

57 No. 2 Prac. Law. 13

Practical Lawyer

April 2011

DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION: THE COMPETENCIES APPROACH

New thinking that centers on competencies promises relief from “diversity fatigue.”

Alison Akant, J.D., M.Ed. ^{al}

Copyright © 2011 by the American Law Institute; Alison Akant, J.D., M.Ed.

WESTLAW LAWPRAC INDEX

GPR -- General Practice Approaches, Articles & Issues

LAWYERS OFTEN ask me where we are going with diversity and inclusion (D&I) in the legal profession. They want change, but they feel it is slow in coming. I've heard many lawyers say they fear it's too difficult to engineer meaningful change at their law offices via the diversity and inclusion programs they've participated in and even championed. Yet many lawyers tell me they have directly experienced or witnessed the harsh effects of inequitable law firm structures and practices on women and diverse lawyers. Unwanted attrition of women and attorneys of color continues virtually unabated. Directors of Diversity and other diversity leaders told me earlier this year that they sensed diversity goals at law firms were going unmet even before they read the latest report from the National Association for Law Placement (NALP) that the percentage of both minority and women attorneys at law firms declined in 2010. www.nalp.org/jan2011wom_min.

Frustration with inability to move the needle on the dial of adequate representation, inclusive culture, and retention of women and attorneys of color in law offices has contributed to “diversity fatigue.” It seems to hit diverse attorneys of the baby boomer generation especially hard. Commitment to change among this group is unwavering, yet some of these good soldiers are feeling worn out (and in fact, are aging out), and have wondered why the new *14 generation often seems disinterested in diversity efforts. Why aren't the Gen Y's and Millennials, including those who self-identify as members of minority groups, participating enthusiastically in D&I efforts at the office? Why aren't they taking up the mantle? On top of these concerns looms the cloud of tough economic times. Even if we chalk-up being stuck on diversity to the bad economy, watching a needle that won't budge -- or is even slipping back -- makes us all wonder whether there any fresh ideas out there. How can we re-frame D&I learning? How can we overcome diversity fatigue? How can we engage young attorneys coming up the ranks and taking over leadership of the profession?

It's important to note that attorneys I talk with believe wholeheartedly in a level playing field in law. And I venture to say that few in the legal profession, no matter their background or where they practice, would argue against growing diversity and inclusion. Most -- but not all -- accept the business case for diversity, i.e., the premise that a more diverse law firm or department will be more successful because it will attract and retain the best talent, satisfy client demand for diverse legal teams, and better serve a generation committed to equity for all. Nonetheless, law firm and department managers wonder about the efficacy of diversity programming (and above all, one-off diversity “training”). They want to move their institutions beyond mere representational diversity and on to building cultures of inclusion. They are not certain about the best way to get there, partly because even the basic representation numbers are so disappointing. In sum, I sense that members of the legal profession are asking: Do we have any new ideas for opening access and creating

DIVERSITY AND INCLUSION IN THE LEGAL..., 57 No. 2 Prac. Law. 13

structures, practices, and behaviors that will allow everyone (whether of minority background/orientation or not) to thrive in the law office?

My answer is, yes, some of the best new thinking on how to grow D&I is centered on development of diversity competencies for the various roles that lawyers fulfill.

WHAT IS A COMPETENCY? • There is no single, controlling definition of “competency” as applied to the task of growing diversity and inclusion in the legal workplace. To begin the conversation, however, here are proposed working definitions:

- A competency is the particular knowledge, skill, or behavior required to be successful in a professional role.

The idea that one needs certain knowledge and skills in order to do one's job is obvious. A taxi driver who doesn't know the way to the airport is incompetent. The notion behind a competency is to tie a clearly stated, specific management objective to a clearly stated, specific performance criterion. Let's say the management of Bayside Taxi Co. has decided it can't afford installation of GPS systems in its fleet for a few more years. Yet it wants to provide service as good on timely destination delivery as its competitor, Laurel Taxi Co., which has a GPS in every car. Bayside's strategic business objectives are to control costs while giving no ground to Laurel on quality of service. Bayside might develop a knowledge competency for employees fulfilling the function of dispatcher: tracking hourly traffic reports broadcast or issued online by the metropolitan transit authority, and transmitting a radio report to drivers every 20 minutes. Bayside's dispatchers might need training in using the electronic and Internet hookups, multitasking, and speaking clearly to drivers. These are competencies that dispatchers must attain to an acceptable standard. They are specific, and clearly tied to a specific function -- that of dispatcher, as well as Bayside's overall business strategy.

- *15** • A diversity competency is the particular knowledge, skill or behavior required to be successful in the role of creating an organizational climate that respects and values differences and in which all attorneys have a fair and equitable chance to thrive.

Like taxi drivers who need to know the route, today's lawyers know that they need to treat everyone fairly and help build an inclusive culture. The competencies approach to diversity learning sets out a framework for how to meet those objectives. First, the competencies approach says to examine the roles or special functions attorneys perform. Depending on the law office in question, these might include managing a practice group, giving feedback, hiring, recruiting, making promotion and partnership decisions, building teams, running the summer intern program, assigning work, reviewing billable hours and billing attribution policies, nurturing client relations, and so forth. Next comes articulating the knowledge, skills, and behaviors that will make advancing diversity objectives part of fulfilling the role successfully.

For example, knowing that women often feel left out of networking opportunities and have a tougher time building a “book of business,” lawyers in the role of reviewing billable hours might grant billable status to time spent on an optional client development skills workshop for fifth- and sixth-year associates. In this example, the diversity competency is knowledge of a factually verifiable gender disparity in client development opportunities and skills. The competency is specific, and it is applied to the role of billing committee member. The intertwined diversity and law firm objectives are to build rainmaking skills among women (or any associate who feels the need for the workshop), without penalty. The ultimate goal for the firm is to develop more senior associates with great networking, rainmaking, and client relationship skills. In the end, the firm will protect its investment in senior associates, make more women stronger candidates for partnership, and attract more clients.

WHY A DIVERSITY COMPETENCIES APPROACH? • The competencies approach rests upon the business case for diversity, that is, the premise that a diverse and inclusive law office is a key component of a successful enterprise. The competencies approach recognizes that in law firms, corporate legal departments, government law offices, and the judiciary, diversity is no longer a mere accommodation to demands, a response to advocacy by discreet groups, or a compliance-driven tactic. The call for diversity competencies stems from the view that development of a diverse and inclusive organization fits in with the organization's strategic business goals. Rather than add-ons, diversity objectives are contextualized, or woven into the strategic plan for developing a successful, stable, competitive enterprise. Thus, the rationale for developing a set of diversity competencies is that diversity should be framed, managed, and assessed according to its strategic business value.

How is a diversity competencies approach different from the traditional approach to D&I, and the policies and practices out there now? A competencies approach is different because it is pragmatic, and aimed at supporting behaviors and skills that further the attainment of interlinked diversity and business goals. Compare these aspects of a diversity competencies and a traditional diversity training approach:

D&I Objectives	Traditional Diversity Training Approach	Competencies Learning Approach
Fit into the institution's culture and goals, such as doing excellent legal work and getting and retaining clients.	D&I goals are separately articulated (D&I is subject to being viewed as an “add-on”).	Business and D&I goals are aligned (D&I is “contextual” or “woven-in”).
Get buy in at the top.	Advocacy/the fairness case.	Pragmatics/the business case.
Reach set learning goals.	Challenge beliefs or evaluate cultures.	Develop knowledge, skills, and behaviors.
Establish learning platforms.	Explain the intent behind actions. Training, which connotes content delivered top-down, and based on general concepts of corporate responsibility, or moral or political values.	Understand the impact of actions. Learning, which connotes interactive skill building from the bottom up; based on the facts about the culture and goals at the office in question.
Get broad engagement.	Motivational: Does it move or resonate with me?	Strategic: Does this work for my professional development and advance my office/firm?
Assessment	Diverse people presumed to benefit most, but may in fact be burdened	Everyone benefits from developing competencies.

and “fatigued” by D&I initiatives.

Quantitative, but external to business goals/How much of the D & I content we want you to learn did you take in? Did you “get it”?

Qualitative, and embedded in business goals/How effective are these skills and behaviors in advancing my career, the office's D & I objectives, and the office's success?

***17 THE COMPETENCIES APPROACH AND DIVERSITY VALUES • A competencies approach does not mean forgetting or devaluing the origins of diversity and inclusion or abandoning our moral compass.**

The chart on the previous page bluntly sets forth ways in which a competencies approach varies from a traditional approach to diversity and inclusion learning. To highlight the competencies approach, the chart contrasts “intent,” “morality,” and “advocacy” with “impact,” “strategy,” and “pragmatics.” This is not to suggest that the legal profession should abandon the moral high ground for equitable treatment of traditionally marginalized groups. To do that would be to ignore our identities, deny the strength in our diversity, and disdain the fundamental goal of creating open access and a fair chance of success for all. We must repair and renew our historic infrastructure of diversity and inclusion. But we also need to build new roads to success, and in my view this means casting our diversity learning into the light of today's demographic and business realities.

Developing a set of diversity competencies entails clear communication of what management has determined stakeholders at the law office or department must know and practice, in order to fulfill their explicit professional roles. With diversity competencies in place, diversity goals and expectations are less fraught with politics and issues of “political correctness” that can gum up the works of progress in today's global, complexly diverse world. A competencies approach may resonate more with the globally diverse, pragmatically oriented younger generation. Barack Obama famously wrote in *The Audacity of Hope*: “... in the elections of 2000 and 2004, I sometimes felt as if I were watching the psychodrama of the baby boom generation -- a tale rooted in old grudges and revenge plots hatched on a handful of college campuses long ago.” Studies of generational differences point out that professionals born after 1970 tend not to have the same relationship to the identity movements that the baby boomers did. Thus a competencies approach may make diversity goals and expectations more relevant, communicable, and manageable among the legal profession of today.

COMPETENCIES APPLY TO A ROLE, NOT A PERSON • Organizational Development experts often point out that competencies are applied to a particular role rather than an individual person. In other words, a competency is a key requirement for fulfilling a role that has a strategic business objective, and the question is whether an individual meets that competency to an acceptable standard.

Accordingly, diversity competencies are developed by asking, “What knowledge, skill, or behavior will a person in this particular role need in order to further the strategic objective of growing a diverse and inclusive workplace (and a more successful and responsible company)?” Thus a person's diversity competency is not a question of whether or he or she believes in diversity, and wants to see more of it. Nor is it a question of one's intent. The question is whether one has the knowledge and skills to fulfill one's various roles in a way that helps bring more diversity and inclusion about, and thereby forwards the goals of the organization. Note that a diversity competency is not embedded in gender, race, ethnicity, sexual orientation, or any other personal status. The idea is that everyone needs diversity competency. In this way, the competencies approach helps us de-emphasize our differences, and denies space to discourse centered on stereotypes,

myths, biases, and personal political or religious views. In short, a competencies approach puts us all in the same boat, rowing hard for the success of the whole enterprise.

TYPES OF COMPETENCIES • It can be helpful to distinguish between two types of competencies: knowledge competencies and skill/behavior competencies.

***18 Knowledge Competency**

A knowledge competency can be measured by an objective test or question. For example, ascertain whether an attorney has the competencies to take on the role of hiring partner, diversity knowledge competencies might include detailed knowledge of the firm's policy on same-sex health benefits and flex-time scheduling. To fulfill the role of Practice Group Leader, a diversity knowledge competency might be keen awareness of how case assignments are managed.

Skill/Behavior Competency

A skill or behavior competency is demonstrated in practice and experienced by others. For example, diversity competencies related to giving constructive feedback are the skill of using language free of sarcasm or insider references, and behaviors such as welcoming body language and bearing in mind the impact of your comments.

An Example

A mid-size intellectual property law firm was concerned that it was not recruiting and retaining women. Everyone recognized that women dedicated to this specialization were hard to find and took several years to grow into the practice. "We can't find any good female candidates, and if we do, they get picked up by big firms either before or within a couple of years of us hiring them," complained firm leadership. The firm had carefully adopted flex-time and parent leave policies specifically in order to recruit and retain women; and yet a fourth-year associate had recently decided not to return from maternity leave. The firm had not met its internally developed diversity scorecard and failed to obtain a ranking on a popular "Best for Women" list.

In developing a set of competencies, the firm might have determined that the recruitment committee needed deeper knowledge of local law schools that offer outstanding media or patent law electives, regardless of whether those schools were outside the firm's traditional recruitment catchment. It might have reconsidered its traditional reluctance to hire laterals or make contact with government agencies. A senior attorney might seek out the fourth-year associate that left the firm to see if she might keep her hand in on one or two of the firm's biggest matters, with a view to keeping open the option of her return. In this example, understanding which policies clash with diversity objectives is the competency that members of the firm's recruitment team needed to develop to fulfill their roles.

DEVELOPING DIVERSITY COMPETENCIES • Below are four suggested broad content areas for developing diversity competencies in a legal workplace. These are offered to stimulate thinking. In reality diversity competencies will vary according to the business function of each employee/attorney, as well as the intertwined diversity and business goals of each law firm, law office, or legal department:

- The ability to define diversity and inclusion in the context of the professional legal workplace. Example: Firm management can skillfully and effectively articulate the firm's commitment to D&I and the reasons for that commitment (such as the business case for diversity);

- Knowledge of institutional and individual actions, practices, language and symbols that communicate respect/disrespect for identities and groups. Example: Everyone at the office understands why “That’s just so gay!” or “She bitch-slapped her,” can be offensive or cause discomfort, even if uttered in jest or by a member of the identity group referenced;
- Understanding of institutional and individual dynamics that both enhance the expression ^{*19} of diversity in the professional workplace and grow a culture of inclusion. Example: Practice Group leaders learn to manage case assignment practices to avoid a “star system” and ensure that all associates get great exposure to talented partners, powerful clients, work that engages them, and stretch assignments;
- Skills and behaviors to participate in, develop, and eventually lead conversations, meetings, and firm activities that are inclusive, and that rely on diversity rather than homogeneity of perspective and ideas. Example: Attorneys learn to focus on the impact of email and hone their casual verbal communication skills.

SUMMARY AND RECOMMENDATIONS • A diversity competency is the particular knowledge, skill, or behavior required to be successful in the role of creating an organization that values differences. The reason for developing a set of diversity competencies is to make diversity learning strategic, pragmatic, and meaningful to the current and next generations, and applicable to all. A good way to develop a competency model is to ask what knowledge, skills, and behaviors does someone performing a certain function need to have, in order to fulfill his or her role as a builder of diversity and inclusion in the office.

Development of diversity competencies for a given legal workplace will require competency itself -- knowledge about competency development, knowledge of diversity and inclusion research and best practices, and knowledge of the law office or department in question. Development of successful diversity competencies will likely require input from many stakeholders. It will require consultancy with experts, and excellent project management skills, but it promises to be an effective way to get everyone pushing on that stubborn needle.

Footnotes

^{a1}

Alison Akant is a lawyer and diversity consultant based in New York City. She is Principal of Diversity Research and Co-founder and Principal of the consulting firm, Competent & Compliant. In partnership with the web publication company, Maconnage, she recently launched DiversityEdu, an online learning platform for higher education. She is currently developing web-based diversity learning applications for the legal profession. She can be reached at aa@diversityresearch.com.