

TOPIC:

FOSTERING DIVERSITY IN THE CAMPUS COUNSEL'S OFFICE

INTRODUCTION:

Just as many colleges and universities seek to promote and preserve diversity within their institutions, college and university general counsel may also wish to foster diversity within their own offices. Indeed, as students, faculty and staff become more diverse every year, college and university counsel who foster diversity in their own offices will only enhance their ability to effectively advise and represent their increasingly diverse institutional clients.

This NACUANOTE will briefly address the legal context for diversity, and then explore methods by which a college or university counsel's office can foster diversity from within – both through outreach and recruiting efforts, and also through effective management and support of diverse employees once they are hired.

DISCUSSION:

A. What is Diversity?

Diversity means more than simply complying with Equal Employment Opportunity ("EEO") laws. While federal and state EEO laws promote employment opportunities and prohibit discrimination on the basis of certain legally-protected attributes, [1] the concept of diversity emphasizes the broad range of human experience that can contribute to the robust exchange of ideas. [2] For example, the University of California at Berkeley's Human Resources department notes that "diversity as a concept focuses on a broader set of qualities than race and gender," and can include "age, ethnicity, gender, physical abilities/qualities, race, sexual orientation, educational background, geographic location, income, marital status, military experience, parental status, religious beliefs, work experience and job classification." [3]

The Supreme Court in *Grutter v. Bollinger* [4] expanded the notion of diversity (in the student admissions context) to include experiences such as living or traveling abroad, community service, or overcoming personal adversity. In short, the most diverse legal departments strive to recruit and hire those with different backgrounds, perspectives and experiences beyond just race and gender differences.

B. The Legal Context for Diversity

While many colleges and universities consider diversity to be a core value that reflects and

reinforces the institution's educational mission, the law in this area is nuanced and warrants consideration alongside any efforts to promote diversity in recruiting and hiring staff.

1. Diversity as a compelling interest in higher education

In its landmark decisions in the University of Michigan admissions cases – *Grutter v. Bollinger* and *Gratz v. Bollinger* – the U.S. Supreme Court held that diversity is a compelling interest in higher education because it has educational benefits for the entire student body. [5] While the *Grutter* and *Gratz* decisions applied only to student body diversity, the Court offered promising language regarding the importance of workplace diversity as well.

2. Diversity as a compelling interest in employment

The Court in *Grutter* cited expansively to amici with an interest in workplace diversity, including corporations that argued that “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints” [6] and retired officers and civilian leaders of the U.S. military who asserted that “a highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its princip[a]l mission to provide national security.” [7]

Despite this language, debate continues as to whether diversity is a legally cognizable interest in the employment context. In *Petit v. City of Chicago*, [8] the Seventh Circuit Court of Appeals reviewed the Chicago Police Department’s affirmative action plan to increase the diversity of officers at the rank of sergeant by promoting minority officers. Invoking the Supreme Court’s decision in *Grutter*, the Seventh Circuit upheld the plan, noting that “there is an even more compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided American city like Chicago.” [9]

Three years later, the Third Circuit in *Lomack v. City of Newark* [10] considered a plan by the city of Newark, New Jersey to eliminate single-race fire houses by transferring fire fighters to new fire companies based on race. Unlike the court in *Petit*, the Third Circuit found the Supreme Court’s *Grutter* analysis irrelevant in this particular employment context:

The Fire Department’s mission is not to educate. Its mission is “the control, fighting and extinguishment of any conflagration which occurs within the city limits.” . . . Accordingly, *Grutter*’s holding regarding a compelling interest in the educational benefits of diversity is unavailing here. And, we note, the City does not argue that diversity within individual fire companies is in any other way necessary, or even beneficial, to the Fire Department’s mission of fighting fires, i.e., that the Department has an operational need for diverse fire companies, and we do not read the City’s assertions of increased “camaraderie,” “acceptance,” and “tolerance” as making such an argument. [11]

While the court found that the city’s affirmative action plan did not pass constitutional muster, it should be noted that the court still proclaimed workplace diversity to be a desirable goal:

This case is not about whether diverse workplaces are desirable. It is not disputed that they are. . . . Rather, this case is about whether the City of Newark may employ a race-based transfer and assignment policy when any racial imbalance is not the result of past intentional discrimination by the City. We hold that it may not . . . [12]

Regardless of the uncertainty surrounding the use of affirmative action plans to achieve diversity in the employment context, many courts clearly find workplace diversity to be a laudable goal, and there are a number of other ways institutional counsel can foster and promote diversity within their

offices – both through outreach and recruiting efforts, and also through effective management and support of diverse employees once they are hired. [13]

C. Recruitment of Diverse Staff

For counsel seeking to foster diversity in their office, the process begins with a deliberate outreach effort to identify and recruit potential employees with diverse backgrounds. When outreach is maintained over time, it demonstrates that the college or university counsel's office is receptive to hiring talented lawyers from varying backgrounds. There are four basic aspects of the recruitment process that can be designed to enhance outreach to diverse communities: drafting the position announcement and qualifications, publicizing the announcement, networking, and interviewing. Thus, when implementing or reviewing recruitment policies, counsel should consider the following:

1. The position announcement and qualifications

The wording of the position announcement is important, as language can send subtle messages and can help shape a diverse applicant pool. If drafted without considering diversity, the announcement may include words or requirements that discourage certain applicants from applying, rather than being deliberately worded in such a way that is inclusive and open to applicants from varied backgrounds.

Qualifications should be scrutinized carefully to determine if, in fact, they are required to produce fully qualified candidates or merely reflect assumptions about necessary skills and abilities. For example, position descriptions that require many years of experience in a narrow field of practice may reduce the diversity of the applicant pool. Consider instead if a solid foundation of legal experience plus the ability to learn a new field quickly would be adequate to provide the expertise and ability the position requires. Amending a position description from “four years of experience in contract and business law” to “four years of experience practicing law, with exposure to contract and business law” sends the message that the institution is looking for a talented lawyer who has a solid foundation practicing law, and whose skills it will develop if the candidate has an interest in that area of practice. Furthermore, lawyers who can bring new ideas or problem-solving approaches to a higher education legal counsel's office, and who have the ability to work with a wide range of constituents, are especially valuable.

2. Publicizing the position announcement

Once the qualifications are determined and the position description and announcement are drafted, counsel must decide where to publicize it. [14] Advertising in publications that are focused on ethnic, cultural, age, gender, and other diverse characteristics can bring the announcement to the attention of populations that might not otherwise have the opportunity to view it. *Diverse – Issues in Higher Education*, *The Hispanic Outlook in Higher Education*, and Minority Corporate Counsel Association's *Diversity and the Bar* are examples of three such publications.

On-line services increasingly are becoming the location of choice for job postings. Selecting sites that are oriented toward specialized communities can provide a valuable complement to the more traditional sites. A number of such services also can be found on NACUA's Diversity Resource Page, which is referenced in the Additional Resources section of this Note.

3. Networking

Reaching out to colleagues at other higher education institutions or law firms can yield valuable information and provide an immediate source for potential candidates both before and after an

available position is announced. Such colleagues can provide suggestions for wording the position announcement and also can advise potential applicants on the receptivity of the college or university counsel's office to hiring and retaining a diverse staff.

Contacting professional associations whose memberships and missions include particular attributes such as ethnicity, culture, gender, or other diversity-related characteristics could also help to expand the applicant pool. These associations often have the means of publicizing position openings to their membership, including listservs or members-only web pages; this may provide another opportunity to reach candidates who might not be reached by other means. Additionally, the mere presence of the announcement on these listservs or web pages further underscores that the institutional counsel's office is welcoming to persons of diverse backgrounds.

College and university counsel can also consider seeking recommendations from community leaders with whom they have relationships. Leaders in various ethnic, cultural, age, gender, or other diverse communities, as well as local and state private practice lawyers and judges who may work with those communities, often can suggest talented lawyers whom they have encountered and who might be qualified candidates. These may be individuals who otherwise might not have learned of the position but would make a strong addition to the applicant pool.

Many law schools also have student organizations that are focused on students of differing backgrounds. By establishing relationships with these groups, the counsel's office can identify potential interns, externs, law clerks, fellows, and possibly staff members.

4. Interviews

Another important step in the process of recruiting and hiring diverse employees is the interview. Counsel should start by ensuring that those persons responsible for the search process understand the goal of bringing a diverse range of applicants to campus. Some staff members may need guidance on how to evaluate applications thoroughly and broadly, focusing not just on educational background and experience, but also on seeking attorneys who represent a broad spectrum of ideas and experience upon which the office can draw to solve problems, identify legal trends, and relate to the client's needs. [15] Additionally, where possible, it may be helpful to include a diverse group of staff members in the interview process, even drawing on colleagues from other departments as necessary or appropriate.

Those participating in the search and interview process should prepare a list of questions that are relevant to the position and that will be asked of all candidates. [16] When looking to design interview questions, it is important to identify relevant factors, such as the skills and abilities that are necessary for the position, the behavioral factors that are important (e.g., motivations and interests), and the type of office culture that the institution is trying to establish. [17]

D. Management of Diverse Staff

Once the college or university counsel has engaged in successful diversity recruitment, he or she also may want to consider how to make the work environment welcoming to all staff. [18] In an effort to retain diverse staff members, indeed all staff members, some helpful techniques might include:

- Getting to know employees. Learning about a co-worker's professional goals and interests will help you view that co-worker not only as a colleague but also as an individual. In this manner, and based on an institution's resources and culture, the institutional counsel can help the employee to achieve those goals, and identify, design, and enhance the kind of environment in which he or she prefers to work.

- Support of outside activities and interests. A supportive work environment is one of the most important job satisfaction elements needed to retain any lawyer. Usually, the nature of the work in a college or university counsel's office is itself a positive factor in retention, inasmuch as it is interesting and varied. Ensuring that the office also is supportive of outside activities can further foster retention. For example, the office may be able to set flexible hours that make combining a law practice with other outside responsibilities practicable. This in turn helps create a positive environment that may enhance the quality of an employee's work. Similarly, paying attention to matters that may be important to a lawyer's cultural life, such as holidays and other events, lets staff know they are valued not only for their legal expertise and background but also as individuals with differing backgrounds.
- Opportunities for professional growth. The type and breadth of legal work to which employees are exposed also plays an important role in their professional development and therefore their retention. Ensuring that diverse staff members are exposed to the decision-making process and are invited to contribute to the discussion allows them to grow, and demonstrates that their opinions are respected and valued.
- Institutional committee work. Where applicable, encouraging lawyers to participate on institutional committees, as both practitioners and members of the campus community, can give them broader exposure and enable them to meet and interact with other university members, including those who may come from like backgrounds. Similarly, encouraging staff to teach university courses can help them become an integral and important part of the institution.
- Leadership positions. Supporting and encouraging attorneys to take on leadership positions in bar activities locally, statewide, and nationally, as well as participate in non-legal outside associations, can increase employee satisfaction and retention. Many lawyers want to get involved in pro bono activities or serve on non-profit/community-based boards. Encouraging such activity can benefit the individual attorney and, by increasing his or her breadth of experience and perspective, the office itself, and ultimately the institution.
- Continuing education. Higher education law is a constantly changing and developing practice, and college and university attorneys sometimes need to re-tool and learn new areas of law. Supporting continuing professional education and growth, and allowing all staff members the opportunity to become the office authority in specific areas, establishes trust and enhances their value to the office and the institution.

Legal offices are in a unique position to help foster the career development of diverse and talented lawyers. Being alert to opportunities to best accomplish this can be seen as an investment in the future.

CONCLUSION:

This NACUANOTE is provided as a resource for counsel seeking to recruit and retain a diverse staff. It suggests strategies that may evidence a commitment to inclusion, respect for the differences among people and the necessity of a sustained effort to attract and retain a diverse workforce. Colleges and universities that utilize the strategies described may develop stronger applicant pools and a higher level of job satisfaction among existing employees, both of which serve to benefit the entire institution.

FOOTNOTES:

FN1. For example, race, gender, religion, national origin, age, disability, citizenship, genetic traits, veteran status, and in some states and localities, marital status, sexual orientation, and gender identity or expression.

FN2. See Jonathan R. Alger, "Diversity and Affirmative Action: Equity, Excellence, and the Law," NACUA March Workshop (2011).

FN3. See "[What is Diversity?](#)", Human Resources at UC Berkeley (2011).

FN4. 539 U.S. 306, 325 (2003).

FN5. See *Grutter v. Bollinger et al.*, 539 U.S. 306, 325 (2003) (law school admissions) (endorsing the view "that student body diversity is a compelling interest that can justify the use of race in university admissions"); *Gratz v. Bollinger et al.*, 539 U.S. 244 (2003) (undergraduate admissions).

FN6. *Grutter* at 330.

FN7. *Id.* at 331.

FN8. 352 F.3d 1111 (7th Cir. 2003), cert. denied, 124 S. Ct. 2426 (2004).

FN9. *Id.* at 1114.

FN10. 463 F.3d 303 (3rd Cir. 2006).

FN11. *Id.* at 310.

FN12. *Id.* at 305.

FN13. For more detailed resources of the legality of affirmative action plans, see [NACUA's Resource Page on Affirmative Action](#).

FN14. As each institution maintains its own procedures and requirements for job announcements, counsel should consult with their Human Resources and EEO officers regarding the required and recommended guidelines for their institution.

FN15. The legal issues surrounding employment interviews are significant, and counsel should consult with the Human Resources and EEO Offices at their institution regarding EEO and affirmative action laws and institutional policies concerning each.

FN16. For examples of questions to ask or not ask, see Michigan Technical University, "[What You Can Ask and What You Can't – Legal/Illegal Interview Questions](#)"; State University of New York – Brockport, Office of Affirmative Action, "[Interviewing and Evaluating Fairly](#)."

FN17. "Interview Questions," table developed by the Society for Human Resource Management (1996) as referenced in *Professional Practices in Association Management*, American Society of Association Executives, John B. Cox, Executive Editor 1997. See also Gary S. Marx, "Legal Aspects of Interviewing," Fifth Annual Benefit Managers' Luncheon – The WHES Multiple Employer Trust,

May 1998.

FN18. The American Society of Mechanical Engineers, Professional Practice Curriculum, *Diversity in the Workplace* (2004).

AUTHORS:

This NACUANOTE is adapted from the White Paper entitled *Fostering Diversity in the General Counsel's Office*, authored by Jonathan R. Alger, Senior Vice President and General Counsel, Rutgers, The State University of New Jersey; Pamela J. Bernard, Vice President and General Counsel, Duke University; and David Williams II, Vice Chancellor and General Counsel, Vanderbilt University. Updated and adapted by Josh Dermott, Assistant Director of Legal Resources – Information, at the National Association of College and University Attorneys.

ADDITIONAL RESOURCES:

NACUA Resources:

- [NACUA Diversity Resource Page](#)
- [NACUA Affirmative Action Resource Page](#)
- [NACUA Career Center](#)

Bar Associations:

- [Association of Corporate Counsel](#)
- [Corporate Counsel Women of Color](#)
- [Hispanic National Bar Association](#)
- [Minority Corporate Counsel Association](#)
- [National Asian Pacific American Bar Association](#)
- [National Association of Women Lawyers](#)
- [National Bar Association](#)
- [National LGBT Bar Association](#)
- [National Native American Bar Association](#)

Other Resources

- [Minority Law Journal](#)
- [ABA Commission on Women in the Profession](#)
- [ABA Commission on Sexual Orientation and Gender Identity](#)
- [ABA Commission on Racial & Ethnic Diversity in the Profession](#)
- [ABA Commission on Law and Aging](#)

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