

## **Why I Resist Casual Friday and Other Thoughts on Diversity and Inclusion: A Black Partner's Perspective**

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I knew that I was going to be pulled over and that part of the encounter was entirely appropriate. I was speeding early one morning on a two-lane highway near my home when a highway patrolman passed me in a curve traveling in the opposite direction. He quickly disappeared over a hill and had not activated his blue lights. Just the same, I steered my late model luxury car onto the side of the highway, put it in park, retrieved my driver's license and the registration, and waited. Soon, the law enforcement officer reappeared and pulled his cruiser in behind my car. I had already lowered my driver's window as he approached.

He dispensed with the pleasantries: "Whose car is this?" I'm sure that I sighed and shook my head ever so slightly. I then said, "It's mine." I stretched out my arm and said, "And here are my license and registration." He left me hanging. He asked, "What's the make and model?" A lump formed in my throat, and I hesitated momentarily while trying to process what was happening. Then, even though I didn't want to, I described my car to him. Since my arm was still resting on the windowsill, I again said, "Here are my license and registration." This time he took them and returned to his cruiser. He issued a ticket and told me to have a good day.

At the time of that stop, I was on my way to a case management conference in federal court. I was wearing a starched white shirt, dark suit pants and a silk tie. My suit coat was in plain view in the back seat of the car. So too was a case file. And, sitting atop the file was a copy of the federal rules of civil procedure. When I responded to the patrolman's questions, I did so through very recent and relatively expensive dental work.

Upon arriving at the conference, I told counsel opposite, who is white, about the stop. He was incredulous. He told me that he was certain that if he had been stopped and was wearing jeans and a T-shirt, he would not have been asked those questions. So, I was not delusional, and my feelings weren't misplaced. Despite the indicators that I was employed as a lawyer (or perhaps a judge), the patrolman, who was also employed in the legal system and had surely interacted with lawyers, only saw a person of color. For him, that fact was enough to ignore objective indicia related to my profession and, instead, caused him to default to a negative assessment.

I won't recount all the thoughts and emotions I have had about that incident. But it was clearer to me than ever before that what might be acceptable for white lawyers to do, or not do, and still be accorded due recognition and respect as a professional, does not apply to me. Women and lawyers of color face the constant specter of being minimized, as more fully

discussed below. I believe that for the diverse lawyer, this situation requires strict adherence to professionalism in every meaning of the word. While it may not seem like much, I resist casual Friday. And for law firms, every effort must be made to promote a welcoming environment of opportunity and inclusivity.

This year marks my 30th year in the practice of law. My experience includes a judicial clerkship, service as a Marine Corps Judge Advocate, criminal cases as a prosecutor and defense attorney, civil law practice representing defendants and plaintiffs, working for a small black-owned firm, being a partner in a small plaintiffs' practice and, for most of my career, being a partner in a top 150 law firm.

It was 25 years ago that another black lawyer and I became the first black lawyers at my firm, which was, at the time, solely based in Mississippi. We were part of the first real push for diversity in large majority practices. Soon, I was the only black lawyer at the firm. I, too, left but ultimately returned and have been back for more than a decade. The firm now has offices nationwide and internationally. The number of black lawyers is 7% today. I am optimistic regarding the progress and am determined that we will do much better.

My practice is complex litigation, which is national in scope. This affords me the opportunity to work closely with lawyers of every conceivable background from large majority law firms. Moreover, here at Butler Snow, I have been elected to firm management, held administrative positions and been involved in the hiring process. These experiences have left me with certain impressions regarding the development of diversity and inclusion initiatives and, in particular, the retention and advancement of black lawyers. The comments below address three issues from among the many that I believe contribute to a law firm environment where diverse lawyers are minimized and their ultimate departure is inevitable. Additionally, I offer some suggestions regarding steps to retain diverse lawyers and increase the numbers of those admitted to equity ownership.

## The Retention Problem

### **A. Diverse Lawyers Do Not Enjoy a Presumption of Competence Like Others Do**

The numbers are generally well known. According to the most recent data from the Vault/Minority Corporate Counsel Association Law Firm Diversity Survey, just 2.1% of law firm partners are black and only 1.87% are equity partners. These numbers have been largely consistent over the last decade. The report notes that more people of color are joining law firms, but there is a problem retaining them, especially associates. In fact, the 2018 Vault/MCCA Survey states that, "Progress for African-American lawyers has been the most elusive, as their hiring remains below pre-recession levels and they continue to leave their firms at a higher rate than other groups." The survey reveals that departures of lawyers of color from law firms is at an 11-year high, exceeding the numbers that existed during the peak of the recession when minorities were more adversely affected by layoffs.

While many of these departures are for reasons other than the effects of bias, it is now largely undisputed that implicit or unconscious bias is a hindrance to the success of lawyers of color. Despite thoughtful diversity initiatives and aggressive recruitment efforts, many lawyers of color find themselves in an environment that does not see them in the same way as it does other lawyers. In particular, much like the patrolman who stopped me on the side of the

highway years ago, some of those responsible for evaluating young associates of color only see what they want to see and don't see what they don't want to see. This phenomenon is a type of unconscious bias known as confirmation bias.

This particular species of bias has been described as a mental shortcut that makes one actively seek information, interpretation and memory only to acknowledge that which affirms established beliefs, while missing data that contradicts established beliefs. A recent study, "Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills" by lead researcher Dr. Arin N. Reeves, reported that partners were provided an identical research memorandum, in which 22 errors of grammar, substance and analysis were embedded. The partners who were selected to evaluate the paper were told that the author was a male graduate of NYU Law School. Some partners were told that the author of the memorandum was white and other partners were told that the author was black. The result of the research was that significantly more errors were found and ascribed to the black author. Additionally, the overall rating of the paper was far worse for the black author than the white author. Moreover, the comments on the paper were more harshly critical of the black writer. For example, the white writer was described as someone who "has potential" and a "generally good writer but needs to work on ..." The black writer had such comments as "average at best" and "can't believe he went to NYU."

The potential effects of confirmation bias are obvious. Ultimately, it morphs into a reputation that is less stellar for the lawyer of color than other lawyers. That flawed assessment of the lawyer of color feeds on itself until it is common knowledge. Everybody knows it. Assignments find their way to other lawyers and fewer meaningful opportunities find their way to the lawyer of color. Even worse, confirmation bias leads to a suggestion of incompetence for lawyers of color and a presumption of competence for others. Evaluations can reflect this objectively inaccurate assessment. Eventually, the handwriting is on the wall and a departure may be the most reasonable response by the lawyer of color.

## **B. The Offensive Notion That Any Woman or Lawyer of Color Will Do**

It can hardly be disputed that the business community has been pivotal in assisting, if not outright pushing, law firms to embrace diversity and inclusion. That influence is growing. In fact, in January of this year, a letter signed by the General Counsels of some 170 companies makes it clear that they will not be inclined to retain firms that do not demonstrate a real commitment to diversity and inclusion. This concept is commonly viewed as the business case for diversity.

Most recognize a need for diversity, but clearly we do not all have the same understanding of what the need is and how to address it. Merely staffing a file to include a diverse attorney to secure business fails to properly address the need. Instead, it amounts to a highly offensive elevation of optics over reality.

Women and lawyers of color are dismayed at having their pictures emblazoned on glossy responses to RFPs or being asked to dutifully participate in pitch meetings, only to be omitted later from any meaningful participation on the file. The only sin worse than not being considered is not being utilized.

This misguided approach to diversity can have effects beyond the law firm environment and the issue of retention. Unbelievably, there is a practice of adding a diverse lawyer to a trial team solely for optics. However, we now have more and more judges who are women and people of color, and juries are certainly filled with every demographic. It is outrageous, in my

view, to assign a diverse lawyer to a trial team when that lawyer's only expected contribution is their immutable characteristic. This transparent act will not go unnoticed by judges nor jurors, and it is clients who may suffer the consequences. Any assignment of lawyers should be substantive and meaningful. There are plenty of talented, diverse trial lawyers who can add real value to a trial team.

Bluntly, no one wants to be "used" as that term is understood in the negative sense. The notion that "any woman or lawyer of color will do" demeans us as professionals. Yet, it remains all too common and is a factor in lawyers leaving firms.

### **C. Relegated to Last and Least**

There is a particularly disturbing practice that women and lawyers of color take note of that I am convinced some others have never noticed. It is a practice that not only those with whom we practice engage but clients, business prospects and others do it as well. It is the practice of routinely putting women or lawyers of color last, no matter their seniority or status in the firm or responsibility on a file. This slight includes everything from email chains to in-person introductions.

I recall being at a professional meeting and standing with a group of six or seven colleagues from various firms. All of us worked on a particular mass tort together. I was the only lawyer of color in the group and clearly the oldest. Another lawyer who knew some but not all of the others walked up and engaged in small talk. Introductions were made, and hands were shaken. He had been involved with some of the early proceedings in the matter and sought an update. When he finally got to me, he asked, "What do you do? Are you on the discovery team?" I replied, "No. I'm national lead trial counsel." He said, "Oh, you're Rod Richmond. Pleased to meet you. I've been reading your work." Of course, that was the second time we had been introduced in a matter of minutes. Even though he was familiar with my name and my role, upon seeing me, he had assigned a different responsibility to me in his mind.

Repeatedly, inside firms or outside firms, women and lawyers of color are routinely introduced or approached last. On numerous occasions and in different settings over my career, someone initiates a conversation with a white male who is with me, only to be told that I am the person they should talk to or who knows the subject matter. I have seen it happen with others as well.

While it is likely not intentional, nor even conscious, it is some evidence of the reality that exists in some law firms despite the stated objectives of inclusivity. Every unwarranted instance of relegating someone to last or least and every time it seems as if a woman or lawyer of color is virtually an afterthought serves as yet another suggestion that we are viewed differently. It is another weighty straw that can push a diverse lawyer in the direction of other employment.

## **Some Potential Solutions to Retain Diverse Lawyers**

My experience here at Butler Snow and the success stories of women and other lawyers of color around the country (to include in-house counsel) make clear that there are effective approaches that can and should be employed to combat bias and retain diverse lawyers. What follows are some potential steps that law firms should take.

**Firm Leadership Must Be Fully Committed** – The importance of diversity and inclusion must be a priority at every level of firm leadership. The unequivocal message to the firm and every partner and employee of the firm must be in terms of a demand. Moreover, one aspect of the evaluation of firm leadership should be their commitment to and progress regarding diversity and inclusion. What gets measured gets done.

**Diversity and Inclusion Committee or Officer** – Achieving greater diversity and inclusion has to be intentional and focused. Perhaps the best way to do so is by having a dedicated committee or person who will stay abreast of the latest developments regarding diversity and inclusion and the specific issues in the firm. This committee or person should report directly to firm management.

**Mentors and Sponsors** – Navigating the law firm environment can be difficult for any lawyer, especially new associates. The journey may be complicated by cultural differences that inhibit the kind of easy interaction that leads to developing good working relationships. The lawyers of color may not attend the same churches as other lawyers. They may not be members of the same fraternal organizations or social clubs. As a result, assign mentors whose mission is to get to know the diverse lawyer and help young lawyers with navigating the system. Mentors help groom the lawyer professionally and help integrate the diverse lawyer into the firm culture. On the other hand, a sponsor is a person of influence within the firm who speaks to issues on another lawyer's behalf. There is a need for onboarding regimens that include sponsors who serve as advocates for the young lawyer or diverse lawyer.

**Appointment to Administrative and Practice Responsibilities** – At many firms, firm involvement is one of the metrics for advancement. Careful attention must be paid to appointment of diverse lawyers to administrative duties and other positions within the firm to provide an opportunity to meet this important metric. For those roles that are elected, consideration should be given to an alternative appointment process, if necessary, that is designed to make sure there is participation in firm governance by diverse lawyers. It is important that younger diverse lawyers have someone who is like them in key leadership roles to inspire and encourage them. So, there should be diversity at all levels and positions of responsibility in the firm.

**Clients Should Go Beyond the Head Count** – Clients should request hard data related to inclusion. Clients should assure themselves that diverse lawyers are billing meaningful hours on their files and are getting an opportunity for client contact as soon as is practical given the complexity of the matter. Moreover, there should be a clear pattern that work is being transitioned to diverse lawyers as well as to other lawyers. Clients should also make crystal clear that the woeful and static percentage of diverse attorneys in the partnership ranks is unacceptable. Clients should inquire about a law firm's initiatives or efforts that are designed to make sure that the path to ownership for women or lawyers of color is not made more difficult as a result of bias.

**Compensation Must Be Constantly Evaluated** – A fair system of compensation that is clearly understood and that provides for progression for all is an absolute must.

## Conclusion

A white law partner, whom I also consider a friend, once attributed my success to being able to “move easily between both worlds.” While I suppose he meant it as a compliment, the notion that there are characteristics and behaviors that are specific to whites and absent in blacks (or

present in men and absent in women), and that lend themselves to success, is just wrong. That idea is no different than that highway patrolman making a negative assessment of me because of my color.

This legal community of ours has to be large enough to accommodate and embrace our wonderful diversity. By doing so, our clients are provided meaningful perspective as to their legal issues. Those with whom we practice enjoy collaboration and a more positive business relationship. And, like all other lawyers, women and lawyers of color can rely on being evaluated on their skill, ability and potential. This is an issue that goes far beyond the business case for diversity. It is the right thing to do.

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