practice*, researchers concluded that "companies with more women were more likely to introduce . . .innovations into the market over a two-year period." [22]Another study, published in *Economic Geography*, found that "businesses run by culturally **[*81]** diverse leadership teams were more likely to develop new products than those [run by] homogenous teams." [23]

These are precisely the benefits that every in-house counsel should demand: better outcomes, new approaches to problem-solving, and increased innovation. And yet, I have repeatedly heard general counsels and other in-house attorneys express a reluctance to "meddle too much" in how their law firms operate when it comes to demanding diverse teams. But this isn't true--in-house counsel have had no problem demanding that clients comply with billing guidelines, ensure that key talent argues specific motions, offer preferred rates, and comply with their outside counsel guidelines. Why are some in-house counsel simply unwilling to ask their outside counsel to provide them with a diverse team? It might be because their credibility can take a hit when they do.

B. In-House Counsel May Take a Credibility Hit When they Advocate for Diverse Talent

Research published in the *Academy of Management Journal* explored diversity-valuing behaviors (defined as behavior that promotes demographic balance within organizations). For example, gender balance involved a 50/50

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17 Tufts Univ., *supra* note 11.

18 Kahneman, Daniel, 1934- author. Thinking, Fast and Slow. New York :Farrar, Straus and Giroux, 2011. APA. Kahneman, Daniel, 1934- author. (2011) (explaining that System 1 decisions (or fast decisions) can lead deciders to rely on biases whereas System 2 decision making (or slow decisions) can lead deciders to make better (fact-based) decisions).

19 David Rock, Heidi Grant & Jacqui Grey, *Diverse Teams Feel Less Comfortable--And That's Why They Perform Better*, HARV. BUS. REV. (Sept. 22, 2016), https://hbr.org/2016/09/diverse-teams-feel-less-comfortable-and-thats-why-they-perform-better.

20 *Id.*

21 *Id.*

22 David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, HARV. BUS. REV. (Nov. 4, 2016), https://hbr.org/2016/11/why-diverse-teams-are-smarter.

23 *Id.*

split between male and female employees. [24]And racial balance involved the same percentage of minority representation as reflected within the relevant community. [25]

Notably, the researchers found that "engaging in diversity-valuing behaviors did not benefit any of the executives in terms of how their bosses rated their competence or performance." [26]But even worse than failing to value the behavior, women and non-White executives who were perceived as engaging in these behaviors were rated worse by their bosses, both in terms of competence and performance. [27]Female and non-White employees who did not engage in diversity-valuing behaviors were rated more favorably. In other words, "[f]or all the talk about how important diversity is within organizations, white and male executives aren't rewarded, career-wise, for engaging in diversity-valuing behavior, and non-white and female executives actually get punished for it." [28]

This research has been replicated in other settings. Researchers Stefanie K. Johnson and David R. Hekman asked 307 working adults to review a hiring decision of a fictitious manager. Participants read a description **[*82]** of the hiring decision, saw a photo of the manager (showing their race and gender), and then answered a survey rating the hiring manager on competence and performance. [29]In sum: "all managers were judged harshly if they hired someone who looked like them, unless they were a white male." [30]

This research suggests that while companies may talk about the importance of diversity, norms are still dictating actions. And those norms actually discourage hiring managers from hiring diverse talent. This finding, of course, suggests that in-house counsel likely face the same challenges when they consider hiring diverse outside counsel.

C. Potential Client Actions

If employees are concerned that they will be perceived as less competent if they hire diverse talent, they have no incentive to do so. So, companies need to change the norms. And they can't do this with talk about diversity--this has been happening for years, and the needle hasn't moved. Institutions must put into place objective, numerical requirements for hiring diverse outside counsel. It is the only way to ensure that talk about the importance of diversity, equity, and inclusion gets converted into action.

To this end, companies must create specific and measurable diversity goals and hold employees accountable for meeting them--including with respect to hiring diverse outside counsel. Writing down our goals makes us more likely to achieve them. [31]And actionable tasks and progress reporting improve goal achievement. [32]Based

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[24] Stefanie K. Johnson & David R. Hekman, *Women and Minorities Are Penalized for Promoting Diversity*, HARV. BUS. REV. (Mar. 23, 2016), https://hbr.org/2016/03/women-and-minorities-are-penalized-for-promoting-diversity.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Marilyn Price-Mitchell, *Goal-Setting Is Linked to Higher Achievement*, PSYCH. TODAY (Mar. 14, 2018), https://www.psychologytoday.com/us/blog/the-moment-youth/201803/goal-setting-is-linked-higher-achievement ("Setting goals is linked with self-confidence, motivation, and autonomy (Locke & Lathan, 2006). A 2015 study by psychologist Gail Matthews showed when people wrote down their goals, they were 33 percent more successful in achieving them than those who formulated outcomes in their heads").

on this research, "a widely accepted goal setting practice" is to create "SMART" goals: Specific, Measurable, Attainable, and Realistic goals with a Timeframe for achievement. [33]

Some companies are creating SMART goals with respect to their own hiring practices: Hilton and Restaurant Brands have both committed to having fifty percent of their employment candidates be diverse as a percentage of overall candidates. [34]VMware's CEO committed that "No job-hiring process will end unless a minority candidate is interviewed." [35]Mozilla has **[*83]** committed to "doubling the percentage of Black and Latinx representation of its . . . U.S. staff." [36]These are specific and measurable goals that will help prevent employees from being devalued when they engage in diversity-valuing behavior.

Some companies have gone so far as to implement SMART goals for the hiring of outside counsel. Microsoft Corporation is tracking outside counsel diversity and rewarding and penalizing law firms based on their diversity "report card." [37]Law firms can earn bonuses by meeting "specific and objective targets designed to measure . . . diversity and inclusion" targets. [38]DuPont, General Mills, Verizon, and Walmart's legal departments have also announced initiatives to "engage diverse lawyers on significant matters and promote diversity" in their outside firms. [39]"These programs require hiring diverse . . . lead counsel . . . and require each firm to assign a diverse team" to their matters. They also require their outside firms "to certify that the diverse lead lawyers assigned to their matters receive financial credit as the originator of the matters." [40]

Research suggests that in-house counsel may take a credibility hit if they engage in diversity-valuing behaviors. However, the more that companies can create institutional metrics (and measure all employees against them), the more companies can turn the tide and reward this behavior instead of silently punishing it.

Beyond the creation of institutional SMART goals, in-house counsel can also be trained and encouraged to do even more. They can affirmatively ask to have the person who wrote the brief argue the motion. They can engage with diverse lawyers in meetings. They can help ensure that diverse lawyers obtain the experiences that will help them develop into key relationship partners. [41]And corporations can reward this qualitative diversity-valuing behavior by including questions on review forms and asking whether in-house counsel are meeting corporate expectations in terms of engaging diverse talent.

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[32] Kath Kyle, *10 Goal-Setting Statistics*, KATH KYLE, https://www.kathkyle.com/goal-setting-statistics (last visited, Oct. 10, 2021).

[33] John Traugott, *Achieving Your Goals: An Evidence-Based Approach*, MICH. ST. U. (Aug. 26, 2014), https://www.canr.msu.edu/news/achieving_your_goals_an_evidence_based_approach.

[34] Heather Barbour, *25+ Examples of Awesome Diversity Goals*, ONGIG (July 8, 2020), https://blog.ongig.com/diversity-and-inclusion/diversity-goals.

[35] *Id.*

[36] *Id.*

[37] Shiva McLaughlin, *Best Practices for Diversity Initiatives Among Corporate Counsel*, UNDER CONSTR. (2016), https://www.mcca.com/wp-content/uploads/2018/10/Hiring-Firing-and-Inspiring-Outside-Counsel-Materials.pdf.

[38] *Id.*

[39] DuPont, General Mills, Verizon and Walmart Launch "Engage Excellence" Minority Lawyer Inclusion Incentive Program, MINORITY CORP. COUNS. ASS'N (July 29, 2014), https://www.mcca.com/mcca-article/engage-excellence.

[40] McLaughlin, *supra* note 37.

[41] Diverse talent is often more junior talent in light of the fact that so few diverse lawyers are promoted to partner. Focusing on promoting diverse talent at the beginning of their careers will help ensure that these individuals develop and make partner.

While measurable, institutional goals will help move the needle, I do worry that some in-house counsel diversity efforts may miss the mark. Of late, some companies are putting out requests for proposals that ask firms to **[*84]** compete, at reduced or low rates, for work so that younger and/or diverse attorneys can get experience working with the client. When firms get this work, they have diverse talent working at lower rates on these projects. But the lower rates will not help these diverse attorneys impress their firm's finance committees as they are earning less per hour than their non-diverse counterparts may be. While well-intentioned, the side effects of paying diverse attorneys less ends up feeling exploitative and counterproductive when we consider that we aren't asking everyone to give away their work at lower rates--just women and people of color who need "experience." It is assumed their White male counterparts are otherwise earning at top rates.

Here is where judges can help close the experience gap.

II. JUDGES CAN ENCOURAGE AND FACILITATE EXPERIENCES FOR DIVERSE TALENT

As suggested above, research suggests that women and people of color are not getting the same substantive legal experiences as their White male counterparts. For example, the New York State Bar Association recently "asked judges to note the genders of the lawyers who primarily spoke in court in every case they heard over four months and collected and analyzed 2,800 responses." [42]"The report found that women were the lead lawyers for private parties barely 20 percent of the time in New York State's federal and state courts at the trial and appellate levels." [43]

Summarizing this research, District Court Judge Shira Scheindlin noted that "[i]n private sector cases, the client, rather than the government or the court, picks the lawyer. The survey definitively showed that when there was a big, 'bet the company' civil case, few clients were prepared to put their business's fate in the hands of a woman. The more complex the case, the less likely that a woman was lead counsel." [44]Judge Scheindlin noted that firms can demand that their legal teams be diverse. [45]But she also noted that judges have a chance to improve this bleak picture. [46]

Judge Scheindlin suggested that judges can encourage law firms to require that the lawyer who wrote the brief be prepared to argue it. [47]Beyond this suggestion, other judges are offering opportunities to split motion practice to facilitate a more diverse group of participants. For example, Chief Judge John Tunheim of the District of Minnesota has a standing order on diversity in the courtroom that provides:

> **[*85]** Motion Hearings. The Court permits oral argument on most dispositive civil case motions and most criminal case motions. The Court encourages counsel to permit lawyers with less experience to argue motions. In particular, the Court prefers to see more diverse lawyers in the courtroom when they are integral members of the legal team and encourages newer lawyers who are women and members of underrepresented, diverse communities to argue motions. When requested, the Court will permit arguments to be split to enable newer lawyers to argue parts of motions. This Order should not be construed to encourage unnecessary motions as the Court always encourages parties to resolve issues short of motion practice. Trials. The Court also encourages newer lawyers who are women, members of other underrepresented and diverse communities to

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[42] Shira A. Scheindlin, *Female Lawyers Can Talk, Too*, N.Y. TIMES (Aug. 8, 2017), https://www.nytimes.com/2017/08/08/opinion/female-lawyers-women-judges.html.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

participate actively in trials by making opening and closing statements, questioning witnesses, and arguing motions or jury instructions. [48]

Standing orders like this one provide opportunities for younger, diverse attorneys to gain experience in the courtroom without paying them less for their efforts.

That said, there may be room for microaggressions to rear their head when judges provide a platform for multiple lawyers to argue before the court. We have seen emails to the court that (condescendingly) alert the clerk that "so and so will be arguing the motion because the judge cares about diversity." In sending messages and emails like this to the court, counsel is signaling that "but for" the judge's expressed preference, "so and so" would not be the best person to argue the motion--a move that likely undermines "so and so's" confidence as they head into their oral argument. This is a disservice to the attorney that the senior partner is aiming to help.

Instead, lawyers should consider Judge Scheindlin's observation that, frequently, in her courtroom, she would ask the senior partner arguing the motion a tough question, and he would turn to the young lawyer seated next to him to confer before answering. [49]Judge Scheindlin's observation hits at the common truth that our profession frequently doesn't ask the person who wrote the brief to argue it. Yet often, this is the individual who is best poised to answer the judge's questions about the facts and the law. If clients take this guidance to heart, we won't be asking "so and so" to argue a motion because the Judge "cares about diversity," we will be letting the judge know that "so and so" will be arguing the motion because they are the best-situated attorney to do so.

In other words, Judges can provide opportunities for oral advocates to split up motion practice among multiple individuals. Judges can express **[*86]** enthusiasm for counsel who do so and who are providing meaningful opportunities for young and diverse talent. But firms should be making sure that the opportunity is fulsome--the person arguing the brief should be the one who wrote it. This is the opportunity that everyone deserves--the opportunity to argue the brief that they wrote (not to argue a brief because the judge expressed a preference for diverse talent). Working together, judges, law firms, and clients can normalize the expectation that the person who wrote the brief is arguing the motion.

III. CONCLUSION

Our profession's diversity numbers have been depressingly low since our profession began measuring them. We know that actions to date (committees, conferences, best practices, hiring initiatives, etc.) are not working. This means we need to evaluate additional actions in order to drive real change. Clients and judges--as nodes of power [50]within our judicial system--have the opportunity to demand more. Recognizing that in-house counsel may face backlash for engaging in diversity-valuing behaviors, clients may first need to institutionalize their diversity goals, ensuring that in-house counsel know that they are responsible for meeting specific, measurable diversity goals when engaging outside counsel. In-house counsel can also be encouraged to create opportunities for diverse attorneys, facilitate their growth, and develop long-term partnerships. Judges can help ensure that young, diverse attorneys get opportunities for experiences within the courtroom, arguing motions, and taking witnesses at trial. But all of us must do more and think harder about ways to do better. The system won't change unless we do.

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[48] Chief Judge Tunheim, United States District Court for the District of Minnesota, Standing Order on Diversity in the Courtroom, https://www.mnd.uscourts.gov/sites/mnd/files/JRT.pdf.

[49] Scheindlin, *supra* note 42.

[50] *See, e.g.*, Jonathan Gaventa, *Foucault: Power Is Everywhere*, POWERCUBE (2003), https://www.powercube.net/other-forms-of-power/foucault-power-is-everywhere ("Foucault challenges the idea that power is wielded by people or groups by way of 'episodic' or 'sovereign' acts of domination or coercion, seeing it instead as dispersed and pervasive. 'Power is everywhere' and 'comes from everywhere' so in this sense is neither an agency nor a structure (Foucault 1998: 63).").

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