

Pathways to Equity: A Step-By-Step Guide to Data-Driven DE&I

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For the past year, conversations around diversity, equity, and inclusion (DE&I) have amplified across economies – and the legal industry in particular. While increased awareness is good, the evolution from qualitative to quantitative action is better.

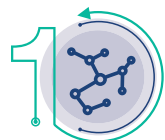
This analysis addresses two critical questions:

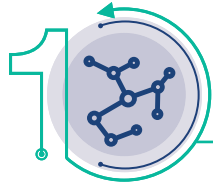
1. How do law firms and legal departments use data to measure improvement and track their follow-through on promises?
2. As law firms and corporate clients embrace the use of data to advance equity in law, how do they also tackle thorny questions about what to measure and how?

In exploring these questions, this analysis provides a step-by-step guide to initiating evidence-based DE&I programs to help break the legal profession’s

poor cycle of attrition and “service partner purgatory” for diverse attorneys. Our “Pathways to Equity” framework incorporates three levels of data analysis.

1. Good: Firm-level statistics based on external survey data;
2. Better: Quantity of work analytics that utilizes diversity-tagged internal billing data; and
3. Best: Quality of work analyses facilitated by high-quality time-entry narratives and tech-enabled analytics. This depth of analysis can reveal disturbing patterns of implicit bias in the allocation of career-advancing work – particularly in high value engagements – that lurk beneath a seemingly equitable hours distribution.





Understanding the DE&I Call to Action

Prior to COVID-19, despite conversations around diversity and inclusion gaining momentum, representation figures in law have remained alarmingly low. **Even as more women, racial/ethnic minorities, and LGBTQ+ law school graduates enter the profession than ever, the percentage of those groups who are Am Law 200 equity partners or Fortune 500 General Counsel is abysmal.**^{1,2} These percentages reflect the staggeringly higher attrition rates for diverse law firm attorneys; an ongoing reduction in the number of equity partner promotions; and an increased reliance on the hiring of lateral partners, of whom more than 70 percent are men.³

At the current rate, it will take 38 years until law firm equity partnerships match law school graduation rates for women. It is not until 2084 (yes, 65 years) before racial/ethnic minority graduates see equal representation as equity partners.¹

The COVID crisis has widened the existing equity gap, universally recognizing that the pandemic disproportionately affected working women.⁴ A 2021 McKinsey study estimates that pre-pandemic employment levels for women may not recover until 2024.⁵ Moreover, the financial impact of

the pandemic sparked concern about DE&I “backsliding” at firms, as the last recession swiftly wiped out decades of work on diversity and inclusion⁶.

Within this perfect storm of adversity, the legal profession faces the genuine possibility that diversity in law firms – already quite awful - could plummet.

Corporate clients are not blind to this bleak possibility. Many have observed the dismal attrition statistics and are asking their law firms to address the pandemic’s effect on diverse attorneys mindfully. Corporate clients are not asking DE&I questions to be nice; they’re asking because they recognize that diversity makes law firms - and lawyers – better. They are more successful in the delivery of legal services (and more profitable organizations.⁷)

According to a recent survey by the Wicker Park Group, **“Clients are directly tying the quality of the work product, advice, and service to the level of diversity on client teams.”⁸ Ultimately, parity is not simply about balancing a tally; it is about building pathways to equity partnership for diverse attorneys.** That journey begins with clients’ clearly communicating their expectations about equity, diversity, and inclusion from the onset of an attorney/client relationship.



Lay the Groundwork for Success

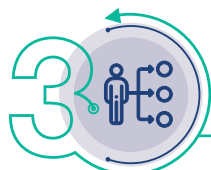
Clients best facilitate collaborative pathways to change when expectations are clear. If those expectations are high, it is only fair that outside counsel is aware from the outset. To lay the necessary groundwork, clients should leverage and enforce engagement processes - such as RFPs and Outside Counsel Guidelines - to signal their position on diversity and the vital role data will play in evaluating their counsel.

Outside Counsel Guidelines with detailed DE&I criteria put law firms on notice that they will face tough questions. These include, why isn't the relationship partner diverse? Why isn't the lead lawyer? In addition, how does the firm assign origination credit for growing and expanding the relationship? These types of guidelines tell law firms that their clients actively consider diversity in hiring decisions, panel consolidations, and rate

discussions. Similarly, in RFPs, clients should include expectations around metrics that drive DE&I success, including origination credit, relationship partners, legal team composition, and the anticipated roles of diverse attorneys in the engagement.

Clients can also leverage engagement processes to drive data integrity at their law firms. These processes are critical foundational steps towards impactful, data-driven talent management initiatives that will help to bridge the diversity gap (see Sections III(B) and (C), *infra*).

When used effectively, engagement processes give law firms fair warning that they must deliver on their promises. Firms that heed the cautionary signal will be well-positioned when their clients later measure performance on DE&I.



Follow Through with a Quantitative Approach

It is impossible to overstate the importance of data as a catalyst for change. For example, the Mansfield Rule, a certification process created and administered by Diversity Lab, has demonstrated how a quantitative approach quickly alters behavior for the better. The Mansfield Rule measures whether law firms have affirmatively considered at least 30 percent

women, lawyers of color, LGBTQ+ lawyers, and lawyers with disabilities for leadership and governance roles, equity partner promotions, formal client pitch opportunities, and senior lateral positions.

According to recent data from Diversity Lab, "Racially diverse lawyers at early adopter Mansfield firms are progressing into the partnership at a

statistically higher percentage than they were pre-Mansfield...This variance is meaningful since all large law firms, on average, only increased by 0.2% each year with regard to racial diversity in their partnerships based on broader data from 2007-2019.”⁹

In a recent article detailing a Kaiser Foundation Health Plan (KFHP) collaboration with Digitory Legal, Greg Kaple, senior director of KFHP legal business services, underscored the importance of data in advancing DE&I.

“With high-quality data, we can take action to fix implicit bias at the source, which is at the firm staffing and work allocation level,” Kaple said.¹⁰

However, not every organization has the resources needed to collect, classify, and analyze the data required to hold law firms to the promises they make in RFP responses. For these organizations, engaging with third-party experts to design bespoke paths that ensure equity allocation of opportunities in law is a resource-friendly strategy that can balance the playing field.

A. Good: Firm-Level Statistics

Reviewing diversity data at a firmwide level is a common starting point for DE&I analytics. Although this type of survey data has limitations, it also has the advantage of being an easy lift for organizations with limited analytics resources because the organization that created the survey also performs the data collection and reporting.

The number and breadth of external surveys and accolades around DE&I can be overwhelming. Moreover, maybe organizations use statistics and marketing spin for gaming the system cleverly. For example, some firms appoint titles that sound like leadership roles but offer no guarantees that

assigned tasks are forward-leaning. Others attempt to cover a few areas with one representative in leadership (such as a minority LGBTQ woman), which ticks off several boxes but fails to prove any accurate measure of inclusion.

To address these challenges, clients should choose one or two highly transparent metrics or surveys (e.g., ALM’s Diversity Scorecard, Mansfield Certification, or the ABA model survey) and use them to answer critical questions about the firm’s overall diversity program and, more specifically, the team that is representing a client. These include:

- Does the firm’s overall composition comport with the client’s DE&I goals?
- How does the diversity of the team compare to the overall diversity of the firm?
- What were the attrition levels for diverse attorneys?
- What percentage of the firm’s diverse partners are promotions vs. lateral hires?
- What percentage of partners - particularly equity partners - are diverse?⁸

Answering these questions enables clients to align their organization’s DE&I goals with firm-level information. However, to gain a proper understanding of the diversity of the outside counsel team, clients need to look beyond firm-level statistics and know who is doing the actual work. This necessity brings us to the next level of analysis: client team staffing by hours or spend.

B. Better: Quantity of Work

Clients want more than firm-level diversity; they want evidence that diverse lawyers are working on their engagements. A Wicker Park Group analysis of diversity in the legal industry in April 2021 demonstrates that clients ask

for proof of diverse representation through data. “The diversity needs to be real and show through on billing records,” one client said. Another survey respondent noted, “[We expect] meaningful progress in the next three years on [hiring metrics, diverse senior attorneys on all projects and more], i.e., progress against published KPIs.”¹¹

The next stage of analysis – timekeeper and matter level information – enables corporate legal departments to understand the composition of the teams advising the organization and the amount of work completed by diverse attorneys. In 2017, College of Law Practice Management Fellows Vincent Cordo (then the legal operations officer for Shell; currently chief legal project management officer for Holland & Knight) and Casey Flaherty (legal operations consultant and founder of Procertas) described the Shell legal department’s implementation of quantitative diversity analytics;

“Shell measures not only the general diversity of its law firms but also the actual diversity of timekeepers assigned to Shell work down to the percentage of total billing for which they are responsible. Measurement is central to management.”¹²

Tracking the amount of work done by diverse outside counsel attorneys allows legal departments to measure a firm’s performance against another and against internal expectations, which may be higher or lower than the market average. This data also provides law firms and legal departments with valuable insight into areas that need improvement within the context of specific client engagements. In reviewing tens of thousands of line-item entries from all types of law firms, I’ve observed that overall, gender diversity is highest in commoditized work but generally plummets as the strategic importance of the engagements increases.

Similarly, diversity-tagged billing data will show differences in diversity between practice groups. It will highlight hidden struggles with racial/ethnic diversity created when firms singularly focus on other categories, like gender, to increase overall diversity hours. Accurate data will announce whether diverse timekeeper hours start to flag at the partner level – an indicator that DE&I-focused succession planning is warranted.

Quantity of work analytics helps law firms and legal departments understand where challenges lie and where to focus their efforts. To find the “why” behind the numbers and drive diversity at the equity partner level, clients must do a deeper analysis into the quality of work.

C. Best: Quality of Work

Equitable work allocation is the key to genuine advancement within the industry. Career litigator Patrick Lamb – a former Katten Muchin partner and founder of the groundbreaking firm Valorum – advises:

Hours measure the amount of time spent but not the importance (value) of one’s contribution. If you want diverse lawyers to be involved, why not [measure] activities performed by diverse lawyers, such as:

- The number of depositions taken, both alone and as a percentage of all depositions on a matter
- The relative importance of the depositions taken
- The number of depositions of client personnel defended
- The number of expert depositions taken and defended
- The number of court appearances
- The number of court appearances where the diverse lawyer was the primary speaker
- The number of motions argued

- The number of client meetings led
- The number of trials first- or second-chaired
- The number of witnesses taken at trial

Measure things that are substantive. . . These things will help diverse lawyers develop as important players in their firms, which will have ramifications for diversity beyond just one client.¹³

As Lamb's comments indicate, not all work provides career-advancing opportunities that increase a lawyer's actual or perceived value to the client.

Moreover, the unfair allocation of administrative tasks directly correlates to attrition. According to the 2019 ABA/ALM report *Walking Out The Door*, "the top reasons why experienced women leave private practice boil down to the stress and time needed to 'do it all,' especially around non-substantive responsibilities at the office that do not reflect the quality of an individual's legal work."³

With limited hours in a day, the disproportionate allocation of non-career-advancing work to women versus men is a double-whammy. Women must overcome implicit bias to receive high-quality assignments while performing the less valued – yet necessary – tasks that men avoid with greater success.

Ensuring equitable distribution of work – both the value-enhancing and the tedious – requires meaningful insight into the quality and type of work lawyers are doing and separating the strategic, success-building work from the administrative tasks.

Until recently, this kind of rigorous approach to examining work allocation was difficult because legal billing data is typically poorly structured. Thus, the data needed to answer the "who did what?" question accurately was

essentially out of reach. Today, new advances in technology – coupled with an unprecedented willingness by corporations to leverage data to examine this issue – make the quantitative study of work allocation possible.

By leveraging time narratives instead of attorney coding, proprietary AI-enabled tools can help to illuminate patterns of implicit bias in billing data that would otherwise remain obscured. For example, by normalizing billing data with consistent classifications, my colleagues and I at Digitory Legal observed that women dominate internal project management (e.g., task lists and checklists, meeting agendas, staffing, and workflow planning and management). That remains true even when women lawyers make up a smaller proportion of the total matter hours; inevitably, women perform most of this important – but typically undervalued or invisible - matter management work. Further, as cases move into trial – some of the best resume-building work available in Big Law – data can reveal a glass ceiling, as women who dominated case workup disappear from sight.

A key question that needs to be answered is whether your billing data in its natural state (i.e., coded inaccurately by lawyers) tells a misleading story of

“ Further, as cases move into trial – some of the best resume-building work available in Big Law – data can reveal a glass ceiling, as women who dominated case workup disappear from sight. ”

parity that hides a darker truth. Namely, that female attorneys are spending significantly more time on administrative tasks than their male counterparts, who are in front of judges, working with key witnesses, and visible to clients.

When engagements are high stakes, do billable hour distributions change, with white men performing the lion's share of this resume-building, profile-raising work? These examples are grounded by authoritative studies and represent troubling patterns identified and disrupted with data. Firms and clients who want to break the cycle of inequality must explore this reality.

Conclusion – Setting Expectations

Successful and accurate DE&I relies on powerful deciders – clients and managing partners – to assign diverse populations career-building and strategically focused tasks that build their portfolios of business development

and client-centric work and lead to career advancement and equity partnership roles.

Pandemic issues and outdated career advancement processes inherent in old-school firms remain challenging obstacles. Yet, change can and will arrive if a company is fully committed to emphatically requiring appropriate diversity and inclusion representation within their firms.

Ultimately, the collective industry goal is to raise the long-term status for diverse and underrepresented groups, improve client work, and strengthen law firm and client relationships. This future is possible when clients set clear expectations with law firms, maintain accountability, and hold fast to their commitment to the continuous and consistent review of established criteria bolstered by reliable data.

END NOTES

1. NALP and MCCA report that while 50% of law school graduates are women, only 28% are G.C.s, and just 20% are equity partners. The numbers are worse for minorities, representing 33% of law school graduates but merely 14% of G.C. and 9% of equity partners. Six percent of law school graduates are LBGQT+ but make up only 2% of equity partners (figures for G.C.s are unknown). See Verma, A., "Moving the Needle with Law Firms Using Metrics", Legal Operators Webinar May 11, 2020 (discussing Facebook's approach to DE&I and citing 2019 statistics from National Association of Law Placement <https://www.nalp.org/minoritieswomen> and Minority Corporate Counsel Association).
2. For a breakdown of diversity at Am Law 200 and NLJ law firms, see ALM Intelligence's *Diversity Scorecard* and *Women in Law Scorecard*.
3. While entering associate classes comprised almost 45% women for several decades, women constitute only 30% of non-equity partners and 20% of equity partners in the typical large firm. The number of lawyers named as new equity partners at big firms declined by nearly 30% over the past several years, and firms increasingly rely on hiring lateral partners, more than 70% of whom are men. See Liebenberg, R. and Scharf, C., "Walking Out the Door: The Facts, Figures and Future of Experienced Women in Private Practice." (ABA 2019) at p.12.
4. <https://www.marketplace.org/2021/03/18/the-pandemic-has-been-especially-damaging-to-working-moms/>
5. Achieving an inclusive U.S. economic recovery, McKinsey & Co. February 2021 <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/achieving-an-inclusive-us-economic-recovery>
6. Digitory Legal, "A Conversation With Diversity Lab: How Can Law Firms and Legal Departments Prevent Backsliding on Diversity In Current Crisis" May 20, 2020 <https://www.digitorylegal.com/blog/2020/5/6/conversation-with-diversity-lab-what-can-law-firms-and-legal-departments-do-to-prevent-backsliding-in-diversity-during-the-current-crisis-tn33w>
7. <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters>
8. Slavin, Nat, "Diversity in 2021: A Snapshot of What Clients are Saying" ALM Intelligence (May 2021).
9. Diversity Lab, Mansfield Rule "Early Adopters" Show Significant Diversity Growth — and Outpace Legal Industry — in Critical Leadership Roles." (April 2021)
10. Greg Kaple and Catherine Krow, "Turning Outside Counsel Guidelines into a Data Analytics, Diversity & Cost Savings Platform" ACC Legal Operations Observer, Jan 6. 2021 <https://www.digitorylegal.com/blog/2021/1/12/turning-data-analytics-diversity-amp-cost-savings-platform>
11. As one client noted in the Wicker Park Group survey: "I look closely at the number of women partners and number of minority partners in a law firm—not associates. It tells me whether the firm is interested in promoting diversity of thought and thinking outside the box. It also tells me whether the firm is supporting their lawyers so the lawyers can provide me with quality product." Slavin, p. 9
12. Vince Cordo & Casey Flaherty, "Shell Legal - Shadow Billing," ACC Docket 2017
13. Lamb, Patrick, "Justifying Shadow Billing as Promoting Diversity? Much Better ways exist." (November 2017) <https://www.patrickjlamb.com/2017/11/14/justifying-shadow-billing-as-promoting-diversity-much-better-ways-exist/>