



THE MYTH OF THE MERITOCRACY IN LAW FIRMS AND CORPORATE LEGAL DEPARTMENTS

Intellectual Property Owners Association's Diversity &
Inclusion Committee

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I. INTRODUCTION

The legal profession has been long plagued by the myth of meritocracy. Traditional merit-based hiring practices in law firms, rely on selection of candidates from top tier law schools, high LSAT scores and interviewing candidates to find a “fit with the firm-culture.” More prestigious law firms and institutions including Clerkships to Justices, almost exclusively select candidates from a T-14 law school (i.e., one of the 14 law schools that are hardest to get admission to). These core hiring practices, based on “meritocracy,” are prevalent in corporate legal department hiring too and automatically exclude candidates that could not pay for or get admitted to a top-tier law school and more importantly candidates that are not similar in background to the decision makers in law firms and corporate legal departments.

With the more recent recognition of the prevailing social injustices and disparities, which have been further deepened by the pandemic, the time has now arrived to tackle the myth of meritocracy in the legal profession. In recent years, most law firms and legal departments of corporations have revamped or tried to revamp their diversity and inclusion initiatives. Active ongoing discussions are trending on advantages of diverse workforce, and on ways to hire and retain diverse candidates. Post-George Floyd’s murder in the summer of 2020, these initiatives were accelerated by the many protests across the country and the world against social inequities which catalyzed discussions on these topics in the media and social media.

However, many diversity & inclusion (D&I) initiatives seem to fail to address the myth of the meritocracy, which is a core issue still silently plaguing D&I efforts within law firms and corporate legal departments.

II. WHAT IS THE MYTH OF THE MERITOCRACY?

a. Generally:

To begin our discussion about the Myth of the Meritocracy, we will start by defining the terms “Myth” and “Meritocracy.”

According to *Merriam-Webster.com Dictionary*, a “Myth” is defined as an unfounded or false notion.¹ “Meritocracy” is defined as a system, organization, or society in which people are chosen and moved into positions of success, power, and influence on the basis of their demonstrated abilities and merit.² Most, if not all, organizations in society claim to be merit-based, where hiring and advancement are allegedly determined by skills, experience, and achievement. However, reality and decades of data prove otherwise.

An excerpt from Talib Visram’s article “Your favorite childhood book perpetuates the meritocracy myth. ‘Three Little Engines’ sets the record straight”³ is one recent example of addressing the myth of the meritocracy head on:

¹ *Myth*, Merriam-Webster.com Dictionary. Retrieved from: <https://www.merriam-webster.com/dictionary/myth>, (last accessed May 19, 2022).

² *Meritocracy*, Merriam-Webster.com Dictionary. Retrieved from: <https://www.merriam-webster.com/dictionary/meritocracy> (last accessed May 19, 2022).

³ Visram, T., *Your favorite childhood book perpetuates the meritocracy myth. ‘Three Little Engines’ sets the record straight*, FastCompany.com (Jul. 9, 2021). Retrieved from: <https://www.fastcompany.com/90653350/your->

A staple of U.S. elementary school classrooms, *THE LITTLE ENGINE THAT COULD* has taught kids for generations about resilience in the face of struggle. The moral of the classic story, about a plucky locomotive that makes its way through an arduous mountain journey by repeating “I-think-I-can, I-think-I-can” (to the cadence of a chugging steam train) fosters the idea that, through hard work and a can-do attitude, anyone can achieve anything.

It’s part of a vision that has pervaded American stories since the country’s founding. But, like many of those legends, it may ignore the reality that some individuals simply don’t have the means to propel themselves to success as easily as others. So, Bob McKinnon, a lecturer, writer, and podcaster whose work focuses on the theme of social good, has penned what he calls a more “nuanced” version of the story . . . At its core, *The Little Engine That Could* focuses on a kind, caring protagonist, a train that helps others while stronger and better-equipped trains pass by with excuses. McKinnon says his new story, *Three Little Engines*, could be viewed as an origin tale, to explain why that determined blue engine does have the heart to offer help to his fellow trains. In McKinnon’s story, it’s graduation day for three locomotives, which have to make a final trip over a mountain to meet their teacher. The blue engine is joined by two friends, a confident yellow engine and a brawny red one. The blue engine makes it through minor trials and reaches the other end: “I think I can...Merrily, she puffed down the mountain, reaching the village without any trouble.” But, the other two—who have to pull heavy loads, climb steep and winding routes, and face blocks on their tracks—do not. “As [the yellow engine] tried to push forward, he chattered, ‘I, I, I, think, think, think, I can, can—can’t,’” the story reads. “He could not go another inch.”

Not considering the different obstacles they faced, the blue engine wonders if her friends just hadn’t tried hard enough. Her teacher, the rusty engine, tells her to consider her own path, asking questions like, “Did you face wind and rain?” “How heavy was your load?” “Was there anything blocking your track?” She finally comes to the conclusion that her friends worked really hard, too. “But they got stuck. Just because you think you can, doesn’t always mean you will, does it?” Upon her realization, she goes back to help her friends, and they all graduate together.

[McKinnon’s book] is firmly rooted in social science research, particularly in a psychological principle known as attribution theory. That theory proposes that when we look for reasons for our success, we tend to over-emphasize our “disposition,” or our internal qualities, rather than our “situation,” or any external factors—like financial help from family, connections made through friends or networks, and luck. [McKinnon] refers to a psychology study that started some Monopoly players off with

[favorite-childhood-book-perpetuates-the-meritocracy-myth-three-little-engines-sets-the-record-straight](#) (last accessed May 19, 2022).

more money than their opponents—like a head start in life. Those players, who eventually won, viewed individual agency as the primary cause for their success; none credited their good fortune. This attitude also influences how we view others' mobility. In the story, the blue engine's "first inclination is this fundamental attribution bias," McKinnon says. "Where are they? Are they not working hard?"⁴

In essence, the myth of the meritocracy perpetuates the main harmful belief that those who succeed are obviously more qualified than those who did not succeed. This pervasive belief across organizations fails to take into account that equally intelligent and qualified individuals (1) have access to different resources (e.g., internships through connections, hiring and/or promotions through friends or family); and (2) face challenges of different sizes and frequencies along their education and career paths (e.g., no financial support during school, working during school, being the first person in the family to attend college, being the first person in the family to enter a certain profession, not having any mentors or allies in the workplace); and (3) face discrimination or bias.

As such, meritocracy is an ideal that cannot be achieved in organizations without thoughtful effort.

b. In the Legal Profession:

The legal profession is especially fertile ground for the myth of meritocracy to plant roots because every stage of a practitioner's journey involves an assessment of merit. Law school admission is based on prior academic achievement and a high score on a test (the LSAT), with students and graduates of prestigious schools seen as more deserving of admission to prestigious law schools. Law schools often rank students based on academic achievement, with high achievers receiving both academic honors and preferential access to credential-enhancing opportunities like working on journals. Students at prestigious schools have an advantage in securing more advantageous employment opportunities during their summers and after graduation. The ability to practice law is determined (most of the time) by completion of yet another exam.

Attorneys operate as actors in an adversarial legal system, where the ability to secure favorable legal outcomes for one's clients deemed evidence of the quality of one's legal work, rewarded with prestigious positions, whether in private practice, in-house legal departments, or government service (including the judiciary). Lawyers and law firms seek the prestige associated with being included in lists like SuperLawyers that rely on peer assessments of one's merit. In a meritocracy ouroboros, the professional success and prestige of a law firm's graduates is used to rank law schools by entities like US News and World Report, creating a hierarchy of prestigious and less prestigious schools and driving demand to attend the most prestigious schools. These various forms of selection, ranking, and distribution of advantages and outcomes are rationalized as the rewards of objectively ascertainable merit. But these assessments of merit may not be objective.

In a study conducted in 2014 by Nextions, a leadership consulting firm and summarized in the ABA Journal, researchers drafted a legal research memo into which multiple errors had been deliberately inserted and sent it to a group of law firm partners who had agreed to participate in a survey on legal writing.⁵ All the evaluating partners received the same memo, purportedly authored by

⁴ *Id.*

⁵ Weiss, D.C., *Partners in study gave legal memo a lower rating when told the author wasn't white*, ABA Journal, (Apr. 21, 2014). Retrieved from: https://www.abajournal.com/news/article/hypothetical_legal_memo_demonstrates_unconscious_biases (last accessed May 19, 2022).

“Thomas Meyer,” a third-year associate and graduate of NYU Law School. But half were told that “Thomas Meyer” was White and the other half were told he was Black.⁶ The partners gave significantly lower ratings to the Black associate’s memo than the White associate’s memo, finding more errors and making more critical comments, including questioning the bona fides of Black Thomas Meyer’s graduation from NYU.⁷ The same memo, with the same errors, was viewed as more meritorious work when seen as coming from White Thomas Meyer than it was when coming from Black Thomas Meyer (see below Table 1 for summary of findings).⁸

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

Table 1

Thomas Meyer (White)	Thomas Meyer (Black)
The memo was rated 4.1 out of 5 .	The memo was rated 3.2 out of 5 .
Rated generally a good writer .	Rated as average at best and needing a lot of work .
Reviewers found an average of 2.9 out of 7 spelling and grammar errors.	Reviewers found an average of 5.8 out of 7 spelling and grammar errors.
“Has potential” and “good analytical skills.”	“Can’t believe he went to NYU.”

Far from the ideal of meritocracy, then, the structure of the legal profession is suffused with opportunities to introduce the type of bias revealed by the Thomas Meyer study.

Whether the decision-maker is a law school admissions committee, law firm partners deciding whether to hire or promote an attorney, or a judge assessing the quality of legal arguments, determinations of merit are inevitably affected by the characteristics of the person whose merit is being assessed and the biases of the person conducting the assessment.

Instead of finding false comfort in the myth of meritocracy, the profession would be best served by acknowledging the reality that bias happens and deliberately introducing “circuit-breakers” to counteract it. This should not be an unfamiliar concept to the profession, as law school exams have been anonymized for years precisely to limit the opportunities for a professor’s biases to affect grades.⁹

III. WHY SHOULD WE CARE ABOUT THE MYTH OF THE MERITOCRACY IN THE LEGAL PROFESSION?

A literal interpretation of the U.S. idiom “pull yourself up by your bootstraps” is as confounding a phrase as it is physically implausible.¹⁰ Bologna describes the origins of the phrase, its intended absurdity, and its 180° flip to the colloquial meaning for self-reliance.¹¹ Like the aforementioned idiom, when Young coined the term “meritocracy” in his book *THE RISE OF THE MERITOCRACY*, “meritocracy” was used as a pejorative.^{12,13} Despite Young’s satirical view of meritocratic society, or more the illusion of

⁹ The reference to anonymizing law school exams is not intended to suggest either that law school exams are appropriate assessments of merit or that the anonymizing solves the problem of bias. Law school exams (particularly closed book or limited time exams) are infamously unlike actual legal practice, and a professor may come to recognize exams written by students who takes multiple courses with her.

¹⁰ Bologna, C., *Why The Phrase 'Pull Yourself Up By Your Bootstraps' Is Nonsense*, Huffington Post (Aug. 9, 2018). Retrieved from: https://www.huffpost.com/entry/pull-yourself-up-by-your-bootstraps-nonsense_n_5b1ed024e4b0bbb7a0e037d4 (last accessed Apr. 19, 2022).

¹¹ *Id.*

¹² Young, M., *Down with meritocracy*, *The Guardian* (Jun. 28, 2001) (stating “I have been sadly disappointed by my 1958 book, *The Rise of the Meritocracy*. I coined a word which has gone into general circulation, especially in the United States . . . The book was a satire meant to be a warning (which needless to say has not been heeded)”). Retrieved from: <https://www.theguardian.com/politics/2001/jun/29/comment> (last accessed Apr. 19, 2022).

¹³ van Dijk, H. *et al.*, *Meritocracy a myth? A multilevel perspective of how social inequality accumulates through work*, *Org. Psych. Rev.*, 2020, vol. 10(3-4), p. 243.

such, today's legal industry is perceived to be a meritocracy. Given this history, we are obliged to self-assess: Are we truly living in a meritocratic society or is it a myth? Does the educational system, corporate recruiting/advancement tactics, or law firm structure truly allow all individuals opportunities to excel based solely, or even predominantly, based on their merits? Why does it even matter?

The principles of hard work (or "pulling yourself up by your bootstraps"), in which much of the "American Dream" is rooted, detail the values of our present society from education, professional development, career aspirations, and the like. Although the benefits and preferences of a meritocratic-based system are widely held,¹⁴ data is often pointing to the opposite. That is, wealthy individuals are often still afforded more opportunities than their socioeconomically challenged counterparts.¹⁵ Although certain organizations and institutions are structured to evaluate individuals based on their merits, the individuals are often evaluated on test scores, internships, and experiences that are limited to those with the means to access certain opportunities.¹⁶ With that said, scholars argue that our meritocratic systems are a myth. If it is, why does it matter?

Promoting a system that is based on meritocracy but fails to achieve its fundamental goal stifles the ideas, spirit, and resolve of the people that the meritocratic system was intended to benefit.¹⁷ Because "merit is 'an institutional construct and that it does not—indeed, it cannot—exist outside the institutions that use it' . . . any attempt to demarcate it inevitably renders it vulnerable to critic."¹⁸ Moreover, society, as a whole, loses out on access to creative human resources that are capable to help innovate, diversify, and project educational and professional institutions into the future.¹⁹

Why we should care about the myth of meritocracy can fall into a number of categories, but the below five prove to be key:

a. Financial and Social Imperative

McKinsey and Company Reports 2021, demonstrate that the business case for increasing diversity and inclusion is indisputable.²⁰ A study of over five years of data, including 1,000 companies in 15 countries, has shown strong connection between diversity in company leadership and the likelihood of financial outperformance.²¹ Companies in the top quartile for gender diversity are 25% more likely to outperform those in the bottom quartile.²² Similarly, companies in the top quartile for ethnic diversity are 36% more likely to outperform their less diverse peers.²³ McKinsey concludes that Companies have a real financial benefit from embracing D&I.²⁴

¹⁴ *Id.* at p. 241.

¹⁵ *Id.* at p. 243.

¹⁶ Liu, A., *Unraveling the myth of the meritocracy within the context of US higher education*, High. Educ., 2011, 62, p. 393 (stating "American higher education 'is not governed by strict principles of meritocracy, but instead, reflects, legitimizes, and reproduces class inequalities'")(internal citations omitted).

¹⁷ *Id.* at p. 384 (stating "[a] troubling effect of an uncritical view of meritocracy is that by not acknowledging there are greater social inequalities at play, there may be a tendency to view students who do not reach higher levels of educational attainment as having failed on their own terms.")(internal citations omitted).

¹⁸ *Id.* at p. 386.

¹⁹ *Id.*, n. 2, p. 385.

²⁰ Burns *et al.*, *The diversity imperative in retail*, McKinsey & Company Reports (Jan. 13, 2021). Retrieved from <https://www.mckinsey.com/industries/retail/our-insights/the-diversity-imperative-in-retail> (last accessed Feb. 20, 2022).

²¹ See *id.*

²² See *id.*

²³ See *id.*

²⁴ See *id.*

Fry and Parker, in the PEW Research article of 2018, have researched the demographic portrait of the post-millennials or Gen-Z's (defined as "today's 6- to 21-year-olds"), and found that this generation is more ethnically and racially diverse, less likely to be foreign born, and the best educated generation so far.²⁵

Inspirus, 2022, Trends and Forecasts for 2022,²⁶ citing the research cited in the articles above, concludes that incorporating D&I into the 2022 business strategy makes smart business sense for all companies. They warn that companies need to make sure that their D&I efforts are real and not mere lip service, or employees and potential new hires will quickly lose trust in them and in this competitive hiring environment, no organization can afford to take that risk.

Corporations and law firms have come to realize that a real demonstration of ethical and social justice responsibility is key in reflecting the current social values and thereby retaining clients and attracting the best of talent. Further, with the Gen-Z demographics in mind, inaction on these issues will soon leave Corporations and Law Firms that do not work on these changes behind.

b. Avoids stale Diversity, Equity, and Inclusion (DEI) practices

The legal industry is no stranger to touting DEI programs and commitments to diversify the number of women or racially/ethnically diverse attorneys.²⁷ Yet, progress comes at an "excruciatingly slow" pace, especially at the leadership level.²⁸ However, even with these slow but hard earned DEI results, these achievements often fail to reverse root causes that stifle progress, which may likely be a result of stale (or ineffective) DEI practices.

Additionally, the ineffectiveness of DEI initiatives supports critics' view that meritocratic-based systems exacerbate social inequalities over time,²⁹ where even the most earnest efforts to implement DEI practices fails to provide true opportunities to individuals who may be equally qualified, as compared to others.³⁰ Outmoded DEI strategies (such as one-time training sessions, grievance systems, incentivizing senior leaders, or performative DEI stances) compound the failings of a meritocracy by

²⁵ Fry, R. and Porter, K., *Early Benchmarks Show 'Post Millennials' on Track to Be Most Diverse, Best-Educated Generation Yet*, Pew Research Center (Nov. 15, 2018). Retrieved from: <https://www.pewresearch.org/social-trends/2018/11/15/early-benchmarks-show-post-millennials-on-track-to-be-most-diverse-best-educated-generation-yet/> (last accessed May 19, 2022).

²⁶ Inspirus, Report, *Employee Engagement Trends and Forecasts for 2022*. Retrieved from https://www.inspirus.com/employee-engagement-trends-and-forecasts-for-2022?utm_term=inspirus&utm_campaign=2021+Trends+and+Forecasts&utm_source=adwords&utm_medium=ppc&hsa_acc=5473861309&hsa_cam=15869817274&hsa_grp=131625943105&hsa_ad=574879120205&hsa_src=g&hsa_tgt=kwd-298548305751&hsa_kw=inspirus&hsa_mt=b&hsa_net=adwords&hsa_ver=3&gclid=CjwKCAiApfeQBhAUeIwA7K_UH6nZYg-rSTGSS7ywdI8NZHeYxBBRC7h8_LxWHKE8E383aLhyWI8uihoCkkoQAvD_BwE (last accessed May 19, 2022).

²⁷ Carr, J.D., *Pimpin' DEI: The Big Business of Diversity & Inclusion*, Savoy (Feb. 17, 2022). Retrieved from: <http://savoynetwork.com/pimpin-dei-the-big-business-of-diversity-inclusion/> (last accessed Apr. 19, 2022).

²⁸ NALP, *2020 Report on Diversity in U.S. Law Firms*. Retrieved from: https://www.law.berkeley.edu/wp-content/uploads/2021/02/2020_NALP_Diversity_Report.pdf (last accessed Apr. 19, 2022).

²⁹ van Dijk, *supra* n. 15, at p. 253.

³⁰ *Id.* at 243.

providing little to no progress when it comes to increasing and retaining the number of women, racially or ethnically diverse, disabled, or LGBTQ+ attorneys.^{31,32}

For example, despite decades long DEI initiatives across the industry, Black, Hispanic or Latino, and Native Americans make up less than 5% of overall IP attorneys—with the numbers decreasing further when you consider just the practice of patent law.³³ In fact, a 2020 American Bar Association article reported that “there are more patent attorneys and agents named “Michael” in the United States than there are racially diverse women.”³⁴ This is representative of the industry’s failure to critically assess meritocracy, which disguises glaring gaps in current DEI strategies and prevents opportunities to implement creative solutions to address the lack of diversity amongst the IP legal ranks.^{35,36} Further, meritocracy plays an outsized role in contributing to the barrier to entry for diverse groups entering college and law schools. For years, scholars have highlighted the endemic inequities that exist in the larger higher educational system for socioeconomically and historically disadvantaged groups.³⁷ Standardized tests, such as LSAT scores, are still heavily relied upon to gain access to elite institutions, but these scores are often a byproduct of socioeconomic class and not merit.³⁸ In the same way, law school may also perpetuate the myth of meritocracy by using admissions and employment methodologies that are outdated and limits the pipeline of underrepresented groups in the IP law market.³⁹

Consequently, the legal system filters individuals from top undergraduate institutions, top law schools, top law firms, top corporations, and top positions within law firms and corporations. This system benefits all those who may have the means to fall into the pre-defined filters and the end result is a largely homogenous workforce with little representation among attorneys from diverse backgrounds.

c. Boosts innovation in professional environments

³¹ Carter *et al.*, Intellectual Property Owners Association®, *Economics of Diversity*, Whitepaper (2019), Figure 5. Retrieved from: <https://ipo.org/wp-content/uploads/2019/03/FINAL-White-Paper-on-Economics-of-Diversity-1.pdf> (last accessed Apr. 19, 2022).

³² Spector, E., *Ensuring Women and Diverse Candidates in the Patent Bar: We Must Address the Root of the Problem*, IPWatchdog.com (Mar. 15, 2021). Retrieved from: <https://www.ipwatchdog.com/2021/03/15/ensuring-women-diverse-candidates-patent-bar-must-address-root-problem/id=130896/> (last accessed Apr. 19, 2022).

³³ National Council on Patent Practicum, *Diversity in Patent Law: The Pipeline is Broken*, News (Sep. 2, 2021). Retrieved from: <https://thencpp.org/diversity-in-patent-law-the-pipeline-is-broken/#:~:text=According%20to%20a%20survey%20by,0.5%20percent%20are%20Native%20American> (last accessed May 19, 2022).

³⁴ Spector, E. and Brand, L., *Diversity in Patent Law: A data Analysis of Diversity in the Patent Practice by Technology Background and Region*, Am. Bar Assoc. (Sept. 16, 2020). Retrieved from: https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/september-october/diversity-patent-law-data-analysis-diversity-patent-practice-technology-background-region/ (last accessed May 19, 2022).

³⁵ Spector, *supra* n. 34.

³⁶ Minority Corporate Counsel Association (MCCA), *The Myth of the meritocracy: A Report on the Bridges and Barriers to Success in Large Law Firms*, Appendix I, no. 9 (2017). Retrieved from: <https://mcca.com/wp-content/uploads/2017/04/Book4-Purple.pdf> (last accessed May 19, 2022).

³⁷ Alon, S. *et al.*, *Diversity, Opportunity, and Shifting Meritocracy in Higher Education*, Am. Sociol. Rev., 2007, vol. 72, (August:487-511), p. 491.

³⁸ Liu, *supra* n. 18, at pp. 390-91.

³⁹ Saenz, C., *Diversity Woes in Patent Field Lead Lawyers to Try New Ideas*, Bloomberg Law, IP Law, Deep Dive (Feb. 28, 2022). Retrieved from: <https://news.bloomberglaw.com/ip-law/diversity-woes-in-patent-field-lead-lawyers-to-try-new-ideas> (last accessed Apr. 19, 2022).

The data is clear. Diversity boosts innovation.⁴⁰ Ideas come from all types of individuals living through various types of circumstances solving different levels of problems. Companies with above-average diversity scores saw higher revenue shares from new product innovations.⁴¹ With the growing focus on and, albeit slow, number of diverse individuals among corporate innovation leaders,⁴² “[t]he IP field requires a certain level of dynamism among its practitioners” to adapt to the rapid pace of innovation.⁴³ In other words, as the IP law practice continues to become more global in nature, identifying talented individuals from different backgrounds, countries, and cultures can help create a cooperative work environment to get applications allowed, better understand and protect inventions originating from other countries, and the like.⁴⁴ However, by maintaining the existing structure of our “meritocratic” systems, the IP field will continue failing to improve on our existing systems and organizations, resulting in homogenous leadership at the highest ranks that are predominantly white and male.

d. Mitigates lost opportunities

Lawyers come in all personalities. However, those individuals that may excel in the practice of law but may not stand out in law school present lost opportunities for law firms. The monetary value of first year associates at large law firms continue to soar presenting the financial opportunity to law firms in identifying talented individuals with strong work ethics.

“The patent bar gives us a unique opportunity to take advantage of the fact that you don’t have to go to law school in order to join the patent profession.”⁴⁵ So, why are we focusing too much on law school? In IP, we are fortunate to provide opportunities to individuals without law school degrees, but are we providing information to those individuals who may be well suited for IP careers? Could we identify talented IP professionals before those individuals know that they are well suited for IP? Meritocracy⁴⁶ may contribute to this. Despite being readily identifiable, the IP field has historically failed to eliminate known barriers to entry in the IP field⁴⁷ or create viable opportunities for more diverse individuals to enter the IP profession.⁴⁸

Another aspect is mitigating lost opportunities through increased market share. The impact diversity has on increasing innovation directly correlates to increases in a corporation’s market share.⁴⁹

⁴⁰ del Castillo, C., *Diversity in the workplace: the case for building a diverse team*, Workable.com, Stories & Insights. Retrieved from: <https://resources.workable.com/stories-and-insights/diverse-team#> (last accessed on Apr. 19, 2022).

⁴¹ Lorenzo, R. et al., “How Diverse Leadership Teams Boost Innovation,” Boston Consulting Group, (Jan. 23, 2018). Retrieved from: <https://www.bcg.com/publications/2018/how-diverse-leadership-teams-boost-innovation> (last accessed Apr. 19, 2022).

⁴² *Id.*

⁴³ Spector and Brand, *supra* n. 36.

⁴⁴ *Id.*

⁴⁵ Saenz, *supra* n. 41.

⁴⁶ van Dijk, *supra* n. 18, at p. 251.

⁴⁷ Lopez, I., *Black IP Lawyers Who’ve Made It Look to Grow Ranks Beyond 1.7%*, Bloomberg Law, IP Law (Aug. 6, 2020). Retrieved from: <https://news.bloomberglaw.com/ip-law/black-ip-lawyers-whove-made-it-look-to-grow-ranks-beyond-1-7> (last accessed Apr. 19, 2022).

⁴⁸ Saenz, *supra* n. 41. Saenz reports that “[l]aw firms’ efforts to recruit diverse candidates have traditionally relied on law schools and lateral attorney hires.” However, these approaches continue to fail, contributing to the complaint that “qualified women and racial minorities are hard to find.”

⁴⁹ del Castillo, *supra* n. 42 (stating “research, spanning more than 40 case studies and 1,800 employee surveys, shows that publicly-traded companies with 2-D diversity were more likely to have expanded their market shares

For example, ethnically- and gender-diverse companies are 35% and 15% more likely to earn above-average revenue, respectively.⁵⁰ In addition, diverse companies are also better at capturing new shares of the market and retaining current market share.⁵¹ Thus, the failure to understand the myth of meritocracy has a cascading effect by limiting the IP field's ability to effectively diversify its ranks and consequently leading to lost opportunities for economic growth.

Existing systems set up people to fail because they believe that they are not capable of certain types of professions. That is, they believe that they do not deserve entry into the profession based on merits when their merits are not accurately assessed. These highly-motivated capable individuals present lost opportunities for growth and profit for law firms and legal departments.

e. Mitigates lost and inefficient investments in diversifying legal teams

If we don't understand the myth of meritocracy, current DEI investments will inevitably become inefficient or, even worse, misguided.⁵² In contrast, addressing the myth of meritocracy necessitates analysis of the root causes for the lack of diversity in meritocratic-based systems, and thus, mitigates losses and inefficient investments in DEI practices.

For example, even when organizations recruit individuals with diverse backgrounds, the limited number of individuals afforded the opportunity to gain access into the organizations will lack a familiar culture or like-minded colleagues.⁵³ This leads to higher employment attrition rates that further exacerbates the loss of investment on new associates.⁵⁴ Training associates is expensive and law firms don't expect a return on the investment for years. Losing these individuals within that time frame financially affects the bottom line for firms. Compounding this loss on investment is the inability of firms and legal departments to meet the rapidly growing and shifting needs of corporations, further resulting in lost performance, productivity, and revenue.⁵⁵

As organizations and firms look to continue to grow, the job market is increasingly competitive with better work-life balances offered to non-legal positions. The need to maximize the investment in DEI practices to cast wider nets to identify those individuals who will succeed, thrive, and enjoy working in a law firm environment is increasingly important.

and captured new markets in the last twelve months"). 2-D (or two-dimensional) diversity is diversity in which leaders exhibit at least three kinds of both inherent diversity and acquired diversity. *See* Carter, *supra* n. 16, p. 8.⁵⁰ *Id.*

⁵¹ Carter, *supra* n. 33, at p. 8.

⁵² Spector, *supra* n. 34 (indicating that initiatives like the Mansfield Rule®, while well-meaning, are statistically at odds with the initiatives' rigid requirements and fail to address the root cause of the diversity issue).

⁵³ "[T]he scarcity of Black professionals in companies puts them at a higher risk of social isolation and attrition, worsening the problem. This remains true despite the rapid increase of Black professionals in the workforce." Machen, R. *et al.*, *Initiatives to Promote Diversity and Reduce Systemic Bias in Corporate America*, Joint Center for Political and Economic Studies, WilmerHale (Oct. 2021), p. 4.

⁵⁴ "[E]ven as recruitment and promotion of attorneys of color increase, so does their attrition, and the ranks of attorneys who leave their firms are more diverse than those who join their partnerships. Twenty-two percent of the lawyers who left their firms [in 2018] were members of racial/ethnic minority groups, even though attorneys of color represent only 17 percent of attorneys at surveyed firms." Vault/MCCA Law Firm Diversity Survey, 2019 Report, p. 5. Retrieved from: https://mcca.com/wp-content/uploads/2020/03/2019-Vault_MCCA-Law-Firm-Diversity-Survey-Report.pdf (last accessed Apr. 19, 2022).

⁵⁵ Carter, *supra* n. 33, at pp. 12-14, Table 2.

IV. WHERE DOES THE MYTH OF THE MERITOCRACY SHOW UP IN THE LEGAL PROFESSION AND WHEN DO WE HAVE TO WATCH OUT FOR IT?

a. Hiring:

“Law firms are law school snobs” – a quote taken from the report on “The myth of the meritocracy: A report on the bridges and barriers to success in large law firms” by the Minority Corporate Counsel Association (MCCA).⁵⁶ One of the findings of this report was that “[i]rrespective of the alma mater represented by the firm’s partnership, law firms place a premium on students from the top 20 [US] law schools, especially those who graduated from Ivy League institutions, such as Harvard or Yale law schools”.⁵⁷

The report by the MCCA provides in-depth findings about which universities US law firms recruit from, the impact of having at least one of the other traditional indicators of high academic achievement (law review, clerkship, graduation with distinction, such as *cum laude* or Order of the Coif) and geographical impact.

Of the 1833 partners surveyed for the report, 887 (48.2%) went to a school ranked in the top 10; 1157 (63.1%) graduated from a top 20 law school. Of the partners who attended schools not ranked in the top 20, 70% practiced law within the same city or metropolitan area as their alma mater – suggesting that geographical vicinity is also relevant – leading the report to surmise that, outside of the top 20 ranked schools, law firm partners seek to mirror their own backgrounds by recruiting at the schools where they went. The figure below (Figure 1) shows the breakdown of law school attendance and other credentials geographically.⁵⁸

Figure 1

Partners-Credentials and Demographics

	New York, NY	Washington, DC	Chicago, IL	New England	South	West Coast	Mid West	Mid-Atlantic	ALL
Top 10 Law School (%)	58.8	50.1	39.5	57.5	13.6	13.6	4.9	47.9	48.2
Top 20 Law School (%)	67.9	65.9	60.1	64.7	33.3	90.7	14.6	55.2	63.1
Law Review Experience (%)	19.4	29.1	20.6	.6	6.1	12.9	60.9	2.1	20.2
Moot Court (%)	.5	2.6	.3	0	4.5	3.7	3.9	0	.8
Graduation with Honors* (%)	22.1	27.1	31.5	46.4	13.6	25.9	18.4	12.5	25.9
Order of the Coif (%)	4.8	6.2	15.7	0	10.6	3.7	29.1	16.7	8.7
Clerkship (%)	11.7	24.4	16.7	0	4.5	5.6	12.6	13.5	13.9
Years In Practice	21.7	21.5	21.1	20.6	22.4	19.1	19.4	19.7	20.7

* Graduation with honors refers to law students who receive *cum laude*, *magna cum laude*, or *summa cum laude* distinction upon graduation.

⁵⁶ MCCA, *supra* n. 38, at p. 2.

⁵⁷ *Id.*

⁵⁸ *Id.* at p. 12.

In the UK, research for the Law Society showed that “*ethnic diversity in the [UK legal profession] is in line with UK society as a whole and has been improving over the years.*”⁵⁹ However, in an article in the Financial Times this was clarified as being shown to not be consistent across all law firms – Black, Asian and minority ethnic solicitors were more likely than white solicitors to be in smaller firms and in lower-paying sectors and practice areas.⁶⁰

Further, in the UK, as in the US, a premium is placed on recruitment from a small set of universities. In an article by City A.M., citing research carried out by Chambers Student Guide, the statistics show that almost a third of lawyers at the UK’s elite Magic Circle law firms attended Oxford or Cambridge universities, and that 76% of trainee lawyers at the UK’s leading 139 law firms are Oxbridge or Russell Group graduates.⁶¹

Turning more specifically to the IP sector, the UK IP regulatory body (Intellectual Property Regulation Board or “IPReg”) carried out a survey of members in 2021 (IPReg represents both Patent and Trade Mark attorneys). The results show that the diversity across many areas is significantly greater at the more junior levels of the profession, which could lead to the conclusion that initiatives that have been put in place to ensure more diverse hiring are starting to make a difference.⁶² The figures below (Figures 2 and 3), taken from the IPReg report, show the gender balance and ethnicity breakdown by seniority.

Figure 2⁶³

Gender Split by Age Group

⁵⁹ Rose, N., *Law Society: Race inclusion in profession not improving quickly enough*, Legal Futures (Dec. 9, 2020). Retrieved from: <https://www.legalfutures.co.uk/latest-news/law-society-race-inclusion-in-profession-not-improving-quickly-enough> (last accessed May 19, 2022).

⁶⁰ Jacobs, E., *Diversity efforts for lawyers switch from hiring to keeping*, Financial Times (Oct. 14, 2021). Retrieved from: <https://www.ft.com/content/1900b8d8-bcc5-4d46-a510-2916b1fcdde9> (last accessed May 19, 2022).

⁶¹ Booth, J., *Almost a third of trainee lawyers at elite Magic Circle law firms educated at Oxbridge*, City A.M. (Jul. 5, 2019). Retrieved from: <https://www.cityam.com/almost-a-third-of-trainee-lawyers-at-elite-magic-circle-law-firms-educated-at-oxbridge/> (last accessed May 19, 2022).

⁶² IPReg, *Diversity Survey 2021*. Retrieved from: <https://ipreg.org.uk/sites/default/files/IPREG%20Diversity%20Survey.pdf> (last accessed May 19, 2022).

⁶³ IPReg, *Diversity Survey 2021 – Supplementary Report*, p. 5. Retrieved from: <https://ipreg.org.uk/about-us/equality-diversity-and-inclusion/ipreg-diversity-survey-2021> (last accessed May 19, 2022).

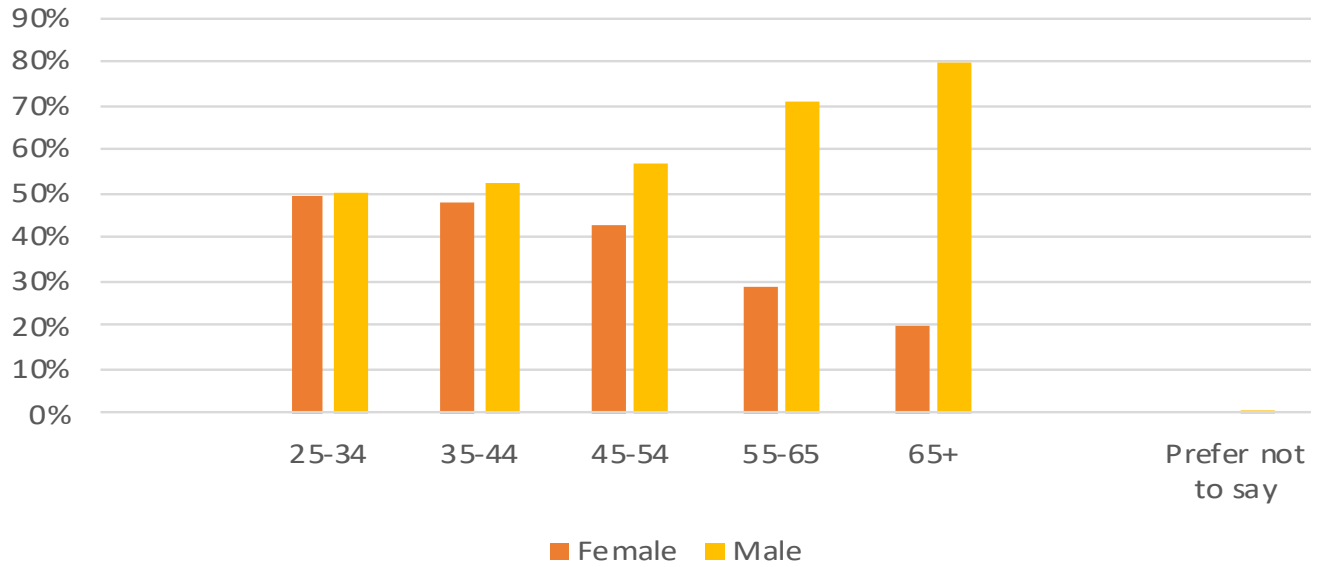
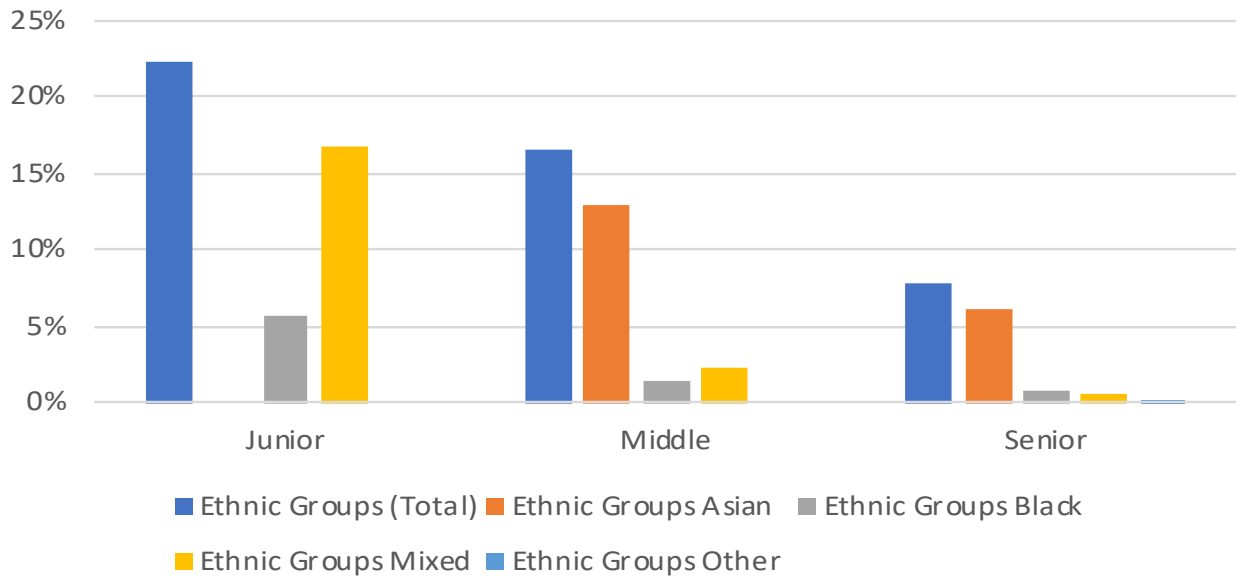


Figure 3⁶⁴

Seniority by Ethnic Groups



The lack of diversity in science, technology, engineering, and mathematics (STEM) is widely reported. Although there are many initiatives in place to try to change the demographics of those

⁶⁴ *Id.* at p. 7.

studying STEM subjects, there is still a long way to go before the representation is similar to that of the wider population.^{65, 66, 67, 68}

Given the additional requirements to have a STEM background to practice as a patent attorney (in both the USA and Europe), and the fact that candidates studying STEM subjects is less diverse, it follows that the balance of people being hired into these positions will inherently be less diverse.

The specific issue in the patent space, at least in the UK, is indicated in the IPReg survey results, as depicted in the following Table 2.

Table 2⁶⁹

- In terms of the change since the 2017 survey, it appears that the diversity of trade mark attorneys is changing at a faster rate than patent attorneys; again, this may reflect the STEM requirement for entry to the patent attorney profession.

	Gender	Ethnic Group					Disability
	Female	Total	Asian	Black	Multiple/Mixed	Other	
Patent Attorneys	38%	9%	8%	0%	1%	0%	4%
Trade mark Attorneys	68%	16%	7%	5%	4%	0%	6%
Dual registrants	19%	4%	3%	0%	1%	0%	4%
2021 Total Respondents	42%	10%	8%	1%	1%	0%	4%
2021 LSB Benchmark	47%	12%	5%	3%	4%	0%	15%

With regard to the patent profession in the US, an article published by the American Bar Association provides statistics relating specifically to the patent profession.⁷⁰ In particular it is referenced that, although USPTO registration data is available as early as 1950, female registrations

⁶⁵ *STEM sector must step up and end unacceptable disparities in Black staff and students academic progression and success*, The Royal Society (Mar. 25, 2021). Retrieved from: <https://royalsociety.org/news/2021/03/stem-ethnicity-report/> (last accessed May 22, 2022).

⁶⁶ *Improving Diversity in STEM*, Campaign for Science and Engineering (May 2014). Retrieved from: <https://www.sciencecampaign.org.uk/static/uploaded/50c4b928-d252-4ce8-825065f92d8deca3.pdf> (last accessed May 22, 2022).

⁶⁷ Nietzel, M., *Nineteen Universities Join Large-Scale Effort To Diversify STEM Faculty*, Forbes (Oct. 30, 2020). Retrieved from: <https://www.forbes.com/sites/michaelt Nietzel/2020/10/30/nineteen-universities-join-large-scale-effort-to-diversify-stem-faculty/?sh=2c1f099e440b> (last accessed May 22, 2022).

⁶⁸ Fry, R. *et al.*, *STEM Jobs See Uneven Progress in Increasing Gender, Racial and Ethnic Diversity*, Pew Research Center (Apr. 1, 2021). Retrieved from: <https://www.pewresearch.org/science/2021/04/01/stem-jobs-see-uneven-progress-in-increasing-gender-racial-and-ethnic-diversity/> (last accessed May 22, 2022).

⁶⁹ IPReg, *supra* no. 65, at p. 12.

⁷⁰ Spector and Brand, *supra* no. 36.

were virtually non-existent until the early 1980s.⁷¹ In 2017, the highest percentage of women in any year registered with the USPTO was 33.9%.⁷²

Addressing racial diversity, the ABA report highlights that “since 1950, less than 6 percent of all USPTO registrants have been racially diverse. Throughout the 1970s and 1980s, an average of 1.7 percent of registrants per year were racially diverse. During the 1990s, that average increased to approximately 4 percent of registrants each year. Despite significant increases in 2000 (16.2 percent increase) and 2013 (20.1 percent increase), the average USPTO registration for racial minorities since 2000 has hovered around 6.5 percent.”⁷³

The ABA report indicates that the statistics for racially diverse women are reported to be significantly worse. “From 1950 until 1999, an average of 0.2 percent of USPTO registrations each year were racially diverse women, with the first being registered in the late 1980s. Since then, those numbers have improved only slightly, with an average of 2.2 percent of registrants being racially diverse women since 2000.”⁷⁴

From the above findings it is clear that, whilst the changes made to hiring processes are being shown to make a difference in the representation across the legal profession, the legal profession is clearly still not a meritocracy. Indeed the MCCA study includes the following comment “Many attorneys reported that their law firm will apply a different lens for students at law schools not ranked in the Top 20 . . . For example, a Harvard or Yale law student may be interviewed . . . despite not having the best grades possible. A student at a Tier 2 law school... will have to be at or very near the top of his/her class in order to be considered, in addition to having law review experience . . .”⁷⁵

b. Retention:

Commentary on where the myth of meritocracy shows up in the legal profession, and when we have to watch out for it, is provided below for the general legal profession. However, given the previous discussion on the additional issues relating to hiring in the IP professions, which are even starker in the patent profession, it is considered likely that the same issues from the general legal profession will be present, indeed potentially magnified, in the IP professions.

Whilst the diversity of entrants to the legal profession has been improving over time, it is clear that this is not reflected in the senior ranks. The title of an article in Legal Cheek in the UK spells this out “Legal profession making ‘significant progress’ on diversity – but top roles remain a problem.”⁷⁶

For example, in law firms in the UK, whilst 49% of lawyers are female only 33% of partners are female. In the UK’s 100 largest law firms, 29% of partners are female, a figure that drops down to 24% when considering only equity partners.⁷⁷

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ MCCA, *supra* no. 38, at p. 16.

⁷⁶ Hussain, A., *Legal profession making ‘significant progress’ on diversity – but top roles remain a problem*, Legal Cheek (Nov. 27, 2020). Retrieved from: <https://www.legalcheek.com/2020/11/legal-profession-making-significant-progress-on-diversity-but-top-roles-remain-a-problem/> (last checked May 24, 2022).

⁷⁷ *Legal Excellence, Internationally Renowned: UK Legal Services 2020*, TheCityUK (Nov. 26, 2020). Retrieved from: <https://www.thecityuk.com/media/hllop1i/legal-excellence-internationally-renowned-uk-legal-services-2020.pdf> (last accessed May 24, 2022).

The same is true when considering representation at partner level for other underrepresented groups – as reported following research carried out by the UK Law Society⁷⁸ “representation at partner level was poor, particularly in the City, and has not improved significantly over the years, despite more BAME solicitors at junior levels. In the top 50 firms, more than twice as many White solicitors as BAME solicitors achieved partner equivalent status. Just 8% of partners in the largest firms (50+ partners) are BAME.”

It is a similar story in the US, where major global companies are driving for change, concerned that the partnership structure of law firms means that relatively few dealmakers have decades of influence over how a firm is run.⁷⁹ This means that change at the top is slow.

The New York City Bar collected diversity and inclusion metrics from signatory law firms over a decade to 2015, and in 2015 a benchmarking survey was instigated. From this report the attrition rates were found to be 43 percent higher for female attorneys and 62 percent higher for racially/ethnically diverse attorneys than for white male lawyers.⁸⁰

Similarly, the Vault/MCCA Law Firm Diversity Survey Report 2020 found that, whilst there had been some progress in the hiring and promotion of women and people of color over the previous decade, the level of diversity still diminishes dramatically the higher up the ladder one considers.⁸¹ Specifically retention of diverse attorneys remains an issue. In fact the survey summary states, “Not only do female and attorneys of color leave their firms at a disproportionately high rate, but the numbers are rising”. Statistics provided include:

“Women of color represented less than 10% of all attorneys but more than 13% of attorneys who left their firms in 2019.

African American/Black attorneys represented under 4% of all attorneys but almost 6% of attorney departures.

Asian American attorneys represented less than 8% of all attorneys but more than 10% of departures.”

This is shown graphically in the following Figure 4 from the Vault/MCCA Law Firm Diversity Survey Report 2020.⁸²

⁷⁸ Rose, *supra* no. 61.

⁷⁹ Milligan, E. *et al.*, *Diversity at Elite Law Firms Is So Bad Clients Are Docking Fees*, Bloomberg (Oct. 5, 2021). Retrieved from: <https://www.bloomberg.com/news/articles/2021-10-05/big-law-has-a-diversity-problem-and-corporate-clients-are-stepping-in> (last accessed May 24, 2022).

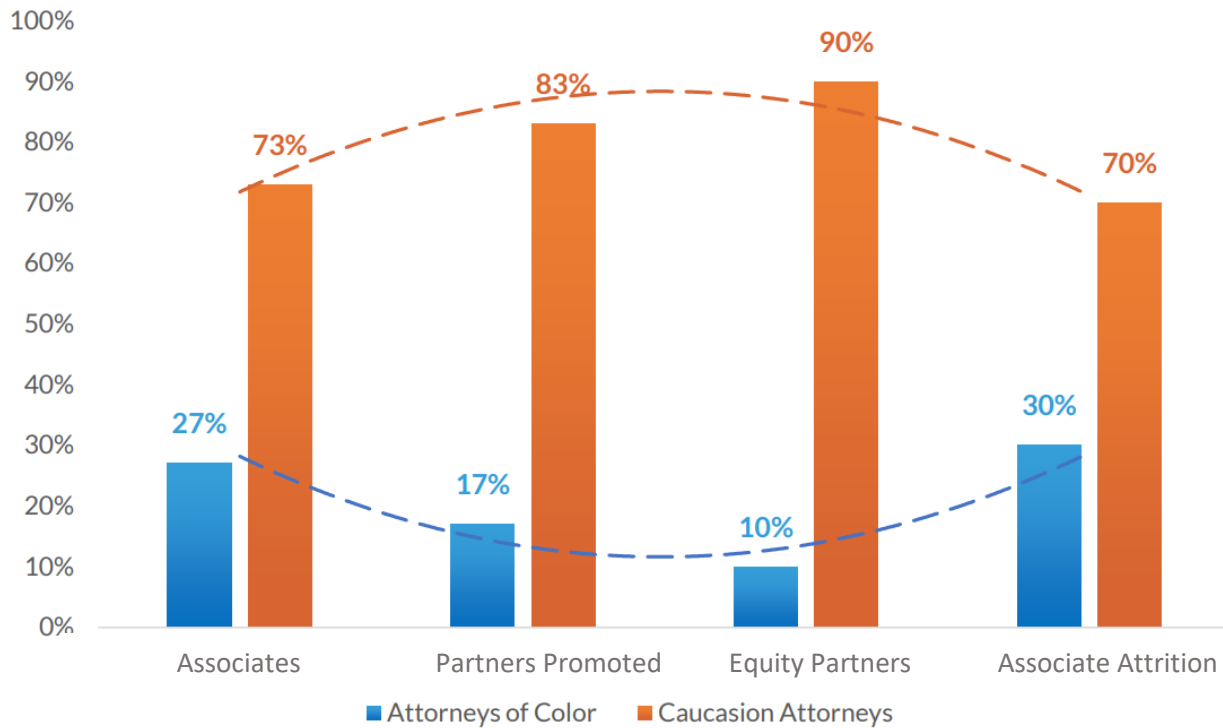
⁸⁰ Natly, K., *Do Law Firm Communications about Diversity and Inclusion Efforts Affect Retention of Attorneys in Underrepresented Groups?*, American Bar Association (May 25, 2017). Retrieved from: <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2017/spring2017-0517-do-law-firm-communications-about-diversity-efforts-affect-retention-of-attorneys-in-underrepresented-groups/> (last accessed May 24, 2022).

⁸¹ 2020 Vault/MCCA Law Firm Diversity Survey Report, p. 6. Retrieved from: https://mcca.com/wp-content/uploads/2021/02/2020-Vault_MCCA-Law-Firm-Diversity-Survey-Report-FINAL.pdf (last accessed May 24, 2022).

⁸² *Id.* at p. 8 (“Partners Promted” spelling corrected to “Partners Promoted” in Figure 4).

Figure 4

Contrasting Levels of Diversity Among Associates and Partners



In Australia, although more than 50 percent of Australian practicing solicitors are women, there remains a stark lack of female representation at the top of law firms. In a 2017 report on the National Profile of the Profession by the Law Society of New South Wales, just 13 percent of female lawyers were reported to be principal solicitors in a legal practice, while the average income of female practitioners was reported to be around 10 percent lower than the average.⁸³

Similar issues are seen in Australia for other underrepresented groups - while 20 percent of non-partner lawyers and 25 percent of law graduates were of an Asian background, just 8 percent of partners were Asian. The results on Indigenous representation were even more startling, with less than 1 percent of those polled identifying as Aboriginal or Torres Strait Islander.⁸⁴

According to the MCCA report on the Myth of the Meritocracy “the process of being nominated and elected to partner is not objective, nor is there a set of policies adhered to strictly in any firm”. In the findings of the report it is stated that “The skill sets, qualifications, or goals that a senior associate must possess in order to be elected to partnership are rarely specified in writing, nor are they clearly communicated to associates”.⁸⁵

⁸³ McKeith, S., *Building diversity in the legal profession*, Law Society of New South Wales Journal online (May 4, 2019). Retrieved from: <https://lsj.com.au/articles/building-diversity-in-the-legal-profession/> (last accessed May 24, 2022).

⁸⁴ Pelly, M., *Asian Lawyers hit ‘bamboo ceiling,’* Australian Financial Review (Apr. 26, 2019). Retrieved from: <https://www.afr.com/work-and-careers/workplace/asian-lawyers-hit-bamboo-ceiling-20190425-p51h8w> (last accessed May 24, 2022).

⁸⁵ MCCA, *supra* no. 38, at p. 3.

Again, the same is reported in the UK. In a study by the Bridge Group, entitled “Pathways to partnership: challenging the myth of meritocracy,”⁸⁶ socio-economic background and progression to partner in the law was considered. In the report it is quoted that “Nobody knows how the process of getting to partner works... it is a very opaque process even when you are in it . . .” If the process is so opaque, finding out the barriers to moving through the ranks clearly becomes more difficult.

Various reports included commentary on why the increasing and improving levels of diversity entering the profession, even with the issues around that from a true diversity perspective, are not being seen at more senior levels.

The report by the UK Law Society highlights that it is not just about representation in terms of statistics, but also about feeling included.⁸⁷ Almost all participants in the study had experienced some level of microaggression based on their ethnicity such as ‘othering’ – for example by people pointing out, or mocking cultural differences, or confusion over non-western names. Further, lawyers from underrepresented groups told researchers they felt they did not fit the big city firms and, if they did that they did not get offered good work or opportunities to progress.⁸⁸ In fact they reported that many left to go to smaller firms or in-house roles where they thought the culture would be more inclusive.

Similar findings were reported in the study by the Bridge Group, where many from underrepresented groups, in particular in the case of this study those from lower socio-economic backgrounds, described “imposter syndrome” and the feeling that even though they are making efforts, and expending large amounts of energy, attempting to assimilate to the dominant culture, they still remain outsiders.⁸⁹

From the citations, it is clear that there is a generally perceived, and potentially real, opaqueness around how to progress through the ranks in private practice law firms. This opaqueness means that it is difficult to ascertain how and why the statistics show a clear drop in underrepresented groups from those entering the profession to those in partner, let alone equity partner, positions.

Data on those in legal positions in-house are more difficult to find. However, it is a generally held view that legal teams within corporations are generally more diverse.

One useful analogy that relates to issues with the myth of meritocracy in the legal industry and beyond, was reported in an article in Utah Business – this is the “leaking diversity bucket”. In the article readers were invited to “Imagine a bucket (your organization) under a faucet (talent acquisition) catching pouring water (your newly employed talent). Now imagine that water leaking out of some large holes at the bottom of the bucket . . .” It is clear that attracting diverse talent is not enough – the key is also to retain such diverse talent. The problem is succinctly set out in the article:⁹⁰

It will not matter how many people of color, women, LGBTQ+ employees you attract if the holes within your organization negatively affect retaining your employees. These holes may represent things like an

⁸⁶ *Pathways to partnership: challenging the myth of meritocracy*, Bridge Group (Sep. 25, 2020). Retrieved from: <https://www.thebridgegroup.org.uk/news/partner-law> (last accessed May 24, 2022).

⁸⁷ Rose, *supra* no. 61.

⁸⁸ Jacobs, E., *Diversity efforts for lawyers switch from hiring to keeping*, The Financial Times (Oct. 14, 2021). Retrieved from: <https://www.ft.com/content/1900b8d8-bcc5-4d46-a510-2916b1fcdde9> (last accessed May 24, 2022).

⁸⁹ Bridge Group, *supra* no. 88.

⁹⁰ Chand, N., *When the diversity bucket leaks*, Utah Business (Mar. 5, 2021). Retrieved from: <https://www.utahbusiness.com/diversity-bucket-leak/> (last accessed May 24, 2022).

unwelcoming workplace culture, daily microaggressions, biased-based decision making, and continually being overlooked for opportunities within the organization.

It is clear that steps must be taken to plug the holes, and to support those entering the legal profession to feel secure, to feel included and to have a true sense of belonging. Without the sense of feeling included and having a sense of belonging, many diverse professionals will not stay in these positions.

One initiative that is gaining momentum, on both sides of the Atlantic, is the Mansfield Rule developed by the Diversity Lab.⁹¹ The goal of the Mansfield Rule is to boost the representation of historically underrepresented lawyers in law firm leadership. This is considering not only the diversity of entrants to the profession, but also the diversity at the top. Recent data shows that the Mansfield Rule is starting to make a difference. The early adopter firms, from the 2017 inception intake, have increased the racial and ethnic diversity of their management committees by 30 times the rate of non-Mansfield Rule firms.

V. HOW CAN WE TACKLE THE MYTH OF THE MERITOCRACY IN THE LEGAL PROFESSION?

The myth of the meritocracy can be addressed by following the two-point check in every hiring and advancement-related decision involving lawyers in law firms and corporate legal departments – (1) merit-based decisions do not occur automatically (e.g., by checking for “fit” with culture or reacting on gut instinct); and (2) make every hiring and advancement-related decision by following circuit-breaker patterns applicable to all candidates equally in each hiring or advancement-related decision.

In an effort to expand upon the two-point check further, the below applies the two-point check in the context of law firms and corporate legal departments.⁹²

a) Law Firms:

(i) Hiring: There seems to be a growing recognition among law firms that diverse teams provide diverse perspectives, strategies, and understandings that lead to success. The American Bar Association, in its D&I Committee Newsletter of 2020, (O'Connor, 2020) reports that while some law firms have increased D&I efforts, corporate legal departments that work with the law-firms have are becoming increasingly active and vocal in encouraging D&I at the majority-owned law firms they retain for legal services. Corporate legal departments are also increasing their use of minority-owned law firms. O'Connor identifies factors that would define law firm diversity and steps for law firms to achieve diversity.⁹³

⁹¹ *Mansfield Rule 5.0 & UK Expansion (2021-2022)*, Diversity Lab (Jun. 28, 2021). Retrieved from: <https://www.diversitylab.com/pilot-projects/mansfield-rule-5-us-uk-canada/> (last accessed May 24, 2022).

⁹² How to handle the myth of the meritocracy is not addressed here in the context of government lawyers including judges and their supporting lawyers.

⁹³ O'Connor, D., *Increasing Law Firm Diversity*, Diversity & Inclusion Committee Newsletter – American Bar Association (Winter 2020). Retrieved from:

Regardless of the increased D&I discussion, law firms still seek candidates from top law schools because firms can market these top law school hires to clients and justify higher billing rates.⁹⁴ However, these individuals, picked from the top law school programs, are leaving AmLaw 100 firms at record rates - at 25% in 2021, up from 19% in 2019.⁹⁵ These statistics make it clear that the recruitment of candidates at top law schools do not correspond to a good predictor for success at the same firms. With this in mind, there is room to expand recruitment practices outside of the normal practices. Indeed, the “normal practices” may include a “mirrortocracy,” a phenomenon where individuals tasked to hire new talent are more likely to select an individual who “mirrors” their own success and story rather than select those candidates who may actually be better suited for the position.⁹⁶

Following the two-point check in law firm hiring – (1) merit-based hiring will not occur automatically (e.g., hiring using the same old “box credentials,” hiring by checking for “fit” with firm culture, or hiring following gut instinct); and (2) make every law firm hiring decision by following circuit-breaker patterns applicable to all candidates equally in each hiring decision (see the example circuit-breaker pattern for law firm hiring shown in Figures 5 and 6 below).

Figure 5

Law Firm Hiring with Circuit-Breakers⁹⁷

https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/committee-newsletters/increasing_law_firm_diversity/ ([Last accessed Feb. 21, 2022])

⁹⁴ Lindstrom, J., *Meritocracy or Mirrotocracy? Reexamining Hiring Practices of New Lawyers*, Hennepin Lawyer (Aug. 8, 2020). Retrieved from: <https://www.mnbar.org/hennepin-county-bar-association/resources/hennepin-lawyer/articles/2020/08/24/meritocracy-or-mirrotocracy-reexamining-hiring-practices-of-new-lawYERS> (last accessed May 24, 2022).

⁹⁵ Strom, R., *Record Salaries Aren't Stopping Associate Turnover 'Crisis' (1)*, Bloomberg Law (Jan. 13, 2022). Retrieved from: <https://news.bloomberglaw.com/business-and-practice/record-salaries-arent-stopping-associate-turnover-crisis> (last accessed May 24, 2022).

⁹⁶ Linstrom, *supra* no. 97.

⁹⁷ *Mansfield Rule 4.0 – An Open Letter from the 4.0 Firms' Chairs & Managing Partners*, Diversity Lab (Sep. 2021). Retrieved from: <https://www.diversitylab.com/mansfield-rule-4-0/> (last accessed May 24, 2022).

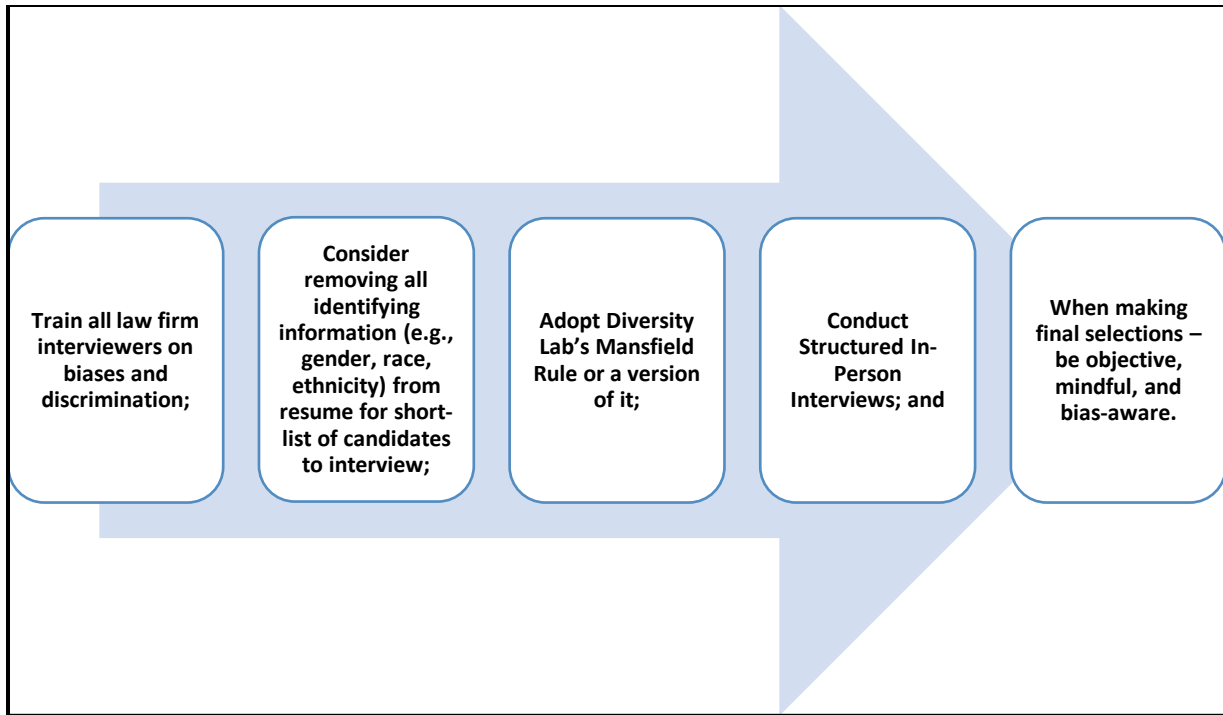


Figure 6

Conduct Structured In-Person Interviews – Law Firms

Structured law firm interviews minimize bias by allowing interviewers to focus on work competencies rather than on what they have in common with the person being interviewed.



Structured law firm interviews use standardized questions

Ask the same questions to all of the candidates in the same order.

Questions should focus on skills and competencies required for the job AND listed in the job requisition.

Interviewers should rate responses to each question on a standardized numeric scale immediately after the interview to neutralize biases.

Compare candidates against the hiring criteria (i.e., skills and competencies) and not against one another.

Law firms should not depend solely on “box credentials” and instead value other non-academic qualities such as leadership ability, interpersonal skills, oral argument skills, and other talents that form excellent attorneys.⁹⁸ When recruiting, law firms should examine their recruiting strategy and expand the firms’ network of schools to focus on recruiting.⁹⁹

It should be noted that implementing these practices may help improve the diversity of a law firm, but they do not focus on solving inherent problems with regard to candidates that are filtered out of the legal career pipeline due to the lack of opportunity and social status due to the myth of meritocracy. As such, to better account for the myth of meritocracy, law firms may need to invest time and resources to programs that focus on undergraduate pre-law students to help mentor these students to be equipped to become successful lawyers. However, this early investment will not directly result in increased diversity at the investing firm because the mentee students will not necessarily go to law school, work at law firms, or remember the law firm that invested in these programs. Moreover, even if these firms expand recruiting networks to include law schools that are not ranked as top law schools in the country, the firms feel pressure of justifying higher billing rates to clients for their first-year associates. Traditionally, students from top law schools helped comfort clientele that they were getting the best and brightest associates to work on their tasks. Accordingly, for law firms to truly commit to making meaningful advancements to help undergraduate and high school students become better groomed for successful legal careers, clients should work in cooperation with law firms to commit to programs that will help younger individuals close the gap between those who grew up under various socio-economic conditions. The co-commitment from clients would allow law firms to maintain important client relationships while expanding the pool of qualified candidates to include those that may not have benefited from the myth of meritocracy.

⁹⁸ See *id.*

⁹⁹ See MCCA, *supra* no. 38, at p. 5.

(ii) Retention: Law firms have recognized the need to retain their diverse and minority employees and ensure they rise to higher roles. Some measures include the creation of mentorship programs, providing more opportunities to junior and minority candidates, and mindfulness in promoting diverse candidates to leadership positions. Having leaders with a similar background to junior minority employees creates an atmosphere of trust and a real potential for growth.

As such, past the recruitment stage, it is important that law firms provide opportunities for all associates to get challenging assignments, work with important clients, and get critical feedback on their work.¹⁰⁰ Indeed, providing training and professional/business development opportunities for junior diverse attorneys are important aspects for these attorneys to be given the tools to succeed in the law firm environment. The opportunities include being assigned to work on important matters for large clients, asked to participate in client pitches, given the opportunity to hold a leadership position at the firm, and mentored and/or sponsored by the most successful partners at the firm.¹⁰¹

Moreover, law firms should work to improve management of the individuals that they hire by providing honest and constructive performance evaluations while being particularly vigilant about encouraging inclusive workplaces that avoid the appearance of systems that disadvantage women and minority lawyers.¹⁰² For example, the process of being nominated and being elected to partner is often not objective or are the written policies strictly adhered to at most firms.¹⁰³ As such, the myth of meritocracy can extend as an individual climbs the law firms ranks because the skill sets, qualifications, or goals that a senior associate must possess to be elected to partnership is rarely specified in writing, nor are they clearly communicated to associates.¹⁰⁴ As such, communication and opportunity should be available to all associates to fend off tendencies to promote those that fit a pre-expected mold.

Following the two-point check in law firm retention – (1) merit-based retention will not occur automatically (e.g., assigning plum assignments to only “box credentialed” lawyers or promoting lawyers by checking for “fit” with firm culture); and (2) make every law firm retention decision by following circuit-breaker patterns applicable to all candidates equally in each retention or advancement-related decision (see the example circuit-breaker pattern for law firm retention shown in Figure 7 below).

Figure 7
Law Firm Retention with Circuit-Breakers

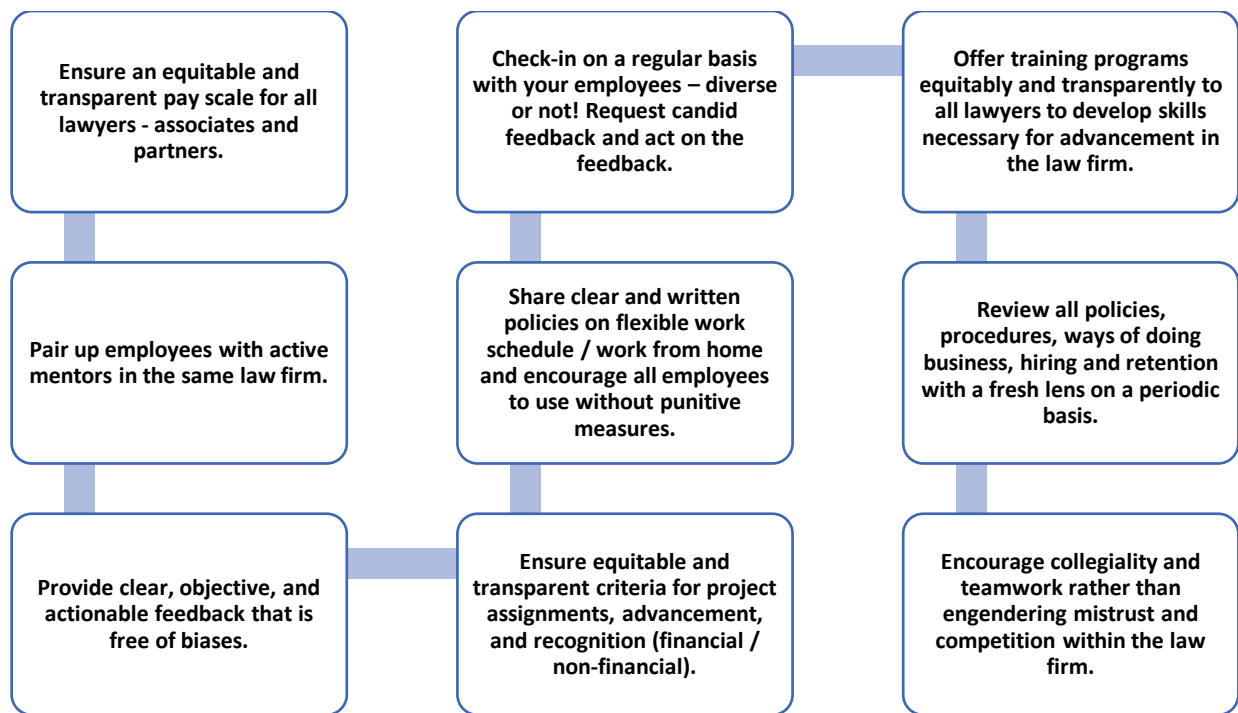
¹⁰⁰ *See id.*

¹⁰¹ DeBerry, J., *United States: Mayer Brown D&I Director Calls Out “myth Of Meritocracy,”* Mondaq (Sep. 17, 2021). Retrieved from: <https://www.mondaq.com/unitedstates/diversity-equity-inclusion/1112000/mayer-brown-di-director-calls-out-myth-of-meritocracy> (last accessed May 24, 2022).

¹⁰² MCCA, *supra* no. 38, at p. 5.

¹⁰³ *See id.*

¹⁰⁴ *See id.*



Finally, law firms need to be accountable for tracking improvement in diversity and inclusion practices and results. DEI efforts and contributions should be a part of the overall annual evaluation process for each partner to help to ensure that DEI initiatives receive the attention they deserve by each and every partner.¹⁰⁵

(iii) According to Minority Corporate Counsel Association’s report on the Myth of the Meritocracy, below are Recommendations to Law Firms:¹⁰⁶

1. Firms should examine the credentials and skill sets that distinguish partners at the firm from senior associates who were not elected. Data should be disaggregated at a minimum by race and gender, although there may be other demographic categories that the firm will wish to examine (e.g., marital status, sexual orientation, number of children, etc.). Based upon this audit, the firm should reexamine its hiring criteria against the findings and, as necessary, adjust their process of culling candidates from the hundreds of resumés they receive annually.
2. Dispelling the myth of the meritocracy starts with successful lawyers taking the initiative to expand the firms’ network of schools at which to conduct on-campus interviews and collect resumés. By challenging the traditional “box credentials”, attorneys may apply more practical measures of potential and legal aptitude to the law students they are considering as new hires.
3. Law firms serious about increasing diversity must extend their efforts past the recruitment stage to provide opportunities for all associates to get challenging assignments, work with important clients, and get critical feedback on their work.
4. Law firms should not depend solely on “box credentials” to evaluate the candidacy of students. Law firms and law schools must work together to provide opportunities for the 90 percent of all students who are not ranked in the top 10 percent of the class

¹⁰⁵ DeBerry, *supra* no. 104.

¹⁰⁶ MCCA, *supra* no. 38, at p. 5.

academically but whose leadership ability, interpersonal skills, oral argument, and other talents foretell their ability to be groomed into excellent attorneys.

5. Law schools have a role to play, too. They must do more to ensure a wider sector of their students, not simply those with “box credentials”, have the opportunity to be considered by top law firms. This will entail reexamining the interview selection process, restructuring how the interview is conducted, and investing more resources to aid law students’ career development and networking opportunities.
6. Undergraduate pre-law students need to understand that the rank of their law school is important in determining where they will practice and how they will be perceived as a new associate. They must also understand that to some extent, their selection will continue to influence the doors that open or close to them throughout their careers. This is particularly true for students of color.
7. Law students who are not at the top of their class academically, or who did not attend a top-ranked law school, must earn letters of recommendation from professors, clients, or partners/alumni of the firms where they seek placement.
8. Law firms must do better at being effective managers of people. Those entrusted with responsibility for leading departments and managing the performance evaluation process must be particularly vigilant about encouraging inclusive workplaces and ensuring that exclusionary tactics do not operate to disadvantage women and minority lawyers.

The above recommendations are from page 5 of the Minority Corporate Counsel Association’s report on the Myth of the Meritocracy.¹⁰⁷ All law firms should study this report by the MCCA, in its entirety.

b) Corporate Legal Departments

(i) Hiring:

Creating a more diverse hiring pipeline has been recognized as the basis for building a stronger department and company. Several corporations are actively recruiting from colleges that were historically excluded from the traditional lists of “elite schools,” such as the Historically Black Colleges and Universities (HBCU’s), by working with hiring managers and their HR departments to hire minority and diverse candidates.

As discussed above in the context of law firms, it is imperative that corporate legal departments hire outside the “box credentials.” Following the two-point check in corporate legal department hiring – (1) merit-based hiring will not occur automatically (e.g., hiring “box credentialed” lawyers from top law firms, hiring by checking for “fit” with legal department culture, or hiring following gut instinct); and (2) make every corporate legal department hiring decision by following circuit-breaker patterns applicable to all candidates equally in each hiring decision (see the example circuit-breaker pattern for law firm hiring shown in Figures 8 and 9 below).

Figure 8

Corporate Legal Department Hiring with Circuit-Breakers¹⁰⁸

¹⁰⁷ *Id.*

¹⁰⁸ Diversity Lab, *supra* no. 100.

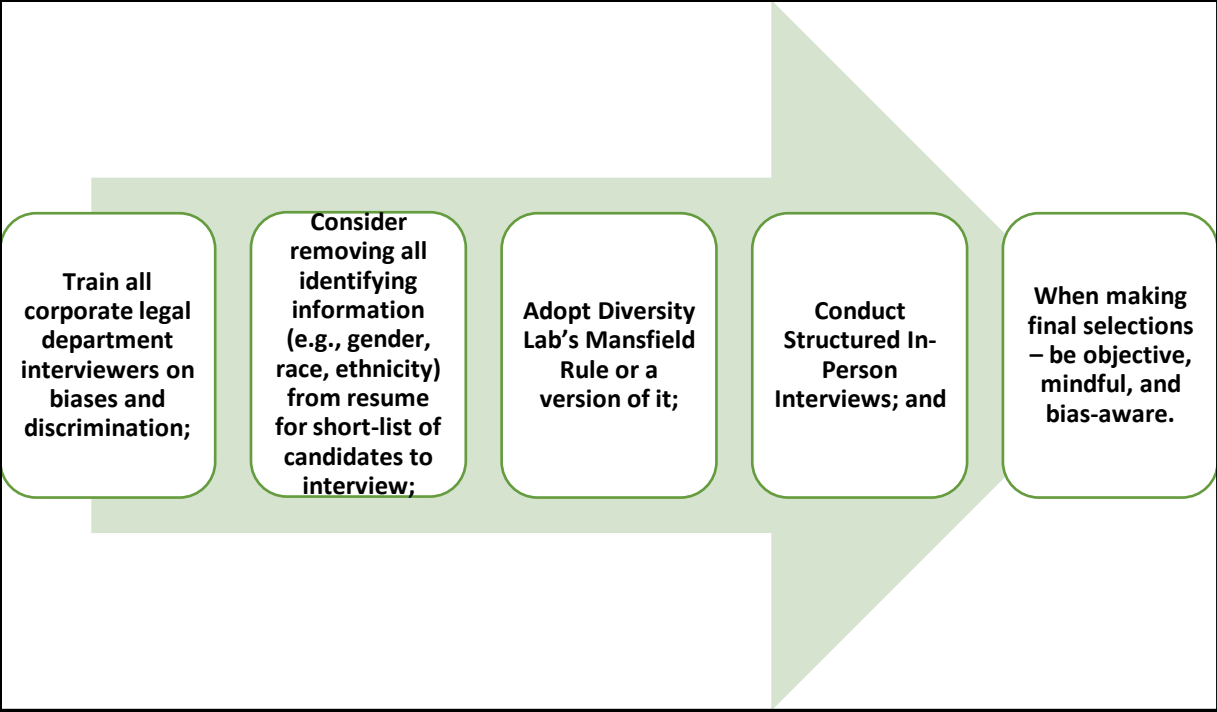


Figure 9

Conduct Structured In-Person Interviews – Corporate Legal Departments



Other measures being implemented include creating a diverse interview panel and setting company goals for short-term and long-term hiring a certain number or percentage of diverse candidates. The recognition that leadership in a corporation should be reflective of the diversity that is sought is fast taking hold of the hiring market. All these measures should move the needle to hire and retain diverse candidates.

(ii) Retention: Corporations including those with Legal Departments, have shown an upward trend on focusing on retention of diverse employees. Most of this is achieved by creating an inclusive and respectful environment in the company. Some examples of these initiatives by Corporations include the following:

D&I Training: Corporations and their Legal Departments have begun to use D&I as a strategy rather than as a mandatory check-box. Training employees on the importance of D&I including mandatory seminars and e-learning courses, bringing Speakers to discuss D&I topics, and an active engagement of Leadership in D&I activities, all of which give examples of how diverse employees contribute to a more productive, effective and engaged company culture. Clear messages from Leadership on priority for D&I have gone a long way in fostering a more inclusive culture.

Employee Resource Groups (ERG's): Creating ERGs and encouragement from leadership to join ERGs has more recently facilitated employees to participate in discussions and provided an informal forum for employees of diverse backgrounds to discuss specific issues that cause employees to prematurely leave a legal department and brainstorm on what could promote retention. Activities of different ERG's and report back findings to leadership.

Corporate Social Responsibility (CSR): Corporate social responsibility is a type of business self-regulation with the aim of social accountability and making a positive impact on society. Some ways that a company can embrace CSR include being environmentally friendly and eco-conscious; promoting

equality, diversity, and inclusion in the workplace; treating employees with respect; giving back to the community; and ensuring business decisions are ethical.¹⁰⁹

Partnering with Industry Organizations such as IPO: In the 2021, Annual Meeting of the IPO, held in Austin, Texas, the D&I Committee panel discussion included initiatives for hiring and retention of diverse candidates in corporate legal IP departments and law firms. An interesting model was presented which involved the chief IP Counsels of Corporations to: 1) accept responsibility and understand underlying issues and working to solve lack of diversity at all levels; 2) enact internal hiring practices to ensure a diverse slate of candidates are considered for every position; 3) partnerships of Companies with the Law Firms they work with; 4) impose goals and metrics on their outside counsel that would require the outside counsel to have a diverse slate of legal professionals; 5) partnerships with legal organizations that work on diversity initiatives (such as NAMWOLF); 6) diversity internships at the company with one-on-one mentoring, (e.g. AbbVie Patent Academy); partnerships with industry organizations (IPO, ACC, FADIPL); 7) scholarships; and 8) actions to feed the pipeline at the lowest level to engage minority high schoolers and college students to have an awareness of Industry and Legal Profession options.¹¹⁰

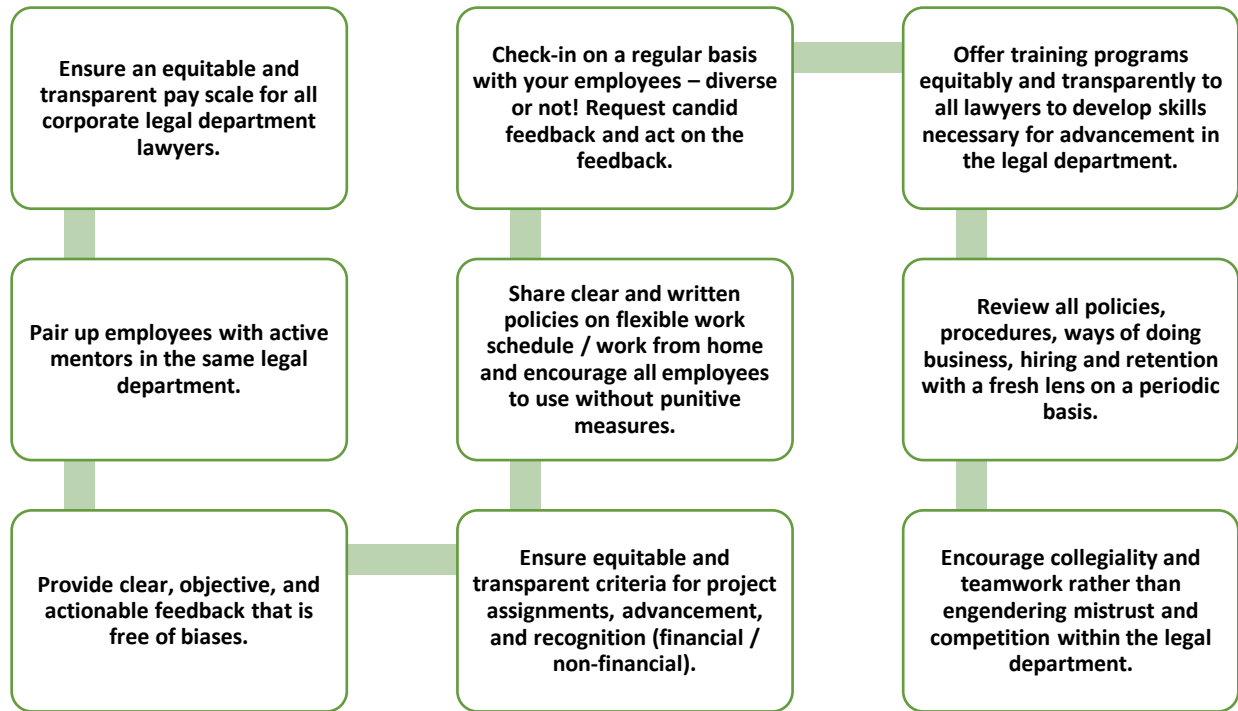
Following the two-point check in corporate legal department retention – (1) merit-based retention will not occur automatically (e.g., assigning plum assignments to only “box credentialed” lawyers or promoting lawyers by checking for “fit” with legal department culture); and (2) make every corporate legal department retention decision by following circuit-breaker patterns applicable to all candidates equally in each retention or advancement-related decision (see the example circuit-breaker pattern for corporate legal department retention shown in Figure 10 below).

¹⁰⁹ Reckman, N., *What is Corporate Social Responsibility?* (Mar. 21, 2022). Retrieved from: <https://www.businessnewsdaily.com/4679-corporate-social-responsibility.html> (last accessed May 25, 2022).

¹¹⁰ Thayer, L. *et al.*, *Diversity and Innovation in the IP Sphere: Why Diversity Matters and Overcoming Challenges*, IPO Annual Meeting (Sep. 21, 2021).

Figure 10

Corporate Legal Department Retention with Circuit-Breakers



(iii) Recommendations to Corporate Legal Departments:

1. Tackling the myth of the meritocracy in corporate legal departments starts with shifting hiring strategies. In order to create a more equitable system, corporate legal departments must attract and then hire candidates outside of the traditional “box credentials” carried over from law firms. Hiring should involve advertising open requisitions to as many large and diverse job boards as possible. Hiring should also involve the Mansfield Rule¹¹¹ principles or criteria at least as stringent as those required by the Mansfield Rule.
2. Next, corporate legal departments must equitize policies affecting retention. This includes and is not limited to: ensuring opportunities for all legal counsel within the department to –
 - i. get challenging assignments,
 - ii. work with important internal clients,
 - iii. get critical and actionable feedback on their work,
 - iv. get paired up with mentors,
 - v. get involved with employee resource groups,
 - vi. get actionable support for career and professional development, and

¹¹¹ *Mansfield Rule: Legal Department 3.0 Edition – More than 40 Legal Departments Join the Mansfield Rule: Legal Department Edition 3.0 Cohort to Continue Boosting Diversity in Leadership and Outside Counsel Ranks*, Diversity Lab (2021). Retrieved from: <https://www.diversitylab.com/pilot-projects/mansfield-rule-legal-department-3-0-edition/> (last accessed May 24, 2022).

- vii. track and set advancement opportunities within defined periods of time (e.g., get promoted to level X within 2 years of taking on the current role).
3. Finally, just like law firms, corporate legal departments should examine the credentials and skill sets that distinguish leaders in the department from senior counsels who have not received promotions. This data should be disaggregated at a minimum by race and gender, although there may be other demographic categories that the firm will wish to examine (e.g., marital status, sexual orientation, number of children, etc.). Based upon this audit, the legal department should reexamine its hiring and promotions criteria against the findings.

The “ensuring” of opportunities for all legal counsel can be achieved and measured by tying executive compensation to diversity and inclusion effectiveness within each executive’s department.

VI. CONCLUSION

It is a moral and economic imperative to have diversity, equity, and inclusion thrive in our organizations. Many law firms and corporate legal departments continue to struggle with understanding and tackling the myth of the meritocracy. As discussed above, it is not possible to have a merit-based organization without deliberate “circuit-breakers” in place when making hiring and retention decisions.

The co-authors of this white paper would like to acknowledge that there are some law firms and corporate legal departments that are thriving under merit-based systems. The reason behind their success is the presence of many thoughtful and deliberate “circuit-breakers” in their hiring and retention decisions.