Facing the Threats to Diversity

How Detractors Are Trying to Undermine Diversity Efforts and What Can Be Done About It

By Francisco Ramos, Jr.

Over the past two decades, companies, in-house law departments, and law firms have invested resources, energy, and time to diversify their workforce. Diversity has become ingrained in business. The term "chief diversity officer" has become part of the lexicon, as diversity has not only become part of the corporate culture but of corporate America's long-term strategy as well. General counsel have taken the lead to diversify the ranks of their law departments and have applied pressure on their outside counsel to do the same. Anecdotes abound of GCs firing outside counsel for not counting more minorities in their ranks. All these efforts have translated into greater opportunities for more minorities. But these efforts are being challenged.

Despite the fact that the country is becoming more culturally and ethnically diverse, some claim that diversity efforts violate antidiscrimination laws, lower the bar for hiring practices, stigmatize minorities, and doom them to failure. It is important to raise awareness about the potential threats to the progress our nation and our profession have made in the area of diversity. It is just as important, if not more so, to address what can be done to safeguard against these threats. So, what are some current threats to diversity?

First, there are the two recent Supreme Court decisions addressing integration in K–12 education. In the landmark cases of *Meredith v. Jefferson County Board of Education* and *Parents Involved in Community Schools v. Seattle School District*, the Supreme Court struck down voluntary school integration programs in Louisville and Seattle. These two rulings are considered by many to be the most important on race in schools since *Brown v. Board of Education*. In them, the Supreme Court struck a blow to the efforts of school boards, administrators, and parents across the country to diversify the racial and ethnic makeup of their children's elementary, middle, and high schools.

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"The Supreme Court plurality does not value integration," notes law professor Richard O. Lempert of the University of Michigan Law School. "These recent cases were not about affirmative action or diversity. They were about integrating our society. The Court has ruled that the most effective devices to ensure integration cannot be used."

But there may be a silver lining to these opinions. Justice Kennedy refused to join the plurality opinion by Chief Justice Roberts, rejecting the proposition that race can never be considered and that schools should not pursue diversity. "Because of Justice Kennedy, school districts can still consider race," notes law professor Tomiko Brown-Nagin at Virginia Law School. "Justice Kennedy still supports the ideal behind *Brown*, and schools can pursue

that ideal. These recent decisions don't necessarily end efforts to advance educational equality." Susan Eaton, research director of the Charles Hamilton Houston Institute for Race & Justice at Harvard Law School, concurs. "Kennedy's opinion laid out some concrete things we can be doing to integrate our schools. For example, states could give localities incentives to combine two school districts, one that is predominantly white and one that is diverse."

Jack Greenberg, law professor at Columbia Law School, who argued the *Brown* case before the Supreme Court more than 50 years ago, notes that the facts underlying these cases reflect this country's strong desire to pursue diversity. "There are efforts to curtail diversity efforts, but there are also efforts to continue to push forward with diversity. Governmental entities at the local levels are trying to integrate, as reflected by the school districts in Louisville and Seattle. They are trying to integrate by democratic means. These cases show the continued drive toward diversity."

It is worth noting that despite the Supreme Court's efforts to curtail diversity in our secondary schools, the Court did not repudiate its 2003 decision in *Grutter v. Bollinger*, in which the majority allowed institutes of higher education to consider race in their admissions policies. Justice O'Connor, writing for the majority, noted that "student body diversity" was a "compelling state interest" that justified the use of race in university admissions. The opinion was lauded by corporate America, which submitted numerous amicus briefs extolling the benefits of diversity in business. Thus, the same Supreme Court that has undermined diversity efforts in our secondary schools may allow similar efforts by companies and law firms in the workplace.

In addition to recent Supreme Court rulings, anti-affirmative action efforts by the likes of Ward Connerly have undermined diversity. Connerly is the man behind state initiatives that outlaw race- and gender-based preferences in state hiring and state university admissions, and has become the face of the anti-affirmative action movement. He has been involved in the passage of anti-affirmative action initiatives in California, Washington, and Michigan, and is pursuing similar initiatives in other states. His efforts ignore the difficulties minorities face in the workplace and only add to them.

Shirley Wilcher, executive director of the American Association for Affirmative Action (AAAA), says that anti-affirmative action efforts ignore demographic realities. "We are getting resistance by those who feel threatened by diversity efforts, which is shortsighted, because by 2050, one half of all Americans will be minorities." Connerly and others like him have been successful because they have defined affirmative action as something other than what it really is. "Affirmative action is not in conflict with principles of merit. It is not about giving unqualified minorities jobs," says Wilcher. "The essence of affirmative action is casting a wider net to give more people an opportunity. It is about eliminating barriers and having a discrimination-free workplace."

Tyree P. Jones, Jr., counsel at Reed Smith, agrees that minorities cannot allow others to redefine such terms as "diversity." "The fallacy is that diversity programs mean lowering standards," says Jones. "That is not true. Being inclusive mandates that we broaden our search for talented candidates beyond traditionally accepted parameters. All applicants to our firm must meet our rigorous standards. That requirement is not compromised by broadening the pool of applicants."

A third threat to diversity efforts is attacks on the credentials of minority attorneys. In 2006, in the *North Carolina Law Journal*, law professor Richard H. Sander of UCLA published a study, "The Racial Paradox of the Corporate Law Firm," in which he concludes that minority attorneys are less likely to succeed in law firms because they are less qualified. Sander's data showed high attrition and low partnership rates among minority attorneys at law firms. But it is not his data that many people have taken issue with; it is his conclusions. Sander concluded that law firms are lowering their standards, hiring minority attorneys with lower grades. These minority attorneys, according to Sander, have a "credentials gap" and are less likely to "measure up" to their white peers. As a result, fewer of them stay and fewer are made partners.

Sander's study has caused outrage in both corporate law departments and law firms, and most have rejected his conclusions, including Professor James E. Coleman, Jr., of Duke Law School, who has debated Sander. "His is too simple an explanation of what happens in law firms," says Coleman. "One cannot look at grades or performance at law school and predict whether specific attorneys succeed." Coleman says the high attrition and low partnership numbers among minority attorneys at law firms are due to factors other than grades. "Some minorities are not getting the good assignments, the good mentors, or the client access they seek. They are not being given the opportunities to succeed in the 'big firm' culture, causing many to leave."

Dr. Arin N. Reeves of the Athens Group agrees that Sander's conclusions are simply wrong. To suggest that minorities are receiving preference is to ignore the preference whites have received all these years. "We have to educate people that we are not operating in a meritocracy. It is anything but. The leadership in law firms is not composed solely of those who received the top grades. Many of them made it to the top because the right person took them under their wing. Some had the advantage of being third generation lawyers. Others were the sons of general counsel. All the factors in hiring practices that give advantages to some and not to others do not always have to do with grades or what law school you went to."

A fourth threat to diversity efforts is the claim by some that pursuing diversity in the workforce violates antidiscrimination laws, amounting to reverse discrimination. This faction is led by several outspoken critics of affirmative action, including Curt Levey, director of the Committee for Justice, a group that promotes "constitutionalist judicial nominees." Levey, who fought the University of Michigan's affirmative action plans, claims that law firms and general counsel give minorities preference in hiring and promotions and may be inviting discrimination suits. In his March 2007 report, "The Legal Implications of Complying with Race- and Gender-Based Client Preferences," Levey concludes that law firms "willing to acquiesce to client demands concerning the race and gender of attorneys" are violating "antidiscrimination laws and exposing themselves to legal liability." In fact, he claims that some organizations have begun soliciting plaintiffs to sue law firms over their diversity programs.

Shirley Wilcher finds it ironic that people like Levey want to eliminate preferences "which they themselves have had the last 300 years." For Wilcher, it is not about making special accommodations for minorities, it is about giving them an equal opportunity: "We have to cast the net wider. We have to assume all groups have the talent and the skill to do the job."

Professor Coleman agrees that diversity programs are not discriminatory; they simply provide minorities with the same opportunities whites already have. "If a law firm or company wants to ensure success of attorneys of color, they have to give them fair opportunity to be successful. They have to give them work that matters to the firm. They have to mentor them. Any lawyer who has made partner had a mentor." In fact, diversity programs are about doing away with discrimination, not creating it. As Dr. Reeves notes, "There are obstacles in place that prevent minorities and women from succeeding. Diversity programs remove these barriers." Wilcher agrees: "In law firms, as in corporate America, there is a glass ceiling. Law firms have to acknowledge the glass ceiling and address it."

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In the face of these threats to diversity efforts by corporate America and law firms, what is the future viability of diversity programs? Are they even legal? MCCA asked the law firm of Jackson Lewis to address this point: Can law firms carry out diversity initiatives without violating antidiscrimination laws? The answer, encouragingly, was yes. Jackson Lewis, led by partners Leroy Watkins, Jr., and Patricia Diulus-Myers, co-chair of the firm's Diversity Committee, drafted a white paper titled "Counterpoint to Attack on Lawfulness of Diversity Initiatives" that addresses the viability of diversity efforts. The following are some of the suggestions they make for what corporate law departments and firms can do to pursue diversity without running afoul of antidiscrimination laws:

Broaden recruitment efforts. Employers can cast a wider net when they are recruiting, to ensure that all groups hear about job opportunities and promotions. Consideration should be given to notifying minority organizations about job openings.

Develop a mentoring program. Employers can develop a mentoring program in which all employees, including minorities, are paired with senior attorneys. In such a program, minorities would be guaranteed a helping hand to help them acclimate to firm life and thrive there.

Develop an internship program. Employers can hire college and law students as interns—again, casting a wide net—to give minorities an opportunity to experience firm life and help them make any necessary adjustments while they are still in school to help ensure their success after graduation.

Monitor turnover. No one denies that there is high attrition of minority attorneys at law firms. Law firms should study why attorneys leave their firms, including conducting exit interviews. They should evaluate why minority turnover is disproportionately high and address those issues to reduce minority turnover.

Evaluate work assignments. Employers can determine which attorneys receive which work assignments and can ensure that all attorneys, including minorities, receive plum assignments and are given access to the firm's major clients.

The "Counterpoint" white paper includes a detailed discussion of law firm diversity programs. To download a copy, click here. **DB**

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MCCA thanks the law firm of Jackson Lewis for volunteering to prepare the "Counterpoint" white paper on a pro bono basis!

From the 10-year Commemorative issue of Diversity & The Bar®