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INSIGHT: BigLaw Diversity—Career Support During the Pandemic

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Women and people of color consistently report more difficulty gaining access to the type of mentorship and sponsorship that can enhance their careers. In the second part of a two-part series, Russell M. Franklin, partner at Morgan, Lewis & Bockius, examines how BigLaw can improve on diversity and inclusion efforts, even amid remote work and the pandemic.

In my last insight, I started discussing some of the challenges BigLaw might face in retaining diverse talent while being remote. While many of us continue to be remote, we continue the conversation.

The Disproportionately Impacted

For decades, women and people of color have consistently reported that they have a more difficult time gaining access to the type of mentorship and sponsorship that can shift career trajectory. These same groups also, on average, are less likely to feel woven into the fabric of their institution.

The reason why is relatively straightforward—scarcity. There will always be more demand for the most interesting and complex work for marquee clients than there is supply. There will always be more demand for the time, energy and focus of the most powerful individuals within an organization than hours in the day. So long as that is true, there will always be some mechanism that allocates these limited resources among the masses who would like to benefit from them.

Typically, that mechanism is just those who control these limited resources choosing who gets access to them. Often, unconscious bias results in a disproportionate amount of these limited resources going to individuals who are most similar to those that control such limited resources. It isn't necessarily a race thing or a gender thing, it's a human thing.

To put it simply, imagine walking into a room and being faced with the choice of speaking to someone that you are fairly certain you can connect with, or to someone with whom you are less certain. In this example, all other things being equal, the choice is clear to most regardless of the decision maker's race or gender.

Those very conversations are how meaningful relationships start and oftentimes result in people who are similar associating with one another and ultimately providing opportunities to one another. The fact that this system perpetuates itself so naturally is why virtually every law firm and large corporation has a diversity and inclusion team focused on ensuring that access to the keys to success are distributed more equitably.

Indeed, the importance of this goal grows daily as the proportion of young diverse lawyers at the junior most levels of BigLaw continues to grow.

Four Overarching Strategies

Although diversity and inclusion practices are challenging to implement, this can be done, in broad strokes, by leveraging four overarching strategies.

First, increased data gathering. Everything starts with having a better understanding of the opportunities within the system and who is getting access to them.

Second, using various mediums to try and help those who control the key limited resources to understand that their unconscious decisions may be playing a monumental role in determining winners and losers.

Third, providing lawyers who have traditionally had less access to these limited resources with tools to help them make conscious decisions designed to help close the gap.

Finally, working to create and maintain a more inclusive work environment in general since, if we look past our apparent differences (like race and gender), BigLaw lawyers tend to have a tremendous amount in common.

An entirely remote work environment makes each of these four strategies more difficult to implement. It is harder to collect data in real-time when people are dispersed. It is harder to see and feel the disparity in opportunity when attorneys cannot walk past the office of one person who has nothing to do while the person next door has papers stacked to the ceiling.

It is generally harder to provide substantive trainings of any type and, as noted above, it certainly is harder to create a feeling of cohesion and inclusion when all contact is digital.

These realities suggest that, unless appropriate steps are taken, BigLaw going increasingly more remote on a more permanent basis is likely to threaten the progress of most diversity and inclusion programs which, if not remedied, is likely to disproportionately harm women attorneys and attorneys of color.

The Silver Lining

If workforces, in general, become more dispersed, where, and how, opportunities are created and distributed may also become more varied. This shift could create new opportunities for

young attorneys to break into the fold, which could benefit women attorneys and attorneys of color.

It also is possible that an increase in the proportion of professional interactions that happen exclusively over the phone, rather than in person or over video, might blunt the impact of unconscious bias since we aren't constantly visually reminded of our physical differences.

Finally, remote working provides flexibility that would not exist otherwise, including a reduction in the need to relocate for a job. The first two realities might create a pathway for some that otherwise might not have existed and the last could make hiring, and retaining, diverse talent easier than it might be otherwise if remote work provides diverse attorneys with a flexibility that increases job satisfaction.

Although positive, it is not clear that these potential shifts will be material enough to negate the meaningful impact of implicit bias.

Diversity and inclusion initiatives exist because the human brain makes various split-second determinations about people with imperfect information. In many instances, those split-second determinations play a crucial role in deciding who gets access to what. If we know whom we are talking to, the fact that we cannot see that person in that very second doesn't change the decisions or assumptions that we have made about that person.

The only things capable of changing that for the better are either realizing that those initial decisions were based on faulty premises or, as a result of increased contact, realizing that those original decisions or assumptions were based on an incomplete picture of a complex individual. Creating situations in which people can come to one, or both, of these realizations, is much harder than it sounds. Yet, doing so is the primary objective of most diversity and inclusion initiatives—an objective that most would not want to make any harder to achieve.

The statistics make clear that, when we look at retention and promotion numbers of women attorneys, and attorney of color in particular, progress has been painstakingly slow. However, recent events that highlight racial injustices have led businesses of all types, and particularly BigLaw, to refocus on their diversity and inclusion efforts and all that falls under that umbrella.

There is little doubt that the Covid-19 pandemic will shift how BigLaw thinks about remote working on a go forward basis. There also is little doubt that a more remote workforce will require that diversity and inclusion programs augment their practices to fit a shifting system.

That said, the various unfortunate events of the last few months may have created a perfect storm where there just may be enough focus, energy and resources dedicated to diversity and inclusion to allow BigLaw to increase the recruitment, retention and advancement of diverse talent while simultaneously adjusting to a constantly shifting landscape. What is clear is that this will not be easy and will not happen overnight.

It is only possible if we, as an industry, make having the difficult conversations a part of our culture and use what is learned from those interactions as a springboard to consistently and relentlessly work at creating equity. I not only believe this is possible, I believe we are faced with a unique opportunity to make it probable.

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