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Yellow Paper Series

Colored by Race:

Bias in the Evaluation of Candidates of Color by Law Firm Hiring Committees

[Summary of Data from 2005-2006 in Preparation for a 10 Year Update]

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This research was initially conducted in 2005 and released by The Athens Group/Nextions in 2006. This research was subsequently published by the Minority Corporate Counsel Association in the September/October 2006 issue of Diversity & The Bar. (<http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=576>) Nextions is in process of updating the research and plans to publish a 10 year update to the study in early 2016.

We have learned a lot about racial/ethnic differences and biases in the last 10 years, and some of the research in the following summary is not reflective of the more nuanced understandings we have today. It is this context as well as the possibility to measure the changes that firms have made in the past 10 years that has driven the update we are currently putting together.

RESEARCH QUESTION:

Does race color the way in which minority candidates are evaluated by hiring committees in large law firms? ¹

While anecdotal stories and individual examples have suggested for years that bias existed in the ways in which hiring committees evaluated candidates of color, these anecdotes have often been dismissed as atypical and not representative of a profession that says it is committed to diversity. "Colored by Race: The Evaluation of Candidates of Color By Law Firm Hiring Committees" — a research study conducted in 2005-2006 — offers some empirical evidence that racial and ethnic bias is indeed present in large law firm hiring processes, and it manifests itself in some predictable and some unexpected ways.

The findings of "Colored by Race" are based on data gathered from confidential telephone interviews with 114 partners² representing 83 large law firms³ throughout the United States. All of the partners in this study were involved with the hiring process in their respective law firms for at least six months during their career as partners. Research findings showed that racial bias did color the way racial/ethnic minority law students'

¹ Since many firms have different names for the committees that engage in the evaluation of candidates for positions within the firms, we use the term "hiring committees" generally to mean any committee in which law student or lawyer candidates are evaluated for employment by that law firm.

² This study is based on telephone interviews conducted between August 1, 2005 and March 31, 2006 with 114 partners who served on their respective firms' hiring committees for at least six months as a partner. Of the 114 partners, 68 were male and 46 were female. Eighty-one partners were white and 33 partners were minorities. The 114 partners interviewed represented 65.14 percent of the 175 individuals who were selected in this researched and weighted random sample.

³ For purposes of consistency, this study's sample of partners was derived only from law firms with at least 250 lawyers.





achievements and aspirations were evaluated, that minority candidates were penalized for the high attrition rate of minority practitioners from law firms, and that there were still a significant number of inappropriate comments being made about minority candidates behind closed doors in the evaluation process.

This summary not only highlights the key findings from this study, but it also offers strategies that law firms can employ to address the challenges they face in creating and implementing an objective hiring process where differences are valued instead of tolerated and diversity is appreciated instead of exploited.

THE DIVERSITY PILE & THE TWO CONVERSATIONS

The data revealed that racial and ethnic bias, in conscious and unconscious ways presented itself in large law firm hiring processes at many levels. As one partner in the study explained, "You've got the regular candidates in one pile, and you have the diversity candidates in another pile. We have different conversations about the diversity pile. We have different standards for the diversity pile even if we don't always acknowledge this. We have different expectations for the diversity pile. Sometimes it can feel like we are giving more breaks to the diversity pile, but we do that to get people in the door because there is so much pressure to have diverse classes."

The data from the study showed that the evaluations of minority candidates from law schools or the lateral market often focused first on the race/ethnicity of the candidate. The partners in the study attributed this primary focus on race/ethnicity to the client demand and hiring pressures felt by many law firms to increase their diversity numbers. Many of the partners did not feel that the focus on race was due in part to personal biases and perceptions, but they acknowledged that sometimes diverse candidates were discussed very differently than their majority counterparts. Furthermore, the majority of the responses by the white partners in the study illustrated that the focus on the race of a minority candidate extended beyond the conversations in the hiring committee meetings. According to many of the white partners in the study, there were often two sets of conversations held about minority attorneys.

The first set of conversations about candidates of color involved the formal evaluative dialogues about candidates held in the hiring committee meetings. These dialogues focused on the firm's need for additional diversity and the minority candidate's ability to contribute to that desired diversity increase.

The second set of conversations occurred outside of the parameters of the formal committee meetings and took place usually without any minorities present, including the minority members of the hiring committees. In these discussions, partners involved in the hiring process express variations of the following themes: 1) the perception that if the minority candidates had been subjected to the same qualifying criteria as their non-minority counterparts, they would not be hired; 2) resentment regarding the client and social pressures for inclusiveness that are driving down the standards of hiring, especially as the standards relate to attorneys of color; and 3) concerns that the minority candidates would most probably never be successful at the firm.





This second set of conversations, occurring almost exclusively in the absence of minority practitioners, reinforced the growing perception that minority attorneys were less qualified than their majority counterparts, but were more likely to be hired because of the pressures faced by law firms to increase their diversity numbers.

According to many of the white partners' observations, these complaints about the minority candidates occurred regardless of the actual objective qualifications: "I've noticed, and it's not right, but I've noticed that even if a diverse candidate is qualified on paper with regards to where they went to school or the grades they have, there is still a feeling like the attorney may not make it because, you know, most people in the past have not made it," said one white partner.

Even though the partners of color in the study had not been present during these second set of conversations, many of them expressed the perspective that they "had a feeling" that these conversations were taking place about the minority candidates.

One minority partner expressed her frustration by saying, "I almost don't want to recruit students of color here [into the firm] anymore. I bring these talented young people here, and I know that, behind the scenes, people are setting the stage for them to fail. No matter how qualified, no matter how much star quality these recruits have, they are going to be seen as people who will most likely not cut it. So, they are under the microscope from the first moment they walk in. And, every flaw is exaggerated. Every mistake is announced. And, it's like, aha. As soon as a minority makes a mistake, they immediately say that that's what they were expecting all along. How well do you think any of the white attorneys would come off if they were under the microscope like that?"

THE "TAINT" OF AFFIRMATIVE ACTION

The data illustrated that racial/ethnic bias colored the ways in which the achievements and aspirations of law students of color were evaluated. Even as law firms worked to increase the racial diversity in their attorney workforces, they worked equally hard, in their drive to be seen as fair and meritocratic, to ensure that their diversity programs were not equated to or associated with affirmative action. A significant majority of the partners in the study, both minority and white, stressed the importance of their hiring programs not resembling affirmative action in any way even though many of them had revealed that diverse candidates were evaluated differently than their majority counterparts. Affirmative action, as defined by the partners, implied that hiring standards were being lowered to hire minority candidates to increase the firm's diversity.

In spite of many of the firms' efforts to separate their diversity efforts from affirmative action programs, a significant majority of the partners in the study acknowledged that their firms' minority hires were often seen as affirmative action hires regardless of their qualifications. As one white partner summarized, "No matter how hard we work within the hiring committee to treat all candidates equally, there is something about the way we talk about diversity that just makes it seem like every minority we hire is tainted by affirmative action."





It's not just us. We try to communicate to everyone who is going to work with the summer associates that everyone is qualified to be here, but I always hear comments during the summer about one or two minorities and some mistakes that they made and should we be lowering standards?"

According to some of the partners in the study, the "taint" of affirmative action colored the perception of a minority candidate even before he or she is formally evaluated by a hiring committee. One minority partner offered, "[The majority attorneys] believe that a lot of minorities are in the Harvards and the Yales because of affirmative action. So, they say they can only hire the best from the best. And, that's fine. But they go to Harvard, and they go to Yale, and they sit in front of a student of color, and they think that this student only got here because of affirmative action. And they come back to the firm thinking they have to interview this student because she is a minority from Harvard, but they start asking weird questions, like if this candidate is the 'right fit' for the firm or if she would just use the firm as a stepping stone for other things that she may want to do. And I just want to scream, because if she is using the firm as a stepping stone for other things that she wants to do, how is that different from why many of the white men come here?"

PENALIZED FOR OVERALL ATTRITION & VIEWED AS FAILURE RISK OR FLIGHT RISK

Racial/ethnic minority candidates are penalized for the high attrition of attorneys of color from law firms for decades even though that attrition had nothing to do with the candidates per se. Research by the National Association of Law Placement (NALP) and other notable organizations has consistently demonstrated that attorneys of color do indeed have dramatically higher rates of attrition than their white counterparts. However, research by the Minority Corporate Counsel Association (MCCA[®]), the American Bar Association (ABA), and other entities demonstrates that a large part of minority attorney attrition from law firms is due to the firms' not fully integrating minority lawyers into their folds and the minority practitioners not being afforded full and equal opportunity to the work, the resources, and the relationships that they require in order to succeed.

In spite of the abundance of research illustrating that minority attrition from law firms is a problem to be solved by law firms instead of an option selected casually by the minority attorneys, many of the partners in this study reported that minority candidates were often placed into two categories of high risk attrition: failure risk and flight risk.

Failure Risk

A significant majority of the partners in the study reported that minority candidates were far more likely than their white counterparts to be evaluated as "failure risks," regardless of their specific qualifications. One partner of color reported, "It's a vicious cycle of assuming that the history is one way so the future is going to be assumed to be the same way too. Except they are wrong about how the history went down. Supposedly,





we've lost a lot of minority lawyers because their performance was weak, but the more I've looked into it, I'm not sure that that's what happened. These were strong candidates when we hired them, and I think it's easier for firms to say that people failed instead of saying we failed."

The history of attrition based on perceived inadequate performance by minority attorneys is used to label future minority hires as "failure risks." One white partner made this connection: "I'm not going to say that it is always your abilities as a lawyer that lead to poor performance, but there is something about the way minorities fit in here or the way we fit in with them that leads to bad results. So, it's reasonable that when we evaluate minority candidates, we are realistic in maybe thinking that it won't work out. But, we still have to try."

Flight Risk

If the risk of failure was reported by many to represent one side of the risk coin, then the risk of flight represented the other side. The interviewees reported that when minority candidates had excellent qualifications and a combination of a proven track record of success or a star personality, it was difficult to evaluate them as risks for failure. These candidates, then, were reportedly viewed as flight risks in that they would be highly sought after by recruiters, other firms, corporations, and myriad other sources of opportunities. Several of the partners focused on the fact that some minority candidates who should have been hired without any further consideration were often discussed as risky hires for the firm because they would be more likely than their counterparts to receive and accept other opportunities. One minority partner notes the self-fulfilling prophecy set up by many of the firms in defining star minority candidates as flight risks: "Talented people will always have many opportunities, but the firms seem to focus on the fact that talented minorities have many opportunities. I see the white lawyers leave all the time for better opportunities, but those departures are not seen as betrayals. They are not seen as a waste of investment by the firm. But if one minority lawyer leaves for a better opportunity, then everybody has to reevaluate the whole diversity initiative. Then, minorities are seen as not worth the investment because they are just going to leave. If you don't invest in people, of course, they are going to leave. If you do invest, they may leave anyway. But, when a white man that we invested in leaves, we don't say that white people shouldn't be invested in because they leave."

THE PERSISTENT PRESENCE OF BIAS

Even with all the good intentions of increasing diversity, we found a significant number of inappropriate comments being made about minority candidates in the recruiting and hiring process. In addition to the findings reported above that reflect on direct biases in the evaluation of minority candidates in law firm hiring processes, many partners, both white and minority, reported inappropriate comments being made by white partners that suggested deeper and perhaps more implicit biases.





For African American and Hispanic candidates, several partners reported hearing comments of surprise when these candidates' grades fell within the firm's grade requirements. One white partner reported another white partner as jokingly saying, "One of his parents must be white," about an African American candidate with very high grades who was being considered for a summer clerkship.

Comments about women of color contained aspects of race and gender inappropriateness and most often focused on a woman's physical characteristics. One minority partner reported a white partner asking her if "black women had to get suits in special stores" in the middle of a conversation about an African American female candidate and her "shapely physique." Another minority partner reported a white partner asking if a South Indian female candidate could "teach a live seminar on the Kama Sutra" as part of the firm's diversity initiative.

Although the partners felt that many of these inappropriate comments were insensitive but not actionable, they did feel that when such comments were made, it affected the ability of the group to evaluate the candidates as objectively as they could have if the comments had never been made.

[Our hypothesis for the 10 year update is that these forms of more explicit bias is where the greatest change has occurred over the last decade. We anticipate hearing less of these stories than we did 10 years ago.]

STRATEGIES FOR CHANGE

Existing research on best practices on the recruitment, retention, mentoring, professional development, and advancement of practitioners of color lays a solid foundation for critical strategies that law firms should integrate into their organizational practices to become and be more diverse. The strategies listed are not meant as substitutes for the broader work that needs to be done on diversity. Instead, these strategies offer focused steps for enhancing the hiring processes in law firms to enable firms to recognize the challenges that currently exist and address those challenges in a candid and informed manner.

- Acknowledge the realities of explicit and implicit racial biases. Racial bias cannot be removed unless its presence is first acknowledged.
 - Provide specific training for hiring committee members and interviewers that focuses directly on recognizing and accounting for explicit and implicit personal biases in the evaluation of candidates.
 - Provide specific training for hiring committee members and interviewers that focuses on developing the skills to confront the biases and comments when they arise in a constructive way that enables people to advance diversity within their firms.
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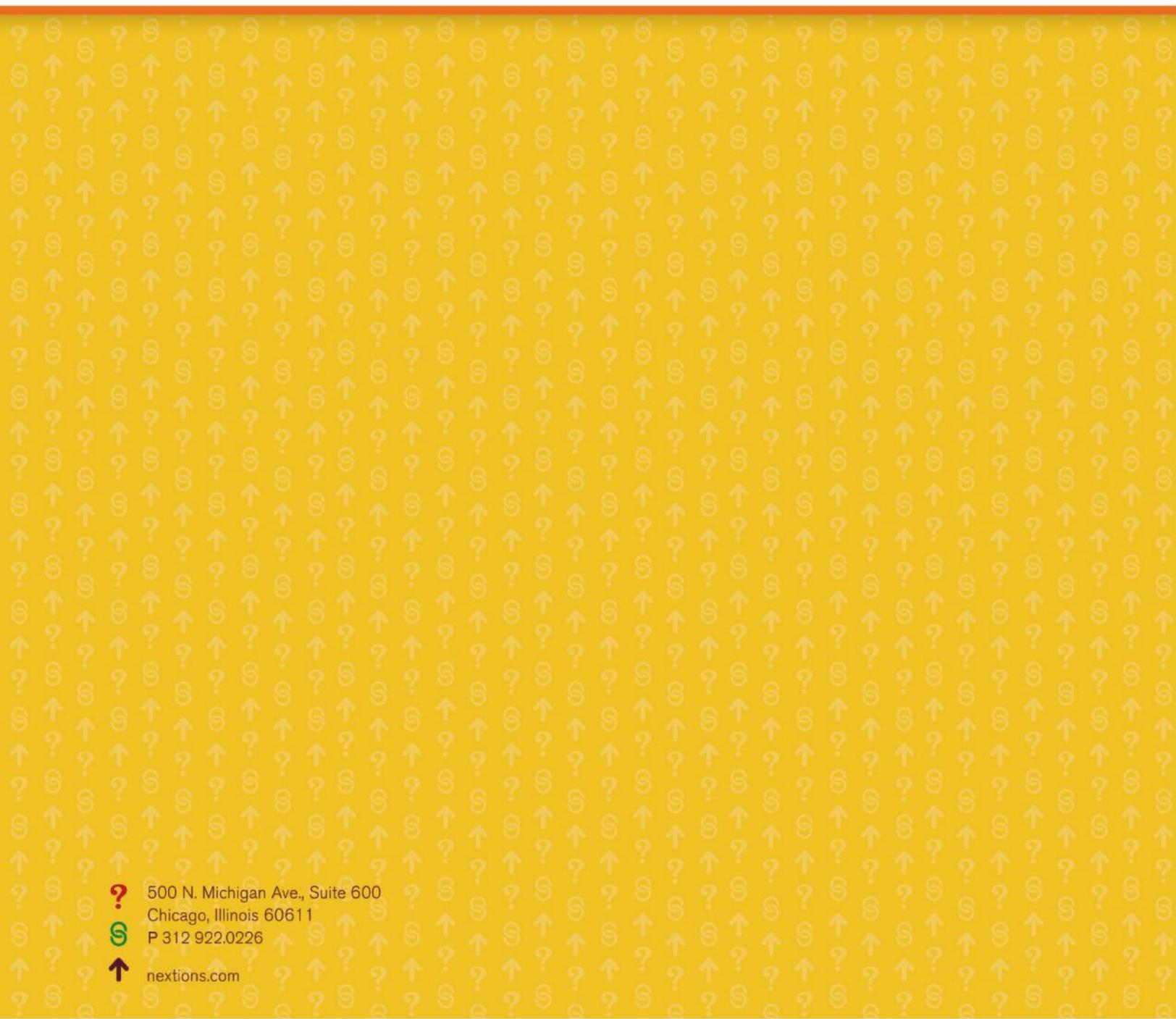


Creating sustainable racial and ethnic diversity in law firms requires hard work and the courage to take a sincere look at every aspect of hiring, retaining, and advancing attorneys of color. Over the last decade, law firm recruiting practices have changed and expanded to increase the number of attorneys of color who enter firms as summer clerks and associates. This progress, however, has been limited and has not yet been able to match representation of minorities in law schools with their representation in law firms. This article highlights one of the key reasons for the lack of representational parity: Racial bias still colors the ways in which diverse candidates are evaluated and minority hires are perceived. Until firms acknowledge this possibility within their own hiring processes and create mechanisms to correct this bias, they will not achieve true progress with the diversity they profess to seek. Furthermore, in recognizing the inseparable connection between effective recruiting and eventual retention, it is important to recognize that bias in the hiring process does indeed translate into consequences for retention. Acknowledging and addressing bias in the way lawyers of color are recruited and hired will not only increase diversity in a law firm, but it will help sustain it for the long term.





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