

# Diversity In the News

the professional's source for news, trends and thought leadership

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Diversity Research

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## At the Law Firm

**Where's the diversity at the top? Law firms tout the diversity of their 2007 promotions to partner, but government agencies find lack of racial diversity among senior staff**

*Proud firms*

Law firms have been genuinely eager recently to showcase their achievement of greater inclusivity by touting the diversity of their promotions to partner. In January, **Greenberg Traurig**, one of the nation's largest law firms, proudly announced that nearly half of their 53 new shareholders were women or minorities. "We were pleased and proud that last year over one-third of our new shareholders were women, Hispanics, African Americans and Asian Americans," said Cesar L. Alvarez, the firm's chief executive officer.<sup>i</sup> Similarly, **Morrison & Foerster**, with 1,000 lawyers worldwide, reported that one-third of its newly minted

partners are women. And **Dewey & Le Boeuf** highlighted their global diversity by reporting in January that their new partner class includes ten diverse new partners and two counsel in each of the firm's offices in Paris, Warsaw, Frankfurt, and New York. The bar has also been eager to congratulate firms' efforts and attorneys' achievements. The March issue of *Diversity & the Bar*, published by the **Minority Corporate Counsel Association** (MCCA), included a list of minority attorneys who were promoted officially to partner in 2007. Notable among big firms, **Kirkland & Ellis LLP** and **Kirkpatrick & Lockhart Preston Gates Ellis LLP** each elevated 12 minority partners.<sup>ii</sup>

*Concerned legislators*

In the federal government, by contrast, there is fresh concern that racial diversity is sorely lacking

<sup>i</sup> National Law Journal, 1/9/08, "Partner Promotions Bolster Diversity at Greenberg Traurig," available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1199873125733>

<sup>ii</sup> Diversity & the Bar's list of new minority partners for 2007 and their firms is at <http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=1699>

### At the Law Firm

in a place where it really counts—the senior executive ranks, known as the Senior Executive Service (SES).<sup>iii</sup> For example, according to a recent congressional report, the career senior ranks at the Department of Homeland Security are less diverse than in the government overall, and less diverse than the department's own workforce. Last year African Americans made up 8.5% of the career SES in the government generally but only 6.5% of the SES at Homeland Security. The report was prepared by the Democratic staff of the House Homeland Security Committee, chaired by Rep. Bennie Thompson (D-Miss.). "The makeup of the department's senior leadership must be reflective of the face of America," Thompson said when releasing the report.

Nor is Congressman Thompson the only House chairman to be paying attention to diversity issues among the upper echelons of government. Rep. Danny K. Davis (D-IL) and Sen. Daniel K. Akaka (D-Hawaii), chairmen of the House and Senate Federal Workforce subcommittees, have introduced legislation aimed at promoting diversity in the government's senior career ranks.

### How to bring women back to the firm

#### Open the On-Ramp...

Lawyers at large firms can now expect some degree of flexible work arrangements geared primarily at keeping women—especially mothers—from leaving the firm. Newer on the horizon are initiatives to entice women to come back after they've left. Here is what some firms and companies are doing to open the on-ramp back into the firm:

- Designate HR or diversity personnel to make regular phone calls to alumnae to discuss when and how they might on-ramp.
- Ensure that top management vociferously encourages personalized, flexible work arrangements.
- Invite alumnae back to the firm for social events and strategic career planning.
- Offer low-cost CLE to inactive attorneys.
- Consider staffing projects with on-rampers: when gauging where the firm needs talent, check the firm's alumnae data base, and inform your search consultants that the firm wants to draw from the on-ramp pool trained outside the firm.
- Ensure through seminars, speakers, diversity train-

<sup>iii</sup> Read the March 12, 2008 Washington Post story about several congressmen's concern over lack of racial diversity at the senior career levels in federal agencies, at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/11/AR2008031102629.html>

ing, and management example, that myths about a mother's commitment to and suitability for returning to the firm are dispelled.

- Calendar and integrate into firm procedures all of the above, in writing.

#### ...But Mind the Usability Gap.

Use of the on-ramp and flexible work arrangements should be without prejudice to advancement and compensation. Yet fear about adverse consequences often means that flexible and reduced-hour plans are underused. A recent national large-firm study conducted by **Flextime Lawyers LLP** and *Working Mother Magazine*<sup>iv</sup> showed that the lowest usage is among equity partners, with little gender disparity (women-2.5%, men-2%). The greatest use and greatest gender disparity is among counsel (women-15.7%, men-8.8%). Why the usability gap? How to bridge it?

The key is to kill the negative effect that using flex-time has on advancement: While 100% of the law firms sampled in the Flextime study stated they *allow* advancement for those on reduced hours, an average of only 1% of reduced-hours attorneys made it to partnership in the last five years.

- Monitor for prejudice to reduced hours and flex-timers with a designated, proactive administrator. For example, keep tabs on whether an on-ramp or other flextime attorney is consistently working significantly fewer or greater hours than agreed to. And have her rate the quality of her projects and reintegration into the firm.
- Charge practice group leaders with communicating openly to the director of diversity and the on-ramp how things are going.
- Publish firm-wide, written reduced-hour and flex-time programs.

<sup>iv</sup> Materials and articles about the 2007 national survey of the best law firms for women released by Flextime Lawyers LLC and Working Mother are available at <http://www.flextimelawyers.com/best.asp>

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- Management has to clearly and vociferously “buy-in” and encourage usage.

### Recent surveys confirm that women in finance want what women in law want; and that professional women need to engage men to effect change

*Women in finance state they're paid less than men and are no better off in terms of gender parity than they were a decade ago; findings closely track experience of women in law.*

Women in law are by no means alone in their statements about gender parity at the office. In a survey to be published this March, 96% of the members of the Manhattan-based **Financial Women's Association** (FWA) said they believe women are paid less than men for comparable work. Nearly two-thirds consider their gender a factor that holds them back in their careers, and many cited a lack of access to decision makers, mentors, and the type of assignments critical for career advancement. Entrepreneurs also felt they had limited access to funding sources they needed to start a business. Respondents to the FWA survey found that the following hindered their advancement:<sup>v</sup>

- lack of access to flextime/part-time
- harmful female, racial, and ethnic stereotypes
- lack of structures for meeting family obligations
- lack of management and leadership experience
- “old boys” networks
- women not supporting other women
- lack of mentors
- not being political or knowing how to “play the game”

Three-quarters of respondents in the FWA survey consider intellectual challenge to be critically important. Also highly ranked are: the company's history of internal promotions of women, proportion of women in senior management, work/life balance, flexible benefits, diversity initiatives, ability to telecommute, flextime options, and family-friendly policies.

<sup>v</sup> Access the FWA report at [http://www.fwa.org/pdf/2008\\_0311\\_FWA\\_Survey\\_Release.pdf](http://www.fwa.org/pdf/2008_0311_FWA_Survey_Release.pdf)

## *Women in law want what women in finance want*

It's not surprising that the FWA report confirms a myriad of other recent studies of women in law and other professions, such as those summarized by Jennifer Bluestein in her *Law Firm Partnership & Benefits Report*, published this January in the *National Law Journal*, and in a study to be released March 4 by the **Georgia Association for Women Lawyers** (GAWL) concluding that flexible work arrangements are crucial to recruiting and retaining women lawyers and mitigating financial risk for employees of both genders.<sup>vi</sup>

## *...and that's what women attorneys of color want*

In addition, the FWA, GAWL, and other reports echo the ABA's 2006 study *Visible Invisibility: Women of Color in Law Firms*, where high percentages of white and of-color women pointed to much the same factors as mitigating their advancement at law firms due specifically to their gender.<sup>vii</sup>

## *...which is what men in the professional workplace also want.*

Bluestein makes the additional point (also made in the GAWL study) that men are essential and largely willing partners in the quest for gender equity and flexibility at the law firm. “From numerous conversations with partners at various law firms,” Bluestein writes, “it is clear that men are committed to seeing women succeed. Men don't like to see the firm's investments disappear, either.” Why it's crucial to add men into the gender-equity equation, and how to do it, was a current subject of research by the women's research group **Catalyst**, and the topic of the Flex-time Lawyers LLC meeting in New York this January entitled *Engaging Men as Champions for Women*.<sup>viii</sup>

<sup>vi</sup> Jennifer Bluestein's report in the Nat'l Law Journal is available at <http://www.law.com/jsp/LawArticlePC.jsp?id=1201601148723>. The GAWL study of Georgia lawyers is available at [http://gawl.affiniscap.com/associations/8500/files/ItsAboutTimeII\\_final.pdf](http://gawl.affiniscap.com/associations/8500/files/ItsAboutTimeII_final.pdf)

<sup>vii</sup> ABA Commission on Women in the Professions, *Visible Invisibility: Women of Color in Law Firms* (August, 2006). The report may be accessed at <http://www.abanet.org/women/woc/wocinitiative.html>

<sup>viii</sup> Catalyst's website is [www.catalyst.org](http://www.catalyst.org), and Flex-time Lawyers LLP is at [www.flextimelawyers.com](http://www.flextimelawyers.com).

## In the Courts

### NY—FOR SAME-SEX UNIONS, IT'S ANYWHERE BUT HERE. BUT IS IT ON ITS WAY?

*NY won't recognize same-sex marriages—but increasingly, it will adjudicate divorce, custody, and benefits issues arising from out-of-state same-sex marriages.*

In two important cases this February, same-sex marriages solemnized in Canada were recognized by New York courts, even though New York has a statutory prohibition against same-sex marriages, and despite the fact that under the precedent set in the 2006 *Hernandez* case, New York courts are not compelled by constitutional considerations to recognize same-sex marriages. These two new decisions buck the trend in some New York lower courts to deny marital benefits to same-sex partners who were married out-of-state. It remains to be seen whether these decisions will cement the apparently emerging position that in New York, valid out-of-state marriages of same-sex couples **must** be legally recognized.<sup>i</sup> In *Beth R. v. Donna M.*, Justice Laura E. Drager of the New York Court of Appeals (First Dept.) rejected a woman's claim that, since her Canadian same-sex marriage was void under New York law, her partner could not divorce her in New York. Justice Drager found that "*Hernandez* . . . holds merely that the New York State Constitution does not compel recognition of same-sex marriages solemnized in New York." She held further that the couple's valid Canadian marriage could be "properly recognized" under New York law, and that out-of-state marriages are "governed by common law doctrines of comity."

Earlier in February, an Appellate Division, Fourth Department, panel unanimously ruled that a gay couple's marriage in Canada should be recognized in New York. The ruling was the first appellate decision in the state to recognize a same-sex marriage from another jurisdiction; it overturned a lower court's decision that a community college did not have to extend health benefits to an employee's lesbian partner. The appeals panel held that the college employee and her partner were entitled to health coverage because there is no legal impediment in New York to the recognition of a same-sex marriage contracted in a jurisdiction where it is legal. Justice Erin M. Peradotto wrote for the panel, "Such marriages are entitled to recognition in New York."

<sup>i</sup> Currently, same-sex couples are entitled to all of the state-level rights and benefits of marriage in Massachusetts only. For a chart of each state's laws on same-sex marriage and civil unions, visit [www.diversityinc.com/public/2952.cfm](http://www.diversityinc.com/public/2952.cfm). See more information on same-sex marriage at <http://www.hrc.org/issues/marriage.asp>

### NY—RACIAL AND RELIGIOUS HARASSMENT IN THE WORKPLACE IS NOT FREE SPEECH

*Slurs by police officer against a fellow professional—a foreign-born Muslim—are not protected by First Amendment or federal legislation.*

In a decision rendered February 6, *John Doe Anti-Terrorism Officer v. The City of New York*, the US Court for the Southern District of New York ruled that a counter-terrorism advisor to the New York Police Department could not use the First Amendment or the Communications Decency Act to shield himself from liability for a series of racist emails he sent to fellow professionals, including the plaintiff, an Arab-American Muslim. The plaintiff had become a citizen in 1990, joined the city Correction Department in 1996, and helped launch the department's anti-terror cyber unit after Sept. 11, 2001.

According to court papers, the defendant, Bruce Tefft, stated to his colleagues that "Muslims have no place in law enforcement." Mr. Tefft was also accused of sending emails such as "a good Muslim . . . can't be a good American," and "[b]urning the hate-filled Koran should be a public service at the least."<sup>ii</sup>

### US COURT CT—NOTE FROM THE IN-HOUSE GENDER GAP

*\$500M gender bias suit against GE goes forward.*

In January, a \$500 million sexual discrimination lawsuit against General Electric Co. brought by one of its former general counsel cleared a major hurdle. A U.S. District Court judge in Connecticut rejected GE's motion to strike the allegations in the complaint on the grounds that Lorene Schaefer, the lead plaintiff in the lawsuit, had disclosed company confidences by bringing the allegations. The class action, first brought in May 2007, alleges that more than 1,000 women lawyers and executives at GE received lower pay and fewer promotions than did their male counterparts. "This lawsuit is designed to achieve systemic injunctive relief to change GE's discriminatory pay and promotions practices and policies," Schaefer charged in court papers. "Women have made few inroads into the domain of the officer's 'club' at GE." Other large companies that have been sued in the last few years by their female employees include **Wal-Mart Stores Inc.** (the largest gender discrimination suit in U.S. history—it includes an estimated 1.6 million women workers nationally), and **Costco Wholesale Corp.** But both suits were brought by

<sup>ii</sup> See the Feb. 8, 2008 story in the Nat'l Law Journal, <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202426498193>

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rank-and-file workers, not a high ranking lawyer like Ms. Schaeffer. Diversity in the News will continue to watch the case.<sup>iii</sup>

### MA—LEARNING AT SCHOOL THAT SAME-SEX PARENTS MAKE A FAMILY, TOO

*Massachusetts court rules parents can't opt out their kids from sex ed. that includes discussion and texts about same-sex couples.*

In February, the 1st U.S. Circuit Court of Appeals rejected U.S. Constitutional challenges to a Massachusetts school district's refusal to let parents exempt their children from instruction and books that portray same gender parents as a type of diverse family.

The plaintiffs are two sets of parents whose children were in classes that either used or had access to the books in kindergarten, first, and second grade in the Lexington, Mass., school district.

The parents claimed that, in being denied the opportunity to have their children excused from the program and books, their rights to the free exercise of religion under the First Amendment and their 14th Amendment due process right to parental autonomy were violated. They also claimed the school district violated the state's opt out law which requires parental notice and the option to exclude their children from teachings involving human sexuality. *Parker v. Hurley*, No. 07-1528 (1st Cir.)<sup>iv</sup>

<sup>iii</sup> Read more in the Nat'l Law Journal, at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1201169139721> and at the Law.com website, <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1185268001259>

<sup>iv</sup> Read more at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1201779827923>

## Thought Leadership

### MORE ON BILLABLE HOUR (BH) REFORM

**How big a deal is it? Who's doing it? What are the alternatives to the BH? How is BH reform a diversity issue?**

*BH reform is becoming a mainstream trend.*

As reported in the fall issue of *Diversity in the News* and with regularity in the media<sup>i</sup> (including in a widely read *New York Times* article this January<sup>ii</sup>) BH reform is quickly growing from a pie-in-the-sky dream of reformers into an agenda item at the firm. The ABA's eight-year-old recommendations on BH reform were first taken up with work/life balance advocates and law student groups like **Better Legal Profession**, which argues that BH requirements are "jeopardizing the roots of the profession."<sup>iii</sup> Now BH reform is hitting home with GC's and clients.<sup>iv</sup> Among large firms now implementing BH reform is Washington D.C.'s **Howrey**, which is introducing performance-based evaluations for associates over a straight BH model. But firms of all sizes across the nation have either reduced billable hour requirements for newer associates, or abandoned them altogether. Some firms of note are **Dreier, Quarles & Brady**; **Strasburger & Price**, a national firm based in Dallas; and **Chapman & Cutler**, a midsize firm in Chicago.<sup>v</sup>

*Alternatives to the BH are evolving.*

**Traditional variations of hourly billing.** The most common variations of hourly billing include:<sup>vi</sup>

- Percentage discounts on standard hourly rates based upon the volume of all or selected types of work performed
- Reduced hourly rates, where the firm agrees to reduce their standard hourly rates with the understanding that a bonus will be received in the event

<sup>i</sup> See, e.g. the National Law Journal, Jan. 21, 2008. Client and practitioner demand for BH reform is treated in detail in Lauren Stiller Rikleen's book *Ending the Gauntlet: Removing Barriers to Women's Success in the Law* (Thomson West/Legilworks 2006). The ABA Comm'n on Billable Hours Report (2002), is at [www.abanet.org/careercounsel/billable.html](http://www.abanet.org/careercounsel/billable.html)

<sup>ii</sup> The Jan. 24, 2008 NY Times story "Who's Cuddly Now--Law Firms," by Lisa Belkin is available at [http://www.nytimes.com/2008/01/24/fashion/24WORK.html?\\_r=2&oref=slogin&pagewanted=print&oref=slogin](http://www.nytimes.com/2008/01/24/fashion/24WORK.html?_r=2&oref=slogin&pagewanted=print&oref=slogin)

<sup>iii</sup> Read more about the influential advocacy group Better Legal Profession (BLP), in the Fall 07 and forthcoming Spring 08 issues of *Diversity in the News*, <http://www.diversityresearch.com/print/dnews.pdf>. Visit BLP's web site to learn more, at <http://www.betterlegalprofession.org/>

<sup>iv</sup> See <http://www.betterlegalprofession.org/principles.php> for a succinct expose of how BH reform serves clients, law firms, attorneys, and families.

<sup>v</sup> For names of the growing number of firms initiating various billable hour reforms, read the Thought Leadership story in the Fall 07 issue of *Diversity in the News*, available at <http://www.diversityresearch.com/print/dnews.pdf>.

<sup>vi</sup> See *Ending the Gauntlet*, note i, supra, 311-314.

## Thought Leadership

of a successful and /or timely conclusion of the matter

- Blended hourly rates and contingency fees

**The FACTS alternative.** In an article in the December, 2007 issue of *Diversity and the Bar*, Deborah Epstein Henry, founder and principal of **Flextime Lawyers LLP**, proposed a framework for more flexible compensation within the billable hour model. The framework goes by the acronym FACTS.<sup>vii</sup> Work/life journalist Lisa Belkin described the FACTS proposal succinctly in the *New York Times*: “Under Ms. Henry’s proposal, work time can be: **Fixed** (allowing lawyers to choose less high-profile work for more predictable schedules), or **Annualized** (intense bursts of high-adrenaline work followed by relative lulls); **Core** (with blocks mapped out for work and for commitments like meeting children at the bus); **Targeted** (an agreed-upon goal of hours, set annually, customized for each worker, with compensation adjusted accordingly); and **Shared** (exactly as it sounds) [with other attorneys].”<sup>viii</sup>

*BH Reform is a diversity and inclusion issue because it fosters...*

**Racial and ethnic diversity.** Substituting or at least supplementing a BH structure with performance-based reviews could help diminish the insidious role that racial and ethnic stereotyping plays in the competition for billable hours at the firm. This is because getting good case assignments is a major touch-point for personal development of all associates, and that people of color face especially high barriers to getting that work. Hence, they often have greater difficulty accumulating sufficient billable

vii The full article by Ms. Epstein, Facing the Facts: Introducing Work/Life Choices for All Firm Lawyers Within the Billable Hour Model, can be read at <http://www.flextimelawyers.com/pdf/art10.pdf>

viii “Who’s Cuddly Now-Law Firms,” note ii, supra.

hours to advance at the firm.<sup>ix</sup> Basing compensation on honest performance reviews could promote more accurate compensation across the board.

**Gender and generational diversity.** Clearly, alternatives open the door to flexible arrangements of special interest to women and especially to parents of both genders. As BH reform advocate and author Lauren Stiller Rikleen wrote, “Imagine if you will a law firm which determines it is going to be flexible enough to develop alternative compensation structures to allow for a variance in billable hours... [A] firm could...develop a structure flexible enough to meet both their [attorneys’] work and family responsibilities.”<sup>x</sup>

ix David B. Wilkins and G. Mitu Gulati, Why Are There So Few Black Partners in Corporate Law Firms? An Institutional Analysis, 84 *California Law Review* (1996); Minority Corporation Counsel Association, *The Myth of the Meritocracy: A Report on the Bridges and Barriers to Success in Large Law Firms* (2003), *Visible Invisibility*, page 3, note vii, supra.

x *Ending the Gauntlet*, note i supra, 310.

## THE OPENING DOOR

Noteworthy moves by minority and women attorneys

**Theodore M. Shaw**, Director-Counsel and President of the **NAACP Legal Defense Fund** (LDF), has joined the faculty of Columbia Law School as a professor of professional practice. Shaw, who holds a J.D. from Columbia, is one of the nation’s leading civil rights attorneys and strategists. “Ted Shaw has carried on a great Columbia Law School tradition of leadership in civil rights advocacy,” said Columbia Law School Dean David M. Schizer.

**Linsley Myles**, of **Munger, Tolles & Olson**, and a former law clerk to Justice Antonin Scalia, became the first woman ever to be named by the Supreme Court as a Special Master. The case, *South Carolina v. North Carolina*, is one of original jurisdiction, where the Special Master’s duties are considered substantive and influential.

**Carolyn B. Lamm** was selected on February 11 to serve as president-elect of the **American Bar Association**. If approved at the ABA’s August meeting, Lamm will become president of the association for one year (starting in August 2009). Lamm is a litigator in the Washington office of **White & Case**.

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