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Strengthening Diversity & Inclusion in E-Discovery in a Post-Pandemic World

The COVID-19 pandemic creates opportunities for the e-discovery industry, like the law and technology industries, to expand its engagement and retention of diverse talent. Here are some actions that can be taken today.

By **Dionysia Johnson-Massie and Kimberly J. Duplechain, Littler Mendelson** | June 02, 2020

The novel coronavirus (COVID-19) sent shockwaves throughout the world and affected every industry. While we continue learning about various aspects of the virus and grappling with the resulting "new normal," the e-discovery industry has an opportunity to strengthen its diversity and inclusion objectives and ensure they remain a strategic business priority.

Recent business disruptions underscore that law firms, legal departments and e-discovery service providers need top-performing talent in order to recover—and successfully move beyond—current circumstances into a future ripe with unimaginable possibilities. Is your team ready for that future? Making quality staffing

decisions now is vital to supporting your organization's goals of creating new, or refining existing, products and services to appeal to a larger group of customers.

Let's face it, every organization needs to make itself more appealing to clients, customers, and communities in order to expand business opportunities and to do so rapidly when the opportunity to safely re-open emerges. A critical component of any post-pandemic business strategy is attracting and retaining diverse talent possessing the skills necessary to expand market share. Talent able to connect meaningfully and respectfully with customers' cultures, values, and other diversity dimensions will drive business successes and should remain a top priority.

Lack of investment in quality diversity, equity, and inclusion efforts plagues many industries and professions, and e-discovery is not immune. Decision makers failing to consider racial or ethnic minorities, women, and LGBTQ+ individuals for meaningful work assignments, valuable networking and client interaction opportunities, mentoring and sponsorship, and training necessarily limit hiring, promotion, and leadership advancement opportunities. More significantly, such deficiencies in investment often steer diverse talent— voluntarily or involuntarily—out the door.

The State of Diversity in Law and Technology

While there are no comprehensive studies or surveys of diversity and inclusion in e-discovery, this industry lies at the intersection of law and technology—both of which struggle to achieve and/or maintain diverse and inclusive workforces. Examining diversity within these two fields can help organizations understand the state of diversity in e-discovery.

Even though the number of women (https://www.americanbar.org/content/dam/aba/images/news/2019/08/ProfileOfProfession-total-hi.pdf) enrolled in law school has surpassed the number of men since 2016 (https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html), and were nearly on par in several preceding years, women comprise (https://www.nalp.org/uploads/2018NALPReportonDiversityinUSLawFirms_FINAL.pdf) only 23% of law firm partners and 45% of law firm associates. Among all U.S. companies, women represent only 31% of all general counsel (https://blog.lawgeex.com/8-stats-you-need-to-know-about-the-male-female-general-counsel-divide/) and men more than double that percentage (69%).

Unfortunately, the numbers are even worse for racial and ethnically diverse attorneys. According to the American Bar Association, in the 10 years following the onset of the previous economic downturn, from 2008 to 2018 (https://www.americanbar.org/content/dam/aba/administrative/market_research/National_Lawyer_Populatio 2018.pdf):

- The percentage of Native American attorneys remained unchanged at only 1% of all lawyers;
- African American attorneys increased by a mere 0.4%, representing 5% of all attorneys though accounting for 13.4% of the U.S. population;
- Asian-Americans are 3% of all attorneys but comprise 5.9% of the total U.S. population;
- Latinx attorneys are a mere 5% of all attorneys, but 18.3% of the U.S. population; and
- Hawaiian/Pacific Islander attorneys decreased by 0.4%, and constitute less than 1% of all lawyers in the U.S. for seven of the 10-year period.

Even within ethnic and gender groups, diversity data can be startling. For example in 2018, minority women (https://www.nalp.org/uploads/2018NALPReportonDiversityinUSLawFirms_FINAL.pdf) were just 13.52% of all U.S. law firm associates and only 3.19% of law firm partners. Likewise, minority men (https://www.nalp.org/uploads/2018NALPReportonDiversityinUSLawFirms_FINAL.pdf) accounted for fewer

than 11% of all associates and 5.94% of partners at U.S. law firms. Meanwhile, the data shows that Caucasian women in the partner ranks have made consistent advances during this same time period with their numbers increasing from 17% to 20% of all law firm partners (https://www.nalp.org/uploads/2018NALPReportonDiversityinUSLawFirms_FINAL.pdf). Representation of minority women and men continues to lag in the legal field, particularly for Latina and African American women who represent only 2.45% and 2.55% of law firm associates and 0.77% and 0.68% of law firm partners, respectively.

(Note: The surveys referenced in this article define racial and ethnic groups in a number of ways; however, for purposes of consistency, this article uses the following categories: Caucasian, African American, Asian-American, Latinx, Hawaiian/Pacific Islander and Native American.)

In addition, while the percentage of LGBTQ+ lawyers has generally trended upward, lawyers self-identifying as LGBTQ+ (https://www.nalp.org/uploads/2018NALPReportonDiversityinUSLawFirms_FINAL.pdf) are fewer than 3% of all lawyers in the U.S., and only 2.1% of all law firm partners.

Similar to the legal industry, the technology industry also struggles with hiring and retaining employees from underrepresented diverse backgrounds. In the U.S., Caucasians are the overwhelming majority of the technology workforce and, according to the U.S. Equal Employment Opportunity Commission (https://www.eeoc.gov/eeoc/statistics/reports/hightech/#_ftnref2), represent 83.3% of all tech executives and 68% of tech professionals (*e.g.*, computer programmers, software developers, web developers, and database administrators). Conversely, minority group representation is significantly lower for both executives and professionals: Asian-Americans represent 10.6% of tech executives and 19.5% of professionals, African Americans are fewer than 2% of executives and 5.27% of professionals, and Latinxs comprise 3.1% of executives and 5.3% of professionals.

Women have not fared much better. The percentage of women technologists (https://smallbiztrends.com/2018/03/women-in-technology-statistics.html) has declined from 32% in 1990 to 20% in 2018, while in 2018 women were 50.8% of the total U.S. population (https://www.census.gov/quickfacts/fact/table/US/IPE120218). For minority women, the numbers tell an even bleaker story—Latinas and African-American women (https://www.ncwit.org/sites/default/files/resources/ncwit_women-in-it_2016-full-report_final-web06012016.pdf) comprise only 1% and 3% of the technology workforce, respectively.

Improving Diversity and Inclusion in Difficult Times

E-discovery occupies a critical space at the intersection of the technology and legal industries. While COVID-19 has disrupted business, e-discovery professionals have a tremendous opportunity right now to transform the way they conceptualize and deliver e-discovery offerings around the globe and strengthen client relationships.

Any vision for e-discovery in the post-pandemic world must recognize the critical importance of the contributions of diverse talent to innovation and to the success of every corporate legal department, law firm, and e-discovery service provider. There are significant opportunities in this moment to develop and execute impactful diversity and inclusion priorities. To achieve these priorities, the e-discovery industry should take the following actions.

Adopt strategies preventing traditionally under-represented groups from being disproportionately impacted by pay cuts and layoffs. The lesson from the 2008 recession is clear—women and/or minority attorneys experienced unprecedented job losses and compensation reductions as a result of the employment decisions made during that time. Those decisions resulted in a years-long decline (https://www.nalp.org/uploads/2018NALPReportonDiversityinUSLawFirms_FINAL.pdf) in the percentage of women attorneys and the number of African-American associates dropped every year between 2009 and

2018, except for a small increase in 2016. In fact, the percentage of African American female associates in law firms remained *below* the pre-recession percentages in the 10 years following the onset of that recession. The goal in this pandemic is to make quality staffing and compensation decisions that do not disproportionately affect diverse lawyers (https://www.newsdesk.lexisnexis.com/click/?p=aHR0cHM6Ly93d3cubmV3c2Rlc2subGV4aXNuZXhpcy5jb20vYXJ0aWNsZS80MjA2MTg2MTM3OS5odG1sP2N and practitioners.

Enhance mentoring and communication skills with diverse talent. Now is the time to employ "best practices" for engaging with and advancing the careers of diverse talent. This is an optimal time for enhancing or developing new e-discovery products and services, and re-thinking how to deliver them to various customers. Consider whether critical information about these career-enhancing opportunities and projects is flowing to all members of the team. It is important to share those opportunities with the full team in order to invest in your team's collective success. Improving communication skills also allows a leader to gather key insights that will improve the team's overall functioning and help diverse talent feel connected, valued, and included.

Use data to assess and enhance diversity and inclusion efforts. Organizations should consider collecting and analyzing (in legally compliant and appropriate ways) diversity, equity, and inclusion metrics identifying opportunities to enhance successes in recruiting, retaining, and promoting diverse e-discovery talent. This is also an ideal time to assess whether business relationships with LGBTQ+, minority, and women-owned businesses could be useful in expanding market share while also demonstrating a commitment to diversity, equity, and inclusion values.

Support e-discovery industry initiatives designed to improve diversity and inclusion in the profession. E-discovery service providers, law firms, and corporate legal departments have numerous opportunities to participate in industry-specific diversity and inclusion initiatives where invaluable "best practices" information is shared. The Sedona Conference, for example, created the All-Sedona Diversity Committee (https://thesedonaconference.org/diversity) to improve diversity within the organization and the larger legal community. Additionally, the Working Group Series' meetings and annual The Sedona Conference Institute have featured panels that provide thought-provoking insights about some of the thornier issues affecting diversity and inclusion in e-discovery. The E-Discovery Institute (EDI) also expresses its commitment to fostering diversity in the e-discovery community through the EDI Diversity Initiative (https://www.ediscoveryinstitute.org/diversity), where signatories pledge to increase diversity within their respective organizations and to consider service providers' workforce diversity when placing business.

The COVID-19 pandemic creates opportunities for the e-discovery industry, like the law and technology industries, to expand its engagement and retention of diverse talent. The decisions made today about the workforce of the future should reflect its commitment to diversity and inclusion.

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