

# Diversity Update

Co-presented by *California Lawyer* and the California Minority Counsel Program

## EXECUTIVE SUMMARY

The business case for diversity is often touted as one of the reasons why it should be a priority in the legal profession. In this roundtable our panelists discuss whether a business case exists—what it means for law firms and corporations as well as the legal industry—and if law firms are likely to lose business if they don't meet a corporation's diversity expectations.

Our in-house and outside counsel panelists also delve into how they measure diversity and how they are looking

beyond the numbers to examine the development and retention of diverse attorneys at law firms. They are Arjun Agarwal of Farella Braun + Martel, Ted Gizewski of Microsoft, Lisa Hamasaki of Miller Law Group, Laura Maechtlen of Seyfarth Shaw, Mary Shen O'Carroll of Google, and Derek Windham of Del Monte. *California Lawyer* and Marci Rubin, executive director of the California Minority Counsel Program (CMCP), moderated the discussion, which was reported by Krishanna DeRita of Barkley Court Reporters.

### CMCP/RUBIN: Do you think there is a business case for diversity?

**WINDHAM:** There is definitely some business case for diversity. As to whether or not there's a good, convincing, or winning case depends on the relationship between a given law firm and the company client. For example, we [Del Monte] make it clear to firms that diversity is one of our primary considerations when selecting outside counsel and we have had experiences with firms that have performed extremely well in all areas other than diversity. However, because we continually reevaluate diversity at our law firms, we realized those firms were not meeting our diversity standards. Accordingly, although we otherwise enjoyed working with them, we stopped considering them for new business and, most importantly, we made the reason very clear to them. We believe it really focused them on the importance of diversity to us, which, ultimately, was the business case for increasing diversity efforts at those firms. The firms that took us seriously and were able to achieve significant results in their diversity programs are once again being included in our RFPs and considered for major projects.

Unfortunately, that's not the case for everybody. The Institute for Inclusion in the Legal Profession conducted a survey last year on the business case for diversity. Although often in-house counsel highlight the importance of diversity in the RFP process, nearly 90 percent of in-house counsel respondents indicated that they had not changed any law firm relationships based on poor performance against their company's

diversity objectives. Until we go from "it's a priority" to "it's an action item," we are not yet going to have a strong and winning case for diversity.

**HAMASAKI:** The businesses case for diversity for outside firms is largely generated by client demands—corporate clients telling firms that this is a priority. I have a slightly skewed perspective because I'm from a women-owned firm [Miller Law Group]. To us diversity is incredibly important and it's who we are as a firm. But as clients tell firms more and more that diversity is important to them, it needs to—and will—become a priority for firms. And while some firms give lip service to diversity, more clients are doing things that prevent that from happening. More corporate clients are actually tracking diversity statistics, who is working on their cases, and they are coming back to us and keeping an open dialogue. From that perspective, there absolutely is a business case.

The other part of it is that the work we do as litigators involves lots of dealing with people—a broad spectrum of personalities—and diversity within our firm helps us to be able to address the different types of issues that come up and to relate to the people we are dealing with on a day-to-day basis whether they are clients, plaintiffs, opposing counsel, or a judge and a jury.

**GIZEWSKI:** We do business with 130 countries. We have employees, customers, and stakeholders from almost every background and every country you can imagine. To meet this challenge, we need the broad-

est range of perspectives to enhance innovation and address legal and commercial cross-cultural issues, and that's why diversity is a business priority for the legal department at Microsoft.

**MAECHTLEN:** There are different perceptions and different expectations about what this amorphous "business case for diversity" is within the profession generally, or in the relationship-based context of outside counsel working with corporate counsel. There can often be miscommunication about who is included within the umbrella of diversity when talking about the "business case." There is a lot of dialogue about the carrot and the stick concept where clients reduce work, or give more work, to firms based on whether they are doing meaningful work in the area of diversity and inclusion. But, with that model, what are the actual results and how do you actually measure those results? In addition, what are the metrics used for measurement?

At Seyfarth, we find that, when we are compiling information to show our clients that we have a meaningful commitment to diversity, every client has different expectations and interests. So it results in a relationship-by-relationship driven communication, which can sometimes be as meaningful in a client relationship as communications regarding substantive legal issues. So I viewed this question as how do you really turn diversity into a competitive advantage for your law firm or your law department? And how do you partner effectively with clients and/or outside counsel to achieve that?

**O'CARROLL:** Google has a very globally diverse audi-

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### PARTICIPANTS



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ence so we try to build a work force that reflects that audience. We think that it's not only the right thing to do, but it also fosters innovation and creativity, gives us more perspectives and ideas, and creates better products and services. We've actually just officially launched our legal department's diversity and inclusion initiative to define our goals around diversity and figure out how to measure it. On top of having a diverse work force, it's very important to have a comfortable, supportive working environment that fosters inclusion so it can bring out the best in each individual.

We do think there's a business case for diversity inclusion at Google. And as a core value of the company, we want to see it in the vendors and law firms that we work with as well.

**AGARWAL:** Given today's highly global and diverse economy, yes, there is definitely a business case for diversity. However, the reality is that, to date, neither corporations nor law firms have achieved their diversity goals. It's no secret that corporate law departments are continuing to face challenges in their attempts to increase their complement of diverse outside counsel. In turn, diverse attorneys at law firms are still not seeing the tangible increase in business from companies who have professed a commitment to diversity.

Both sides need to do more make the business case for diversity a true success story. For corporate clients, diversity still remains one factor out of many when choosing law firms. While that may not change anytime soon, companies should take a page from what Del Monte apparently did, and that is either end a relationship, or at minimum, change the relationship with outside law firms that are not living up to the diversity standards set by the company. And not to put the entire burden on corporate law departments, but as law firms, we must continue to improve our efforts to retain and promote diverse attorneys into positions of leadership. Law firms need to close the gap with corporate law departments that continue to be much more successful in their ability to recruit, retain, and promote diverse attorneys.

**GIZEWSKI:** I've often heard the argument from law firms that really it's the companies that need to drive diversity. I believe there's definitely a role to play for the in-house folks and the corporations, but I also believe that to be successful, we need a partnership with our outside counsel, which is really important. To promote diversity, law firms should have both an incentive to meet client demand and the internal incentive to promote diversity as a competitive advantage. Both parties play a role, but I'm very reluctant to put it all just on the corporation or the in-house departments to drive demand.

**CO-MODERATOR:** Has Microsoft ever fired a law firm for not meeting its diversity expectations?

**GIZEWSKI:** Not to my knowledge. We use more of a carrot approach than a stick approach in the vernacular we are using. We meet our firms where they are and work together to improve. We do give an incentive bonus on top of a regular bonus to our law firms that achieve the law firm diversity program metrics. We are metrics driven—focused on incremental growth and the representation of diverse attorneys in our firms and working on our matters.

**CMCP/RUBIN:** Can a law firm keep working for Microsoft—never get a bonus, never change—because there's a carrot without a stick?

**GIZEWSKI:** The scenario hasn't come up yet, because to date we've determined firms winning RFPs are making or intend to make sufficient efforts on diversity. When we eventually encounter a situation where a firm hasn't made any progress and isn't trying, we'll consider our options.

**CO-MODERATOR:** How do you measure diversity?

**WINDHAM:** We don't just look at numbers—anyone can hire diverse associates. We place a strong emphasis on inclusion and development, looking at who is included in the initial pitch, who is assigned a continuing and/or lead contact role on our matters, and, if appropriate, who ultimately gets origination credit.

**MAECHTLEN:** Looking at numbers alone is not going to achieve what we are trying to do as a law firm. We recently developed a multi-year strategic plan that defines goals for our internal and external initiatives in three main areas including recruitment, retention, and community engagement. As part of that strategic plan, we developed an internal score card, which includes a variety of metrics that go far beyond pure numbers, including utilization and professional development. We are also engaged in client benchmarking.

So, among other metrics, we are trying to take a much harder look at where are our diverse associates and partners are getting work: what kind of work; is it meaningful; are they high-level projects; do they get face time with clients. Secondly, we are providing more business development and other types of training to our attorneys. We believe the key is looking at deeper metrics, which obviously takes more time, energy, focus, and understanding about what your organization is doing. However, we have support in a national diversity action team, national affinity groups, and local diversity

action teams that coordinate with our recruiting and professional development teams. So we hope that this network that is focused on diversity and inclusion can help us move forward as an organization.

**AGARWAL:** I agree with my fellow panelists that numbers, by themselves, should not be the ultimate measure of diversity. Rather, I believe that success at law firms should be measured in terms of how successful we are in retaining and promoting diverse attorneys into leadership and/or high visibility positions. This requires firms, first and foremost, to create a culture of inclusiveness at the workplace where diverse attorneys feel valued. Second, firms must put in place tangible programs aimed at providing diverse associates with the skills and opportunities needed for business development.

We are actively doing both at Farella. For example,

under the purview of our diversity committee, we have created a Client Outreach subcommittee whose sole purpose is to provide diverse associates with opportunities to interact and interface with in-house lawyers from leading companies. Diverse associates take the lead role in interviewing the main in-house lawyers at current and prospective corporate clients on a variety of topics. The opportunity to sit down, one-on-one, with some of the leading in-house lawyers is an opportunity that is not generally available to associates, whether diverse or otherwise. The hope and goal is for the diverse associates to cultivate and foster these relationships with an eye towards future potential business development.

**O'CARROLL:** Over the past few years, we've focused on developing our legal department and the diversity of our in-house team, so now we are one of the most diverse groups within Google—and we want our outside

## PARTICIPANTS



**MARY SHEN O'CARROLL** is head of legal operations at Google, where she oversees financial performance, outside counsel management, and internal operations. She also led the establishment of Legal's Diversity and Inclusion Council. Prior to joining Google, Ms. O'Carroll served as profitability analysis manager for Orrick, Herrington & Sutcliffe, where she led firmwide profitability improvement initiatives by advising leadership on ways to monitor and improve practice management, client management, and operations. She also has worked as an investment banker and a strategic management consultant. [mocarroll@google.com](mailto:mocarroll@google.com)

**MARCI RUBIN** is executive director of the California Minority Counsel Program (CMCP), the state's leading legal diversity organization. Founded in 1989 by general counsels of major California corporations, CMCP provides access and opportunity for business and professional development for attorneys of color. Prior to joining CMCP, Ms. Rubin was deputy general counsel at Wells Fargo where she practiced law for 29 years. She has been a strong advocate for diversity in the legal profession and served on CMCP's Board of Directors for many years. [mrubin@cmcp.org](mailto:mrubin@cmcp.org)



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counsel to reflect that. Google's legal department is about 50 to 60 percent women now, and that's across the board, attorneys, and non-attorneys as well as management teams. Then for minorities, we are probably close to half as well.

We are now trying to gather information from the firms on the composition of the teams that actually work on the Google matters. We are not only interested in the percentage of folks who are women and minorities, but also who are in leadership roles, not just supportive roles. That is important to us and shows the firm's commitment to diversity.

This year, we plan to get statistics on team composition and then figure out how do we want them to look in the next few years. We definitely want to see improvement over time.

**GIZEWSKI:** If you can't measure it, it's really hard to figure out whether you are successful or not. From a Microsoft perspective, we look to our firms to improve year over year. If a firm is very diverse to begin with and has achieved or exceeded our diversity, which we are working to improve on an ongoing basis, then the firm receives the bonus. We are looking for incremental increases year over year: .5 percent diverse attorneys across the entire firm or 2 percent recruitment on number of hours worked by diverse attorneys on our matters.

**CMCP/RUBIN:** What are the important factors in measuring diversity? How are you defining it?

**GIZEWSKI:** This is now the third year of the law firm diversity program at Microsoft. We are looking to tweak our system as we track our matters and which attorneys are billing on those matters. We are getting a better idea internally of the metrics and whether we are sufficiently helping to develop the careers of our outstanding field of contributors.

**HAMASAKI:** I have a slightly different perspective because of the firm that I work in. We don't hire out of law school. We only hire people who have come from other big firms so we hear a lot of the concerns of those attorneys who are looking for an alternative environment. We work very hard to have an inclusive environment in all respects. Being a 21-lawyer firm, we have the ability to work one-on-one with all of our attorneys to make sure that they get the opportunities that they want and that they get to work to their strengths.

So if some people want to go on pitches and others don't, we work with them to figure out how best to develop each individual's career. By having the ability to work individually with them and to promote them to our

clients and help them develop relationships with clients we know they will work well with, we are able to create that kind of inclusive environment, which is much more difficult in much larger organizations.

**MAECHTLIN:** We have clients that will ask only for numbers, which creates several problems. First, reporting statistics as of a certain date shows only a snapshot in time, not trends, and doesn't really address the idea of inclusion, or the tangible actions that firms take to improve an organization.

Second, there are diverse attorneys at many large law firms whose diversity may be not obvious. For example, for the LGBT or disabled persons, if a firm does not have an inclusive environment and/or a mechanism for allowing people to self-disclose their diversity status, a firm may not have accurate numbers to report. Even if you have an inclusive environment, and you have a mechanism for attorneys to self-disclose their diversity status, some attorneys choose not to self-identify their diverse status. Accordingly, statistics or numbers may not really demonstrate what an organization is doing meaningfully to drive diversity or inclusion within the profession or a firm.

**CMCP/RUBIN:** What are the advantages of being a women, minority-owned smaller firm?

**HAMASAKI:** Being a 100 percent women-owned firm helps us with entrées to certain corporations and companies, which is definitely a positive. Then you have to take it from there and get the work based on your skills and keep the work based on your skills. The other positive is that we get a lot of extremely talented lawyers who are interested in us because we are a different model of firm. As an employment firm, we are every bit as big as many of the labor and employment groups in the larger firms, so we have a tremendous breadth in terms of the ability to service our clients, but we are narrow in terms of what we do. So we really attract a certain type of lawyer who wants change. For example, if you need to come into work and your kid has a cold or you couldn't find childcare, you can bring them in and we have all kinds of fun stuff to keep them occupied.

**CMCP/RUBIN:** For the outside lawyers, do you find that what Del Monte is doing is unique?

**AGARWAL:** It's the exception. It's innovative and it legitimizes the business case for law firms to prioritize retaining and promoting their diverse associates and partners. This goes beyond mere diversity "window dressing" and, if more companies followed suit, it would

have an appreciable impact on the diversification of our profession.

**MAECHTLIN:** I would agree that it's really an exception but also, we hope, a model for other corporations. There are a handful of clients that are taking a more involved approach in terms of partnering with outside counsel to have meaningful dialogue about how they can drive diversity and inclusion within our profession. However, each corporation is different. Because there does not seem to be a uniform approach, Seyfarth reviewed RFP questions related to diversity and various diversity questionnaires that we received from the calendar year 2010. We used a summary taken from these various client questions to develop our internal score card because we wanted to understand the variety of metrics and client expectations in this area. As with Del Monte, we hope the questions in upcoming years will focus on metrics other than statistics alone.

**HAMASAKI:** The clients who take this active of a role are, in my experience, in the minority at this point. If we are talking about the carrot versus the stick, we've never really had the stick drawn on us because we are a women-owned firm. We meet clients frequently through different organizations that we're involved in that support minority attorneys; but whether they take it to the next step to create the dialogue and to track our attorneys is still fairly rare.

**CMCP/RUBIN:** Are your law firms actually doing anything proactively to let you know that diversity is important to them?

**WINDHAM:** The relatively recent emergence of formal flex- and part-time programs is important because it can be a proxy for diverse attorneys and increases their retention at the firms. We also get updates from both our current and prospective outside counsel via business newsletters, etc. that highlight the accomplishments of their diverse attorneys.

**GIZEWSKI:** I love it when our firms come to us proactively to ask us to participate in events or share successes with us. That's really how it's demonstrated. It's funny how rarely we really get asked or shown some of the really innovative things folks have been doing to help us in our general mission of increasing diversity.

**WINDHAM:** Law firms do approach us to speak at programs targeted to diverse associates, provide feedback on proposed or existing diversity programs, etc. It's a great opportunity to give their firm exposure and showcase their diversity efforts, and to create meaningful dialogue. ■