

Undercover Ethics Working with Private Investigators

BY JENNIFER B. BECHET



Pprivate investigators are often a valuable resource for attorneys seeking to obtain information relevant to litigation. With the benefits, however, comes ethical responsibility for the investigators' methods and means. In the "undercover customer" scenario, for example, various ethical rules are implicated—including prohibitions on communication with represented persons, misrepresentation, fraud, and deceit.

Communication by an Attorney

The restrictions the ethical rules place on attorneys concerning communications with represented persons and misrepresentation, fraud, and deceit are fairly clear. Both the Model Rules of Professional Conduct (Model Rules) and the Model Code of Professional Responsibility (Model Code) restrict attorney communication with certain represented people. Rule 4.2 of the Model Rules provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Although nearly identical to Rule 4.2, DR 7-104(a)(1) of the Model Code limits its restriction of attorney communication to that with a represented

"party," as distinguished from the represented "person" of Rule 4.2.

The ethical rules also specifically prevent an attorney from giving a false impression to an unrepresented person about the attorney's role and the purpose of the communication. Model Rule 4.3 provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Similarly, DR 7-104(A)(2) of the Model Code provides:

During the course of his representation of a client a lawyer shall not . . . [g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with interests of his client.

Whether or not the third person is "represented," the Model Rules prohibit an attorney from making misrepresentations in general. Rule 4.1(a) broadly states: "In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person." Similarly, Model Rule 8.4(c) provides: "It is professional misconduct for a lawyer to . . . engage in professional conduct involving dishonesty, fraud,

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Walk the Talk: Creating an Inclusive Legal Workplace

BY JANE DiRENZO PIGOTT

Here are the facts. The legal profession has made progress toward inclusion, but more progress is necessary; continued progress requires leadership. Diversity at all levels is still a goal for the legal profession, not a reality. This two-part article presents a pragmatic approach to diversity in the legal profession, and, hopefully, empowers the audience with tools to lead their respective workplaces towards inclusion.

Part I provides an assessment of where we are

now and demonstrates the business case for creating and maintaining an inclusive workplace. Part II, to be published in the next issue, will provide best practices for legal profession employers.

The Baseline

Any strategic business effort requires metrics. Creating an inclusive legal workplace requires the same. In order to measure progress and the ability of specific action items to achieve the intended goals and objectives, a baseline must be established.

According to national statistics, progress has been made, with progress at the lowest levels of the legal profession being the most significant. Leadership within the legal profession, however, remains disproportionately white and male.

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Legal Workplace

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Jane DiRenzo Pigott Opportunity Commission (EEOC) detailed in a 2003 report (See chart below).¹

The report draws the following conclusion from these figures:

There have been material increases between 1982 and 2002 in the percentage of legal degrees received by women and people of color, as the U.S. Equal Employment

date, 64.4 percent, than female attorneys overall, 54.9 percent.

- Gender disparities in retention are also material.

Promotion

Whereas the recruitment of associates of color increased materially during the last 11 years, the promotion of attorneys of color into leadership ranks in law firms does not reflect this increase. In addition, the percentage of associates of color has not kept pace with the percentage of attorneys of color graduating from law schools, as can be seen by comparing the 19.4% of JD degrees received by people of color in 2002 (See chart below) with the 14.27% of

women but were materially less likely to make partner than white male associates.⁶

The Business Case

The business case for diversity is well established and directly relates to any legal organization's ability to compete for clients and the best talent. Abundant research, practical experience, and media stories support the business case for diversity. Ensuring that the goal is met requires committed leadership and rigorous assessment so that change is both measurable and sustainable into the future.

Clients and diversity. In recent years, many corporate clients have encouraged law firms to evaluate their diversity efforts. To date, more than 500 chief legal officers in corporations have signed a form letter entitled Diversity in the Workplace: A Statement of Principle. The statement reads, in part, "We expect the law firms which represent our companies to work actively to promote diversity within their workplace. In making our respective decisions concerning selection of outside counsel, we will give significant weight to a firm's commitment and progress in this area."

In 2004, Roderick Palmore, general counsel of Sara Lee, issued A Call to Action: Diversity in the Legal Profession, a statement pledging the support of corporate chief legal officers in holding their outside law firms accountable for hiring, retaining, and promoting diverse lawyers. As of November 2004, it has been signed by 65 general counsel who pledged to "make decisions regarding which law firms represent our companies based in significant part on the diversity performance of the firms."

Clients use a variety of mechanisms to focus the attention of law firm management on diversity:

- Retain firms with a strong performance in diversity and restrict relationships with firms lacking that track record.
- Hold regular meetings with firm management and billing partners to discuss diversity best practices.
- Require annual reports on diversity statistics and measured progress from the baseline.
- Award annual bonuses based in part on achieving diversity objectives.
- Expect legal service providers to have

Percentage of All JDs Earned

| | 1982 | 2002 |
|--------------------------|-------|-------|
| African Americans | 4.2% | 7.2% |
| Asian Americans | 1.3% | 6.5% |
| Hispanics | 2.3% | 5.7% |
| Women | 33.0% | 48.3% |

In large, national law firms, the most pressing issues have probably shifted from hiring and initial access to problems concerning the terms and conditions of employment, especially promotion to partnership. In small, regional, and local law firms, questions about fairness and openness of hiring practices probably still remain, particularly for minority lawyers.

Disparities between hiring and promotion rates for both attorneys of color and women support this conclusion.

Retention

The retention of attorneys of color and women remains a challenge. Research from the National Association for Law Placement (NALP) showed the following disparities:²

- Male attorneys of color are more likely to have left their employers within 55 months of their start date than male attorneys overall, with 68 percent of male attorneys of color leaving as compared with 52.3 percent of male attorneys overall.
- Female attorneys of color are also more likely to have left their employers within 55 months of their start

associates of color in law firms (See chart, top of page 14).³

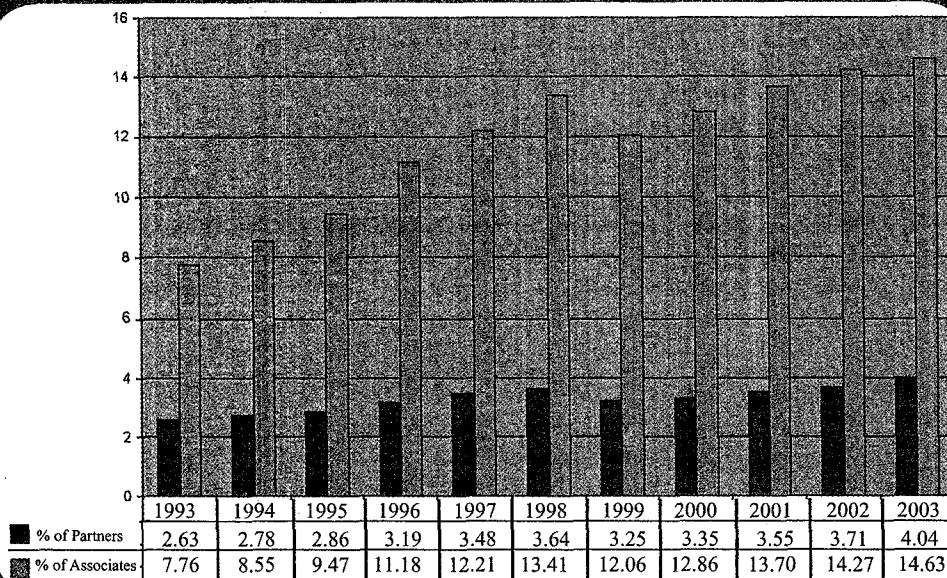
The progress of women into law firm partnership ranks is similarly disproportionate to the rates at which they have populated law firm associate ranks during the past 11 years⁴ (See chart, bottom of page 14).

Organizational barriers still exist. The legal profession is mistaken if it presumes otherwise; the facts refute the presumption.⁵

Organizations must continue to focus attention on eliminating gender and race disparities in access to high-visibility assignments; to formal and informal mentoring; and to leadership opportunities, evaluation, and compensation systems, and other key factors in promotion decisions.

The EEOC examined the likelihood that attorneys of color and women would make partner in large law firms, defined as those with 100 or more employees. The EEOC found that Asian Americans had the lowest probability of making partner, and African-American attorneys had the second lowest. The least likely to make partner were women. Hispanics were the most likely to make partner among attorneys of color and

Nationwide Law Firm Averages: Attorneys of Color



legal staffs that mirror the significant diversity within the in-house legal department.

Law firms are getting a clear and consistent message: If they successfully increase their diversity at all levels, they will get more work from important clients; if not, they will lose work from long-term clients.

As we reach the beginning of the fifth year of the new century, law firms must assume their clients will have women and attorneys of color among their legal and business decision makers. In 2004, general

counsels of the Fortune 500 companies were 15 percent women and 7 percent attorneys of color. Clients of attorneys in other types of legal organizations are similarly diverse, if not even more so.

Law firms have not kept pace with these changing demographics, and, consequently, the firms now look considerably different from their clients, especially in leadership ranks. Many corporations hold their employees accountable on diversity issues, setting goals for both internal diversity measures and external measures

on the diversity of outside vendors, and compensating employees for achieving those goals. When law firms fail to meet requested diversity goals, compensation for their clients can be adversely affected. When this occurs, there is a noticeable impact on hiring decisions for new matters. Who would blame general counsel—especially after losing 10 percent of their incentive compensation when chosen vendors did not meet the published vendor diversity guidelines of the company—for choosing to do business with outside counsel who already meet these requirements?

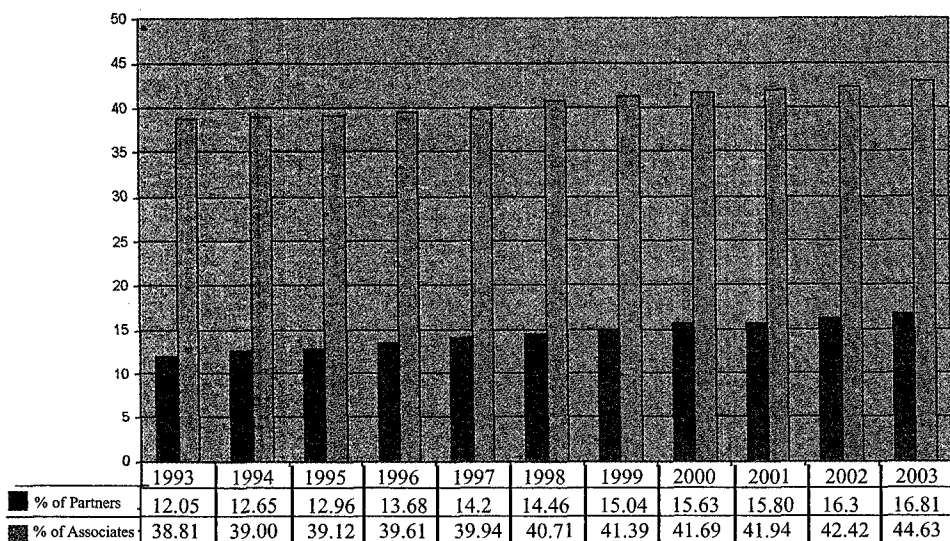
Business development. Tremendous business development opportunities are available to legal organizations that achieve meaningful and sustained diversity within their leadership ranks. One of the most obvious comes from corporations that sever their longstanding relationships with law firms that fail to demonstrate a commitment to diversity. In addition, because many law firms have not demonstrated significant progress in this area, firms that achieve diversity will have a competitive advantage in obtaining significant new engagements.

Attorneys of color and women attorneys bring valuable attributes to their organizations and may open unique marketing opportunities. For example, E. I. du Pont de Nemours and Co. (DuPont) established networks for women lawyers and attorneys of color within its legal department and at the firms and companies it uses for outside legal assistance. Women lawyers and attorneys of color who are part of the network send business to other members in DuPont's legal service provider network, and outside counsel form stronger relationships with in-house attorneys.

There is also research demonstrating that strong female leadership in workplaces may contribute positively to an organization's financial performance. Recent studies demonstrate that Fortune 500 companies with the largest percentage of women among their executive officer ranks significantly outperformed on key financial indicators the companies with few women officers.⁷

Maintaining talent and increasing revenue. Organizations are hurt financially when talented professionals leave for the wrong reasons. As demonstrated earlier

Nationwide Law Firm Averages: Women



er in this article, attorneys of color and women depart at a higher rate than do similarly situated white men. Legal organizations that do not create an environment in which attorneys of color and women succeed lose valuable personnel and the associated financial investment in their training and recruitment. This loss requires additional expenses for hiring and training, costs clients or firms additional fees to bring attorneys up to speed on matters, and risks client goodwill. The firm or company also may lose key people essential to their leadership succession ranks.

It is critical that professional services organizations attract the most talented professionals. The foundation for an organization's reputation, and its key assets, are its attorneys; therefore, hiring the "best and brightest" lawyers is the mantra for most organizations. Law students and practicing lawyers today gather information in two main ways: through the Internet and through hearing the experiences of their peers. An organization perceived as inhospitable to attorneys of color and/or women will be hindered in its efforts to hire both the new attorneys and the laterals it needs to be competitive.

Reducing legal risk. High turnover and increased recruiting expenses are not the only increased expenses of non-inclusive organizations. There are legal implications to failing on the diversity issue; indeed, the list of organizations that have ended up in high-profile litigation from it is long. Discrimination and workplace harassment lawsuits are embarrassing; damage the

organization's reputation; detrimentally impact the organization's ability to recruit; use critical attorney time in non-revenue-producing ways; and cost the organization money for legal fees, settlements, judgments, training, and lost opportunities.

The employment practices of law firms have come to the attention of the federal government. In late 2003, the EEOC issued its report *Diversity in Law Firms*, which analyzes trends, sets baselines, and categorizes issues.⁸ This governmental review puts law firms on notice that they must have solid policies to implement and follow. There is no excuse for legal organizations, with all of their internal expertise on legal issues, to become defendants in employment lawsuits. It is time for leaders of these organizations to have a zero-tolerance policy on those who step over the line. Whether the error is discrimination, harassment, or ignorance, it is no longer acceptable.

Enhanced reputation. As mentioned above, a legal organization's reputation is critical to every aspect of its business: client demands, business development opportunities, the talent pipeline, and retention and promotion of attorneys. Through its reputation, an inclusive organization creates a competitive advantage in maintaining client relationships, attracting new clients, recruiting talented lawyers, and increasing financial performance.

The legal profession's progress on creating and retaining leaders who are also female and of color has been slow. Material progress is lacking in the percentages of equity partners, office heads,

and managing partners who are female and of color. Consequently, performing at the same level as peer institutions is not acceptable and should not be the goal. On the other hand, the low level at which most legal organizations perform provides an opportunity for attentive organizations to gain a competitive advantage by positively differentiating themselves.

Conclusion

The decision to diversify and be inclusive does not require long debate. There is a clear best solution: Leaders of legal organizations must create and implement a strategic plan that ensures that attorneys of color and women attorneys are recruited, trained, retained, and promoted at the same rate as their white male colleagues. Resources must be put behind implementation, and progress should be tracked. It is time for all organizations to reap the benefits for measured and sustained successes in creating and maintaining an inclusive workplace.

Part II of this article will set forth best practices and practical tips for legal organizations in the pursuit, maintenance, and marketing of inclusive workplaces. Watch for it in the Spring 2005 issue of *MTL*.

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Notes

1. Diversity in Law Firms, U.S. Equal Employment Opportunity Commission (2003).
2. Keeping the Keepers II: Mobility and Management of Associates, National Association for Law Placement Foundation for Law Career Research and Education (2003).
3. NALP Research: Women and Minorities in the Law: www.nalp.org.
4. NALP Research: Women and Minorities in the Law: www.nalp.org.
5. Pathways to Partnership: Associates in Pursuit of the Brass Ring, NALP Foundation for Research & Education (1999).
6. Diversity in Law Firms, *supra* note 1.
7. Catalyst, The Bottom Line: Connecting Corporate Performance and Gender Diversity (2003); The Glass Ceiling Research Center, *Women in the Executive Suite Correlate to High Profits*, Pepperdine University, 2001.
8. See *supra*.

Perception of Senior Associates

| Perception of Senior Associates (Firms of 100 or more lawyers) | "There is Equal Access to Partnership." | "There is Equal Access to High-Visibility Assignments." | "There is Equal Access to Compensation and Bonuses." | "There is Equal Access to Mentoring." |
|--|---|---|--|---------------------------------------|
| All | 51.2% | 72.1% | 78.1% | 58.1% |
| Males | 57.9% | 89.5% | 94.4% | 79.0% |
| Females | 45.8% | 58.3% | 65.2% | 41.7% |
| Attorneys of Color | 20.0% | 20.0% | 40.0% | 20.0% |
| Non-minorities | 55.3% | 79.0% | 83.3% | 63.2% |