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FEATURE

Why Diversity Matters in the Selection and Engagement of Outside Counsel: An In-House Counsel's Perspective

An in-house counsel explains why she thinks diverse teams are stronger.

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The case for the importance of diversity and inclusion starts with a simple truth: Every person has inherent value and deserves an equal opportunity. All people have rich identities, life experiences, passions, and skills. That combination creates unique perspectives and potential that deserve a fair chance to be realized, irrespective of gender, race or ethnicity, sexual orientation, disability, or other traits or characteristics. We are at our best when we enable this equal opportunity, and we are falling far short of our potential when we leave people and communities behind. Research demonstrates that diversity makes us more innovative and more creative, enables better decision making, and results in deeper, more effective engagement with customers.



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Despite the clear benefits of diversity, and despite the fact that the United States continues to become more and more diverse each year, progress to increase diversity in the legal profession has been slow, with only small gains for women and almost none for most minority groups over the last decade.

Real, meaningful, and sustained progress will require all of us to work together across the legal industry, innovate, and share learnings and insights openly to help us all improve. We each must start by focusing on diversity within our own organizations and then also look for ways we can advance diversity by working with others in the industry.

For those of us in corporate legal departments, one way in which we can do this is by dedicating a percentage of our outside counsel budget to women- and minority-owned law firms. Another is by working with our outside counsel to increase the diversity at their firms, to increase the number of diverse attorneys who are working on our legal matters, and to continuously innovate on diversity initiatives and programs. While the lack of diversity in the profession is by no means a law firm problem alone, law firm diversity is an important area of focus, given that most attorneys in the United States practice in law firms. It is only by working together that we will be able to unlock the opportunity to accelerate progress at scale.

The legal profession continues to lag behind other industries in diversity and behind the diversity of the United States overall, whether for women, minorities, or other diverse groups. LAW360, GLASS CEILING REPORT (2019); LAW360, DIVERSITY SNAPSHOT (2019); Terry Carter, *The Biggest Hurdle for Lawyers with Disabilities: Preconceptions*, ABA J., June 1, 2015. In this year's *10-Year Trend in Lawyer Demographics*, the ABA reported that since 2009, the number of women in the profession rose about five percentage points from roughly 31 to 36 percent. While this reflects some progress, it still represents a shortfall of roughly 189,000 women in the profession. More tellingly, if the growth rate of the representation of women continues to increase at this modest pace, equal representation will not be achieved for another 28 years.

The 10-year trend for racial and ethnic minorities was even more bleak, where progress in proportional representation was almost nonexistent. Since 2009, the number of lawyers identifying as African American, Asian, Hawaiian/Pacific Islander, Hispanic/Latinx, and Native American has been essentially flat, with less than a one percentage point change for each group. The only category of growth for racial and ethnic minority groups is "multiracial," which was introduced by the ABA in 2016. In the three years since its introduction, it has gone from zero to 2 percent.

Representation for individuals with disabilities and individuals identifying as LGBTQ+ has also lagged. While data relating to individuals with disabilities in the legal profession are scarce, it is undeniable that this group is vastly underrepresented at both attorney and leadership levels. In its 2018 report, the National Association of Law Placement found that only 1 to 2 percent of law school graduates, and 0.52 percent of law firm partners, reported having a disability. NAT'L ASS'N OF LAW PLACEMENT, 2018 REPORT ON DIVERSITY IN U.S. LAW FIRMS (Jan. 2019). The same 2018 survey also reflected that only 2.86 percent of lawyers identified as LGBTQ+, which is well below the percentage of the population that self-identifies as LGBTQ+.

The lack of diversity in the legal profession is not simply an issue of hiring—it also signifies a lack of proportional representation across many aspects of the legal career path. For instance, women and minorities leave the profession as a whole at greater rates than white men and are underrepresented at key milestones: passage of the bar exam, successful launch into attorney jobs, and promotion to leadership positions, including in the equity partner ranks at law firms. *See, e.g., Abby Yeo, Fight or Flight: Explaining Minority Associate Attrition*, CORNELL J.L. & PUB. POL'Y, THE ISSUE SPOTTER, Mar. 21, 2018; LAW SCH. ADMISSION COUNCIL, DIVERSITY IN THE US POPULATION & THE PIPELINE TO LEGAL CAREERS (last updated Apr. 29, 2019). *See also* LAW360, 2015 MINORITY REPORT (May 2015).

Slow Pace, Deep Effect

The slow pace of diversity progress belies the importance of diversity and the depth of its impact on the profession. The case for the importance of diversity begins with the proposition that every person has value, and people's distinct perspectives and experiences

are valuable as well. At Microsoft, we believe this deeply, and we are driven by a mission that is inherently inclusive—to empower every person and every organization on the planet to achieve more. Our mission requires commitment to the needs of *all* people, across *all aspects of diversity*, and to constantly push ourselves to innovate for their benefit. This imperative applies to our own employees as well, including within our legal department. And, like many corporate legal departments, we view our outside counsel as key partners and as an extension of our own team, and we believe that the principles that drive us to diversify our overall workforce apply equally to our law firm partners.

The positive business effect of diversity is clear. Studies in recent years have concluded that when diversity is embraced to form diverse teams, those teams produce higher revenues and better financial results. In its 2015 report *Diversity Matters*, McKinsey reported that in its study of 366 public companies, it found that gender, racial, and ethnic diversity correlated to positive financial performance. VIVIAN HUNT, DENNIS LAYTON & SARA PRINCE, MCKINSEY & CO., *DIVERSITY MATTERS* (Feb. 2, 2015). The performance differential was significant: Companies ranking in the top quartile on these aspects of diversity were 15 to 35 percent more likely to have financial returns above national industry medians. These findings were reinforced in additional research McKinsey subsequently published in 2018 showing that gender and ethnic diversity in management correlates to profitability. VIVIAN HUNT, SARA PRINCE, SUNDIATU DIXON-FYLE & LAREINA YEE, MCKINSEY & CO., *DELIVERING THROUGH DIVERSITY* (Jan. 2018). And a 2017 study by Boston Consulting Group (BCG) found that diverse management teams grew 19 percent higher revenues and achieved better overall financial performance compared with management teams with below-average diversity. BCG, *HOW DIVERSE LEADERSHIP TEAMS BOOST INNOVATION* (Jan. 23, 2018). BCG's study further concluded that positive effects on performance metrics can follow even modest gains in proportional representation in management.

The reasons for diversity's positive impact on companies' bottom lines are multifaceted. For global companies like Microsoft that serve a diverse customer base, the diversity of our workforce is critical to understanding our customers. Our customers' needs and desires are shaped by a host of factors that are each highly diverse, such as diversity of culture, language, age, gender, sexual orientation, political affiliation, religious belief, nationality, local economy, geography, and historical context. Our ability to serve our customers well requires that we understand their wants and needs, which in turn requires that we have a sophisticated understanding of their full contextual experience. In addition to its importance in serving our customers, diversity is equally important as we engage with our broader stakeholders. The reality is that we cannot be effective if we cannot understand and appreciate the interests and needs of the incredibly diverse individuals who make up our stakeholder groups, from employees and customers to business partners, regulators, and judges.

Diversity also has a positive effect on decision-making, creativity, and innovation. In part, that benefit comes from the broader set of ideas that diverse groups will generate, which is a real advantage in driving innovation; and in part, it comes from the broader skill sets that diversity can bring. But organizational science and sociology research has shown that it goes deeper. When individuals in a team represent a range of cultures, ethnicities, worldviews, and other attributes, it takes more effort to reach consensus on projects, but research shows that people expect that and, in response, prepare better and anticipate alternative points of view in their preparation. David Rock, Heidi Grant & Jacqui Grey, *Diverse Teams Feel Less Comfortable—and That's Why They Perform Better*, *HARV. BUS. REV.*, Sept. 22, 2016; SCOTT PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (Princeton Univ. Press rev. ed. 2008). In other words, individuals contribute more effectively when their colleagues are diverse. This layered impact of diverse teams makes a diverse culture a critical element to spark innovation and allow unique perspectives and insights to surface.

Diversity and the Law

These benefits of diversity extend to the legal profession. First, the legal work product itself is better when teams reflect a diversity of backgrounds, life experiences, and perspectives. In the context of litigation, for instance, so much of advocacy is rooted in an understanding of the audience, in appealing to common sense, and in distilling complex legal issues to narratives that resonate with people's lives. Legal teams are better able to create great advocacy through teamwork that draws on a wider variety of life

experiences and perspectives. This is especially so where the subject areas are particularly technical, as in patent litigation. Because patent cases are so technical, they are difficult for judges and jurors to understand. Because everybody learns differently, patent litigators need to be able not only to explain the technology and patent issues clearly and effectively but also to convey the message in a number of different ways. The only way to do that effectively and authentically is to have diverse points of view and different types of “teachers.” And, as our litigation team at Microsoft has observed over and over, diverse teams often are better received across key participants in our legal system: Judges, juries, arbitrators, and perhaps even regulators appreciate seeing diverse teams in front of them and may even be more open to advocacy from teams that reflect the diversity of the bench and jury pool.

Strong talent is critically important to any business. This is especially so in a profession like the law, where value accrues from talent itself: Lawyers provide advice, our clients make key strategic decisions based on that advice, and sound strategic business decisions accrue to success. Given that there is not one single demographic group that has the talent market cornered, it is important that companies and firms cultivate a talent pool that is broad and deep. Talent is as diverse as we all are, and we are shortsighted if we are not seeking talent that includes all aspects of diversity.

As we step into what Klaus Schwab has termed the fourth industrial revolution, it is more important than ever that the profession is cultivating top-notch legal talent to address the key legal and policy issues on the horizon. Advancements in technology are fundamentally changing how we live, work, and engage with each other in our communities. With these changes, we face novel and substantial legal and policy issues that must be addressed: How will we manage data as a vital resource while balancing respect for people’s privacy, maintenance of public safety, and appropriate principles of fair competition? What new forms of crime must we protect against in a digital era? Similarly, what new forms do acts of aggression and war by nation states take? What must government and industry do to keep people and nations safe? What will respect for human rights require? What is the future of work when technology enables wide-scale automation in environments ranging from manufacturing to information workers and professional services, including legal services? As we step into this new era, the legal profession cannot afford to deploy less-than-the-best legal talent against these issues. We must build the most creative, innovative teams possible with broad perspectives, skills, talents, and passions to fulfill our duty in the face of challenges of this importance and scale.

And top talent in any one part of the legal profession strengthens the profession as a whole. The U.S. legal system includes thousands of agencies, legislative bodies, and courts, and well over a million lawyers, judges, regulators, legislators, law enforcement officers, and other professionals. The diversity we foster in each of our organizations benefits the system more broadly, as it enriches the overall diversity of talent that will naturally move through different parts of the system as individual careers evolve. It is not uncommon for legal professionals to hold roles over time in in-house legal departments, law firms, government agencies, and the judiciary, and the movement of talent infuses legal organizations with the benefit of more diversity of skill, experience, and perspective.

Finally, fostering diversity in the legal profession is critical to maintaining a healthy legal system. Just as it is important that businesses like ours understand their diverse customer bases, it is equally important that lawyers and judges—those who represent our legal system—understand the diverse communities that they represent and serve. It is important that the public trusts the legal system to produce fair rules, fair incentives for compliance, a fair enforcement scheme, and a fair judiciary. In a complex system that regularly requires compromises among stakeholders—and in some cases results in winners and losers—diversity and inclusion are essential to fairly and adequately representing and considering the needs, interests, and points of view of the many communities that comprise a public, especially one that at times is skeptical of the legal system and its impact on them.

Advancing Diversity

To meaningfully advance diversity, first we each must make progress and hold ourselves accountable within our own organizations, whether in a corporate legal department, a law firm, a nonprofit legal department, or a government agency. From there, we each can look for ways to extend our impact beyond our own boundaries. For in-house legal departments, considering diversity in the selection and engagement of outside counsel provides an important opportunity to expand a company’s impact on diversity in the

profession. This is a particularly rich opportunity, given that the majority of U.S. lawyers—perhaps as much as 75 percent—are employed by law firms. See CLARA N. CARSON & JEEYOON PARK, A.B. FOUND., *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2005*, at 5 (2012).

Over the last decade, a number of in-house legal departments, including Microsoft's, have been investing in programs and initiatives to help increase diversity within their partner law firms. The American Bar Association has recognized this need and opportunity as well, and in 2016 adopted Resolution 113 asking corporations to promote change by (i) expanding and creating opportunities at all levels of responsibility for diverse attorneys, (ii) urging corporations as clients to assist in the facilitation of opportunities for diverse attorneys within law firms, and (iii) directing a greater percentage of procured legal services to diverse attorneys. We supported the resolution when it was introduced (see the statement by Brad Smith, Microsoft's president, ABA Resolution 113: Creating a Legal Profession That Reflects the Public it Serves, Nov. 22, 2016, <https://blogs.microsoft.com/on-the-issues/2016/11/22/aba-resolution-113-creating-legal-profession-reflects-public-serves/>) and are proud to continue our support along with more than 100 other organizations, representing a broad range of industries, including financial services, transportation, food and beverage, retail, pharmaceuticals, and information technology.

Many of the law firm diversity initiatives and programs companies are developing focus on leveraging their purchasing power to advance diversity by considering diversity in the selection of outside counsel, the rates they pay through metrics-based or incentive-based fee structures, or both. These programs are important for at least four reasons. First, research supports that diversifying outside counsel on a company's matters leads to improved outcomes for the company. And this increased diversity within the law firm creates a multiplier effect—by creating a more diverse attorney base at the law firm, the benefits of that diversity extend beyond the work for the original client to the firm's other clients, as well as the firm's own operations. Second, companies can broaden their influence dramatically through these partnerships and programs. For example, a corporate legal department may have 50 in-house attorneys but may engage 1,000 or more law firm attorneys in a given year. Third, to the extent that many or most of a law firm's clients ask the law firm to ensure diversity within the firm and on the companies' matters, it helps ensure that the talent "supply and demand" are aligned, thereby empowering the firms to diversify. Finally, the increased diversity resulting from these programs can also further reinforce a virtuous cycle—as law firms hire, develop, and retain top-notch diverse talent, it is more likely that their clients will seek that diverse talent for their work.

Incentives

In 2008, Microsoft sought to create partnerships with our strategic partner law firms to advance diversity at those firms. As we had worked to improve the diversity in our own legal department, we found that accountability helped accelerate progress, and we believed that would naturally extend to our outside firms as well. We also believed that working together collaboratively in partnership with our law firms on diversity would be the best approach for making real and enduring progress. With these two principles in mind, and in light of our experience that many of our firms were already focused on these issues and recognized their importance, we concluded that an incentive-based program was the right approach for us. We launched a law firm diversity program designed to reward our strategic partner firms based on key metrics regarding diversity at their firms, including diversity at the firm overall, diversity in leadership positions, and diversity of the attorneys in the firm working on Microsoft matters. Now in its 11th year, the program has evolved to also financially reward our partner firms for the most innovative diversity programs, and Microsoft encourages them to share their ideas and learnings with us and with each other. This program has allowed us to extend our influence beyond the nearly 575 attorneys in our own legal department to more than 15,700 attorneys at the participating firms.

Over the 11 years our program has been in place, we have seen meaningful progress. Participating firms have increased the average percentage of hours worked by diverse lawyers on Microsoft matters from 33.6 percent to 58.7 percent. Since 2015 when we added leadership diversity metrics, diversity in overall partner ranks at our strategic partner firms increased from 33.2 percent to 37.4 percent, diversity in management committees increased from 31.2 percent to 41.8 percent, and we have had a diverse first or second in 90 percent of the litigation matters large enough to be subject to bidding.

The success of this program is the result of strong partnerships with our strategic partner firms. To their enormous credit, they have embraced this initiative, participated fully, and collaborated on innovative approaches and learnings. The majority of participating firms have earned a bonus in each and every year they have participated, with 92 percent of the firms receiving their bonus in 2019. Not surprisingly, our experience is that most law firms believe, like Microsoft, that these types of diversity partnerships and programs are mutually beneficial.

Continued innovation will be key, and we are optimistic that rewarding innovation and broad sharing of best practices will help enhance diversity programs and partnerships and ultimately advance progress. We were heartened by the openness with which our strategic partner firms engaged with each other, sharing broadly their ideas and best practices with us and with each other. This sharing allows organizations to adopt ideas and programs they like, to innovate based on things they see others doing, and to learn from each other's less successful programs and initiatives.

More broadly, companies can also partner with their law firms to enhance career development and progression for diverse attorneys. Most successful careers in private practice are built on opportunities to do meaningful work and develop meaningful networks with clients that result in more and higher-stakes work over time and credit for securing that work for the firm. Ensuring that diverse outside counsel have exposure to in-house legal teams can go a long way toward advancing career development and enabling diverse talent to develop important client relationships. This can include leveraging legal departments' diverse internal affinity networks to provide diverse outside counsel with rich networking opportunities and investing in mentorship programs that pair diverse talent from outside counsel teams with in-house attorneys. In-house legal departments also can incorporate goals for staffing on new matters and key tasks on significant projects to ensure that diverse attorneys are given opportunities appropriate to their tenure and skill. For example, Microsoft's litigation team works with our strategic partner firms to ensure not only that diverse attorneys are included on teams managing our cases but also that specific work, ranging from document review, depositions, motion writing, and brief writing, all the way to management of the matter as a whole, is assigned in a manner that provides career-stage-appropriate opportunity for that talent.

In the future, we also see an opportunity to heighten the focus on how law firms credit their diverse associates and partners for their work on our account, ensuring that it aligns with the impact of those attorneys' contributions to our business.

Women- and minority-owned law firms are an integral part of the legal market, and engagement of these firms is another important avenue for increasing diversity. Programs like the National Association of Minority & Women Owned Law Firms (NAMWOLF) Inclusion Initiative are helping increase legal spend on firms owned by women and minorities. As a part of this initiative, companies commit to a significant calendar-year-stretch goal of legal spend with diverse law firms. Since the Inclusion Initiative was launched in 2010, participating companies have spent over \$1.6 billion on women- and minority-owned law firms. Microsoft has participated in this initiative since 2010, and we annually pledge to spend a minimum of 7 percent of our legal budget with women- and minority-owned law firms. This aligns with Microsoft's supplier diversity strategy more broadly—last year Microsoft spent more than \$2.9 billion across the company working with suppliers who are minority, disabled, veteran, LGBTQ+, and woman-owned businesses.

Other Ways to Build Diversity

Beyond focusing on the selection of outside counsel, the profession can also continue to invest in other ways to support the diverse talent pipeline, enhance career development and progression, and foster a culture of inclusion. There are important opportunities for those in the legal profession to partner with nonprofit organizations focused on directly supporting the development of diverse attorneys, such as the Minority Corporate Counsel Association and Leadership Council on Legal Diversity. Affinity bar associations also are important stakeholders driving progress. These organizations provide important community, networking, and career development opportunities for diverse lawyers, and they offer excellent opportunities for in-house departments and law firms to partner and explore ways to improve diversity in our organizations and the profession. Partnerships between colleges, universities, and legal employers also can be invaluable in creating a sustainable diverse talent pipeline and enabling diverse attorneys to launch

successfully into the profession. The Gregoire Fellows Program in Seattle is one such example. The program connects law students with Seattle-area businesses and law firms, and supports students through their law school education through paid internships, financial assistance for bar exam preparation, and mentorship by former Washington Governor Christine Gregoire. Finally, it is important that we collectively invest in further research to drive a deeper understanding of the state of diversity in the profession and the barriers to progress.

Given the importance of diversity in the legal profession, it is critical that we work together as an industry to accelerate the pace of progress and to find ways to do so at scale. Two key places in which corporate legal departments can contribute are considering diversity in the selection of outside law firms and working with the law firms with which they currently engage to increase diversity within those firms. Fortunately, many legal departments are actively taking such steps today, as is evident from the more than 100 corporate signatories to ABA Resolution 113 and the more than 30 signatories to the NAMWOLF Inclusion Initiative. However, expanding the number of companies and law firms engaging in this way will be invaluable in accelerating progress. In addition, we need more companies, law firms, and other organizations to create new, innovative programs and to share those innovations and the resulting insights with the rest of the industry, with the goal of all of us getting better together. As more companies and law firms commit to partnership, innovation, and sharing in this space, the pace of progress should accelerate, and the entire legal profession, including the clients we serve, will benefit immensely.

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