

Toward Inclusive Meritocracies

Examining the Relationship between Merit and Diversity in Large Law Firms

by Dr. Arin N. Reeves

Reprinted with permission from DRI's *For the Defense Magazine* and the Author.

According to The American Heritage Dictionary, a meritocracy is a "system in which advancement is based on individual ability or achievement." Many law firms pride themselves on operating as meritocracies embodied by this definition. Individual ability and achievement is carefully examined in future hires, and attorneys who have been deemed to be worthy of inclusion in law firms are rewarded and advanced based on their abilities as evidenced by their achievements in meeting billable hour requirements, generating revenues and contributing to a law firm's overall profitability and reputation.

When the topics of diversity and inclusion are introduced into law firm operations, a "yes, but" reaction is often triggered in most firms. **Yes**, we are for diversity and inclusion, **but** we don't want to violate our meritocracy. This "yes, but" reaction is based on a definition of merit where ability alone equals achievement. In other words, a lack of achievement has to mean a lack of ability. This definition of merit sets up diversity and inclusion as oppositional to a meritocracy and suggests that a law firm has to supplement the abilities of some groups to achieve while other groups achieve naturally.

What if law firms are environments where ability does not naturally equate to achievement? What if merit, in law firms, is not based on ability alone but requires ability to be paired with opportunity in order to result in achievement? If merit, in fact, is the sum of ability and opportunity, would unequal access to opportunity mean that law firms are, in fact, not operating as meritocracies? What if diversity and inclusion initiatives are focused on eradicating inequality in opportunity, would they not, then, be consistent with creating a true meritocracy?

A recent ground-breaking study of attorneys' experiences in AmLaw 200 firms, *Sustaining Pathways to Diversity* (2009), by the Minority Corporate Counsel Association (www.mcca.com) provides some critical research that supports the definition of merit in law firms as the sum of ability and opportunity and begins to answer the questions posed above. The most comprehensive study on diversity and merit in large law firms to date, *Sustaining Pathways* is based on responses from 4406 attorneys from 124 law firms. 49.3% of the attorneys were partners, 40.7% were associates and 8.2% were counsel/of counsel. 58.5% of the attorneys were male and 41.5% were female. 22.6% of the attorneys identified themselves as belonging to one or more racial/ethnic minority groups, and 75.1% identified themselves as white/Caucasian. The study yielded a 99% confidence interval for generalizability to the full population of all attorneys in AmLaw 200 law firms. *Sustaining Pathways* examined many aspects of the attorneys' experiences in their respective law firms, and it closely examined the myth of meritocracy in which many firms continue to be steeped.

This article will explore the relationship between merit and racial/ethnic diversity in large law firms as illuminated by the research in MCCA's *Sustaining Pathways* report.

Commitment to Diversity vs. Protecting a Meritocracy

The data in *Sustaining Pathways* illustrates that the majority of attorneys in large law firms feel that their firms are committed to diversity. With 81% of minorities and 90% of whites reporting that their law firms demonstrate a commitment to diversity, the report seems to indicate that law firms have indeed made laudable strides towards creating more inclusive workplaces. Yet, the National Association for Law Placement (NALP) reports that minorities accounted for 5.92% of partners in major law firms in 2008, only a "marginal" change from the 2.55% reported 15 years ago in 1993. (www.nalp.org) How can a strong perception of commitment to diversity by so many yield such a slow pace of change?

The "yes, but" responses from many white men in *Sustaining Pathways* sheds some light on how the commitment to diversity may be perceived by some as contradictory to their perceptions of sustaining a meritocratic workplace thereby creating a disparity between commitment and action. In other words, the commitment to diversity may be high, but if diversity feels contradictory to meritocracy, the transition of commitment to action may be much lower.

As one white male respondent notes in his survey response, "[d]iversity and inclusion are important but stretch hires of minorities who are not qualified sometimes does much to undermine the message and acceptance of diversity and inclusion." Another white male respondent posits that the "best way to achieve diversity and inclusion is outstanding performance. The use of pernicious discrimination in the name of diversity and inclusion fosters a victim mentality and an expectation that success does not need to be earned." In both of these responses, the definition of merit conflates ability with achievement and assumes diversity as supportive of substandard performance.

The perception that diversity threatens meritocracy relies on the assumptions that 1) diversity involves hiring and advancing minorities who are less qualified than their white counterparts, and 2) everyone has equal and unfettered access to opportunities that allow them to translate their abilities into achievement. Unless these two assumptions are actively challenged, the high levels of commitment to diversity will not result in higher numbers of minorities actually entering and succeeding in large law firms.

Ability vs. Opportunity

In 2003, MCCA explored the assumption that diversity in law firms was created by hiring "less qualified" minorities in its *Myth of Meritocracy* report and found that, in a random sample of partners in large law firms, minority partners were actually more likely to have graduated from a Top 10 school than their white counterparts. *Sustaining Pathways* builds on this initial research to show that while only 14.42% of white lawyers in this survey graduated from Top 10 schools,

25.45% of racial/ethnic minorities graduated from Top 10 schools. Further, whites comprised only 12.51% of schools ranked 11-20 as compared to 18.01% of minorities who graduated from the same tier of law schools. Even though white respondents are far more likely than minorities to report that law school ranking was important in hiring criteria, minorities in large law firms are more likely than their white counterparts to have attended the top law schools.

The statistics detailed above paint a clear picture that diversity is not inconsistent with merit, insofar as law school rank is rated as an important criterion of merit by the majority of white attorneys in law firms. With the first assumption at least partially refuted, we turn to what the research illustrates in regards to the second assumption.

According to NALP and the NALP Foundation, although minority law students comprise roughly the same percentage of law firm clerkships as their representation in law schools, their numbers continue to dwindle as you move upwards in law firm hierarchies signifying a much higher attrition rate than their white counterparts. If we define merit in terms of ability as equivalent to achievement, we may conclude that minority attorneys have less ability than their white counterparts. However, if we define merit as the sum of ability and opportunity to manifest that ability into achievement, we can see the many ways in which unequal opportunity may undergird the higher attrition rates of minority lawyers.

In *Sustaining Pathways*, minority attorneys reported higher incidences of both discrimination and exclusion in their workplaces and their interactions with others. 14% of minorities and only 6% of whites reported discrimination in the workplace. While discrimination acts as one barrier to opportunity, exclusion from key assignments, networking and client development opportunities points to more direct inequity in opportunities offered to minorities. 16% of minorities compared to 6% of whites reported being excluded from key assignments and 22% of minorities compared to 12% of whites reported being excluded from informal networking and client development opportunities. Moreover, minorities who attended Top 10 schools reported having less access to mentoring, coaching and sponsorship than did white lawyers from all law schools. Among graduates of Top 10 law schools, 73% of whites in comparison to 53.25% of minorities reported having adequate access to mentoring, coaching and sponsorship. Similarly, 72% of whites from schools ranked 11-20 in comparison to 57.5% of minorities from the same law school tier reported the same. 73% of whites from all other schools in comparison to 61% of minorities from all other schools reported having adequate access to mentoring, coaching and sponsorship.

Furthermore, only 78% of minorities in comparison to 91% of whites reported getting access to good work that was unfettered by their race, and 77% of minorities in comparison to 90% of whites reported getting fair evaluations that were unfettered by their race.

Law firms may see themselves as meritocracies, but they often operate on the currency of favoritism. Favoritism can often manifest as a preference for a particular group or individual as opposed to a bias against a group or an individual.

Law firms have made considerable progress in confronting bias, but subjective preference continues to prevent true merit from manifesting.

If minorities, regardless of their law school qualifications, are getting less access to good work, adequate mentoring and fair evaluations, is it possible for minorities to translate high levels of talent into high levels of achievement? What if the adherence to a false sense of meritocracy actually prevents minorities from competing equally with whites thereby obscuring both the bias that hinders minority achievement as well as the privilege that enhances white achievement?

A New Definition of Merit

If law firms directly addressed the myth of meritocracy that underlies the resistance to diversity efforts in their workplaces, they can better articulate the consistency between diversity and meritocracy. The data in *Sustaining Pathways* clearly demonstrates that diversity is not only synchronous with meritocracy, but diversity is actually necessary for a true meritocracy because exclusion hinders the realization of talent. If merit is redefined as the sum of ability and opportunity to manifest that ability, diversity and inclusion become the tools by which inequalities in opportunity are identified and corrected. *Sustaining Pathways* offers many strategies by which to identify and correct existing inequalities in opportunity; however, the first step in creating truly diverse and inclusive workplaces is to recognize that meritocracy is an unrealized ideal to which law firms can aspire, not a reality that they should seek to protect.

Reports on Hidden Issues Affecting Female and Diverse Attorneys

MCCA's Sustaining Pathways to Diversity: The Next Steps in Understanding and Increasing Diversity and Inclusion in Large Law Firms (2009):

www.mcca.com/_data/global/images/Research/5298%20MCCA%20Pathways%20final%20version%202009.pdf

ABA's Visible Invisibility: Women of Color in Law Firms (2006):

www.abanet.org/women/VisibleInvisibility-ExecSummary.pdf

ABA's From Visible Invisibility to Visibly Successful: Success Strategies for Law Firms and Women of Color in Law Firms (2009):

www.abanet.org/women/woc/VisiblySuccessful.pdf

Diversity in Colorado's Legal Profession (2007):

www.colegaldiversity.org/images/stories/Documents/CSI_Diversity_Report_August_2007.pdf

Catalyst's Women of Color in U.S. Law Firms (2009):

www.catalyst.org/file/304/woc_law-report.pdf

Few and Far Between: The Reality of Latina Lawyers (2009): <http://www.hnba.com/publications/status-of-latinas-in-the-profession-report/> (Executive Summary)