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## How Globalization has Shifted the Paradigm of Diversity Inclusion in Intellectual Property Law

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"Our workforce and our entire economy are strongest when we embrace diversity to its fullest, and that means opening doors of opportunity to everyone and recognizing that the American Dream excludes no one." Thomas Perez, United States secretary of labor, consumer advocate, and civil rights lawyer, made that comment about one of the most popular business topics in recent decades.<sup>1</sup> Diversity is frequently discussed among other popular topics such as equality, leadership, and ethics; however, it is also one of the most controversial and least understood among them.<sup>2</sup> Globalization has impacted the need for diversity in business practices over several decades. In turn, this has affected diversity programs and diversity inclusion initiatives that law firms have developed to better serve their clients. While these programs and initiatives have assumed different forms over the years, the philosophical and economic rationales driving them have remained constant.

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## Diversity Inclusion and Initiatives: Some History

The U.S. population is becoming increasingly diverse, and minority populations have increased at a rate significantly faster than the nonminority population. According to the U.S. Census Bureau, between 2000 and 2010, the Latin American population grew by 43 percent, and the African American population grew by 12 percent.<sup>3</sup> Moreover, in 2009, worldwide American companies in the Standard & Poor's 500 (S&P 500) had more than 55 percent of their total income earned outside the United States.<sup>4</sup> It is evident that the U.S. population is becoming more diverse, and with increasing

globalization comes the imperative to acknowledge and address diversity inclusion.

In recent decades, legislation has been enacted and diversity training implemented to attempt to keep up with the changes in the diversity of our society. Title VII of the Civil Rights Act of 1964 and related legislation made it illegal to discriminate on account of race, color, religion, sex, national origin, pregnancy, age, and disability.<sup>5</sup> Initial diversity-training efforts date as far back as the 1960s and centered their efforts on creating equality like legislation.<sup>6</sup> Throughout the 1970s, diversity efforts were most visible through affirmative action, which focused on providing equal opportunities and reversing historic patterns of discrimination primarily in the areas of education and employment.

But antidiscrimination training often has been focused only on issues of treating underrepresented minorities and women in a fair and equitable manner. While minority and women representation increased and this type of inclusion led to an increase in “workforce diversity,” it was driven by compliance. True *diversity inclusion*—that is, not only having a seat in the room, but also having a voice in the conversation—was still missing. Roosevelt Thomas, a well-known diversity leader, author, and founder of the American Institute for Managing Diversity, shifted the paradigm of diversity from compliance to a matter of business survival. He advocated for a change that lasted beyond the initial hiring process, focusing on a philosophy that the goal should be to create an environment “where we is everyone.”<sup>7</sup>

Diversity-training efforts continued to evolve through the late 1980s and 1990s, with the content starting with compliance topics and moving toward valuing and respecting differences.<sup>8</sup> By the end of the 1990s, another shift occurred. Practitioners began to understand that diversity should not be related to a program and instead should be viewed as a business process or method to be integrated into the core strategy of an organization. Now in the twenty-first century, diversity training programs are created not only to enable employees to value differences but also to help them leverage diversity and make better business decisions. The evolution culminates in the philosophy that “all employees need to be more cross-culturally competent in an increasingly global world.”<sup>9</sup>

This is as true in law firms as it is in business—perhaps even more so. With the onset of the Internet and the globalization of business, the need for diverse lawyers to serve those diverse individuals and diverse interests likewise has become paramount. An understanding of the unique differences in representing Japanese versus Korean clients in United States courts, for example, can be immeasurably increased with a workforce that comes from that culture. Likewise, recognizing the impact that an African American or woman can have on the factfinder’s view of your legal team—especially when the factfinder is himself or herself diverse—simply is no longer optional. It is a prerequisite to presenting the best and most persuasive case in any courtroom.

In an effort to bridge this gap, in 2005 the intellectual property (IP) law firm Fish & Richardson launched its 1L Diversity Fellowship Program, which annually provides fellowships to diverse first-year law students. Each student selected to participate in the program receives a paid summer associate position in one of the firm’s domestic offices; is offered mentoring throughout the academic year by members of the firm; participates in the Leadership Council on Legal Diversity (LCLD) 1L Scholars Program; and is eligible to



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receive up to a \$10,000 scholarship. The program is a key component of the firm's ongoing initiative to recruit, retain, and advance attorneys who will contribute to the diversity of its practice and of the legal profession.

## The Economic Side of Inclusion

Diversity is not just the right thing to do, it makes sound business sense. As globalization increases, companies and law firms need to be cognizant that diversity inclusion should be incorporated as a core policy for their economic strategy. Individuals from different ethnic backgrounds, as well as women, contribute to a diverse mentality that is necessary to be competitive in today's world. In *Grutter v. Bollinger*, a landmark case that upheld affirmative action in a university admissions process, the Supreme Court stated that "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, culture, ideas, and viewpoints."<sup>10</sup> Since that decision, several American companies have continued their expansion into global markets. They need employees who can "serve and work together with people from many different cultures."<sup>11</sup> Many amici Fortune 100 and other leading American businesses in *Grutter* explained that diversity inclusion is essential because it leads to individuals who have

an increased ability to facilitate unique and creative approaches to problem-solving by integrating different perspectives and moving beyond linear, conventional thinking; they are better equipped to understand a wider variety of consumer needs, including needs specific to particular groups, and thus develop products and services that appeal to a variety of consumers and to market those offerings in appealing ways.<sup>12</sup>

Diversity inclusion is now a driving force that increases competitive advantage and is often necessary for business survival. Merck & Co., an American pharmaceutical company and one of the largest in the world, uses diversity inclusion as a method to increase its market leverage. Merck relied on the diversity of its employees to increase access to Gardasil, a vaccine that protects against the virus that causes cervical cancer. Specifically, the pharmaceutical company "sought the assistance of its Muslim employees in obtaining Halal certification in order to improve its acceptability and use under Islamic guidelines."<sup>13</sup> Merck and many other companies have formed and supported groups of employees "who bring their specific cultural, ethnic, religious, gender and other demographic knowledge and understanding to bear on business challenges and opportunities."<sup>14</sup> The need for diversity to be competitive for businesses has naturally impacted the need for diversity in law firms.

One area where this is especially apparent is the hiring and selection criteria that businesses use for their law firms. Global businesses have recognized the importance of diversity and are demanding that their law firms justify and explain how they will utilize a diverse team to meet the client's ultimate business goals. Moreover, the decision makers themselves within Fortune 500 legal departments are increasingly diverse attorneys and women, and this makes the need to present a diverse team even more necessary. Indeed, recent studies have shown that diverse individuals and women are graduating from law school at a greater percentage than they have historically, yet the number of those same individuals successfully matriculating through to partnership at law firms is woefully small. Where

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are these lawyers going when they leave the law firms? A significant number of them are going in-house.

In this new paradigm, uninformed law firms will miss real business development and client relations opportunities if they fail to appreciate the background from which these decision makers come, and the goals of diversity inclusion that they seek. Even for those entities where the ultimate decision maker may not be a diverse attorney or a woman, strong economic incentives exist to increase diversity. Microsoft, for example, has for years awarded its premier preferred provider firms with a two percent annual bonus for achieving certain benchmarks in the number of hours that women and minorities spend on Microsoft matters.<sup>15</sup> This was done to advance diversity beyond merely hiring and firing, and to further inculcate it into law firms' core business practices. As its general counsel Brad Smith explains, Microsoft chose this incentive because "[t]he focus on hiring and firing is good but incomplete. One conclusion we came to is we need more tools. You want to encourage people to advance diversity after you hire them."<sup>16</sup> Microsoft's program has evolved to include five achievement options related to both diverse hours and diverse headcount at the firms. Going even further, Microsoft and many other Fortune 500 companies have taken the next step by becoming participating members in the LCLD, an organization whose goal is to lead by example, take action, and challenge the legal profession to prepare future generations of diverse talent for the highest positions of leadership.<sup>17</sup> Diversity inclusion is now a business imperative for law firms.

### **Inclusion Takes Persistence**

While diversity inclusion is necessary for corporations to stay competitive in global markets, law firms are still facing a disconnect in maintaining diversity inclusion as a part of their business practice. "Law360's findings in its first-ever review of legal industry diversity reveal that minorities make up just 8 percent of partners and only 7 percent of equity partners at major law firms."<sup>18</sup> Experts have concluded that the "share of the blame rests on the failure of law firm leaders to recognize the importance of diversity and inclusion in both a social and a business context."<sup>19</sup>

In order for law firms to fully implement and experience the benefit of diversity inclusion, they must work to reduce the social strata that diverse and women attorneys naturally face, and involve them in the growth process. It is not enough to include the diverse or female attorney on the pitch: law firms must take him or her to the client meeting and give the attorney a meaningful role on the case. It is not enough to create a mentor program for the developing diverse attorney: firms must align the attorney with mentors that will invest in his or her development and growth as a future leader. It is not enough to introduce the female attorney to the client: the firm must also give her the opportunity to learn to develop business and bring in clients of her own. An attorney's ability to do the work no doubt is a condition precedent, but providing the right tools for success and affording the right opportunities to succeed are conditions subsequent to the success of any law firm diversity program. A salutary nod to diversity without embracing the core values of the approach is doomed from the beginning. It is critical that firms recognize that their mentors need not necessarily be diverse or of the same gender but should share in the commitment to progress. Every partner in a law firm has the ability to help create an environment of real diversity inclusion if he or she is mindful of staffing and work allocation.

This also applies in coordinating with organizations outside of the firm, such as the American Intellectual Property Law Education Foundation (AIPLEF). Sponsored by the American Intellectual Property Law Association and the ABA Section of Intellectual Property Law, AIPLEF promotes diversity in the IP field through scholarships, mentoring, and job opportunities. Annually, AIPLEF distributes over \$100,000 in scholarships and awards to underrepresented minority students in the United States, helping not only to bring awareness, but also to diversify the IP legal community by encouraging these students to pursue their legal studies. The Hispanic National Bar Association (HNBA), which partnered with Microsoft in 2013 to develop and launch the HNBA/Microsoft Intellectual Property Law Institute (IPLI), is another group that is leading the way. IPLI is held annually in Washington, D.C., for rising 2L and 3L Hispanic/Latino law students who are interested in IP law. Up to 25 Hispanic/Latino students are selected from law schools across the country to participate in the weeklong immersion program where they receive substantive instruction, visit and observe IP law institutions including the U.S. Patent and Trademark Office, attend live oral arguments before the Court of Appeals for the Federal Circuit, and network with IP legal professionals. Attorneys from fellow firms provide mentoring and work on various projects with the law students.

In the end, what is critical to the success of these programs is awareness of their existence and importance. It has been said that "faith comes by hearing." For a firm to be rewarded for faith in the importance and viability of its diversity program, those in positions of power and authority within the firm must be heard on the matter. If the leaders do not lead, the people surely will not follow.

## Endnotes

1. Tom Perez, *Justice and Identity*, U.S. Dep't of Labor Blog (June 30, 2014), <http://blog.dol.gov/2014/06/30/justice-and-identity>.
2. Keith Earley & Mary Frances Winters, *Diversity and Inclusion Training: What Law Firms Can Learn from Corporate Clients*, Diversity & Inclusion Rep. (Ass'n of Law Firm Diversity Prof'ls), Nov 1, 2009, at 6, 6, available at <http://alfdp.com/wp-content/uploads/2009/09/alfdp-nov-09-newsletter.pdf>.
3. U.S. Census Bureau, 2010 Census Briefs: Overview of Race and Hispanic Origin: 2010, at 3, 5 (Mar. 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.
4. Bus. Roundtable, Taxation of American Companies in the Global Marketplace: A Primer 4 (Apr. 2011), available at [http://businessroundtable.org/uploads/studies-reports/downloads/Taxation\\_of\\_American\\_Companies.pdf](http://businessroundtable.org/uploads/studies-reports/downloads/Taxation_of_American_Companies.pdf).
5. See 42 U.S.C. §§ 2000e *et seq.*
6. Earley & Winters, *supra* note 2, at 6.
7. *Id.* at 7 (emphasis added).
8. *Id.*
9. *Id.* at 7–8.
10. 539 U.S. 306, 330 (2003).
11. Brief for Amici Curiae Fortune-100 and Other Leading American Businesses in Support of Respondents at 9, Fisher v. Univ. of Tex. at Austin, No. 11-345 (U.S. Aug. 13, 2012).

12. *See id.* at 5.
13. *Id.* at 12.
14. *Id.*
15. *See* Debra Cassens Weiss, *Microsoft's Outside Counsel Can Earn a Bonus for Increasing Diversity*, ABA J. (July 25, 2008), available at [http://www.abajournal.com/news/article/microsofts\\_outside\\_counsel\\_can\\_earn\\_a\\_bonus\\_for\\_increasing\\_diversity](http://www.abajournal.com/news/article/microsofts_outside_counsel_can_earn_a_bonus_for_increasing_diversity).
16. Catherine Ho, *Microsoft's Chief Legal Officer Talks about the Company's Diversity Benchmarks*, Wash. Post., Mar. 24, 2013, [http://www.washingtonpost.com/business/capitalbusiness/microsofts-chief-legal-officer-talks-about-the-companys-diversity-benchmarks/2013/03/22/60b58162-919f-11e2-9cfd-36d6c9b5d7ad\\_story.html](http://www.washingtonpost.com/business/capitalbusiness/microsofts-chief-legal-officer-talks-about-the-companys-diversity-benchmarks/2013/03/22/60b58162-919f-11e2-9cfd-36d6c9b5d7ad_story.html).
17. *See* Leadership Council on Legal Diversity, <http://www.lclldnet.org> (last visited June 21, 2015).
18. Gavin Broady, *Diversity Gap a Growing Threat to BigLaw Bottom Lines*, Law360 (May 19, 2015), <http://www.law360.com/articles/657593/diversity-gap-a-growing-threat-to-biglaw-bottom-lines>.
19. *Id.*

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## Whether local or global, settling tough disputes require ownership and respect among parties

Participants engaged in mediation, whether in an international stage such as the Arab-Israeli conflict or more locally through U.S. bankruptcy courtrooms, must take ownership and develop trust with each other to have any chance of success.

That was a message delivered on the opening day of the four-day 2018 Spring Conference of the ABA Section of Dispute Resolution, which closed in Washington, D.C. on April 7.



New York Times columnist Thomas Friedman addresses the Spring Conference of the ABA Section of Dispute Resolution

In two different sessions, Thomas Friedman, foreign affairs columnist for The New York Times, and lawyers involved in leading the city of Detroit through its bankruptcy proceedings, struck a common theme in their presentations: People having the most at stake in any negotiation must enter deliberations with good listening skills and respect for the other parties.

"Mediation in situations like this can be quite controversial," observed David Heiman, a Jones Day attorney who served as lead counsel for Detroit, recalling the 2013 municipal bankruptcy proceeding. He added that the various stakeholders must be listened to.

Friedman suggested the same approach in Israeli-Palestinian negotiations. It doesn't matter if presidential aide Jared Kushner of another American is in charge, it will take the "will" of parties in the Middle East "and not U.S. leadership" to resolve these decades-old differences.

The conference, titled "Dispute Resolution in Complex Times," addressed the current changing environment for alternative dispute resolution, as well as offering programs in six additional areas: arbitration; mediation, negotiation; advocacy; communication, psychology and neuroscience; and ethics. The Detroit panel was one of several case studies on the success of mediation in resolving local disputes.

Heiman joined then emergency manager Kevyn Orr and retired federal judges Steven Rhodes, who presided over the case, and Gerald Rosen, who engineered the mediation that led to what is called the "Grand Bargain," to provide a post-mortem in the program, "The Detroit Bankruptcy: The Power of Mediation."

Their success is widely touted nationally. As Rosen, a federal district court judge at the time who accepted the offer to mediate, observed, "The short, long story of this was ... the city peaked in 2009 at a rate of unemployment of 17.9 percent. The city (unemployment) is better off now than the national average."

Rhodes, a retired federal bankruptcy judge, said he realized early on that "mediation was going to be an important component of the solution of Detroit's problems." He said he "toed the line between (mediation) being compulsory or it being voluntary," and tried to ensure that the various stakeholders in the city – primarily pensioners, teachers and city workers — had an opportunity to speak in regular court sessions and be listened to.

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"The thoughts they brought to me were highly impactful," he said. "I knew (mediation) was the key to the resolution. ... Not just the case but the city's future."

The city emerged from bankruptcy — the largest municipal case in U.S. history — in December 2014, or 17 months after filing Chapter 9. The "Grand Bargain" conceived and pushed by Rosen prohibited the sale of artwork from the city-owned Detroit Institute of Arts (DIA) to pay off the city's massive debt and pension obligations. Under its terms, \$816 million was donated by multiple foundations, DIA and the State of Michigan to offset pension and other cuts, which were accepted by city retirees.

At the opening plenary session, Friedman deliver the [Frank Sander Lecture](#), named for a Harvard law professor and pioneer in the field of alternative dispute resolution who died earlier this year. A three-time Pulitzer Prize winner, Friedman also received the [D'Alemberte-Raven Award](#), the section's highest honor, for his writings on foreign affairs and globalization that, in his words, "translates from English to English" so readers can better understand world events.

In his remarks, Friedman emphasized the importance of the art of listening and showing respect for the other party, although the context was more from an international perch where the parties have a long history of antagonism.

Friedman also discussed many of the ideas and concepts in his 2016 book "Thank You for Being Late: An Optimist's Guide to Thriving in the Age of Accelerations," including sharing his thinking that in today's environment those who show "resilience" and "propulsion" will ultimately be the winners in economic and other sectors.

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