

## Ending the Revolving Door Syndrome in Law

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In 2009, major U.S. law firms became less diverse.<sup>1</sup> *The American Lawyer* recently reported that the percentage of minority<sup>2</sup> lawyers at AmLaw 200 firms decreased from 13.9% in 2008 to 13.4% in 2009.<sup>3</sup> Overall, *The American Lawyer* found, Corporate Firms<sup>4</sup> lost about 6% of their total lawyers in 2009.<sup>5</sup> During the same period, these firms lost 9% of their Asian-American lawyers, 9.7% of their Hispanic-American lawyers, and 13% of their African-American lawyers.<sup>6</sup> It is reasonable to expect increased layoffs during an economic downturn, particularly in an industry that is highly leveraged. What is troubling is that, after a substantial effort by many to increase Corporate Firm diversity, diverse attorneys<sup>7</sup> still seem to be experiencing a higher attrition rate relative to their non-diverse peers. This suggests a “revolving door,”<sup>8</sup> as first highlighted in the 2000 American Bar Association

<sup>1</sup> Emily Barker, *Minority Lawyers Losing Ground at Big Law Firms, New Report Shows*, AM. LAW., Mar. 2, 2010, <http://law.com/jsp/article.jsp?id=1202444960177>. In this Article, the term “diversity” refers to policies and practices that seek to include persons who, because of their race, ethnic background, age, gender, sexual orientation, disability, or some other characteristic, are considered, in some way, different from the traditional members of the workforce.

<sup>2</sup> In this Article, the term “minority” refers to Hispanic-Americans, African-Americans, Asian-Americans, Multi-racials, and Native Americans.

<sup>3</sup> Barker, *supra* note 1; Vernon Francis, *Commentary: Law Firms Must Act to Offset Diversity Setbacks*, LEGAL INTELLIGENCER, Mar. 30, 2010, at 7, available at <http://law.com/jsp/LawArticlePC.jsp?id=1202447052608>.

<sup>4</sup> In this Article, the term “Corporate Firms” refers to AmLaw 200 firms. See *The Am Law 200 2010*, AM. LAW. (June 1, 2010), <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202458243145>.

<sup>5</sup> Barker, *supra* note 1.

<sup>6</sup> *Id.* These statistics are based on the *American Lawyer*’s Diversity Scorecard survey of 191 law firms around the nation. *Id.*

<sup>7</sup> The terms “diverse lawyer” or “diverse attorney” are used interchangeably in this Article to mean persons who, because of their race, ethnic background, age, gender, sexual orientation, disability, or some other characteristic, are considered, in some way, different from the traditional lawyers at Corporate Firms. For purposes of this Article, it includes both women and minorities.

<sup>8</sup> In this Article, the term “revolving door” refers to the higher rate of turnover for diverse lawyers at Corporate Firms relative to the population of non-diverse attorneys.

(ABA) study, *Miles to Go 2000: Progress of Minorities in the Legal Profession*.<sup>9</sup> The study found that 50% of minority associates leave their law firms within the first three years, and two-thirds within the first four years of practice, as compared with an overall attrition rate of 43% and 55.6%, respectively.<sup>10</sup> While an approximate 10% higher attrition rate for diverse attorneys may not seem alarming at first blush, the cumulative long-term impact is devastating to the industry as it eliminates the candidate pool of potential diverse partners in the AmLaw 200. With increasingly diverse U.S. populations of business owners,<sup>11</sup> corporate decision makers, judges, legislators, and other influencers, as well as consumers wielding greater purchasing power,<sup>12</sup> the relevant query is whether the continued prevalence of a revolving door at Corporate Firms and the resulting failure to meet client demand for diversity will adversely impact firm reputation and financial performance in the long term.

Part I of this Article is divided into three sections. First, we review the changing demand by corporate clients over the past two decades for greater diversity at Corporate Firms. Second, we discuss the underlying forces driving this demand in the global economy. We also review recent empirical research showing that the racial and gender diversity of corporate clients is positively associated with increased sales revenue, more customers, greater market share, and higher relative profits.<sup>13</sup> Third, we address the disparate impact of the “Great Recession”<sup>14</sup> on diverse-attorney retention at Corporate Firms, the push by general counsel for greater value, and the possible business model changes that such a push foretells.

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<sup>9</sup> ELIZABETH CHAMBLISS, A.B.A. COMM’N ON RACIAL & ETHNIC DIVERSITY IN THE PROF., *MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION* 6 (2000).

<sup>10</sup> *Id.* at 6–8.

<sup>11</sup> See, e.g., *Estimates of Business Ownership by Gender, Ethnicity, Race, and Veteran Status: 2007*, U.S. CENSUS BUREAU, <http://www.census.gov/csd/sbo> (last visited May 12, 2011).

<sup>12</sup> See Jeffrey M. Humphreys, *The Multicultural Economy 2009*, GA. BUS. & ECON. CONDITIONS, Third Q. 2009, at 1, 3, available at <http://www.terry.uga.edu/selig/docs/GBEC0903q.pdf>.

<sup>13</sup> Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208, 208 (2009).

<sup>14</sup> The phrase “Great Recession” is a pun on the Great Depression, the economic depression of the 1930s. It refers to the late-2000s economic recession and resulting financial crisis. See, e.g., THOMAS I. PALLEY, NEW AM. FOUND., *AMERICA’S EXHAUSTED PARADIGM: MACROECONOMIC CAUSES OF THE FINANCIAL CRISIS AND GREAT RECESSION 32* (2009), available at [http://www.newamerica.net/files/Thomas\\_Palley\\_America’s\\_Exhausted\\_Paradigm.pdf](http://www.newamerica.net/files/Thomas_Palley_America’s_Exhausted_Paradigm.pdf) (referring to the recent financial crisis as the “Great Recession”).

Part II of this Article reviews the unique aspects of the business model used by Corporate Firms to provide customized, knowledge-based solutions to clients. We maintain that, because reputation is a critical determinant of financial performance at Corporate Firms, the existence of a revolving door may undermine long-term financial performance. We propose strategic legal management of key business processes that require further enhancements to help end the revolving door. This includes (i) using technology and diversity managers to ensure more objective work assignments, (ii) developing more objective evaluation processes that can bypass potential micro-inequities, and (iii) implementing a quality review process that can help ensure work product quality. Part III proposes increasing formal training programs to teach essential soft skills to all associates, namely, (i) the role of mentors and role models in professional development, (ii) business development and networking, and (iii) legal analysis utilizing an analytic framework modeled on the SOAP method now utilized by physicians. Lastly, we discuss secondment and other experiential programs that expose diverse attorneys to clients and influencers.

## PART I

### A. *Client Demand for Diversity*

In the over half-century since *Brown v. Board of Education*,<sup>15</sup> our nation has changed dramatically. Demographers predict that the United States will become a “majority of minorities” by the year 2042.<sup>16</sup> The nation’s increased diversity has substantially impacted its culture, social norms, politics, consumer preferences, and economics. It has also impacted most institutions, including the military, government, judiciary, and corporate America. Thus, when the U.S. Supreme Court revisited the issue of race and education in 2003 in *Grutter v. Bollinger*<sup>17</sup> and *Gratz v. Bollinger*,<sup>18</sup> the military and the country’s most profitable corporations (both of whom had a past history of discriminatory practices) wrote amicus briefs requesting that the Court not overturn *Regents of the University of California v. Bakke*,<sup>19</sup> which al-

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<sup>15</sup> 347 U.S. 483 (1954).

<sup>16</sup> Sam Roberts, *A Generation Away, Minorities May Become the Majority in U.S.*, N.Y. TIMES, Aug. 14, 2008, at A1.

<sup>17</sup> 539 U.S. 306 (2003).

<sup>18</sup> 539 U.S. 244 (2003).

<sup>19</sup> 438 U.S. 265 (1978); see, e.g., Brief for General Motors Corp. as Amicus Curiae Supporting Respondents at 3–4, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-

lowed colleges and universities to consider race as a factor in admission.<sup>20</sup> The essence of their arguments was that diversity is good for business and essential to global competitiveness.<sup>21</sup> This business case for diversity was relied on heavily by Justice O'Connor in her majority opinion.<sup>22</sup>

Today, corporate America devotes significant attention to issues relating to marketplace diversity,<sup>23</sup> workplace diversity,<sup>24</sup> supplier diversity,<sup>25</sup> and corporate social responsibility (CSR).<sup>26</sup> Many corpora-

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241 and 02-516) [hereinafter Brief for GM Corp.]; Consolidated Brief for Lt. Gen. Julius W. Becton et al. as Amici Curiae Supporting Respondents at 5, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241 and 02-516) [hereinafter Brief for Lt. Gen. Julius W. Becton].

<sup>20</sup> *Bakke*, 438 U.S. at 360–79.

<sup>21</sup> See, e.g., Brief for GM Corp., *supra* note 19, at 3–4; Brief for Lt. Gen. Julius W. Becton, *supra* note 19, at 5.

<sup>22</sup> *Grutter*, 539 U.S. at 330–32.

<sup>23</sup> “Marketplace diversity” refers to the mix of product and service offerings that are responsive to changing consumer preferences in diverse communities. See Lynn D. Lieber, *Capitalizing on Demographic Change: How Your Organization Can Prepare for the Global Workforce*, DIVERSITYBUSINESS.COM (Aug. 21, 2009), <http://www.diversitybusiness.com/news/diversity.magazine/99200841.asp> (“As the U.S.’s racial and ethnic makeup shifts, products and services must respond in order to capitalize on changing consumer demographics.”). For example, McDonald’s now offers Mexican-inspired cuisine in key markets in the Southwestern United States. See Amy Zuber, *McD Rolls 7-item Fiesta Menu in 700-Unit S. Calif. Market*, NATION’S RESTAURANT NEWS, Aug. 28, 2000, at 1, available at [http://findarticles.com/p/articles/mi\\_m3190/is\\_35\\_34/ai\\_65077381](http://findarticles.com/p/articles/mi_m3190/is_35_34/ai_65077381).

<sup>24</sup> “Workplace diversity” refers to the make-up of the workforce employed by a company or firm. *Workplace Diversity*, CORNELL UNIV. (2010), <http://www.ilr.cornell.edu/library/research/subjectguides/workplacdiversity.html>. The focus of this Article is workplace diversity at Corporate Firms. This is to be distinguished from supplier diversity programs.

<sup>25</sup> “Supplier diversity” refers to programs employed by corporations and firms to increase the number of diverse vendors that supply goods and services to the business. See Anjali Chavan, *The “Charles Morgan Letter” and Beyond: The Impact of Diversity Initiatives on Big Law*, 23 GEO. J. LEGAL ETHICS 521, 525 (2010). Originally, these programs were limited to prime, or “first tier,” supplier relationships for goods between diverse vendors and corporations. See Maggie Johnson, *Minority Firms, Major Customers Try to Cope with Changes in Supply Chain*, DAILY REC. (Balt.), July 17, 1997, at 11. The programs have been extended so that corporations now track “second tier” spend by a majority-owned prime supplier with a diverse vendor. *Id.* (noting the belief held by some companies that “a second-tier program would also help expand minority firms in the first tier”). Most recently, the programs also have been expanded to capture spend with professional service firms like law firms. Chavan, *supra*, at 525 (“Many corporations have adopted supplier diversity initiatives, in which they set diversity and inclusion criteria for companies they do business with, including their law firms”).

<sup>26</sup> A.B. CARROLL, A.K. BUCHHOLTZ, *BUSINESS AND SOCIETY: ETHICS AND STAKEHOLDER MANAGEMENT* 36 (2003) (defining CSR as the “economic, legal, ethical,

tions use these initiatives to influence purchasing decisions by consumers and to differentiate their product and service offerings.<sup>27</sup> As corporate America has embraced diversity and inclusion as worthy goals, the number of diversity initiatives in the Fortune 500 has exploded. It is no surprise that major corporate clients like Sara Lee Inc., Wal-Mart Stores, Inc. (“Wal-Mart”), and other Fortune 500 companies are demanding greater workplace diversity from their Corporate Firm suppliers.<sup>28</sup>

In 1999, for example, more than 500 general counsel around the country signed “Diversity in the Workplace: A Statement of Principle” developed by Charles Morgan of BellSouth, which called on Corporate Firms to invest in diversity initiatives.<sup>29</sup> The statement evidenced the commitment of the signatory corporations to diversity in the legal profession.<sup>30</sup> It was intended to be a mandate for law firms to make immediate and sustained improvement in this area.<sup>31</sup> This was followed in 2004 by Roderick Palmore’s “Call to Action,” in which general counsel of major corporations pledged to limit business with

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and discretionary expectations that society has of organizations at a given point in time”).

<sup>27</sup> See Karen L. Becker-Olsen et al., *The Impact of Perceived Corporate Social Responsibility on Consumer Behavior*, 59 J. BUS. RES. 46, 52 (2006). Consumer perceptions of fit, motivation, and timing of corporate social initiatives that were embedded in promotions played a significant role in influencing consumers positively. *Id.*

<sup>28</sup> See Karen Donovan, *Pushed by Clients, Law Firms Step up Diversity Efforts*, N.Y. TIMES, July 21, 2006, at C6. Corporate clients are not the only stakeholders demanding greater workplace diversity at Corporate Firms. The ABA has commissioned several important studies over the past decade on the need for greater diversity at Corporate Firms. See, e.g., Vera Djordjevich, *ABA President Carolyn Lamm Discusses Next Steps to Achieving a More Diverse Legal Profession*, VAULT.COM (Aug. 18, 2010), <http://www.vault.com/wps/portal/usa/vcm/detail/Career-Advice/Q&A/ABA-President-Carolyn-Lamm-discusses-next-steps-to-achieving-a-more-diverse-legal-profession?id=20211>. The Equal Employment Opportunity Commission (EEOC) also has addressed the problem. In 2003, the EEOC issued a report titled *Diversity in Law Firms*, presenting data on Corporate Firms’ disparities in conditions of employment for women and minorities and noting that the diversity data related to Corporate Firms’ practices could have broad implications on civil rights enforcement. Press Release, EEOC, *Law Firms Embrace Diversity, But Hurdles Remain* (Oct. 22, 2003), <http://www.eeoc.gov/eeoc/newsroom/release/10-22-03.cfm>. The EEOC subsequently initiated litigation against Corporate Firms for discriminatory practices. Gerald L. Pauling II & Karen K. Harris, *Paradigm Shifts: Changes in the Structure and Diversity of Corporate Law Firms*, METROPOLITAN CORP. COUNS., Apr. 1, 2006, at 47, 47. In 2005, it filed a class action suit against Sidley Austin Brown & Wood for alleged violations of the Age Discrimination in Employment Act. *Id.*

<sup>29</sup> Charles R. Morgan, *Leading General Counsel—and Their Law Firms—up the Path to Diversity*, METROPOLITAN CORP. COUNS., Mar. 1, 2006, at 47.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

Corporate Firms that ignored their demands for greater workplace diversity:

As Chief Legal Officers, we hereby reaffirm our commitment to diversity in the legal profession. Our action is based on the need to enhance opportunity in the legal profession and our recognition that the legal and business interests of our clients require legal representation that reflects the diversity of our employees, customers and the communities where we do business.

In an effort to realize a truly diverse profession and to promote diversity in law firms, we commit to taking action consistent with the referenced Statement. To that end, in addition to our abiding commitment to diversity in our own departments, we pledge that we will make decisions regarding which law firms represent our companies based in significant part on the diversity performance of the firms. We intend to look for opportunities for firms we regularly use which positively distinguish themselves in this area. We further intend to end or limit our relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse.<sup>32</sup>

In response, Shell Oil Company reduced outside counsel to twenty-seven firms, eliminating many Corporate Firms that did not meet diversity goals.<sup>33</sup> Wal-Mart also took action; the company surveyed its top 100 outside counsel, including many Corporate Firms, utilizing a selection criteria based on relative diversity performance.<sup>34</sup> Wal-Mart changed forty firms at the top, shifting \$60 million worth of work to more diverse law firms.<sup>35</sup> Corporate Firms responded swiftly by appointing diversity managers. Although Corporate Firm diversity initially improved, the gains have not been sustainable. Most recently, senior legal executives from The Coca-Cola Company, Microsoft, Inc., Wal-Mart, and eleven other Fortune 500 companies joined with

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<sup>32</sup> RICK PALMORE, A CALL TO ACTION: DIVERSITY IN THE LEGAL PROFESSION (2004), available at <http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=16074>. Rick Palmore was the CLO of Sara Lee Inc., and a member of the Board of the Directors of the Association of Corporate Counsel (ACC). *Id.* ACC's Board endorsed Rick's efforts and the "Call to Action" at their October 24, 2004 meeting. *Id.*

<sup>33</sup> Nathan Koppel, *Courting Shell*, AM. LAW., June 24, 2004, available at <http://www.law.com/jsp/article.jsp?id=1087855518341&slreturn=1&hbxlogin=1>. Catherine Lamboley, Shell Oil Company's General Counsel, stated, "We no longer do business with [some] firms because they were simply giving lip service to diversity." Roy Ginsburg, *Diversity Makes Cents: The Business Case for Diversity*, BENCH & B. MINN., Feb. 2005, at 26, 27.

<sup>34</sup> Meredith Hobbs, *Wal-Mart Diversity Program Sweeps in 40 New Firm Relationship Partners*, FULTON CNTY. DAILY REP., Oct. 25, 2005, at 1, available at <http://www.law.com/jsp/article.jsp?id=900005439737>.

<sup>35</sup> *Id.*

the managing partners of O'Melveny & Myers LLP, DLA Piper LLP, Gibbons P.C., and other Corporate Firms to form the recently-announced Leadership Council on Legal Diversity ("LCLD").<sup>36</sup> Under the management of Executive Director Robert J. Grey, Jr., a former President of the ABA, and Roderick Palmore, LCLD Chairman, this new organization of chief legal officers and law firm managing partners continues the "work of the 'Call to Action' initiative by having our organizations hire, retain, promote and engage the best talent. A critical and necessary element of having the best talent is having diverse talent."<sup>37</sup>

Notably, the corporate client demand for greater diversity in the new millennium differs markedly from the perceived opposite demand from clients for homogeneity in the 1960s. Erwin Smigel's seminal study of large-firm, homogeneous recruiting standards during that period found that "more than academic performance, firms . . . were looking to hire 'Nordic men' [with] pleasing personalities and 'clean cut' appearances, [who] are graduates of the 'right schools', [and] have the 'right' social background[.]"<sup>38</sup> In short, Corporate Firms believed that diversity was bad for business,<sup>39</sup> which prevented religious, ethnic, women, and minority attorneys from entering the ranks of the elite firms. Modern law firms have grown tremendously in size, complexity, and wealth in the last few decades, and the legal profession has come a long way toward opening its doors to diverse attorneys. Although Corporate Firms enjoy success in recruiting diverse attorneys, the great challenge has been retaining diverse attorneys once they enter Corporate Firms. This dichotomy has not gone unnoticed by corporate America.

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<sup>36</sup> See LEADERSHIP COUNCIL ON LEGAL DIVERSITY, <http://www.lclldnet.org/> (last visited Mar. 19, 2011). The initial goals of LCLD are (i) to develop a joint GC/Law Firm Call to Action, (ii) to analyze strategies for law firm and corporate partnerships, (iii) to develop a universal set of metrics to measure diversity success, and (iv) to address recruiting, retention, and advancement issues. *Fortune 500 Legal Officers, Top Law Firm Managing Partners Launch Leadership Council on Legal Diversity*, BUSINESSWIRE, May 6, 2009, <http://www.businesswire.com/news/home/20090506006036/en/Fortune-500-Legal-Officers-Top-Law-Firm>.

<sup>37</sup> *Our Mission*, LEADERSHIP COUNCIL ON LEGAL DIVERSITY, [http://www.lclldnet.org/about\\_us\\_mission.html](http://www.lclldnet.org/about_us_mission.html) (last visited Mar. 19, 2011); *About Us*, LEADERSHIP COUNCIL ON LEGAL DIVERSITY, [http://www.lclldnet.org/about\\_us.html](http://www.lclldnet.org/about_us.html) (last visited Mar. 19, 2011).

<sup>38</sup> David B. Wilkins, *Why Global Law Firms Should Care About Diversity: Five Lessons from the American Experience*, 2 EUR. J. L. REFORM 415, 417 (2000) (quoting ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 37 (2d ed. 1969)).

<sup>39</sup> See SMIGEL, *supra* note 38, at 37.



Whether the demand for diversity based on a business case is justifiable or more worthy than earlier arguments based on social responsibility, i.e., doing the right thing, is beyond the scope and purpose of this Article. The fact remains that corporate clients evaluate Corporate Firm legal alternatives in terms of both the functional and psychological benefits they offer. This is not only affected by marketing stimuli, such as service, price, place, and promotion, but, more importantly, by reputation and other environmental stimuli—namely, the changing economic, political, demographic, and cultural circumstances of a society. In short, diversity matters.

The great paradox is why, in the highly competitive marketplace for legal services, Corporate Firm diversity initiatives have failed to produce sustainable results that are more responsive to corporate-client demand. Commentators have noted that focusing on recruitment without a track record of minority retention is a fundamental feature of the problem.<sup>40</sup> Today, the “Diversity Scorecard” from *The American Lawyer*, as well as similar annual reports published by the National Association for Law Placement (NALP) and other journals, focuses on simple, self-reported headcounts of minority and/or women attorneys at the associate and partner levels.<sup>41</sup> Because the relative attrition rates between diverse and non-diverse populations are not tracked, some Corporate Firms have beefed up their diversity performance by having a lot of first-year and second-year associates of diverse backgrounds.<sup>42</sup> Although this practice leads to increased headcounts in the short run and generates bragging rights, ultimately, the firms do not hold on to diverse associates—they simply change the heads.

The existence of a revolving door not only limits the available pool of potential diverse partners at Corporate Firms, but it can also

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<sup>40</sup> See, e.g., Tiffani N. Darden, *The Law Firm Caste System: Constructing A Bridge Between Workplace Equity Theory & the Institutional Analyses of Bias in Corporate Law Firms*, 30 BERKELEY J. EMP. & LAB. L. 85, 88 (2009).

<sup>41</sup> See *The Diversity Scorecard 2010*, AM. LAW., Mar. 1, 2010, [http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202444469087&src=EMC-Email&et=editorial&bu=The%20American%20Lawyer&pt=Am%20Law%20Daily&cn=am\\_law\\_daily\\_20100301&kw=The%20Chart](http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202444469087&src=EMC-Email&et=editorial&bu=The%20American%20Lawyer&pt=Am%20Law%20Daily&cn=am_law_daily_20100301&kw=The%20Chart) (showing (i) the minority percentage of all U.S. attorneys, (ii) the minority percentage of all U.S. partners, (iii) total U.S. attorneys versus non-U.S. attorneys, (iv) African-American partners versus African-American non-partners, (v) Asian-American partners versus Asian-American non-partners, (vi) and other Hispanic-American partners versus other Hispanic-American non-partners, and (vii) other minority/multiracial partners versus other minority/multiracial non-partners).

<sup>42</sup> Emily Barker, *Diversity Scorecard 2010: One Step Back*, AM. LAW., Mar. 1, 2010, at 71, available at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202444097605>.

have a devastating impact on the self-esteem and careers of diverse attorneys. Many leave Corporate Firms disappointed by low-grade work assignments and perceptions of unfair evaluations and lacking the skill sets to compete effectively with peers. At the partner ranks, diversity metrics also do not differentiate between equity and contract or other non-equity partner roles. Again, this loophole creates the potential for some firms to use a revolving door strategy with contract and non-equity partners. The above suggests the need for greater accountability by professional associations and for a more comprehensive set of metrics (e.g., differential attrition rates) to better gauge success and relative performance.

Today, many of the Requests for Proposals (RFPs) produced by corporate clients demand diversity performance data. A number of blue-chip companies now evaluate diversity data when they consider retaining counsel.<sup>43</sup> This trend is only likely to increase. The 2010 ACC/*Serengeti Managing Outside Counsel Survey Report* found increased use of RFPs by corporate clients.<sup>44</sup> The number of companies that issue RFPs has increased to 25%, while the average annual number of responses by law firms also has increased—from about two responses in years past to an average number of responses of 15.5 and 14.7 in 2008 and 2009, respectively.<sup>45</sup> The use of RFPs allows clients greater flexibility in evaluating Corporate Firms across multiple dimensions. As noted by Merck's general counsel, Kenneth Frazier, "We are in the fortunate position of having many highly capable law firms lining up to work with us. And it was hard in some ways to differentiate among these firms. But we found that diversity was something that would allow us to make that differentiation."<sup>46</sup> Simply put, diversity has become a qualitative differentiator used by corporate clients to select Corporate Firms when comparable marketing stimuli exist among competitors. Assuming that Corporate Firms are rational economic actors operating in a highly competitive marketplace, those firms that attempt to game the RFP system or simply ignore client demand for

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<sup>43</sup> See Ginsburg, *supra* note 33, at 27.

<sup>44</sup> Press Release, Controlling Law Firm Spending with Business-Oriented Solutions Is Top Priority for Corporate Clients, Ass'n of Corp. Couns. (Oct. 25, 2010) [hereinafter Press Release, Ass'n of Corp. Couns.], available at <http://www.acc.com/aboutacc/newsroom/pressreleases/2010-ACC-Serengeti-Survey-Key-Findings.cfm>.

<sup>45</sup> *Id.*

<sup>46</sup> Larry Bodine, *Clients Are Happier, but Offer Less Legal Work with a Tiny Fee Increase*, LAWMARKETING CHANNEL (Dec. 14, 2010), <http://www.lawmarketing.com/pages/articles.asp?Action=Article&ArticleID=1108>.

greater diversity ultimately may find themselves with tarnished reputations and at a competitive disadvantage.

*B. The Forces Driving Demand*

The 2008 election of President Barack Obama, an African-American, signaled a changing political landscape that views diversity and inclusion as functional for society. The resulting Senate confirmations of Eric Holder, an African-American, as U.S. Attorney General and Sonia Sotomayor, a Latina, to the U.S. Supreme Court are consistent with this functionalist perspective. The nation's demographic changes have also created burgeoning purchasing power for diverse communities. The combined buying power of African-Americans, Asians-Americans, Hispanics-Americans, and Native Americans, is expected to rise by \$1 trillion from 2010 to 2015, which will account for 26% of the nation's buying power.<sup>47</sup>

This purchasing power has had a major impact on many Fortune 500 companies. Hispanics alone now account for nearly 20% of Toyota's U.S. sales.<sup>48</sup> The labor pool for legal talent also has changed. Since 1980, more than half of all law school graduates have been women.<sup>49</sup> During the same period, the number of minority law school graduates doubled to 20%.<sup>50</sup> Thus, firms that recruit solely through the "old boys' network" ultimately may lose out on many talented lawyers.

At many large corporations that employ Corporate Firms, it may be a person of color or a woman deciding who to use as outside counsel. Today, 17% of all general counsel in Fortune 500 companies are women<sup>51</sup> and 7.6% are minorities<sup>52</sup>. The top brass of the Fortune 500 is more diverse. More than 90% of the corporate boards in

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<sup>47</sup> Press Release, Sam Fahmy, Despite Recession, Hispanic and Asian Buying Power Expected to Surge in U.S., According to Annual UGA Selig Center Multicultural Economy Study, Univ. of Ga. (Nov. 4, 2010), available at <http://www.terry.uga.edu/news/releases/2010/minority-buying-power-report.html>.

<sup>48</sup> *Asian Brands Dominate Preference Among Hispanic Buyers in the U.S., According to Polk*, POLK (Dec. 15, 2010), [https://www.polk.com/company/news/asian\\_brands\\_dominant\\_preference\\_among\\_hispanic\\_buyers\\_in\\_the\\_u.s.\\_accordin](https://www.polk.com/company/news/asian_brands_dominant_preference_among_hispanic_buyers_in_the_u.s._accordin).

<sup>49</sup> Ginsburg, *supra* note 33, at 26.

<sup>50</sup> *Id.*

<sup>51</sup> Dorian Denburg, *Women General Counsel and In House Women Lawyers Focused on Growth*, NAT'L LAW REV. (Oct. 21, 2010), <http://www.natlawreview.com/article/women-general-counsel-and-house-women-lawyers-focused-growth>.

<sup>52</sup> MINORITY CORP. COUNSEL ASS'N, MCCA 2007 SURVEY OF FORTUNE 500 MINORITY GENERAL COUNSEL, <http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=1581> (last visited May 9, 2011).

the Fortune 500 have at least one female director.<sup>53</sup> Minority CEOs are also increasing in number and influence. Their ranks now include Ken Chenault at American Express Company,<sup>54</sup> Dick Parsons at Citigroup, Inc.,<sup>55</sup> and Andrea Jung at Avon Products, Inc.<sup>56</sup> Additionally, many more minorities are employed at lower-executive levels by corporate clients, including a large number of key influencers that serve as chief diversity officers, procurement officers, and supplier diversity officers. Among emerging market companies in the United States, some of the fastest growing businesses are minority-owned and women-owned companies.<sup>57</sup> Many of these companies can and do, in fact, retain Corporate Firms for legal representation. These changes are mirrored in the public sector, where women- and minority-owned businesses are gaining greater access to business opportunities at many levels of government.<sup>58</sup> It is also apparent that juries, judges, and policymakers are of increasingly diverse backgrounds. In short, the demographic changes in America have created an alternate network of decision-makers that wields considerable economic power and influence. This trend is expected to continue for the foreseeable future.

Despite the above trends, however, some commentators have questioned whether there is a real nexus between diversity and an organization's economic performance.<sup>59</sup> They cite studies suggesting that diversity diminishes group cohesiveness.<sup>60</sup> Until recently, there was little systematic research on the impact of diversity on business financial success. Drawing on a National Organizations Survey from 1996 to 1997, however, a major 2009 study by Cedric Herring at the

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<sup>53</sup> Michael Connor, *Women Lack Numbers and Influence on Corporate Boards*, BUSINESS ETHICS (Mar. 19, 2010), <http://business-ethics.com/2010/03/19/0932-women-lack-numbers-and-influence-on-corporate-boards>.

<sup>54</sup> *Kenneth L. Chenault Profile*, FORBES, <http://people.forbes.com/profile/kenneth-i-chenault/4704> (last visited Mar. 18, 2011).

<sup>55</sup> *Richard D. Parsons Profile*, FORBES, <http://people.forbes.com/profile/richard-d-parsons/19731> (last visited Mar. 18, 2011).

<sup>56</sup> *Andrea Jung Profile*, FORBES, <http://people.forbes.com/profile/andrea-jung/6598> (last visited Mar. 18, 2011).

<sup>57</sup> See *Minority and Woman-Owned Firms*, NAT'L OPINION RESEARCH CTR., <http://www.norc.uchicago.edu/DataEnclave/Research+Topics/Minority+and+Woman-Owned+Firms/> (last visited Mar. 22, 2011) ("The majority of U.S. businesses are small businesses, and minority and women-owned firms are two of the fastest growing sectors of the small business community.").

<sup>58</sup> *Obama Administration Increases Contract Opportunities for Minority Businesses*, NETWORK J., <http://www.tnj.com/obama-administration-increases-contract-opportunities-minority-businesses> (last visited Jun. 6, 2011).

<sup>59</sup> Herring, *supra* note 13, at 208.

<sup>60</sup> *Id.*

University of Illinois at Chicago concluded that both racial and gender diversity are associated with increased sales revenue, more customers, greater market share, and higher relative profits within corporations.<sup>61</sup> Thus, “[d]iversity may be valuable even if changes in an organization’s composition makes incumbent members uncomfortable.”<sup>62</sup> Within the proper context, therefore, “diversity provides a competitive advantage through social complexity at the firm level.”<sup>63</sup> The “Call to Action” and similar initiatives suggest that this competitive advantage may extend to Corporate Firms doing business with corporate clients demanding greater workplace diversity from prime suppliers. Even if the diversity at one Corporate Firm does not result in incremental business, it can serve as an important factor to ensure that existing business is not lost to more diverse competitors.

### C. Impacts of the Great Recession

A downturn in the economy often prompts organizations to reevaluate their business environments. Organizations analyze processes, personnel issues, and initiatives and then make adjustments as necessary to suit the business climate. The Great Recession has caused Corporate Firms to lay off a large number of associates, de-equitize partners, and create a “lost generation” of law school graduates. For the first time, many industry watchers and leaders are seriously questioning whether the leveraged Corporate Firm business model is sustainable in the long run.<sup>64</sup> General counsel continue to push for a greater value proposition that includes both increased diversity and better efficiency.<sup>65</sup>

Aside from profitability, the disparate impact of the Great Recession on diverse attorneys has raised serious questions about the genuineness of Corporate Firm commitment to diversity and inclusion. Specifically, corporate clients and advocates wonder whether Corporate Firms view diversity initiatives more as luxuries subject to outside factors that significantly threaten law firm earnings.<sup>66</sup> The most recent ABA report, *Diversity in the Legal Profession: The Next Steps*, issued in 2010 by the ABA’s Presidential Diversity Initiative, reached a troub-

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 209.

<sup>63</sup> *Id.* at 220.

<sup>64</sup> Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 751–52 (2010); Dan Slater, *At Law Firms, Reconsidering the Model for Associates’ Pay*, N.Y. TIMES, Apr. 1, 2010, at SPG10.

<sup>65</sup> Press Release, Ass’n of Corp. Couns., *supra* note 44.

<sup>66</sup> Francis, *supra* note 3.

ling conclusion consistent with the view that the recession was (i) “drying up monies for diversity initiatives” at law firms and (ii) “creating downsizing and cutbacks that . . . disproportionately and negatively affect lawyer diversity—thereby reversing the gains of the past decades.”<sup>67</sup> Although in 2009 the percentage decrease in minority attorneys was fairly small in absolute terms, it signals a deeper problem—the revolving door—inherent in the business model now utilized by many Corporate Firms.

Unlike *Visible Invisibility*, the report on women of color at law firms presented by the ABA’s 2006 Commission on Women in the Profession, which addressed some of the Corporate Firm structural obstacles to women,<sup>68</sup> the 2010 report fails to analyze the underlying causes of these disparities. Instead, it discusses past failed efforts and provides a litany of new suggestions for improving diversity outcomes directed at Corporate Firms, corporate law departments, law schools, government, judiciary, and bar associations<sup>69</sup> but fails to provide detailed suggestions for implementation of these ideas. With regard to Corporate Firms in particular, the recommendations focus on diversity program planning, culture modification, assessment, accountability, mentoring, hiring, training, retention, and advancement.<sup>70</sup> But the report does not provide any meaningful guidance on how to actually modify or enhance the Corporate Firm business model to deliver services that meet client needs for diversity. Without a clear appreciation of the structural constraints now inherent in the Corporate Firm business model, diversity initiatives may be doomed to failure in the long run.

If Corporate Firms are going to continue to make progress on diversity, they need to pay more attention to structural obstacles in the business model and the model’s impact on retention issues, which requires a greater understanding of the informal management methods used by firms in the ordinary course of business. Diverse lawyers leave their firms for many reasons, but too often the reason is that they are not meeting billable requirements because their workflow diminishes after they are no longer viewed as partnership

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<sup>67</sup> A.B.A. PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 10 (2010), *available at* <http://www.wsba.org/abadiversityinthelegalprofession.pdf>.

<sup>68</sup> JANET E. GANS EPNER, A.B.A. COMM’N ON WOMEN IN THE PROF., FROM VISIBLE INVISIBILITY TO VISIBLY SUCCESSFUL: SUCCESS STRATEGIES FOR LAW FIRMS AND WOMEN OF COLOR IN LAW FIRMS 26 (2006).

<sup>69</sup> ABA PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY, *supra* note 67, at 15–31.

<sup>70</sup> *Id.* at 21–24.

material. Thus, the challenge is to keep more diverse lawyers at Corporate Firms by enhancing key business processes to increase firm reputation for both excellence and efficiency.

## PART II

### A. *Reputation Drives Performance*

Research suggests that Corporate Firms, as professional service firms, represent a unique type of organization because they rely on distinct input—namely, expertise provided by highly trained professionals—to produce complex and customized solutions for clients.<sup>71</sup> Because of the high degree of specialized knowledge required to produce these outputs, critical dependencies exist that influence strategic and organizational choices.<sup>72</sup> The significant degree of information asymmetry existing between Corporate Firms and their clients results in clients' particular dependence on Corporate Firms.<sup>73</sup> This dependence by clients makes the reputation of a Corporate Firm a critical influencer on performance.<sup>74</sup> Firms that generate superior reputations through positive media reports and word-of-mouth gain substantial brand equity. Thus, the firm considers its name, as a symbol of its reputation, among its most valuable assets.<sup>75</sup> This brand equity serves to attract the best professionals and clients to the firm, which in turn becomes an iterative process.

In his study titled "Reputation and Performance in Large Law Firms," Michael Smets addresses the importance of firm reputation and its financial impacts:

Reputation is a [signaling] device to clients and other stakeholders about a firm's products, strategies and employees' quality compared to its competitors. Firms with strong reputations obtain several benefits that either reduce the costs of attracting or keeping customers or can influence their price sensitivity. Because positive reputations signal to customers appropriate mes-

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<sup>71</sup> Michael Smets, *Reputation and Performance in Large Law Firms 3* (2008) (unpublished manuscript), available at <http://www.legalservicesdigest.com/S25ReputationPerformance.pdf>.

<sup>72</sup> Royston Greenwood et al., *Reputation, Diversification, & Organizational Explanations of Performance in Professional Service Firms*, 16 *ORG. SCI.* 661, 661 (2005).

<sup>73</sup> Greenwood et al., *supra* note 72, at 661; see also Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 *MD. L. REV.* 869, 889, 900–02 (1990).

<sup>74</sup> Greenwood et al., *supra* note 72, at 661.

<sup>75</sup> Steven Tadelis, *Firm Reputation with Hidden Information*, 21 *ECON. THEORY* 635, 635 (2003).

sages about the quality of a firm and its products, those firms with strong reputations have to spend less on capturing customers than others and are more likely to be able to hold on to those customers to obtain repeated sales. In addition, reputation allows firms to charge a premium price for their products, thereby generating higher profits and enabling them to attract the best people. Reputation is in effect a sorting mechanism to stratify firms into status based groups. Those with high status obtain economic benefits, which in turn reinforce their reputation.<sup>76</sup>

Absent clear indicators of the difference in the quality of professional services, reputation serves as a proxy or “social proofs of competence” and as a means by which clients and their in-house counsel sort Corporate Firms.<sup>77</sup> Simply put, “if reputation is an important source of competitive advantage for professional service firms, it seems that it is a resource which only a limited number enjoy.”<sup>78</sup> Reputation helps firms attract the best talent, reduces marketing costs because clients seek elite firms, and allows firms to leverage their brand equity in the form of premium fees.<sup>79</sup> Reputation is particularly important in sourcing “high margin/low volume” work that is highly profitable to firms.<sup>80</sup> Smets further clarifies that, because Corporate Firms are best understood as a collection of practices, reputation can vary by practice group.<sup>81</sup> Thus, a Corporate Firm may enjoy a greater reputation in one practice area than in another.<sup>82</sup>

Because of the importance of reputation, professional service firms must always remain sensitive to client demand for diversity and refrain from any conduct that can adversely impact brand equity. Unsupported claims concerning a firm’s commitment to diversity can result in credibility gaps that impact financial performance in the long term. Most recently, the Colorado Supreme Court publicly censured Willie Shepherd, Jr., co-founder of Denver firm Kamlet Shepherd & Reichert, LLP, for misrepresenting the firm’s diversity numbers to win legal work from DuPont.<sup>83</sup> According to court documents, Mr. Shepherd made false statements to an in-house member of DuPont’s

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<sup>76</sup> Smets, *supra* note 71, at 4 (internal citations omitted).

<sup>77</sup> *Id.* at 2, 5.

<sup>78</sup> *Id.* at 25.

<sup>79</sup> Greenwood et al., *supra* note 72, at 663.

<sup>80</sup> Smets, *supra* note 71, at 25.

<sup>81</sup> *Id.* at 7.

<sup>82</sup> *Id.*

<sup>83</sup> Renee McGaw, *Denver Lawyer Shepard Sanctioned on Diversity Claim*, DENV. BUS. J., Mar. 29, 2010, available at <http://www.bizjournals.com/denver/stories/2010/03/29/daily11.html>.



legal department about minority ownership so that his law firm would qualify for the company's Diverse Legal Supplier Program.<sup>84</sup> The DuPont program was designed to give some of the company's legal work to firms where women and minorities own at least 50% of the equity.<sup>85</sup> Mr. Shepherd represented that his firm met that standard, when in fact women and minority lawyers owned only 30% of the firm's equity.<sup>86</sup>

DuPont's Diverse Legal Supplier Program is part of a much wider and more systemic effort by organizations like the LCLD, which includes the general counsel from major corporations such as Prudential Financial, Inc. ("Prudential Financial"), and Wal-Mart.<sup>87</sup> These leaders are committed to shifting legal work away from law firms that generate credibility gaps by merely paying lip service to diversity in favor of those that are genuinely committed to diversity as evidenced by associate and partner demographics.<sup>88</sup> The Fortune 500 is not alone in these efforts. Federal and state agencies such as the Federal Deposit Insurance Corporation and the Dormitory Authority for the State of New York have also launched major initiatives to level the playing field for diverse attorneys in the profession.<sup>89</sup>

The potential impact of diversity on a firm's reputation is likely to increase as a result of the increased use of RFPs by general counsel in procuring legal services. Most RFPs inquire about "the number of women and visible minorities and their seniority levels within the firm."<sup>90</sup> The RFPs also ask about the role that diverse attorneys will play in completing legal work.<sup>91</sup> To further ensure accountability, clients also increasingly require periodic matter reporting from Corporate Firms concerning the breakdown of hours worked on their

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See *About Us: Our Council Members*, LEADERSHIP COUNCIL ON LEGAL DIVERSITY, [http://www.lclldnet.org/about\\_us\\_council\\_members.html](http://www.lclldnet.org/about_us_council_members.html) (last visited Mar. 20, 2011).

<sup>88</sup> See *Membership: Commitment Statement*, LEADERSHIP COUNCIL ON LEGAL DIVERSITY, [http://www.lclldnet.org/membership\\_commitment\\_statement.html](http://www.lclldnet.org/membership_commitment_statement.html) (last visited Mar. 20, 2011).

<sup>89</sup> See MWBE TASK FORCE, N.Y. DORMITORY AUTHORITY, RECOMMENDATIONS REGARDING BEST PRACTICES IN PROCUREMENTS FOR LEGAL SERVICES ii–iii (2009), available at [http://www.dasny.org/finance/mwbe\\_taskforce/legalservicesrecommendations.pdf](http://www.dasny.org/finance/mwbe_taskforce/legalservicesrecommendations.pdf); *Legal Division Honors Program*, FED. DEPOSIT INS. CORP., <http://www.fdic.gov/about/legalhonors/index.html> (last visited May 9, 2011).

<sup>90</sup> Paul Singh & Ernest McNee, *Diversity and RFPs*, BLAKES (June 9, 2009), [http://www.blakes.com/english/view\\_disc.asp?ID=3191](http://www.blakes.com/english/view_disc.asp?ID=3191).

<sup>91</sup> *Id.*

files by various demographic groups, and some companies use computer programs to track such information.<sup>92</sup> In response, Corporate Firms track, collect, and report demographic information related to their legal personnel to organizations like NALP and publications like *The American Lawyer*.<sup>93</sup> Many firms also “publish extensive information regarding equity and diversity on their websites, as a part of their marketing and recruitment initiatives.”<sup>94</sup>

The growth of RFPs in legal procurement magnifies the potential adverse impact of retention disparities for diverse attorneys. Thus, even when specific demographic breakdowns may not be readily available, a Corporate Firm should be wary to respond “Not Applicable” or “Not Available” to RFP diversity questions, as such response can significantly reduce its chances of being selected as counsel for that client.<sup>95</sup> With all else being equal among firms, diversity data serves to differentiate counsel for important matters. The existence of long-term disparities between diversity claims and performance will likely have an adverse impact on reputation. Thus, it is critical that firms respond to these questions in a meaningful and forthright manner.

Today, diversity data is largely self-reported. As a result, some firms may be tempted to overstate their numbers. While this gamesmanship may provide short-term advantage, Kamlet Sheperd & Reichert, LLP’s experience with DuPont illustrates that the reputational damage resulting from such misrepresentations can adversely impact long-term financial performance and greatly outweigh any short-term gain. One general counsel put it more bluntly: “[I]f your numbers don’t add up, you’re history.”<sup>96</sup> Companies have already admitted to firing law firms because they did not approve of the racial and gender compositions of the firms, and other law firms are reportedly teetering on the firing block for the same reason.<sup>97</sup> The absence of un-

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<sup>92</sup> See Thomas Adcock, *Firms Agree to Give Clients Diversity Data on Lawyers*, N.Y. L.J., May 13, 2005, available at <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=900005428974>; Nathan Koppel, *Shell’s Reward for Diversity: Work*, AM. LAW., Jun. 28, 2004, available at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=900005410396>.

<sup>93</sup> See generally *NALP Directory of Legal Employers*, NAT’L ASS’N FOR L. PLACEMENT, <http://www.nalpdirectory.com> (last visited Mar. 20, 2011); *The Diversity Scorecard 2010*, *supra* note 41.

<sup>94</sup> Singh, *supra* note 90.

<sup>95</sup> *Id.*

<sup>96</sup> See Adcock, *supra* note 92.

<sup>97</sup> See Kris Hudson, *Wal-Mart Presses Suppliers to Enhance Their Diversity*, WALL ST. J., Feb. 23, 2007, at A12 (“Wal-Mart has fired three outside [law] firms and reduced the workloads of two others for failing to show progress on diversity matters.”); Kellie

iformity in RFPs suggests the need for bar associations to promulgate guidelines for the collection of diversity data via RFPs.

Aside from the reputational impact of a revolving door, retention disparities for diverse attorneys also impact the financial performance of Corporate Firms via the loss of human capital—a firm’s most important resource.<sup>98</sup> The ability of Corporate Firms to develop and retain talented diverse attorneys can itself result in a competitive advantage. Generally, the high degree of mobility among the human capital at Corporate Firms makes them dependent on their professional workforce.<sup>99</sup> The loss of senior attorneys, especially those of diverse backgrounds, is costly to Corporate Firms in several ways. First, it diminishes the social capital that exists between attorneys and clients demanding diversification, which can sever relationships with clients.<sup>100</sup> Unlike other forms of business, Corporate Firms are prohibited by ethical rules from entering into non-competition agreements with lawyers to avoid clients following those attorneys who leave the firm.<sup>101</sup> Second, the loss of more senior diverse attorneys adversely impacts the firm’s reservoir of intellectual, multicultural, and social capital, thereby hindering the firm’s ability to tap alternate decision-makers’ networks. Lastly, the inability of Corporate Firms to maintain a diversified talent pool of more senior lawyers adversely impacts the firm’s ability to grow its partner ranks and to respond creatively to the complex problems posed by an increasingly global economy. In a recent survey of more than 1,500 chief executive officers worldwide, the CEOs singled out “creativity” as the single most important quality required to deal with the greater complexity that 79% of the CEOs expect to face in the future business climate.<sup>102</sup>

In order to avoid competitive disadvantage and ensure long-term financial performance, Corporate Firms need to manage their busi-

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Schmitt, *A Little Diversity Speech Goes a Very Long Way*, RECORDER (S.F.), Dec. 26, 2006, at 1, available at <http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1166782006352> (reporting that McKesson Corp. fired the law firm Gibson Dunn because it was unhappy with the racial composition of the firm); Koppel, *supra* note 92 (reporting that “at least one [law] firm that had worked for Shell in the past . . . was bounced simply because it did not have the right stuff on diversity.”).

<sup>98</sup> Greenwood et al., *supra* note 72, at 665.

<sup>99</sup> *Id.* at 661.

<sup>100</sup> *Id.*

<sup>101</sup> See MODEL RULES OF PROF’L CONDUCT R. 5.6 (2004) (“A lawyer shall not participate in offering or making: (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship.”).

<sup>102</sup> INT’L BUSINESS MACHINES, CAPITALIZING ON COMPLEXITY: INSIGHTS FROM THE GLOBAL CHIEF EXECUTIVE OFFICER STUDY 8, 18 (2010).

ness processes to eliminate problems underlying the disparate attrition rate for diverse attorneys. Commentators, practitioners, and the bar have started to focus on certain aspects of the business processes of Corporate Firms as the cause of the problem. In a seminal paper published in 1996, Professors David B. Wilkins and G. Mitu Gulati identified several reasons why Corporate Firms have failed to achieve sustainable diversity: (i) focusing too much attention on recruitment instead of retention; (ii) relying on an improper structure for critical business processes; (iii) using a “one size fits all” approach to diversity; (iv) adopting initiatives purely for short-term economic reasons and without any appreciation of the long-term benefits; and (v) opting to focus on mission statements and other superficial indicia of diversity without making organizational and structural changes.<sup>103</sup> We next address the unique process constraints of the business model utilized by Corporate Firms and suggest some specific improvements that can help end the revolving door.

*B. The Business of the Law*

Corporate Firms utilize a unique business approach developed more than a century ago by the law firm of Cravath, Swaine & Moore LLP, called the “Cravath Model.”<sup>104</sup> This distinctive model has served the industry well for over a century in providing customized, knowledge-based solutions to clients. In the Cravath Model, Corporate Firms adopt a variant of the partnership format. Ownership is vested in a decentralized group of professional owners (“partners”) dispersed among practice groups who assume responsibility for governance and share profits.<sup>105</sup> The ownership of Corporate Firms is dictated by law and by ethical rules governing the profession and is credited with high commitment and productivity.<sup>106</sup> Because of its success, the Cravath Model serves as the de facto standard for the practice of law throughout the globe.<sup>107</sup>

Under the Cravath Model, hours worked, billable rates, and partner-to-associate leverage drive profitability.<sup>108</sup> To maximize billable hours and profitability, Corporate Firms hire more lawyers than

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<sup>103</sup> David B. Wilkins & G. Mitu Gulati, *Why Are There so Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493, 499–500, 502–06, 546–82 (1996).

<sup>104</sup> See Wilkins, *supra* note 38, at 423.

<sup>105</sup> Greenwood et al., *supra* note 72, at 665.

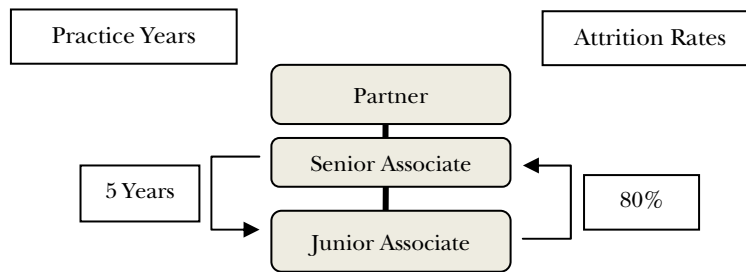
<sup>106</sup> *Id.*

<sup>107</sup> Wilkins, *supra* note 38, at 424.

<sup>108</sup> *Id.*

are expected to make partner. The firms compete for the most talented newly minted attorneys (“associates”)<sup>109</sup> out of law school, usually after a brief clerkship. These associates enter a probationary period (usually six to ten years) during which they are expected to sink or swim. At the end of this period, often analogized to a “Tournament,” Corporate Firms select the ones they perceive to be the best and offer them the opportunity to enter the partnership ranks.<sup>110</sup> Another way of looking at it is that by hiring a large pool of associates, Corporate Firms are investing in a portfolio of options to acquire the future value of their human capital after it has developed over a probationary period.<sup>111</sup> Corporate Firms make money by leveraging a large number of associates to a relatively small number of partners. Generally, the chances of achieving partner status in a Corporate Firm depend on the firm’s leverage structure of partners to associates, the associate’s individual performance relative to others during the probationary period, and the business needs of the firm at the time of partnership determination.

FIGURE 1: THE TOURNAMENT<sup>112</sup>



<sup>109</sup> A small percentage of new law school graduates are hired into contract or staff attorney positions. Wilkins, *supra* note 103, at 548–49. Staff attorneys are not eligible for partnership and tend to be in more permanent positions but with lower pay and benefits than associates. *Id.*

<sup>110</sup> See Wilkins, *supra* note 38, at 416–17, 423–24; David B. Wilkins, *Do Citizens Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 858–67 (1998). See generally David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding & Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998).

<sup>111</sup> Stanley B. Malos & Michael A. Campion, *An Options-Based Model of Career Mobility in Professional Service Firms*, 20 ACAD. OF MGMT. REV. 611, 612 (1995).

<sup>112</sup> See Kate Neville, *Why Associates Bail Out of Law Firm Life—& Why It Matters*, LEGAL TIMES, Nov. 14, 2007, available at <http://www.law.com/jsp/llf/PubArticleLLF.jsp?id=1194948247090> (noting that 80% of associates leave Corporate Firms within five years).

Corporate Firms promote only a small number of associates to partner using a lockstep system in which all associates from the same class are considered in the same year.<sup>113</sup> Thus, the “up-or-out” nature of the Cravath Model creates a high attrition rate for associates.<sup>114</sup> Those who are not selected usually are let go. As illustrated in Figure 1 above, the most recent NALP study on attrition found that almost 80% of all associates leave Corporate Firms within five years.<sup>115</sup> According to research, a full 32% leave by the end of year two and 62% are gone by the end of the fourth year.<sup>116</sup> As confirmed by *The American Lawyer*,<sup>117</sup> the 2000 ABA Study,<sup>118</sup> and the 2010 National Association of Women Lawyers Foundation report,<sup>119</sup> the attrition rate is significantly higher for diverse attorneys. Some of this attrition is caused by voluntary departures as some associates come to law firms for training, experience, prestige, or to pay off debt and never intend to participate in the partnership Tournament. For others, the departure is involuntary. Either way, Corporate Firms serve as significant training grounds for young attorneys who eventually become major figures in society, including judges, legislators, corporate executives, and government officials.<sup>120</sup>

Relational capital is essential to success under the Cravath Model.<sup>121</sup> Thus, associates, who by virtue of less favored pedigree or bad luck with initial assignments do not end up on a “training track,” may still work very hard and profitably on discovery, research, and other lower quality work assignments during the probationary period but never have a realistic chance of developing the skills required to eventually make partner.<sup>122</sup> Recent changes in law firm structure to

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<sup>113</sup> See KRIS SATKUNAS, REDWOOD THINK TANK, DEFINING SUCCESS—ASSOCIATE LIFECYCLE 3 (2009), available at [http://www.lexisnexis.com/redwood-analytics/pdf/Defining-Success\\_Associate-Lifecycle.pdf](http://www.lexisnexis.com/redwood-analytics/pdf/Defining-Success_Associate-Lifecycle.pdf).

<sup>114</sup> See Malos & Campion, *supra* note 111, at 611.

<sup>115</sup> Neville, *supra* note 112.

<sup>116</sup> SATKUNAS, *supra* note 113, at 3.

<sup>117</sup> BARKER, *supra* note 1.

<sup>118</sup> CHAMBLISS, *supra* note 9.

<sup>119</sup> See STEPHANIE A. SCHARF AND BARBARA M. FLOM, NAT'L ASS'N OF WOMEN LAWYERS (NAWL) & NAWL FOUND., REPORT ON THE FIFTH ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS (2010).

<sup>120</sup> David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1600 (2004).

<sup>121</sup> Wilkins, *supra* note 38, at 430.

<sup>122</sup> *Id.* at 424. See generally Wilkins & Gulati, *supra* note 110, for a detailed critique of the application of Tournament theory to the internal labor markets of large law firms.

add nuanced stratifications of lawyers to include non-equity partners, staff attorneys, and contract attorneys complicate the picture and could further diminish opportunities for diverse attorneys.<sup>123</sup> As confirmed by a University of Michigan study, success at Corporate Firms is not significantly correlated to law school grades or class rank, although these do help associates secure their first employment.<sup>124</sup> Assuming comparable innate ability and strong work ethic among associates, success is instead more a function of gaining access to meaningful work assignments from powerful partners, earning good evaluations, and receiving good mentoring and training opportunities.<sup>125</sup>

A benchmark study by the NALP Foundation confirms that “female and minority associates at Corporate Firms depart their law firm employers with greater frequency than males and non-minorities at almost every benchmark.”<sup>126</sup> All else being equal, the existence of retention disparities for diverse attorneys has led some to conclude that the Cravath Model does not produce the meritocracy claimed by some practitioners.<sup>127</sup> Further, research has found the very concept of “meritocracy” and the asserted notions of “ability” and “qualification” are socially constructed concepts reflecting the dominant culture.<sup>128</sup> This is not to say that associates do not perform differently and should not be evaluated accordingly. The critical issues in a socially constructed model are how best to allocate work opportunities, how to measure performance, and what value should be attached to specific measures to ensure fairness.<sup>129</sup>

Past diversity initiatives have focused on education and the elimination of perceived cultural bias through sensitivity training, community outreach, mentoring, recruitment, and marketing the

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<sup>123</sup> SCHARF & FLOM, *supra* note 119, at 6.

<sup>124</sup> See Richard Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 426, 496–97 (2000); Wilkins, *supra* note 38, at 426; see also David B. Wilkins, *Rollin' on the River: Race, Elite Schools, and the Equality Paradox*, 25 LAW & SOC. INQUIRY 527, 528 (2000).

<sup>125</sup> Wilkins, *supra* note 38, at 424.

<sup>126</sup> LAUREN STILLER RIKLEEN, ENDING THE GAUNTLET: REMOVING BARRIERS TO WOMEN'S SUCCESS IN THE LAW FIRM 174 (2006); see NAT'L ASS'N FOR LAW PLACEMENT FOUND., KEEPING THE KEEPERS II: MOBILITY & MANAGEMENT OF ASSOCIATES 47 tbl.18, 50 tbl.20 & tbl.21, 51 tbl.22 & tbl.23 (2003).

<sup>127</sup> See Wilkins, *supra* note 38, at 416–19.

<sup>128</sup> Craig Haney & Aida Hurtado, *The Jurisprudence of Race and Meritocracy: Standardized Testing & “Race-Neutral” Racism in the Workplace*, 18 LAW & HUM. BEHAV. 223, 239–40 (1994).

<sup>129</sup> *Id.* at 240.

firm's diversity initiative to existing and potential firm clients.<sup>130</sup> It has been common for firms to measure diversity progress in terms of well-drafted diversity statements and sponsorship of diversity luncheons, conferences, affinity groups, scholarships, and bar events.<sup>131</sup> While these activities are laudable, they have not focused on the business of law itself and therefore have not helped to lower attrition rates for diverse attorneys at Corporate Firms. As a result, the partner ranks of Corporate Firms have remained largely composed of white males.<sup>132</sup>

Commentators,<sup>133</sup> practitioners,<sup>134</sup> and the organized bar<sup>135</sup> now conclude that the Cravath Model itself contains organizational obstacles<sup>136</sup> that impact the ability of diverse attorneys to integrate into Corporate Firms.<sup>137</sup> The horizontal structure and informal management approach of Corporate Firms allow for greater subjectivity to exist, which can result in attrition disparities for diverse attorneys.<sup>138</sup> Obstacles may exist in the assignment, evaluation, and mentoring processes, and existing training programs may be inadequate to bridge the gap. It should be noted that some of these obstacles are not unique to Corporate Firms. Diverse attorneys in corporate legal departments, government, and academia have experienced some of these problems to varying degrees.<sup>139</sup> Our analysis, however, focuses purely on Corporate Firms.

### C. *Strategic Legal Management of Key Processes*

The market pressures on Corporate Firms have caused some commentators to predict the death of Corporate Firms as a viable model.<sup>140</sup> Corporate Firms, however, have proven to be remarkably resilient and adaptable. It seems inevitable, therefore, that progressive Corporate Firms will respond to the current crisis by innovating

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<sup>130</sup> Darden, *supra* note 40, at 111.

<sup>131</sup> *Id.*

<sup>132</sup> See N.Y.C. BAR, 2010 LAW FIRM DIVERSITY BENCHMARKING REPORT 18 (2010), available at <http://www.abcny.org/nycbar/images/stories/pdfs/diversity/2010report.pdf> (noting that in 2010, the number of women attorneys and minority attorneys at the partner level declined).

<sup>133</sup> See Wilkins & Gulati, *supra* note 122, at 1628–30.

<sup>134</sup> See RIKLEEN, *supra* note 126, at 14.

<sup>135</sup> See A.B.A. PRESIDENTIAL INITIATIVE COMM'N ON DIVERSITY, *supra* note 67.

<sup>136</sup> Darden, *supra* note 40, at 88–89; see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 479 (2001).

<sup>137</sup> RIKLEEN, *supra* note 126, at 15; Wilkins, *supra* note 38, at 416.

<sup>138</sup> See RIKLEEN, *supra* note 126, at 15; Wilkins, *supra* note 38, at 416.

<sup>139</sup> See RIKLEEN, *supra* note 126, at 15; Wilkins, *supra* note 38, at 416.

<sup>140</sup> Ribstein, *supra* note 64, at 759–71.



enhancements to further strengthen their management systems and service delivery processes toward a more “corporate” style of management.<sup>141</sup> As noted by Susan Blount, General Counsel for Prudential Financial, the changes likely to impact diversity in the industry will be “evolutionary and not revolutionary.”<sup>142</sup> Because of the unique aspects of professional service firms, Corporate Firms must be cautious in migrating corporate methods to a law firm environment. In law firms, professional norms rather than managerial hierarchies are more likely to facilitate trust, reputation, and financial performance.<sup>143</sup> Notwithstanding, strategic legal management (“SLM”) of key processes in the service delivery model likely will play an important role to ensure a more client-centric organization that satisfies client demand for both diversity and greater efficiency.

With the exception of *Quality Review*, Step 8, below, which is a process enhancement recommended by the authors, the key business processes of the typical Corporate Firm are as follows:

FIGURE 2: SERVICE DELIVERY WORKFLOW<sup>144</sup>

1. *Origination*: A partner originates a matter from a new or existing client.
2. *Initiation*: The partner initiates a conflicts check, and, assuming no issues exist, the new matter intake process is completed.
3. *Assignment*: The partner individually, or in collaboration with the staffing partner for the practice group, assembles a team of resources (other partners and associates) to work on the matter.
4. *Execution*: The production team performs legal analysis, research, and other services and tracks time.
5. *Production*: The production team produces outputs for the client in the form of opinions, written work product, counseling, negotiation, and other forms of advocacy.
6. *Reporting*: The firm generates billing and periodic reports to partners and clients.

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<sup>141</sup> Laura Empson, Evolution and Revolution in the Governance of Law Firms (Mar. 2010) (unpublished manuscript) (abstract at 1), *available at* <http://www.law.georgetown.edu/LegalProfession/documents/EmpsonABSTRACTsharable.pdf>.

<sup>142</sup> Susan Blount, General Counsel, Prudential Financial Inc., Remarks at the Third National People of Color Legal Scholarship Conference at Seton Hall University Law School: Panel on Ending the Revolving Door Syndrome, (Sept. 10, 2010).

<sup>143</sup> Joan E. Manley, *Negotiating Quality: Total Quality Management & the Complexities of Transforming Professional Organizations*, 15 Soc. F. 457, 458 (2000).

<sup>144</sup> The Service Delivery Workflow steps are used throughout the Article. Each step is referred to by its italicized title.

7. *Evaluation*: Partners complete annual evaluation forms to review the collective performance of an individual associate on tasks performed on multiple matters during the review period.
8. *Quality Review*: A quality review team randomly selects files on a periodic basis for in-depth qualitative review of work product, process, efficiency, outcomes, and other key variables.

The existing Service Delivery Workflow can be enhanced by the application of SLM practices. SLM is a process by which Corporate Firms set important goals and objectives with clients and then adjust business processes and strategies to achieve those desired outcomes.<sup>145</sup> SLM derives from the related concepts of Six Sigma<sup>146</sup> and total quality management (“TQM”),<sup>147</sup> which have pervaded corporations in the past few decades. Generally, TQM and Six Sigma entail “the creation of an organization system that fosters cooperation and learning for facilitating the implementation of process management practices, which, in turn, leads to continuous improvement of processes, and services, and to employee fulfillment, both of which are critical to customer satisfaction, and, ultimately, to firm survival.”<sup>148</sup>

Notably, the implementation of SLM best practices to improve outcomes in diversity is now possible at Corporate Firms due to organizational and technology shifts that have occurred over the past decade. As law firms have grown, there has been a movement away from the traditional model of informal decision-making to a more hierarchical system that includes full-time managers for mission-critical functions within the firm,<sup>149</sup> including chief operations officers, chief marketing officers, human resource directors, chief technology officers, and chief diversity officers. Firms also are leveraging technology and knowledge management for competitive advantage. While some firms have relied on the implementation of new technology systems for administrative tasks like billing, word processing, and research, the new frontier is to redesign the service delivery process itself to meet client demand. As clients place more demands on law firms for diversity, the pressure has mounted for tools and processes to manage these demands more effectively.

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<sup>145</sup> Stuart E. Rickerson, *Law Firm Profits Increase with Strategic Legal Management*, 68 DEF. COUNS. J. 228, 232 (2001).

<sup>146</sup> See MIKEL HARRY & RICHARD SCHROEDER, SIX SIGMA: THE BREAKTHROUGH MANAGEMENT STRATEGY REVOLUTIONIZING THE WORLD'S TOP CORPORATIONS (2005)..

<sup>147</sup> Manley, *supra* note 143, at 458.

<sup>148</sup> *Id.* at 460 (internal citation omitted).

<sup>149</sup> See LAURA EMPSON, MANAGING THE MODERN LAW FIRM: NEW CHALLENGES, NEW PERSPECTIVES 190 (2007); Robert L. Nelson, *Practice and Privilege: Social Change and the Structure of Large Law Firms*, 1981 AM. B. FOUND. RES. J. 95, 118–19, 129 (1981).

In applying SLM best practices to workplace diversity, the threshold issue is to define what it means for an associate to succeed at a Corporate Firm in today's economy.<sup>150</sup> Because associates come to law firms with different objectives, and because overall associate attrition rates can reach 90%,<sup>151</sup> success from the perspective of the associate or the Corporate Firm should not be defined simply as winning the Tournament and making partner. The Redwood Think Tank, an industry group associated with LexisNexis, has defined the measurement of success based on a combination of three key variables: "tenure, quality of work, and the next career move made by the associate."<sup>152</sup> First, with regard to tenure, they note that Corporate Firms incur a significant sunk cost when associates depart.<sup>153</sup> Thus, retaining associates (whether diverse or not) for a longer period to ensure the firm recovers its investment is a critical determinant of success for the firm. For the associate, remaining at a firm long enough to acquire important advocacy skills is imperative for professional development. Second, while quality of work is difficult to measure, firms must do a better job at removing subjectivity from the process used for *Evaluation* by basing reviews on actual work product. Associates who are underutilized often are perceived to have work quality issues and are more likely to speak negatively about their experiences with the firm.<sup>154</sup> Similarly, it is important that the process used for *Assignment* be fair and equitable to all attorneys. From the firm's perspective, the optimal allocation of human resources is of strategic importance to ensure both efficiency and excellent value for clients. To illustrate, it is not cost-effective to staff a matter with a partner billing at \$700 per hour when a junior associate billing at \$300 per hour can complete the work as efficiently. Third, the career path taken by a Corporate Firm alumnus is important since the reality is that most associates will not make partner. Under the original Cravath Model, Corporate Firms have traditionally helped associates secure new employment. An alumni network that is full of ex-associates who speak highly about their experiences at the Corporate Firm and who are willing to refer business to the Corporate Firm is an extremely valuable asset. From the viewpoint of associates, there is great value in developing a broad network of relationships that includes colleagues

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<sup>150</sup> SATKUNAS, *supra* note 113, at 1.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 2.

<sup>153</sup> *Id.* at 3.

<sup>154</sup> *Id.*

and partners from prior employers. In sum, it never makes sense for either Corporate Firms or associates to burn bridges.

As suggested by the Redwood Think Tank and other industry commentators, therefore, the key determinants of associate success or failure at a Corporate Firm are the *Assignment* and *Evaluation* processes.<sup>155</sup> Firms must do a better job at more accurately measuring these key functions in order to better manage retention disparities and outcomes for diverse attorneys and to ensure the *Production* of legal work in a cost-effective manner. Thus, we review these processes, potential obstacles that disadvantage diverse attorneys, and innovative enhancements to the service delivery process consistent with SLM best practices that can help eliminate retention disparities. We also discuss the value of adding a *Quality Review* process to ensure that actual *Production* quality, client and partner perception of that quality, and firm reputation are enhanced while leveling the playing field for diverse attorneys.

#### D. *Assignment*

In her insightful review of the Cravath Model, practitioner Lauren Stiller Rikleen discusses the realities of Corporate Firm life and identifies specific problems with the process for *Assignment* used at Corporate Firms.<sup>156</sup> In the Cravath Model, she writes, the “Coin of the Realm” is the billable hour.<sup>157</sup> The more billable hours a lawyer produces, the more valuable that person is to the firm.<sup>158</sup> In the 1980s, Corporate Firm billable hour expectations ranged from 1,600 to 1,700 hours per year.<sup>159</sup> By the early 1990s, billable hour requirements climbed to 2,000 hours or more.<sup>160</sup> Rikleen notes that some firms today budget associates at 2,500 or more billable hours per year.<sup>161</sup> A recent study by the Association of the Bar of the City of New York finds that “[b]illable hours not only reflect the actual time spent on a case; they have also become a benchmark for ascertaining commitment to the firm.”<sup>162</sup> According to Corporate Firm consultant David Maister, the work-assignment process is

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<sup>155</sup> See, e.g., *id.* at 2–4.

<sup>156</sup> See RIKLEEN, *supra* note 126, at 303–06.

<sup>157</sup> *Id.* at 53.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 54.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 57 (quoting Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession: A Report to the Committee on Women in the*

the single most important managerial activity in a professional service firm. . . .

Over time, the pattern of assignments given to professionals will profoundly influence their *professional development*, their worth to the firm and clients, and their *satisfaction* with the firm, and, as a result, their *motivation* and *productivity*.<sup>163</sup>

Given the central role of billable hours in Corporate Firm economics, work assignments are the critical determinant of associate life during the probationary period. The failure to secure increasingly complex and challenging assignments will doom an associate's potential to make partner<sup>164</sup> or otherwise have a positive experience that will enhance the firm's reputation among its alumni network.

### 1. The Assignment Process

Law firms employ a variety of formal and informal work-assignment systems, each with its own strengths and weaknesses. Following *Initiation*, the formal process for *Assignment* generally is as follows: (i) the new matter is set up for billing purposes, and a physical file is generated; (ii) the originating partner works with the designated practice group staffing partner to identify one or more associates to work on a matter team; and (iii) the associate is briefed on the nature of the matter, provided with a matter number, and given work assignment(s) to complete.

Ideally, the objective of the staffing partner during the process of *Assignment* is to match practice group associates with matter requirements based on the perceived skill sets required to generate quality work. Despite the existence of a formal assignment process, staffing partners at the practice group level, and even assignment committees, the work-assignment process at some Corporate Firms can be more informal and partner-centric.

In the informal assignment process, rainmaking partners select associates based on existing relationships. Rikleem notes that the impact of the informal process is that work is likely to be distributed in a more arbitrary and disorganized manner than suggested by the formal assignment process.<sup>165</sup> Consultant David Maister concurs, stating that "many firms take an unstructured, even haphazard, approach to

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*Profession, the Association of the Bar of the City of New York*, 64 *FORDHAM L. REV.* 291, 379 (1995)); see also Maryann Hedaa, *Attracting—and Keeping—the Best & Brightest*, *HILDEBRANT REP.*, Spring 2001, at 2–3.

<sup>163</sup> DAVID H. MAISTER, *MANAGING THE PROFESSIONAL SERVICE FIRM* 175 (1993).

<sup>164</sup> See Epstein et al., *supra* note 162, at 336.

<sup>165</sup> RIKLEEN, *supra* note 126, at 43.

staffing projects. There may be an assignment committee, but in the day-to-day press of events, it is often circumscribed. . . . Junior staff are assigned to whichever project appears most pressing—or to the senior partner who screams the loudest.”<sup>166</sup> Various studies confirm that the distribution of assignments at law firms is socially constructed.<sup>167</sup> One managing partner explained the informal assignment process at his firm in the following manner:

Because a lot of time a file will come into a lawyer and, say, if it comes into a senior employment lawyer, that lawyer might have two or three associates that he or she would work with and the file might tend to go in those directions. And while the firm might want to cross-pollinate those relations a little bit more, we are creatures of habit and we tend to go the force of least resistance.<sup>168</sup>

Corporate clients also drive informal work assignments. In-house counsel often develop “comfort zones” with the individual attorneys at Corporate Firms with whom they enjoy working. Thus, it is not uncommon for in-house lawyers to request specific attorneys to work on their matters. In many cases, the initial call comes to the associate, who then communicates the matter information to the partner responsible for the client relationship. Because Corporate Firms are very client-centric, they encourage these types of relational bonds, as they serve to enhance firm reputation and generate work. In short, at some Corporate Firms, there are both formal and informal assignment processes, which can make it more difficult to ensure a level playing field for diverse associates.

## 2. Obstacles to Equitable Work Assignments

Aside from informal assignments, some commentators have argued that, because rainmaking partners are predominantly white males, the potential also exists for subconscious bias and stereotyping to permeate the assignment process.<sup>169</sup> No one intends to purposefully discriminate against any group, but the result of unrecognized bias and stereotyping can be equally detrimental to diverse attorneys.<sup>170</sup> The manner in which many cases are assigned is the first step in the longer-term elimination process of the Tournament and results in unintended consequences. Critics maintain that the Cravath Model’s

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<sup>166</sup> MAISTER, *supra* note 163, at 156.

<sup>167</sup> See RIKLEEN, *supra* note 126, at 46 (quoting NANCY REICHMAN & JOYCE S. STERLING, GENDER PENALTIES REVISITED 43 (2004)).

<sup>168</sup> RIKLEEN, *supra* note 126, at 244–45.

<sup>169</sup> See, e.g., Wilkins & Gulati, *supra* note 103, at 582–83.

<sup>170</sup> SUSAN ESTRICH, SEX & POWER 9–10 (1st ed. 2000).

reliance on a socially constructed assignment process does not ensure that Corporate Firms provide diverse associates with equal opportunities to develop relationships with clients, making it difficult or impossible for them to demonstrate the business development potential required to make partner.<sup>171</sup>

To illustrate, Cleary Gottlieb Steen & Hamilton LLP (“Cleary”), a major firm based in New York City, actively recruited and hired more than thirty African-American associates from 1989 to 1996 but managed to retain none of them.<sup>172</sup> When surveyed about their experiences, the associates did not report overt racism at Cleary but mentioned a subtle yet pervasive tendency by almost exclusively white partners to favor those who looked similar to themselves.<sup>173</sup> This finding was confirmed by a Deloitte & Touche study on assignments to women within the firm, which found that fewer women were assigned high-profile, high-revenue assignments because male partners made certain negative assumptions about the type of work they wanted.<sup>174</sup> A similar study by the New York City Bar Association found that women attorneys perceived that they were more frequently assigned pro bono matters, resulting in reduced opportunities to network with potential clients.<sup>175</sup> Whether these perceptions are accurate or not, the existence of assignment disparities for diverse attorneys is troubling and suggests that business process enhancements are required to ensure all diverse attorneys have a fair opportunity to work on important matters during the early stages of their legal careers.

### 3. Assignment Process Enhancements

A Corporate Firm’s *Assignment* system is one key to building an “inclusive” law firm environment that attracts and retains promising attorneys early in their careers.<sup>176</sup> The goal of any work-assignment system is to ensure that all associates have an equal opportunity to obtain meaningful work within the firm environment. The cutting-edge approach is to integrate a firm’s work-assignment process with a me-

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<sup>171</sup> RIKLEEN, *supra* note 126, at 47.

<sup>172</sup> Garner Weng, *Racial Bias in Law Practice*, CAL. LAW., Jan. 2003, at 37, 38.

<sup>173</sup> *Id.*

<sup>174</sup> RIKLEEN, *supra* note 126, at 46.

<sup>175</sup> *Id.*; see Epstein et al., *supra* note 162, at 337.

<sup>176</sup> Press Release, Jenner & Block LLP, Wager: Assignment System Is Key to Creating Inclusive Environment (Mar. 20, 2006), [http://www.jenner.com/news/news\\_item.asp?print=true&id=000013386224](http://www.jenner.com/news/news_item.asp?print=true&id=000013386224) [hereinafter Press Release, Jenner & Block] (summarizing the remarks of Charlotte L. Wager at the National Association for Legal Placement Diversity Summit Panel: Assignment is Key to Creating Inclusive Environment).

rit- or competency-based model for developing, advancing, and promoting associates. We discuss three possible enhancements to the process: (i) the free-market system, (ii) the automated system with partial randomization, and (iii) the goals-based system.

a. The Free-Market System

The law firm of Jenner & Block LLP has utilized a regulated “free-market” assignment system, wherein a partner could ask any associate to work on a particular case.<sup>177</sup> Alternatively, associates could approach any partner directly to seek out the work experiences they wanted.<sup>178</sup> In implementing the system, Jenner & Block LLP helped associates and partners use the free-market system to their advantage.<sup>179</sup> Thus, associates were encouraged to network with partners internally.<sup>180</sup> The firm also endeavored to ensure that all associates had access to the firm’s institutional clients and a broad section of partners within the relevant practice groups.<sup>181</sup> After the first year, the firm also monitored associates’ development and implemented mechanisms to ensure that associates were doing level-appropriate work at each stage of their careers.<sup>182</sup>

The free-market system concedes that the assignment process is socially constructed and promotes relationships among associates and partners. In essence, it eliminates formal assignments in favor of an informal process. Although novel in approach, the free-market assignment system suffers from many of the same limitations of existing assignment processes. It does not attempt to ensure equitable distribution of assignments during the initial years of associate life at Corporate Firms. Also, the system provides firm management with less control over a mission critical business process. In the final analysis, it is uncertain whether the free-market system can eliminate the differential attrition rates for diverse attorneys at Corporate Firms.

b. The Automated System with Partial Randomization

One SLM approach to the constraints presented by informal assignments might be to model judicial assignments and introduce into the process some element of automated assignment utilizing technology. Although the profession has not promulgated assignment

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Press Release, Jenner & Block LLP, *supra* note 176.



standards for attorneys, the process of assigning cases to judges is random in many jurisdictions.<sup>183</sup> This form of randomization takes place in courts across the nation and some administrative agencies.<sup>184</sup> The local rules for the Southern District of New York expressly state that randomization is a component in case assignment: “All cases shall be randomly assigned by the clerk or his designee in public view in one of the clerk’s offices in such a manner that each active judge shall receive as nearly as possible the same number of cases.”<sup>185</sup> In addition, parties and their attorneys may ask to be present during case selection.<sup>186</sup> The Southern District’s commitment to random-case assignment is substantial, and the court will not entertain formal objections from litigants based on the local rule. Of course, no system is purely random. Many state-court systems permit parties to exercise peremptory strikes on judges initially assigned.<sup>187</sup> Judges also can recuse themselves.<sup>188</sup> And cases might be reassigned when related parties, issues, or other circumstances warrant assignment.

Despite the perceived merits of purely random assignment, Corporate Firms are not likely to adopt such a model as it could adversely impact their perceived reputation for quality. Critics would note that a purely random process would not ensure that the best-qualified person was assigned to a matter. To reverse this perception, any automated assignment process would need to take various qualitative and quantitative factors into account before a Corporate Firm could realistically deploy such a process. First, the system would need to consider if the associate is a practice group member with the relevant expertise. Second, depending on the nature of the matter, the associate would need to have the requisite number of years in practice to address the matter’s complexity. A million-dollar contract litigation might be appropriate for a seventh-year associate in the business and commercial litigation group but not for a second-year associate. Third, the system would need to consider the availability of the associates in a group based on objective factors such as the recent number of hours billed, the number of active matters assigned, and

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<sup>183</sup> See Adam M. Samaha, *Randomization and Adjudication*, 51 WM. & MARY L. REV. 1, 4–5 (2009).

<sup>184</sup> *Id.* at 47.

<sup>185</sup> *Id.* at 49 (quoting S.D.N.Y. & E.D.N.Y. R. 50.2(b) (2009)).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 50 (citing Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 292 (1996) (stating that nineteen states allow such peremptory strikes)).

<sup>188</sup> Samaha, *supra* note 183, at 50.

planned vacation schedules. Assuming that a pool of associates met all criteria for availability, however, the system could randomly select from the pool and automatically assign one or more associates to a matter. Once the associate is recommended for assignment, the staffing partner for the relevant practice group would be notified of the assignment. As with judges, the originating partner and staffing partner would have the right to peremptorily strike any associate but would be required to note reasons for the strike. Also, an associate could recuse himself from any assignment. The system would track both strikes and recusals and the reasons for the same.

The main advantage of an automated assignment process is that it would optimize the use of resources while allowing skills-based assignment to occur in an objective manner. By tracking resource allocation, strikes, recusals, and other data, the system also would allow the managing partner and executive committee of a Corporate Firm to enhance its reputation by ensuring a level playing field in the *Assignment* process for all attorneys. The system also would help the firm implement SLM practices by diversifying the investment in associate development, improving quality, and proactively managing problems while reducing the administrative burden of attorney selection on staffing and originating partners. The more efficient utilization of diverse attorneys likely would result in greater retention and more positive references within the alumni network.

c. The Goals-Based System

Another means of implementing SLM while enhancing the *Assignment* system is for Corporate Firms to establish a goals-based system (“GBS”) for diverse attorney utilization. GBS is now possible without creating any incremental burden to practice group leaders or staffing partners, as many Corporate Firms have retained chief diversity officers (CDO).

As part of the new matter staffing process, the CDO would collaborate with the client’s in-house counsel and diversity managers to establish client-driven GBS objectives. The CDO would interface with the practice group leader and/or staffing partner at the onset of the matter to communicate GBS objectives and ensure that, where feasible, the new matter is staffed so as to achieve the client’s utilization objectives. While the matter is in process, the CDO would monitor diversity-utilization data during the *Reporting* phase using billable time entries and generating periodic GBS reports to the practice group leader and client concerning budget versus actual utilization. The CDO would manage the GBS process to minimize disruption to the

working team and flag potential disparities to practice group leaders in order to correct them in a timely and efficient manner.

The advantage of GBS as part of SLM is that it is socially constructed and enhances the existing *Assignment* process without creating any incremental management burden on already busy practitioners. Many Corporate Firm clients already successfully use this method to manage supplier diversity goals. To illustrate, corporate America now routinely commits to procure a certain percent of goods and services from minority and women business enterprises (M/WBEs) through supplier diversity programs.<sup>189</sup> It is common for RFPs to require first-tier suppliers to disclose the percent of M/WBE utilization in their proposals.<sup>190</sup> It is also common for in-house counsel to collaborate with Corporate Firms in setting budgets and allocating specific attorneys to work on company matters. With the proliferation of RFP usage in the legal industry, one can expect the extension of GBS from supplier diversity goals to workplace diversity goals.

To succeed, GBS requires that the CDO work as an extended member of the matter team, focusing on meeting the client's expectations relative to diversity. The practice group leader would remain focused on ensuring a successful outcome from the representation. The only potential downside of the method is that practice group leaders may be hesitant to collaborate with the CDO. To succeed, therefore, the CDO must be effective at communicating the business case and managing GBS to achieve the client's objectives while minimizing interference with the day-to-day work of the practice group. Notably, Corporate Firms could utilize GBS in combination with an automated system. The GBS objective set by clients simply would act as an additional factor considered by the system in allocating resources on a partially random basis.

#### d. Toward Standards for Associate Assignment

To date, the organized bar has not promulgated standards or best practices for the Corporate Firm assignment process. In its 2010

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<sup>189</sup> See Michael J. Lubben, *Lending to Minority and Women Owned Businesses*, N.J. LAW., Oct. 2010, at 41, 44; see, e.g., COCA-COLA CO., 2008/2009 SUSTAINABILITY REVIEW 37 (2009), available at [http://www.thecoca-colacompany.com/citizenship/pdf/2008-2009\\_sustainability\\_review.pdf](http://www.thecoca-colacompany.com/citizenship/pdf/2008-2009_sustainability_review.pdf) (describing the company's efforts to support M/WBEs through its supplier relationship).

<sup>190</sup> See, e.g., *Capital One Diversity: Frequently Asked Questions*, CAPITAL ONE, <http://www.capitalone.com/about/supplier-diversity/faqs/> (last visited Mar. 20, 2011) (discussing the company's Supplier Diversity Program, which permits registration of M/WBEs for the opportunity to be included in the RFP process).

study, *Diversity in the Legal Profession: The Next Steps*, the ABA simply recommends that Corporate Firms “[c]reate programs where attorneys from underrepresented groups receive access to high-profile client assignments.”<sup>191</sup> But one group of women lawyers from Utah has gone further and suggested specific practices to overcome retention disparities, including: (i) communicating with associates as to whether they think they receive enough projects and quality projects, (ii) reviewing billable hours to determine who needs more work and apportioning assignments accordingly, (iii) developing policies for case assignment and distribution, and (iv) encouraging partners to assign work to diverse attorneys to address disparities resulting from underlying gender bias.<sup>192</sup>

Given the critical nature of work distribution at Corporate Firms, the organized bar should consider promulgating guidelines or best practices regarding the assignment and distribution of work. The bars also could commission the creation of a cloud-based service that would be licensed to participating Corporate Firms to help them implement automated assignment in a consistent manner. This would allow the bars to aggregate data and to more accurately pinpoint trends and problems in the industry.

#### e. Summary

In order to overcome the problems associated with a socially constructed process for *Assignment*, Corporate Firms can consider implementing automated assignment with partial randomization or a goals-based system to ensure the equitable distribution of work during associates’ first years of practice. Moreover, the organized bars could assist Corporate Firms by promulgating standards for assignment and distribution of work and possibly by commissioning the development of a software-based solution that can be made available to law firms.

#### E. Evaluation

For associates on the path to partnership, the process utilized by Corporate Firms for *Evaluation* is also a critical determinant of success. The literature identifies five general methods for measuring lawyer competence: (1) measurement of competence by a lawyer’s

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<sup>191</sup> A.B.A. PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY, *supra* note 67, at 29.

<sup>192</sup> WOMEN LAWS. OF UTAH, THE UTAH REPORT: THE INITIATIVE ON THE ADVANCEMENT AND RETENTION OF WOMEN IN LAW FIRMS—EXECUTIVE SUMMARY 13 (Oct. 2010), *available at* [http://utahwomenlawyers.org/wp-content/uploads/WLU\\_Executive\\_Summary1.pdf](http://utahwomenlawyers.org/wp-content/uploads/WLU_Executive_Summary1.pdf).

training and performance on examinations, (2) assessment based upon a lawyer's status or reputation, (3) performance in terms of successful results in advocacy, (4) success in the avoidance of negligence claims, and (5) systematic and detailed evaluation of the ways lawyers carry out certain activities in servicing clients.<sup>193</sup> Many junior attorneys enter law firms with the incorrect perception that their work will be assessed as it was during law school. Unlike law schools, which award grades based on specific student work product in the form of test answers or other written material, the Corporate Firm evaluation process often is more intuitive and subjective, generally reviewing associates using annual or bi-annual surveys about overall performance rather than evaluating specific work product. Although a few "superstars" are sometimes visible almost at once, even they must prove their value during the probationary period of the Tournament.

#### 1. The Evaluation Process

Most firms designate an associate evaluation committee to drive the process and determine associate compensation, bonus, advancement, and development.<sup>194</sup> The typical evaluation tool is a short questionnaire that is completed by partners concerning associates who have worked on their matters. For example, the Altman Weil standard Associate Evaluation Form asks partners to rank associates on a scale of 1 (low) to 5 (high) on fifteen factors: (i) practice administration (e.g., time keeping), (ii) drafting ability, (iii) thoroughness, (iv) analytic ability, (v) advocacy skills, (vi) efficiency, (viii) ability to work independently, (ix) professional development, (x) business development, (xi) judgment/maturity, (xi) initiative, (xii) responsiveness, (xiii) commitment, (xiv) relations with partners, and (xv) on track for partnership.<sup>195</sup> Most evaluation forms also provide room for partner comments. While evaluation forms vary widely from firm to firm, some even employing very complicated scoring systems, most leave significant room for subjectivity. The comments section of the forms, which is purely subjective, becomes a very important component of

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<sup>193</sup> Douglas E. Rosenthal, *Evaluating the Competence of Lawyers*, 11 LAW & SOC'Y REV. 257, 257 (1976).

<sup>194</sup> See NAT'L ASS'N FOR LEGAL PLACEMENT FOUND., HOW ASSOCIATE EVALUATIONS MEASURE UP 22-23 (2006).

<sup>195</sup> *Is It Time to Update Your Associate Performance Evaluation Form?*, REP. LEGAL MGMT., June 1998, at 2, 3-4, available at [http://www.altmanweil.com/dir\\_docs/resource/61a5935d-2ca9-4275-a1c2-4ef7b9fe6128\\_document.pdf](http://www.altmanweil.com/dir_docs/resource/61a5935d-2ca9-4275-a1c2-4ef7b9fe6128_document.pdf).

the process. Thus, it is important for partners reporting positive outcomes to provide feedback whenever possible.

## 2. Obstacles in the Evaluation Process

Because reputation is a key component of financial performance for the legal industry, partners at Corporate Firms monitor work product carefully to preserve their brand equity with clients.<sup>196</sup> The work product during *Production* takes the form of opinions, written materials, counseling, negotiation, and oral communications, utilizing problem solving and analytical skills. The failure of an associate to plan and express ideas in a cogent and professional manner can create the appearance of incompetence with both clients and partners. A poorly drafted memorandum or email containing misspellings, the failure to return a client call, or an incorrect legal conclusion can create a bad impression with the client and cause the firm to lose business. It can also derail an associate's chances of winning the Tournament, as the bad news spreads quickly among partners who are less likely to assign future work to the associate due to the perceived risk that it might adversely impact firm reputation or the client relationship. Most lawyers today overestimate the role played by technical proficiency in evaluating lawyers. They underestimate the social skills and proficiency in dealing with people. Thus, diverse attorneys report that one bad evaluation can spread seeds of doubt about an associate's performance and derail the attorney's chances to make partner.<sup>197</sup>

In light of the above, Corporate Firms need to gather information about the abilities of their associates to make accurate and efficient promotion and assignment decisions. The principal means now utilized at many Corporate Firms, the evaluation, involves use of a periodic survey that is removed in space and time from the underlying work product generated by the associate. Because the survey is not tied to the actual work product resulting during *Production*, the existing process for *Evaluation* allows for greater subjectivity and bias to affect the process. Some commentators also have found that the evaluation process is hampered by teamwork limitations. As noted during *Execution*, legal production often occurs in teams, and only team outcomes are observable. Thus, the allocation of an associate's billable time across multiple matter teams can adversely affect the amount of information available to partners about relative abilities

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<sup>196</sup> See Steven Tadelis, *Firm Reputation with Hidden Information*, 21 ECON. THEORY 635, 635 (2003).

<sup>197</sup> See RIKLEEN, *supra* note 126, at 159.

and impact both the evaluation and quality of subsequent assignments. Armen Alchian and Harold Demsetz, in their article concerning principal-agent relationships, maintain that accurately monitoring attorneys is costly because team production makes it difficult to evaluate individual output.<sup>198</sup> The nature of legal work also hampers partner efforts to measure quality because much of a lawyer's efforts are of an intellectual nature and occur in the mind.<sup>199</sup> Arlene Leibowitz and Robert Tollison confirm that monitoring costs increase with firm size.<sup>200</sup>

Another potential problem suggested by commentators with the Corporate Firm evaluation process is the existence of "leniency bias." In a seminal study about law firm diversity strategies, the Minority Corporate Counsel Association (MCCA) identified patterns that impede the ability of diverse attorneys to be judged fairly, namely, "in-group favoritism, status-linked competence assessments, attributional bias, and the problem of polarized evaluations."<sup>201</sup> The study found that "[c]oldly objective judgment is reserved for out-groups. . . . The higher the group's status, the more convincing the demonstration of incompetence will have to be."<sup>202</sup> The ABA's Study, *From Visible Invisibility to Visibly Successful: Success Strategies for Law Firms and Women of Color in Law Firms*, supports the existence of leniency bias.<sup>203</sup> It found that, although 1% of white men reported having received an unfair performance evaluation, close to 31% of women of color, 25% of white women, and 21% of men of color said that they have had at

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<sup>198</sup> Armen A. Alchian & Harold Demsetz, *Production, Information, Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 780, 786 (1972); Kevin A. Kordana, *Law Firms and Associate Careers: Tournament Theory Versus the Production-Imperative Model*, 104 YALE L.J. 1907, 1914 (1995).

<sup>199</sup> See Kordana, *supra* note 198, at 1914; see also Alchian & Demsetz, *supra* note 198, at 786; Michael C. Jensen & William H. Meckling, *Rights and Product Functions: An Application to Labor-Managed Firms and Codetermination*, 52 J. BUS. 469, 502 (1979); S.S. Samuelson, *The Organizational Structure of Law Firms: Lessons from Management Theory*, 51 OHIO ST. L.J. 645, 647 (1990); Stephen David Silberman, *The Market, the Firm and Delivery of Legal Services* 111, 113–14 (May 1975) (unpublished Ph.D. dissertation, Yale University) (on file with author).

<sup>200</sup> Kordana, *supra* note 198, at 1916 (citing Arleen Leibowitz & Robert Tollison, *Free Riding, Shirking, and Team Production in Legal Partnerships*, 18 ECON. INQUIRY 380, 386 (1980)).

<sup>201</sup> RIKLEEN, *supra* note 126, at 157 (quoting MINORITY CORP. COUNS. ASS'N, *THE MYTH OF THE MERITOCRACY: A REPORT ON THE BRIDGES AND BARRIERS TO SUCCESS IN LARGE LAW FIRMS* 34 (2003), available at [http://mcca.com/\\_data/n\\_0001/resources/live/MythOfMeritocracyDifferentExperiences.pdf](http://mcca.com/_data/n_0001/resources/live/MythOfMeritocracyDifferentExperiences.pdf)).

<sup>202</sup> *Id.* (quoting MINORITY CORP. COUNS. ASS'N, *supra* note 201, at 35).

<sup>203</sup> See GANS EPNER, *supra* note 68.

least one unfair performance evaluation.<sup>204</sup> The NALP Foundation also found that minority associates are much more likely to report receiving less challenging work following an unfair performance evaluation.<sup>205</sup> These realities work against diverse attorneys who typically are not like members of the “in-group”—predominantly white males—at Corporate Firms.

As shown in Figure 1 above, Corporate Firms often decide not to exercise the option to convert an associate to partner long before the probationary period expires. The decision typically follows a bad evaluation. The associate’s assignments are then often reduced or cut off entirely. Whether the result of collective risk aversion by partners fearing adverse impact to reputation or a conscious decision by a practice group leader, the outcome is the same: the associate struggles to meet the minimum billable requirement. The reduced billable hours are a clear signal to both the firm and the associate that it is time to move on.

### 3. Evaluation Process Enhancements

It is now possible to enhance the process of *Evaluation* to permit greater use of SLM to make the process more equitable to all associates. This can involve (a) greater use of spot evaluations to measure actual performance on specific work product, (b) use of an automated evaluation survey and feedback system, and (c) adoption of uniform industry standards for evaluations.

#### a. Spot Evaluations of Work Product

One possible SLM enhancement is for law firms to supplement the annual review with “spot evaluations” designed to measure actual associate performance on specific projects. The spot evaluation form could ask the following questions:

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<sup>204</sup> *Id.* at 26.

<sup>205</sup> Aravinda N. Reeves, *Gender Matters, Race Matters: A Qualitative Analysis of Gender & Race Dynamics in Law Firms* 104, 227 (June 2001) (unpublished Ph.D. dissertation, Northwestern University) (on file with author).



## FIGURE 3: SPOT EVALUATION SURVEY

1. Describe the nature of the work (e.g., memo, brief, contract, negotiation, advocacy).
2. Were you satisfied with the attorney's overall performance on this assignment?
3. Relative to prior work, has the attorney's performance improved?
4. Please detail any perceived strengths and weaknesses.
5. Please provide any constructive suggestions for improvement.
6. Have you already provided the attorney with feedback on this project?

In one implementation, the spot evaluation can be initiated on an ad hoc basis by any partner on any project. It can be used to report both positive and negative information. A more sophisticated method could involve surveying a randomly selected sample of attorney work product for each associate based on the population of active cases. Under this approach, the firm's leadership would require that partners complete spot evaluations when selected to do so. The advantage of this approach is that a representative sample set of work-product evaluations would exist for each associate. The evaluation data would be aggregated and used in combination with feedback obtained during the annual review process. If there is a significant deviation between spot-evaluation scores and the annual evaluation, the variance itself can trigger a separate *Quality Review*, assuming the managing partner or executive committee of the firm included this recommendation in the workflow to resolve the variance.

Aside from comparing relative performance among associates, a firm's commitment to maintaining and enhancing efficiency and quality of work product as part of its peer-review process can serve to impress current and prospective clients now seeking greater value.<sup>206</sup> This may be particularly relevant to clients that have instituted TQM initiatives.<sup>207</sup> Among other benefits, the systematic use of spot evaluations and similar work-product review mechanisms can also help firms manage risk by flagging potential problems early and defend professional liability claims alleging a "duty to monitor" theory.<sup>208</sup>

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<sup>206</sup> Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. COL. L. REV. 329, 346-47 (1995).

<sup>207</sup> See, e.g., Gary R. Garrett, *What Does Total Quality Management Mean for Legal Organizations?*, LEGAL MGMT., May-June 1992, at 18, 20; Ward Bower, *In Search of Excellence—Applying TQM to a Legal Environment*, L. PRAC. MGMT., Apr. 1993, at 22, 22.

<sup>208</sup> Fortney, *supra* note 206, at 332-35.

Simply put, the adoption of peer-review mechanisms such as spot evaluations can be an effective means of inserting greater objectivity into the associate evaluation process, but it can also enhance firm reputation and long-term financial performance. The evaluations also provide the foundation for a *Quality Review* process that allows management to investigate variances between work product in a more systematic manner.

b. Automated Evaluation and Feedback System

With the advent of the internet, it is common for companies to implement quality control surveys using an automated online system like SurveyMonkey.com<sup>209</sup> or other similar intranet software. Thus, it is now possible to replace form-based surveys (typically a Microsoft Word document) with electronic survey technology to formulate a simple survey to measure partner and client satisfaction with associate performance. In the simplest implementation, the electronic survey evaluation would be automatically emailed to the originating partners on active matters for each associate with billable entries. The timing of such requests would be set by each firm. The problem with this approach, however, is that it could overwhelm partners with a large number of survey requests. Thus, a more elegant approach would be to limit the request to matters upon closing. The limitation of the latter approach is that a great deal of work in Corporate Firms is completed under “general” categories, and, thus, the system would not capture this activity. A more appropriate solution would be to combine the electronic survey capabilities with the random spot surveys of work product to create an easy-to-use system that generates a statistically significant number of responses for each attorney. Again, this would allow firms to proactively manage the evaluation process to eliminate potential hidden biases and to level the playing field for women and diverse attorneys. One great advantage of an electronic survey system is that it can provide instant feedback to both partners and associates on performance.

c. Toward Standards for Associate Evaluations

Given the critical nature of evaluations to diverse attorney success at Corporate Firms, the need for industry standards is apparent. Performance evaluations that “feature rigorous, detailed criteria, and that are regularly scheduled, taken seriously, and conspicuously tied

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<sup>209</sup> SURVEYMONKEY, <http://www.surveymonkey.com> (last visited May 9, 2011).

to compensation and advancement are critically important[.]”<sup>210</sup> The ABA, however, has not yet published a comprehensive set of recommendations for creating a neutral evaluation process for diverse attorneys. There is ample precedent for such standards. For example, the ABA has longstanding guidelines to measure judicial performance.<sup>211</sup> And, in 1997, the ABA’s Commission on Women in the Profession published a comprehensive set of recommendations for creating a gender-neutral evaluation process.<sup>212</sup> This process is equally relevant for diverse attorneys working at Corporate Firms and, as modified, can serve as an initial model for the industry:

1. Redefining success to encourage varied communication styles and other differences;
2. Instituting a two-way evaluation system in which junior attorneys also provided feedback on partners;
3. Designing an evaluation form (e.g., the Alman Weil form) that clearly sets out specific performance criteria, includes a simple rating scale allowing associates to compare their relative performance, and can capture comments for factors not measurable using the rating scale;
4. Conducting the evaluation interview in a way that allows for two-way communication as well as the establishment of an action plan to assist with the associate’s professional development;
5. Conducting goal-setting sessions to formulate associate professional goals for critical areas like mentoring, training, and business development;
6. Leading educational sessions for all stakeholders involved in the evaluation process, including associates, so they understand the process itself, potential obstacles, and importance of diversity to the firm;
7. Including women and diverse attorneys in all aspects of the evaluation process, including any teams or committees leading the effort; and
8. Periodically reviewing the process and its effectiveness in ensuring accountability.<sup>213</sup>

In addition to defining the above process, the industry also can propound model guidelines similar to the Black Letter Guidelines for

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<sup>210</sup> RIKLEEN, *supra* note 126, at 305.

<sup>211</sup> See generally A.B.A., BLACK LETTER GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (2005) available at [http://www.americanbar.org/content/dam/aba/migrated/jd/lawyersconf/pdf/jpec\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/jd/lawyersconf/pdf/jpec_final.authcheckdam.pdf).

<sup>212</sup> A.B.A. COMM’N ON WOMEN IN THE PROF., FAIR MEASURE: TOWARD EFFECTIVE ATTORNEY EVALUATIONS 24–31 (1997).

<sup>213</sup> See *id.*

the Evaluation of Judicial Performance issued by the ABA in February 2005, which addresses goals, uses, criteria, dissemination, methodology, administration, and support in relation to the evaluation process.<sup>214</sup> Irrespective of the approach taken, the goal would be to ensure that Corporate Firms adopt an effective evaluation process that helps to further level the playing field for women and diverse attorneys.

d. Summary

In order to overcome the problems associated with the existing process for *Evaluation*, Corporate Firms can consider greater use of work product-based evaluations. They can also leverage technology to simplify evaluation and feedback systems. Lastly, the organized bars could assist Corporate Firms by promulgating standards for evaluation modeled on those promulgated by the ABA for women in the profession and possibly by commissioning the development of a software-based solution that can be made available to law firms.

F. *Quality Review*

Reputation is a critical driver of performance in the legal industry. Thus, in any SLM system designed to eliminate retention disparities for diverse attorneys, it is important for a business process to exist that ensures an independent, objective assurance of quality. *Quality Review* would work in tandem with an enhanced business process. The purpose of *Quality Review* would be to help an organization accomplish its diverse attorney retention objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of the *Assignment* and *Evaluation* processes. During *Quality Review*, a relevant number of matters for each attorney (diverse and non-diverse) would be randomly selected for an in-depth evaluation by a quality review team ("QR Team"). The QR Team would be composed of senior attorneys not working on the matter, but with substantive knowledge of the area. In most instances, the attorneys can be employed by the firm or they can be independent consultants. The QR Team would substantively review work product and conduct an independent evaluation of quality, efficiency, and outcomes. Those evaluations could be compared with spot evaluations and other feedback to identify variances and implement corrective measures. To illustrate, if the spot evaluations show high ratings for an associate, but the subjective feedback is inconsistent, the QR Team would

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<sup>214</sup> A.B.A., *supra* note 211, at 1–5.

analyze the variance. The QR Team also would monitor patterns in critical business processes such as *Assignment* and *Evaluation* for both diverse and non-diverse associate populations to ensure a level playing field. The QR Team would generate a periodic report to the managing partner or executive committee concerning compliance with the Corporate Firm's policies and procedures.

The existence of a QR Team at a Corporate Firm would generate many benefits. First, clients would benefit as the by-product of *Quality Review* that would lead to greater efficiency, value and accountability. Second, *Quality Review* would likely curb or eliminate any problems that may occur with *Assignment* and *Evaluation*. Lastly, the existence of *Quality Review* would be a valuable tool to ensure diverse and female attorneys a level playing field. This would go a long way toward eliminating the revolving door.

We next address additional training opportunities that Corporate Firms can leverage to eliminate differential attrition rates for diverse attorneys.

### PART III

#### A. *Bridging the Gap*

Unlike graduates in the medical profession, where doctors in training must pass a mandatory residency period at a hospital where they are taught practical skills, newly minted lawyers receive no such training. While law schools have utilized the Socratic method to teach lawyers "how to think," they have not been effective at providing practical knowledge about the business of law discussed above or the actual practice of law. As a result, in *Diversity in the Legal Profession: The Next Steps*, the ABA recommends that law schools "develop a professional development system for new attorneys who recently passed the bar to teach law practice realities and skills for success, such as how to bill, how to manage time, and how to practice."<sup>215</sup>

Historically, Corporate Firms have served as incubators for the nation's top lawyers. As a result, the Cravath Model relied heavily on leverage and the willingness of clients to pay for services performed by junior attorneys, albeit at lower billable rates. With increasing pressure from corporate clients to increase efficiency, Corporate Firms are curtailing incoming associate classes and there is now a steeper learning curve for junior attorneys. To bridge the gap between theory and practice, Corporate Firms are finding it necessary

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<sup>215</sup> A.B.A. PRESIDENTIAL INITIATIVE COMM'N ON DIVERSITY, *supra* note 67, at 24.

to teach essential soft skills to associates and to provide associates with real world-residency-like opportunities. These opportunities can be especially helpful for diverse attorneys in achieving a level playing field, as they expose attorneys directly to clients.

In this Part, we address the need for (i) effective mentoring programs, (ii) business development and networking training for lawyers, (iii) more experiential programs like secondment, and (iv) a new analytic framework modeled on the SOAP method—now utilized by physicians—to help junior lawyers perform legal analysis.

### B. *Learning from Mentors*

In a survey of top business executives, Gerald R. Roche found that 63.5% reported having had a mentor and nearly as many had served as mentors.<sup>216</sup> A mentor can be defined as “a person who took a personal interest in your career and who guided or sponsored you.”<sup>217</sup> Whether it is through individual lawyers at Corporate Firms, bar organizations, law school apprenticeships, or programs like the American Inn of Court, mentoring is an important activity that helps to foster success by (i) enhancing efficiency in job matching and (ii) reducing attrition.<sup>218</sup> From the standpoint of the mentee, various empirical studies on the impact of mentorship on career success confirm that individuals with mentors experience greater job satisfaction and earn more than do their unmentored peers.<sup>219</sup>

A 1984 ABA National Survey of Career Satisfaction/Dissatisfaction revealed that nearly 50% of lawyers at firms with more than ninety lawyers had mentors.<sup>220</sup> Today, it is common during an acceptance speech by a successful lawyer for the individual to acknowledge a powerful mentor that impacted his or her career. The legal profession has a long history of more senior attorneys taking an

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<sup>216</sup> Gerard R. Roche, *Much Ado About Mentors*, HARV. BUS. REV., Jan–Feb. 1979, at 14, 15; David. N. Laband & Bernard F. Lentz, *Workplace Mentoring in the Legal Profession*, 61 S. ECON. J. 783, 783 (1995).

<sup>217</sup> Laband & Lentz, *supra* note 216, at 783.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 783–84.

<sup>220</sup> *Id.* at 784; *see* Epstein et al., *supra* note 162, at 343, 420. “As in all fields, those in the legal profession who climb the ladder to success and those who are well integrated in the workplace proceed along tracks that are made available for them on courses that depend on assistance from experienced elders and gatekeepers.” *Id.* at 343.

active role in promoting the careers of junior attorneys via informal mentoring relationships.<sup>221</sup>

In her commentary on Corporate Firm mentoring practices, Rikleen summarizes the various roles performed by mentors based on a study conducted by the Bar of the City of New York:

As teachers: “mentors may be involved in training their younger colleagues by providing challenging and varied assignments, teaching the craft of lawyering, offering strategies on how to deal with clients, and sharing insights about how to negotiate the organizational systems and politics of firm life.” As [advisors]: “This would be someone with whom the junior colleague can share personal difficulties, for example, about the stresses of balancing work and family responsibilities, and someone whom the junior colleague can identify with and emulate.” [As career counselors], “senior lawyers offer sponsorship by recommending protégés for special assignments; they provide opportunities for protégés and their work to be exposed or showcased to influential partners . . . and they offer protection in controversial situations.”<sup>222</sup>

Research suggests, however, that women and diverse attorneys are more frequently excluded from informal activities like mentoring due to type-based mentor preferences.<sup>223</sup> These preferences, psychologists and sociologists confirm, are more likely to form between members of the same group.<sup>224</sup> Generally, the reason is that communication, and thus mentoring, may be more natural and more effective when people share gender, race, or common interests. These common traits can include sports, culture, language, or shared experiences outside of the work environment.<sup>225</sup> Thus, researchers have cited the prevalence of white men in the partner ranks at Corporate Firms as the reason that women and diverse attorneys may have fewer mentoring opportunities.<sup>226</sup> A *National Law Journal* article reported:

Despite women’s progress, the partnership ranks nationwide are 86.4 percent male. This puts women at [sic] disadvantage when it comes to mentoring, the most important factor in becoming a

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<sup>221</sup> RIKLEEN, *supra* note 126, at 105; *see* Epstein et al., *supra* note 162, at 343. “In law, there has been a long tradition of mentoring, where older, more experienced partners in the large firms have taken junior colleagues under their wings grooming and promoting them for partnership. This system created an informal network—a brotherhood.” *Id.* at 343.

<sup>222</sup> RIKLEEN, *supra* note 126, at 106 (quoting Epstein et al., *supra* note 162, at 344–45).

<sup>223</sup> Susan Athey et al., *Mentoring and Diversity*, 90 AM. ECON. REV. 765, 766 (2000).

<sup>224</sup> *Id.* at 766 n.3.

<sup>225</sup> *Id.* at 766 n.4.

<sup>226</sup> RIKLEEN, *supra* note 126, at 105.

partner . . . . Often, it's harder for women . . . because the massive majority of partners are men, and men tend to be more comfortable mentoring other men. . . . Rainmaking and client development—skills typically learned from a mentor—are keys to partnership.<sup>227</sup>

Effective mentoring also impacts assignments, business generation credit, and, ultimately, promotion opportunities. Rikleén concludes that, at most law firms, “there is a direct link between a good mentoring relationship and the referral of challenging work from important firm clients. A good mentor will provide opportunities to showcase an associate’s talent and, ultimately, open the door to key client contacts which will be invaluable when partnership elections are near.”<sup>228</sup> The direct effect of type-based mentor preferences is that entry-level associates of the majority type (white males) acquire more human capital in the long run, yielding a relative competitive advantage when compared against women and diverse attorneys.<sup>229</sup> In light of these mentoring realities, Corporate Firms need to continue making efforts to ensure a level playing field for diverse attorneys with regard to mentoring opportunities. While informal mentoring is preferred, the NALP Foundation and the MCCA found that formal mentoring is effective.<sup>230</sup> Still, despite the best of intentions on both sides, many associates never connect with their mentors and may only speak with them at firm events. It is important that Corporate Firms conduct effective formal programs. A key part of any formal mentoring program is matching the strengths of the mentor with the needs of the mentee.<sup>231</sup> Thus, the firm should consider the personalities, goals, and interests of both the mentors and the mentees in pairing them together. The program also should draw only willing participants who understand their respective roles and responsibilities and are willing to commit time and resources to the process. To ensure a good match, firms can use a brief questionnaire regarding goals and expectations for the mentoring relationship to prompt both parties to solidify their goals and help them to work toward those goals more effectively. Corporate Firms should also train both mentors and asso-

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<sup>227</sup> Chris Klein, *Women’s Progress Slows at Top Firms*, NAT’L L.J., May 6, 1996, at A13, A20–A21.

<sup>228</sup> RIKLEEN, *supra* note 126, at 108.

<sup>229</sup> Athey et al., *supra* note 223, at 766.

<sup>230</sup> RIKLEEN, *supra* note 126, at 338; Ida O. Abbott & Rita S. Boags, *Mentoring for Women and Minority Lawyers: Making It Succeed in Your Firm*, NAT’L ASS’N L. PLACEMENT BULL., Feb. 2004, at 1, 1–3.

<sup>231</sup> Arin N. Reeves, *Five Principles for Creating Diversity in Law Firms*, PRAC. LAW., Oct. 2002, at 41, 46.



ciates on the process of effective mentoring. In the final analysis, effective mentoring is a process. It is therefore critical that firm attorneys view the mentoring program as the start, and not the finish, of young associates' professional development.

Aside from internal mentors, associates should consider working with external mentors and role models. Programs like the American Inns of Court provide meaningful opportunities to work with mentors.<sup>232</sup> In addition, for diverse attorneys, active participation with affinity bar associations and business groups also serves as a means of developing strategic relationships with mentors and role models.

### C. *Business Development & Networking Training*

In today's world, the ability to develop business is a critical part of winning the Tournament. Junior associates require knowledge about both the business of law and the successful generation of new client business. Although young attorneys certainly are not expected to be rainmakers early in their careers, if they want to make partner or start firms of their own, they need to develop their rainmaking skills.

As noted, law schools do not teach business development or networking skills. Thus, many firms have initiated homegrown programs to help attorneys develop the different skill sets needed to successfully generate new business. According to the Women Attorneys Business Development Study, the predictors for high originations are (i) the number of years of legal practice, (ii) the amount of time spent doing business development each month, (iii) the use of a targeted approach to business development, including a business plan, (iv) participation in pitch groups, (v) cross-selling other firm services to existing clients, and (vi) asking clients for introductions to others in need of legal services.<sup>233</sup> Corporate Firms should provide diverse attorneys with opportunities to network with peers and potential business clients. One effective means is to pair junior attorneys with more senior lawyers who can act as role models to introduce attorneys to their existing networks and to teach networking in a real world context. This practical experience should be supplemented by more formal training on effective networking and business development.

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<sup>232</sup> AMERICAN INNS OF COURT, <http://www.innsocourt.org> (last visited Mar. 15, 2011).

<sup>233</sup> HARRY KESHET, WOMEN ATTORNEYS BUSINESS DEVELOPMENT STUDY 1-2 (2007).

It is clear, then, that associates must start early in order to make an impact on their careers. For a young associate, the first step to marketing involves creating an extensive list of contacts including former colleagues, law school classmates, family, and friends.<sup>234</sup> These contacts will become the attorney's personal support system and professional referral network moving through his career, and in the future may even become the attorney's client list.

Part of building a network includes becoming involved with organizations outside of the law firm.<sup>235</sup> Bar associations, industry groups, and not-for-profits are all excellent ways to meet new and interesting people who young attorneys might learn something from, build a relationship with, and eventually represent as clients. The other step that must be focused on in the early years of an attorney's career is honing the legal skills necessary to become a great lawyer. In fact, some experts say this is the only marketing step needed for young attorneys.<sup>236</sup>

Focusing on building strong client relations skills will also serve young attorneys well throughout their careers, as it is proven that keeping an existing client is much easier than trying to bring in a new client.<sup>237</sup> Good habits to develop early on include (i) producing quality work product, (ii) being responsive and accessible to clients, (iii) learning more about clients and their industries, and (iv) developing a good relationship with client contacts.<sup>238</sup> An important marketing step for all attorneys, regardless of age or experience level, is to create formal, written plans that are reviewed and revised annually. These plans should identify target clients, growth areas, and personal improvement strategies for the year ahead, and must be put in writing in order to commit to achieving these goals.<sup>239</sup>

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<sup>234</sup> Sharon Meit Abrahams, *How Partners Can Help Associates Grow Marketing Skills*, N.J. L.J., July 10, 2008, at 77, available at <http://www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202422887438&slreturn=1&hbxlogin=1>.

<sup>235</sup> See *id.*

<sup>236</sup> See, e.g., *id.*

<sup>237</sup> See *In Search of Customer Loyalty*, INSIGHT ADVANTAGE, <http://www.theinsightadvantage.com/wp-content/uploads/2009/02/tia-customer-loyalty.pdf> (last visited Mar. 21, 2011) ("It costs 5 times more to get a new client than to keep an existing one and existing clients are much more profitable than new ones.").

<sup>238</sup> Dionne Carney Rainey, *It's Never Too Early to Start Building Client Relationships*, N.J. L.J., June 3, 2008, at 25, available at <http://www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202421915293>.

<sup>239</sup> Jaimie B. Field, *Action Is the Key to Being a Successful Rainmaker*, N.J. L.J., Dec. 7, 2009, at 27, available at <http://www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202436019528>.

*D. Experiential Programs*

Traditionally, lawyers learned to practice law via apprenticeships. This system is still utilized by some European countries like Germany to supplement the theoretical knowledge provided by law schools.<sup>240</sup> Physician training follows a similar approach, with doctors entering residency programs immediately following medical school. Recently, Corporate Firms also have started to experiment with experiential training.<sup>241</sup> Secondments have become a popular option.<sup>242</sup> These are “short-term contracts under which companies ‘borrow’ an outside lawyer for a few weeks to a year or more.”<sup>243</sup> The practice has gained acceptance as a means for Corporate Firms to provide associates with excellent training opportunities within the corporate law departments of clients.<sup>244</sup> The lawyer, typically an experienced associate, takes on duties comparable to any other newly-hired in-house lawyer.<sup>245</sup> For diverse attorneys in particular, secondments represent an excellent opportunity to gain client exposure and experience.<sup>246</sup> While the client generally pays the attorney’s salary, it avoids the overhead expenses attached to an outside lawyer.<sup>247</sup>

In addition to secondments, some Corporate Firms like Drinker Biddle & Reath LLP are adopting apprenticeship-type programs, with new associates spending time attending classes or shadowing partners on client matters.<sup>248</sup> Because Corporate Firms wield substantial influence, moreover, they can also partner with other organizations to

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<sup>240</sup> See generally *Apprenticeship Programs*, REFERENCE FOR BUSINESS, <http://www.referenceforbusiness.com/management/A-Bud/Apprenticeship-Programs.html> (last visited Mar. 16, 2011).

<sup>241</sup> Lorelei Laird, *Lending Lawyers: Secondments Gaining Popularity*, GC CAL. MAG., May 20, 2008, available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202421517914>.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> See Laird, *supra* note 241.

<sup>248</sup> Press Release, Drinker Biddle & Reath, Drinker Biddle Launches Much-Heralded Training Program for First Year Lawyers (Sept. 29, 2009), available at [http://www.drinkerbiddle.com/files/News/9a2d0264-3922-4812-8d3d-03a3c588ab0a/Presentation/NewsAttachment/c1f40422-1778-428a-a835-0c595107a07d/First\\_Year\\_Associates.pdf](http://www.drinkerbiddle.com/files/News/9a2d0264-3922-4812-8d3d-03a3c588ab0a/Presentation/NewsAttachment/c1f40422-1778-428a-a835-0c595107a07d/First_Year_Associates.pdf); see also *William Henderson and the Drinker Biddle Move*, WALL ST. J. (May 12, 2009, 4:36 PM), <http://blogs.wsj.com/law/2009/05/12/william-henderson-and-the-drinker-biddle-move/tab/print>. But see Elie Mystal, *Legal Press More Fascinated by Apprenticeship Programs than Law Firms*, ABOVE THE LAW (Jun. 15, 2010, 5:53 PM), <http://abovethelaw.com/2010/06/legal-press-more-fascinated-by-apprenticeship-programs-than-law-firms>.

help associates gain experiential opportunities via judicial clerkships, pro bono, academic appointments, and government service. Experiential programs represent an excellent opportunity for diverse attorneys to gain client exposure and meaningful legal skills early in their career lifecycle.

*E. Thinking like a Lawyer*

Perhaps one of the greatest failures of formal law school training is the inability to teach a consistent analytical framework that can be useful to lawyers in the real world. In law school, students are taught to spot issues in fact patterns using something akin to the IRAC method—issue, rule, analysis, and conclusion.<sup>249</sup> The fact patterns themselves are provided to the students by the professors or appear in well-written published opinions. In the real world, the iterative process of fact gathering is critical to legal analysis and outcomes. An associate must interview clients, gather essential facts, and propound formal discovery to support his or her theory of a case.

By comparison, in the medical field, residents are taught to utilize a cohesive analytical framework—the SOAP method—as the means of acquiring various component skills involved in fact gathering, medical diagnosis, and progress note taking, and these play a key role in the development of good clinical judgment.<sup>250</sup> SOAP is an acronym that stands for subjective, objective, analysis, and plan.<sup>251</sup> Research confirms that the activity of reading and writing progress notes is an exercise in the development of pragmatic awareness, through which the resident learns, and learns to use, the terms, abbreviations, and discursive forms that constitute the specialty idiom.<sup>252</sup> Moreover, the SOAP method provides a structure for the medical encounter that guides the novice's investigation and analysis as he or she struggles to construct the "case."<sup>253</sup>

Progress notes serve a number of related functions. They are, first and foremost, a record of the patient's care and treatment which is immediately available to any member of the treatment team, allowing him or her to review current information about

<sup>249</sup> See, e.g., *IRAC/CRAC Handout*, UNIV. OF CAL. BERKELEY SCH. OF L., available at [www.law.berkeley.edu/files/IRAC\\_handout.doc](http://www.law.berkeley.edu/files/IRAC_handout.doc) (last visited Mar. 21, 2011).

<sup>250</sup> Pamela Hobbs, *The Role of Progress Notes in the Professional Socialization of Medical Residents*, 36 J. PRAGMATICS 1579, 1579–1607 (2004).

<sup>251</sup> Susan Cameron & Imani Turtle-Song, *Learning to Write Notes Using the SOAP Format*, 80 J. COUNS. & DEV. 286, 286–92 (2002).

<sup>252</sup> Hobbs, *supra* note 250, at 1603.

<sup>253</sup> *Id.*

the patient's physiological status, medications, and treatment plan. However, residents' progress notes also serve important pedagogical functions: like the oral case presentation, they are a means both of rehearsing the reasoning and analysis involved in medical decision-making, and of demonstrating those skills to the resident's supervising attending. They thus constitute meticulous records of both the patient's and the resident's progress.<sup>254</sup>

The significance of the SOAP method to the resident's professional socialization becomes apparent with the recognition that the case itself is a discursive construct; thus, the repetitive activity of writing progress notes acts to consolidate the cognitive skills that are central to the performance of medical work and the development of clinical judgment.<sup>255</sup>

As with medicine, lawyers are focused on generating successful outcomes for clients. Doctors employ technologies and applications for discovery, diagnostics, monitoring, and treatment. Lawyers employ discovery tools like interrogatories, requests for admission, depositions, and knowledge specialists as expert witnesses to interpret and inform fact finders as to their significance and meaning. These series of activities help to identify the specific nature of the problem or issue as well as the action to be taken. What is consistent is the iterative process used to generate results. One of the great insights from decision theory is that problem solving is not a linear process in which each step is exhausted before the next one is taken:

In any moderately complex matter, no preliminary strategy will anticipate every contingency. New facts emerge. Intermediate rediagnosis is often required. Preliminary strategies need to be modified. This suggests that important values of legal performance are flexibility and adaptability in midcourse. Is there feedback? Is the lawyer "on top" of the case? Do both lawyer and client review developments along the way?<sup>256</sup>

"Lawyers essentially perform a problem solving service."<sup>257</sup> Generally, the process involves the following steps: (i) gathering information, (ii) sifting the information, (iii) devising a preliminary strategy, (iv) putting the strategy into operation, and (v) revising the strategy in light of new information resulting from discovery.<sup>258</sup> Unlike physicians, however, junior attorneys today are not trained to utilize an

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<sup>254</sup> *Id.* at 1582.

<sup>255</sup> *Id.* at 1603.

<sup>256</sup> Rosenthal, *supra* note 193, at 273.

<sup>257</sup> *Id.* at 270.

<sup>258</sup> *Id.* at 271.

analytical framework to perform these steps. It is not uncommon for a junior associate to meet with a senior partner or client about a matter and walk out prematurely without asking a sufficient number of questions to elicit information critical to legal analysis.

The adoption of the SOAP method as a tool for legal analysis would allow junior associates, partners, and clients in the legal process to exchange information in a systematic manner in order to effectively contextualize and legitimize the decision-making process. The SOAP method has already been extended to business intelligence.<sup>259</sup> In the table at Figure 4 below, the comparative use of SOAP for medical and legal applications is illustrated. While not necessarily understanding the discovery tools or the lawyer's reasoning process themselves, the client understands the relevance of the problem-solving process and its importance to the decision-making of the lawyer, whose judgment the client typically must trust. The objective underlying the SOAP process (to produce a successful outcome) and the roles of everyone involved are understood and accepted by all parties.

FIGURE 4: MEDICAL ANALYSIS V. LEGAL ANALYSIS  
USING THE SOAP METHOD

	Medical Practice	Legal Analysis
<b>Subjective</b>	Doctor personally interviews patient and documents the input	Lawyer interviews client and witnesses and gathers documents
<b>Objective</b>	Doctor examines the patient and orders tests to help clarify alternative diagnoses	Lawyer reviews contracts and documentation and uses discovery methods to clarify facts and issues
<b>Analysis</b>	Doctor reviews test results and assesses most likely diagnosis and options for treatment; summarizes the doctor's clinical thinking	Lawyer identifies potential legal issues in the case
<b>Plan</b>	Doctor and patient meet and doctor recommends parameters of treatment and course of action most likely to resolve medical problem	Lawyer and client develop theory of the case and plan to bring desired result

The SOAP protocol is an important component of the clinical-teaching process for medical students.<sup>260</sup> Not only is SOAP used to

<sup>259</sup> Richard T. Herschel, *Creating an Effective Business Intelligence Process*, CXO EUROPE (Aug. 2008), <http://www.cxo.eu.com/article/Creating-an-effective-business-intelligence-process>.

<sup>260</sup> See Hobbs, *supra* note 250, at 1601.

configure the clinician-patient encounter, but it also serves to structure the documentation found in the patient's medical record.<sup>261</sup> This record can then be used to assess how physician knowledge has been deployed and utilized over time.<sup>262</sup> For example, analyses of SOAPs by agencies such as the Joint Commission on the Accreditation of Hospitals<sup>263</sup> have been used to gain overall impressions of the nature and quality of patient care at various medical institutions.

In a legal context, the use of SOAP could help facilitate legal analysis and reasoning by giving junior associates a consistent framework for gathering and using data to formulate and test legal theories. During the subjective phase, the lawyer would engage in information-gathering by interviewing partners, clients, and potential witnesses to the matter. For example, in the case of a potential contract dispute, the associate would meet with the client to gather all relevant facts about the contract formation, objectives of the parties, course of dealing, and events leading to the first breach. The goal would be for the associate to gain a clear understanding of the relevant facts of the case and, where relevant, to prepare a timeline for the sequence of events leading up to the dispute or issue between the parties. In the objective phase, the lawyer would review contracts, relevant documentation, relevant discovery, and other evidentiary material to clarify facts and issues. In the contract dispute example, the lawyer would review the contract itself, correspondence, emails, and other relevant documentation. Once the lawyer understands the case, he would then proceed to the analysis phase. During this phase, the lawyer applies his knowledge of the law to identify potential legal issues in the case. In the contract dispute, for instance, the claims might entail the materiality of the breach, a formation problem, a tort claim for fraud, a statute of limitations problem, or other similar issues. Lastly, during the plan phase, the lawyer would prepare a cohesive theory of the case that ties in all the relevant facts favorable to the client and formulate a plan for resolving the dispute. In the contract dispute, therefore, the lawyer might find that a demand letter is the appropriate first step to minimize legal expense. The letter would set forth applicable legal theories that would provide the client with a basis for recovery and propose a settlement.

From a *Quality Review* perspective, the QR Team can analyze the SOAP plan to gain knowledge about how an associate's conclusions

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<sup>261</sup> See *id.*

<sup>262</sup> See *id.*

<sup>263</sup> THE JOINT COMMISSION, <http://www.jointcommission.org> (last visited May 9, 2011).

were created and justified. The QR Team also could review the SOAP documentation to evaluate associate assumptions, underlying actions, resulting theories, and outcomes. The linkage between data, analysis, and outcomes is made transparent by the SOAP method as applied to legal analysis. This allows a retrospective assessment of the methods and legal analysis employed by associates.

The SOAP knowledge exchange protocol example suggests not only the appropriateness of incorporating it into the legal analysis and decision-making processes, but the value of clearly delineating a contextual process wherein legal analysis can be documented, even if only an expert can interpret its meaning. In effect, SOAP can be used to provide functional legitimacy to a process wherein legal analysis facilitates evidence-based decision-making and action.

#### CONCLUSION

In 2009, major U.S. law firms became less diverse, highlighting retention disparities for diverse attorneys. In the past, diversity efforts have focused on recruitment and not retention. Because reputation is a critical determinant of financial performance at Corporate Firms, the existence of a revolving door for diverse attorneys may undermine long-term financial performance. The strategic legal management of key business processes can help eliminate retention disparities. We propose the following: (i) using technology and diversity managers to ensure more objective work assignments, (ii) developing more objective evaluation processes that can bypass potential micro-inequities, and (iii) implementing a quality review process that can help ensure work product quality. In order to further level the playing field, we also propose increasing formal training programs to teach essential soft skills to all associates, namely (i) the role of mentoring and role models in professional development, (ii) business development skills, (iii) the use of secondment and other experiential programs that expose attorneys to clients and influencers, and (iv) the use of an analytical framework based on the SOAP method, used by physicians, to improve legal analysis and outcomes. The programs would benefit diverse attorneys the most, as they are formal in nature and not grounded in social constructs. Notably, the focus of these enhancements is to eliminate differential attrition rates for diverse attorneys—not to eliminate attrition in general. High attrition rates are part of the Cravath Model utilized by Corporate Firms.

In addition, we recommend that the organized bar model its efforts for the judicial process and collaborate with key stakeholders to develop guidelines for critical business processes under the Cravath



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*ENDING THE REVOLVING DOOR*

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Model, namely work assignments, associate evaluations, and quality review. As discussed, there is also a need to formulate uniform diversity metrics that track relative attrition rates and not simply headcounts. Lastly, the organized bar should consider commissioning software tools to facilitate these critical functions and formulating uniform standards for the use of RFPs, which increasingly impact the business of law.