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BULLETIN

Breaking the Silence: **INVISIBLE MINORITIES IN THE LEGAL PROFESSION**

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Numerous recent reports, articles, and seminars have focused attention on diversity within the legal profession, including among law students and in the pipeline leading to law school.



Typically, conversations revolve around race and gender, in part because race- and gender-related issues have long and often contentious histories in our society. But these efforts also tend to take center stage because it is generally easier to measure the success, or lack of success, in recruiting a workforce that is diverse in terms of race and gender (which is entirely separate from achieving success in retaining such a workforce).

But what about those types of characteristics that also signal “diversity” but which are not nearly as visible and easily measured as race and gender often are? In what ways should the

legal profession work to meet the needs of lawyers, law students, and others whose “diversity” might not be immediately apparent?

THE MINNESOTA STUDY: BACKGROUND

In 2005, the Minnesota State Bar Association (MSBA) undertook to update studies of gender-related concerns in the Minnesota legal community that had begun in the 1990s and continued on into the early part of the current decade. Additionally, the MSBA agreed to expand the scope of its study to include race, sexual orientation, disability, and religion. The study was based on questionnaires sent to larger legal employers in Minnesota (those employing at least ten lawyers) and to employees – and also based on focus groups recruited and occasionally facilitated with the assistance of minority bar associations. Law students were not surveyed.

The goal of the study was to get a snapshot of the legal community and of the circumstances faced by women, racial minorities, people with disabilities, people of minority religious backgrounds, and gay, lesbian, bisexual, and

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transgender (GLBT) people, to see how these populations are faring professionally. A follow-up effort will review the findings and recommend “best practices” for addressing those concerns the study brought to light.

DIVERSITY AND THE “INVISIBLE” POPULATIONS

Simply *finding* the so-called “invisible” populations – those identified by sexual orientation, disability, or religion – within the “diversity” rubric occasionally proved challenging. Of these, the easiest population to find and study were gay, lesbian, and bisexual attorneys. The Minnesota Lavender Bar Association is an active organization of GLBT lawyers, law students, and others, which provided enthusiastic support for the MSBA effort, promoted the project, circulated questionnaires to members, and recruited for and facilitated a GLBT-oriented focus group.

In contrast, Minnesota has no similar association of attorneys identifying themselves as disabled per se. MSBA worked closely with Lawyers Concerned for Lawyers, an organization serving attorneys and law students affected by mental health or substance abuse issues to recruit participants. But LCL’s laudable focus on these topics tended to bring forward individuals whose disabilities tended to be less visible than, for example, physical disabilities, though some physically disabled individuals were also recruited, largely through personal connections.

Regarding religion, there were no identified organizations of Minnesota lawyers identifying with minority religions, which made recruitment extremely difficult, again relying almost entirely on word-of-mouth and personal contacts.

Whether GLBT attorneys are invisible is a debatable question: fully 81% of gay, lesbian, and bisexual participants (no participant identified as transgender) indicated they were “out” at work, but 70% reported having hidden their sexual orientation for professional reasons at some point in their career. Tellingly, only 32% of GLB participants felt it was “safe” to be out at work, and 26% of GLB attorneys



(and 50% of non-GLBT attorneys) said that it was better *not* to be out at work at all. There may be a professional impact of being “out”: nearly a third of GLB participants believed they had lost a client in the past five years because of the client’s attitude toward their sexual orientation.

Far and away most Minnesota legal employers have non-discrimination policies that include sexual orientation and report that they routinely invite employees’ partners to company events, and nearly three-quarters of Minnesota law firms offer domestic partner benefits. (Minnesota law prohibits discrimination based on sexual orientation in any event.) Nevertheless, the ambiguity that exists about being “visible” as a GLBT attorney can make accessing these benefits a difficult choice. Current or prospective GLBT employees perceive that asking about such benefits effectively “outs” them: “It’s an uncomfortable thing to have that conversation (about the availability of domestic partner benefits) when you’re in ... the honeymoon stage with ... a potential new employer,” said one study participant.

Although workplace “diversity” efforts are presumably intended to make a positive difference in office culture, only 28% of GLB participants agreed that such efforts at their workplaces included issues related to sexual orientation or gender identity. Said one participant: “Gay/lesbian culture is the last safe group to hate in this

country ... and, at the same time, we’re ... in the diversity realm, being considered not really a diversity issue. So you get the worst of both worlds.”

Among study participants with disabilities, a similar dynamic exists with respect to how visible one’s disability is, how or whether a person “comes out” about their disability, and how employers deal with requests for accommodations. According to one participant, “In firms, any disability is viewed as creating vulnerability for the firm as a whole.” The law places the burden on employees to request reasonable accommodations of their disabilities, but a second participant reported that “changing jobs (when one needs an accommodation) is very, very difficult, unless you know the people personally that you’re going to be working with and they, on an individual basis, can see some advantage to themselves by accepting your limitations.”

The need for employees to initiate the conversation about disability accommodations can be stressful. “When I started working at the jobs that I’ve had, I’ve had quite a bit of anxiety in clearing things up at the get-go as to what I need,” reported one disabled attorney. “But once that’s smoothed out, things are OK.” But according to another, taking the bull by the horns not only comes with the territory, it can

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be the best approach: “We have figured out ways to deal with what comes up,” she said. “Most of us have learned if something comes up we have to deal with it – that we’re best off dealing with it ourselves than waiting for someone one else to take care of it.”

When it came to study participants who took part in the “religious” focus group, once again difficulty arose concerning how open to be about a non-visible, non-traditional faith, particularly about holiday observances and event menus. “It would be nice that you wouldn’t have to sneak out for (a religious holiday) and not make a big deal about the fact that you’re gone,” said one man. “It would be nice if ... there was some way for people to be made generally aware of that kind of stuff.” Reported another: “I was part of a practice group and it was mostly women in the group and then there were actually a couple of Jewish people, and I can’t understand why every meal had pork in it.” After unsuccessful efforts to raise the subject, she said, “It got to the point where I actually don’t even go to that practice group any more.”

For a third, there were questions about how far appreciation of religious diversity extended in his workplace, in light of coworkers’ more mainstream religious expressions: “It made me start thinking if I was to bring in a Buddha and put it into the corner of my office ... I know I couldn’t get away with it without every person walking by and saying something.”

In each case, employees responded to difficult or at least ambiguous workplace conditions by choosing to remain to some degree in a religious “closet” and to keep this aspect of workplace diversity less visible.

Among these three sometimes “invisible” populations in the Minnesota study, there seemed clearly to be tension between the desire to be more open about their sexual orientation, disability, or religion, and the perception of a work culture that preferred not to address such matters. Certainly, we live in an era when topics relating to sexuality and religion, already potentially delicate, are also highly politicized, and when there is height-

ened concern regarding privacy surrounding medical issues involved with disability. Further complicating this is the fact that employment law, including Minnesota’s Human Rights Act, generally prohibits employers from making inquiries about identified characteristics, including employees’ race, sex, sexual orientation, disability, and religion. But even with such prohibitions in place, employers consciously trying to foster a diverse workplace may find it less necessary to make inquiries into characteristics that are more readily observable in the first place. This can logically translate into diversity efforts that fail to include populations identified by “invisible”

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characteristics employers may not inquire about, but which they may not be able to observe without such an inquiry.

ADDRESSING THE ISSUES OF THE “INVISIBLE”

So how should employers or law schools address the issues of these, or other, “invisible” constituents within their workforce or classrooms? The Minnesota study suggests that the answer may be that employers and schools should begin by *assuming* that they currently have, or will have in the future, employees or students who identify as GLBT, disabled, or of minority religions. Next, policies, procedures,

and the physical workspace or school layout should be *assessed*, potentially with the assistance of outside consultants, to see where shortcomings exist that would negatively affect these populations. Finally, employers and schools should not only address such gaps, but then affirmatively *promote* the inclusivity of the resulting workplace or school to *all* current or potential employees or students.

For example, if *every* job applicant is told that the employer offers domestic partner benefits, it not only avoids uncomfortable moments for those who need them, it also communicates the employer’s initiative in addressing the concerns of GLBT employees. If *every* applicant is told that school events feature “accessible” menus and are scheduled to avoid religious holidays, it communicates that students are not required to leave their spirituality at home. Similarly, if a workplace is demonstrably accessible to people with physical limitations, or an employer spells out that it already owns or is willing to acquire technology that is needed to accommodate disabilities, or that its health plan has broad coverage for conditions involving physical health, mental health, and substance abuse, the candidate learns that this workplace is committed to lowering barriers related to disability. Finally, if an employer creates a diversity committee, the employer should specifically task it with responsibility for issues relating to these or other comparatively “invisible” populations.

Among GLBT, disabled, and religious employees or students, there will always be some who are perfectly comfortable speaking up about their concerns. The Minnesota study suggests that many won’t, however, and, even among those who do, there may be a reluctance to be the “squeaky wheel.” Employers and schools, as institutions seeking to embrace diversity, are in a better position to break the silence themselves by proudly being visible about the steps they have taken in this direction – not because they have been asked to do so, but because they recognize it is the right thing to do. ■

NOTE: The full report of the MSBA study can be found at <http://www2.mnbar.org/committees/DiversityTaskForce/Diversity%20Report%20Final.pdf>.