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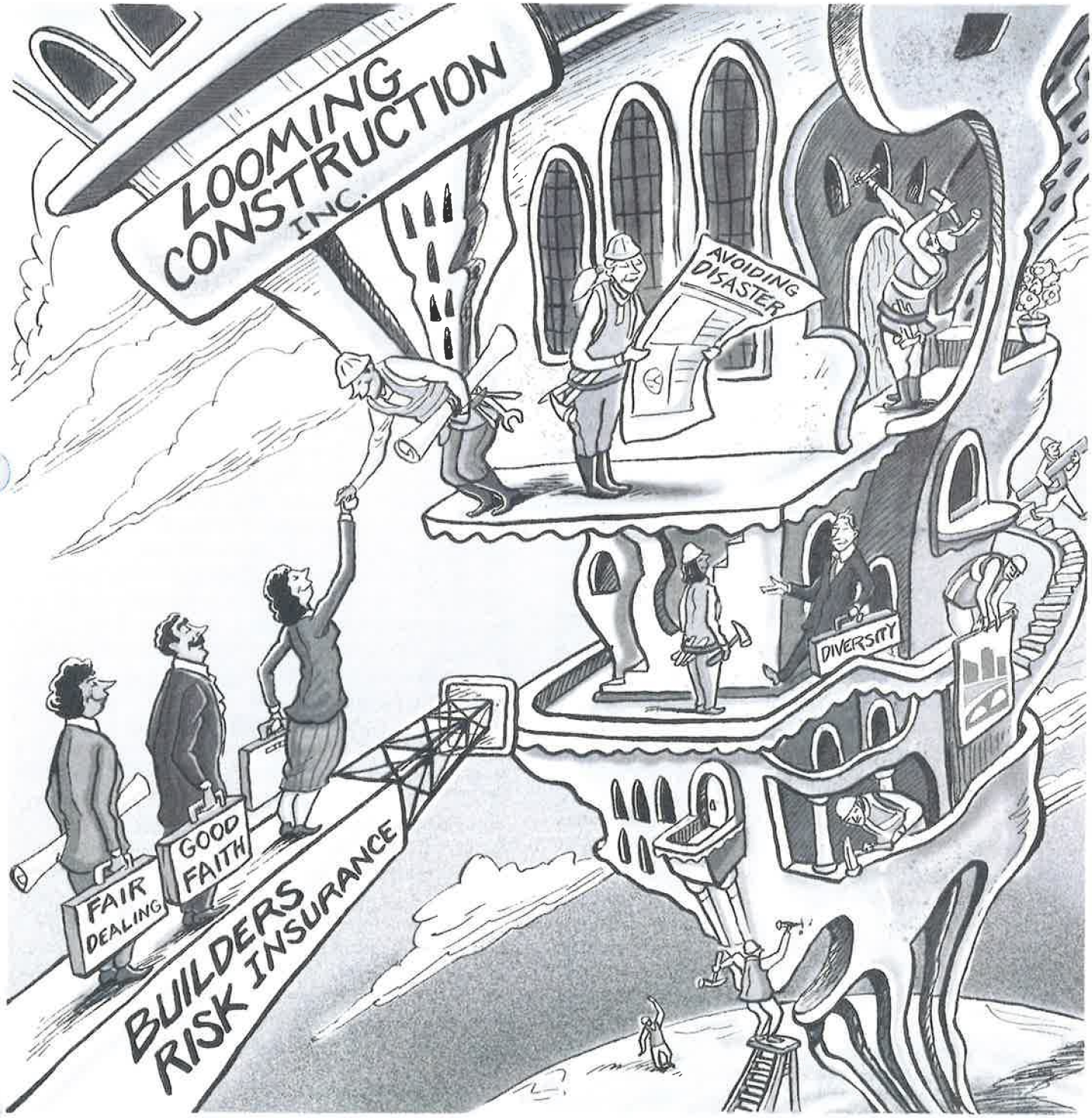

Mitigating and Avoiding Risk

Illustration: Chad Crowe

The Diversity Dividend: Diversity Does Pay

By Melinda S. Gentile and Monique S. Cardenas

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Introduction

The Diversity Dividend, which can be described as the business case for diversity, has been an ever-growing trend for Fortune 500 companies and their outside counsel. Some have even posited that the Diversity Dividend is a new emerging business model. Corporate clients are increasingly implementing diversity initiatives within their companies, as well as requiring outside counsel to implement certain diversity initiatives. The Diversity Dividend takes many shapes and forms.

For example, Fortune 500 companies go so far as to pay "diversity incentives" to outside counsel for achieving certain diversity benchmarks while corporate general counsel and in-house counsel have changed and even terminated their relationships with outside counsel if certain diversity metrics and objectives are not achieved. Many of the most successful law firms recognize the Diversity Dividend and are diversifying within their firms to reflect the same values of their clients and potential clients.

The potential of losing clients due to a lack of diversity is a stark reality that many firms now face. With the threat of losing substantial business, a louder call to action to diversify within law firms is essential to financial survival. While this call to action has been successful with many Fortune 500 companies and the top players within the construction industry, research indicates that diverse outside counsel continue to be under-represented in the practice of law and even more so in construction law practice.

Corporate Diversity: By the Numbers

"[Corporate diversity] isn't a form of political correctness, but an insurance policy against internally generated blindness that leaves institutions exposed and out of touch."[1]

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Empirical evidence markedly demonstrates that companies with more diverse workforces perform better financially. Simply stated, more diverse companies are financially outperforming their less diverse competitors. In 2015, McKinsey & Company, a worldwide marketing consulting firm, conducted a study that examined proprietary data sets for 366 public companies across a range of industries in the United States, Canada, Latin America, and the United Kingdom for the years 2010 through 2013.[2] McKinsey evaluated the public companies' financial performance and the composition of their top management and boards.[3] According to the study, there was a "statistically significant connection between diversity and financial performance."[4] Specifically, the findings evinced that companies in the top quartile for racial and ethnic diversity are 35% more likely to have financial returns above their respective national industry medians.[5] Likewise, McKinsey's findings also showed that companies in the top quartile for gender diversity are 15% more likely to have financial returns above their respective national industry medians.[6] McKinsey's research further revealed that the average percentage of women in C-suite and senior vice president positions in the United States was 16%.[7] McKinsey's research also revealed that for every 10% increase in racial and ethnic diversity on a senior-executive team, earnings before interest and taxes (EBIT) rose by 0.8%.[8] Cumulatively, McKinsey's study showed that the more racially diverse companies had better financial performance. As for gender diversity, for every 10% increase in gender diversity in the senior management team (and 1.4% for the board), the companies' EBIT rose 3.5%.[9] Interestingly, McKinsey's research indicated that there was no statistically significant correlation of gender diversity and increased EBIT until women constituted at least 22% of a senior executive team.[10] Once the 22% composition was reached, McKinsey found that for every 10% increase in gender diversity, there was an increase of 0.3% in EBIT margin.[11]

A study conducted by investor research firm MSCI showed that companies in the MSCI World Index with "strong female leadership" generated a return on equity of 10% per year versus 7.4% for those companies without such leadership.[12] MSCI defined strong female leadership as companies that have three or more women on the board or companies whose percentage of women on the board is above its country's average. MSCI's study also showed

that companies lacking board diversity tend to suffer more governance-related controversies than average.[13]

The Diversity Dividend has even been embraced by Wall Street. In March 2016, State Street Global Advisors launched a new exchange-traded fund (ETF), the SPDR Gender Diversity Index, which debuted on the New York Stock Exchange with the moniker "SHE."[14] The SHE fund includes a portfolio of companies that have high proportions of women in senior leadership positions. Companies in the index that rank in the top 10% of that company's respective sector are included in the SHE fund portfolio, with the requirement that each also have at least one woman on its board or as its CEO.[15] The SHE fund's goal is to achieve market-rate returns by investing in United States companies that recognize the value of gender diversity and do their part to ensure that women are well represented on their boards of directors and in their management.[16]

According to State Street Global Advisors' former executive vice president, Kristi Mitchem, the companies included in the SHE fund portfolio are expected to outperform and exhibit less volatility than their less "female-inspired peers."[17] As of May 2016, approximately 150 companies were included in the SHE fund portfolio and the returns have closely tracked the S&P 500 index. When it launched, the SHE fund included $270 million in assets, which was more than any other ETF that debuted in 2016.[18] As of December 2016, SHE fund assets have increased to approximately $284 million.[19]

Power of the Purse: Diversity Incentive Programs for Outside Counsel

Statistics show that diversity impacts revenue and, as a result, diversity incentives are now the emerging business model. This is part of why many corporate legal departments and outside law firms have incentivized diversity. Presently, corporate clients spend approximately 25% more with outside counsel considered "very diverse" than they spend with teams they see as "not at all diverse" or strictly male.[20] Research shows that "very diverse" outside counsel are more than 1.5 times as likely to achieve a "perfect ten" performance score and receive over three times higher Net Promoter Scores according to the Bain & Company's client satisfaction index.[21]

Several notable Fortune 500 companies have instituted diversity programs with their outside counsel. Microsoft's outside counsel, for example, have the opportunity to earn an annual bonus of up to 2% of the legal fees billed to the company based on their performance in increasing diversity in three aspects of a firm's leadership: (1) leading the management of the law firm; (2) leading the law firm's relationship with Microsoft; and (3) leading Microsoft's legal matters.[22] Microsoft also pays an additional bonus to the highest diversity-achieving law firm, along with public recognition from Microsoft.[23] Senior Microsoft corporate counsel's year-end bonuses are also tied to the diversity success of its outside counsel.[24] Senior in-house counsel only receive a year-end bonus if at least 75% of Microsoft's outside counsel receive diversity bonuses.[25] In sum, Microsoft's diversity program is resulting in a Diversity Dividend to its corporate counsel and outside counsel as nearly 50% of the business Microsoft gives to outside counsel is handled by diverse attorneys.[26]

In 2014, the general counsel of DuPont, General Mills, Verizon, and Wal-Mart announced the launch of a minority lawyer inclusion incentive program, Engage Excellence, which is designed to engage diverse lawyers on significant matters and promote diversity in the majority of law firms the companies hire.[27] As part of Engage Excellence, each company agreed to engage diverse lawyers on significant matters and promote diversity in the primary law firms that they retain.[28] Specifically, each company hires diverse lawyers to be lead counsel on significant matters and requires each law firm to assign a diverse team to those matters.[29] The companies also require outside counsel they hire to certify that the diverse lead lawyers assigned to their matters receive financial credit as the originator of the matters.[30] The companies participating in Engage Excellence have set as a goal that at least 50% of the lead counsel for work awarded will be women. Notably, the participating companies in Engage Excellence committed a portion of their legal spend to diverse outside counsel and have also committed to award that work to diverse attorneys with the intent of having a significant impact on those diverse attorneys advancing within their law firms.[31] As a result, ethnically diverse lawyers (including Latino, Black, and Asian) and openly LGBT attorneys are now managing matters in practice areas such as intellectual property, class action litigation, healthcare, patent litigation, corporate transactional, corporate governance, employment law and environmental law.[32]

Wal-Mart has one of the most aggressive and financially incentivizing diversity initiatives for its outside counsel. In 2005, Wal-Mart implemented its diversity initiative which resulted in a change to forty relationship attorneys at its top 100 law firms and shifted $60 million of legal work to matters managed by women and minority attorneys.[33] Since 2012, Wal-Mart has spent $189 million with its diverse outside counsel, i.e., women and ethnic attorneys.[34] Moreover, over 200 women and ethnic relationship partners have a book of business with Wal-Mart worth $90 million.[35] While Wal-Mart's diversity initiative focuses on the generation of business for diverse outside counsel, its diversity initiative may also result in the loss of business by outside counsel.[36] For example, Wal-Mart terminated a relationship with one of its outside counsel for its failure to participate in Wal-Mart's diversity initiative. That failure to participate in the diversity initiative resulted in a loss of $12 million dollars in revenue for that firm.

Wal-Mart has been consistently lauded for its diversity initiatives with its employees, outside counsel and suppliers. In fact, Wal-Mart was recently named the number one company for providing business opportunities to diverse

business owners throughout the United States.[37] Some other large companies which have achieved high diversity rankings include IBM, AT&T, Northrop Grumman, Apple, Lockheed Martin, Toyota, Verizon, Microsoft, Kroger, Cisco, Time Warner, Raytheon, and Turner Construction Company.

Turner Construction Company is consistently recognized for its commitment to diversity and inclusion in the construction industry. Since 2010, Turner has received several notable recognitions and awards for its commitment to diversity. Specifically, Turner has been recognized as (1) a Top 100 Employer by Black Collegian Magazine; (2) a Business Corporate Champion at the Top Minority Business Awards presented by the Greater Miami Chamber of Commerce; (3) one of the Top 50 Organizations for Multicultural Business Opportunities; (4) the Best of the Best among Supplier Diversity Programs by Professional Women's Magazine; and (5) the Top Contractor for Diversity by Diversity Matters Magazine. Turner has also received the Diversity Advocacy Award (selected by *The Summit Magazine* and the *Black Pages Ohio*) and Top Contractor for Diversity in 2014 (selected by *Diversity Matters Magazine*). Turner was also recognized by the Human Rights Campaign (HRC) for scoring 90 out of 100 on the HRC's Corporate Equality Index.

Turner does not stand alone when it comes to award-winning diversity initiatives in the construction industry. In 2016, Gilbane Building Company received the Supplier Diversity Crystal Award by AT&T and the Best in Class Award for Supplier Diversity by the Greater Cleveland Partnership's Commission on Economic Inclusion for outstanding diversity.[38] Likewise, Austin Industries has been recognized as (1) Construction Corporation of the Year Award by the DFW Minority Business Council (7-time recipient); (2) General Contractor of the Year by the Associated Minority Contractors of America; and (3) Corporate Advocate of the Year by the Black Contractors Association.[39] In 2015, Bechtel Corporation received one of the top diversity awards in the United Kingdom when it was presented with the Women in Science and Engineering (WISE) Employer Award by Her Royal Highness, The Princess Royal.[40] AECOM, Inc. is also a leader in diversity and has been recognized as (1) a Top 50 Employer by Minority Engineer Magazine AECOM; (2) the Most Outstanding Company in Gender Diversity by Engineers Australia; (3) the Top Corporations for Women Business Enterprise by the Women Business Enterprise National Council; and (4) the Top 30 Champions of Diversity by DiversityPlus Magazine.[41]

Diversity Performance: The Competitive Advantage

> *"A large group of diverse individuals will come up with better and more robust forecasts and make more intelligent decisions than even the most skilled 'decision maker'."*[42]

Research has demonstrated that diverse companies have a competitive advantage over their less-diverse competitors. Studies have shown that diversity has a positive impact on many key aspects of company performance.[43] Specifically, research has shown that diverse companies are better able to hire top talent, retain top talent, improve decision-making, and increase employee satisfaction, all of which positively correlate to increased financial returns. Moreover, diversity fosters innovation and creativity through a greater variety of problem-solving approaches, perspectives, and ideas.

Many forward-thinking companies have implemented diversity initiatives to strengthen client relations with top consumer decision-makers. These companies realize that there is much to be gained by focusing on the business of diverse companies. By way of example, racial and ethnic consumer power in the United States was estimated to be $1.1 trillion dollars in 2015.[44] The consumer power for LGBT individuals was approximately $790 billion dollars in 2012.[45] According to a recent report, as diverse businesses become more financially successful in various diverse multicultural markets, less diverse corporations are taking note and are beginning to implement their own diversity measures in order to compete for the growing diverse market share.[46]

Diversity in Law: Slow and Not Quite Steady

The practice of law remains one of the least diverse professions in the nation. For example, statistics unfortunately show the legal profession is one of the least racially diverse professions in the nation as 88% of attorneys are white.[47] As of 2015, only about 33% of practicing attorneys were women and only 12% identified as non-white.[48] AmLaw360's 2015 Minority Report found that while more than 20% of law students in the United States have been minorities over the past decade, just 7% of equity partners are minorities.[49]

The American Bar Association (ABA) recently reported that for the first time ever women make up the majority of law students at accredited law schools in the United States at approximately 50.32%.[50] While this milestone may suggest that there is a significant representation of women in the legal profession, the simple fact remains that women continue to be underrepresented in the practice of law. A survey of law firm participants in AmLaw360's 2015 Glass Ceiling Report revealed that approximately 33.5% of attorneys in law firms were women, while only 21.5% of law firm partners are women.[51] Even more striking, only 18% of equity partners are women.[52] Further, as of 2015, only seven of the nation's 100 largest law firms have a woman as chairperson or managing partner.[53]

With respect to the ABA's Forum on Construction Law (the "Forum"), the Forum's Diversity Committee conducted an analysis over the past year of diverse membership, or lack thereof, within the Forum.[54] According to the Forum, women account for approximately 18.5%

of total membership, while racially and ethnically diverse members currently account for approximately 6.8%.[55] The Forum has made concerted efforts to increase diversity within its membership. For example, the Forum initiated the Diversity Fellowship Program which awards up to six diverse construction attorneys with fellowships each spring. The fellowships can last as long as three years. The fellowship benefits include (1) waiver of all registration fees for the Forum's Fall, Midwinter, and Annual Meetings; (2) reimbursement of reasonable travel and accommodation expenses associated with attending the Forum's Annual Meeting; (3) waiver of Forum membership dues; and (4) payment of a certain portion of ABA membership dues. The Forum has also recently adopted goals for increasing diversity membership and participation within the Forum. More information on these goals is reported in David J. Theising's (Chair of the Forum's Diversity Committee) article: *Fixing the Pipeline for Diverse Construction Lawyers Before It Leaks.*

The Diversity Dividend and the Gender Gap: What Gives?

We know that times are changing and with that so are the demographics. In fact, according to the Census Bureau, by 2045 white men will no longer make up the largest percentage of the population in the United States. There is no doubt that there are political and societal movements for equality. There are also economic movements for equality in the construction industry. As of 2016, the percentage of women serving as general counsel in Fortune 500 companies was 24%.[56] Likewise, the percentage of women serving as general counsel in Fortune 500 to 1000 companies was 19%.[57]

While inroads have been made to diversify C-suite positions with women, the legal profession continues to fall behind the national trend. Women attorneys still earn lower incomes than men and have higher attrition rates than men.[58] According to the U.S. Bureau of Labor Statistics, women attorneys made 17% less than men in 2014. That is actually progress because 10 years prior to that, the percentage was 26.6%. The Census Bureau presents an even bleaker picture and reports that in 2014 full-time women attorneys earned 22.4% less than their male counterparts. While the statistics resulting from these studies are interesting, few studies have provided answers as to why the gender gap remains in the legal profession. Further study is needed as to the issues that lead to higher attrition, lower pay, less business generation and slower advancement of women in the legal profession.

Conclusion

The Diversity Dividend is proven fact, not fiction. It is not a coincidence that 50% of the top 25 construction companies in the United States ranked by *Engineering News-Record* have at least one women serving in executive positions. Clients and potential clients continue to diversify within their ranks and in their hiring requirements for outside counsel. Accordingly, law firms must rise to the challenge of bringing diversity within their ranks. To be competitive, law firms must make diversity a priority. In order for diversity initiatives to thrive, law firms must adapt their business models and change their internal cultures.

The potential and realized economic benefits of being diverse cannot be ignored and are significant. Conversely, the lack of diversity is certain to be detrimental to the long-term financial success of law firms.[59] For law firms to remain competitive and provide clients with the best legal services in the current economic climate of the ever-evolving diversity business model, it is imperative that law firms embrace the power of the Diversity Dividend. While it is not enough to merely recognize the importance of diversity and its return on investment, embracing the Diversity Dividend does not necessarily require a total overhaul of firm policies or payment structures. However, successful diversity initiatives do have common denominators. Fortune 500 companies and law firms alike who reap the benefits of the Diversity Dividend commonly have diversity committees with diverse members who wield power and credibility with their colleagues and who have a stake in the outcome and success of the business. Frank conversations regarding the current climate of diversity within the law firm and developing strategies to overcome diversity shortcomings are also common denominators of successful diversity initiatives. Walking the diversity talk has never been more critical for a law firm's financial success than now.

Endnotes

1. Margaret Heffernan, Willful Blindness: Why We Ignore the Obvious at Our Peril (Walker & Co. 2011), at 223.
2. Vivian Hunt, Dennis Layton & Sara Prince, *Diversity Matters,* McKinsey & Co., Feb. 2015.
3. The management teams included positions from the C-suite to senior vice presidents.
4. *Diversity Matters, supra* note 2.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* (United States' data set).
11. *Diversity Matters, supra* note 2.
12. *Women on Boards, Global Trends in Gender Diversity on Corporate Boards,* MSCI, Nov. 2015.
13. *Id.*
14. State Street Global Advisors, *Better Together, Introducing the SPDR SSGA Gender Diversity Index ETF Ticker: SHE,* May 2016, available at https://www.ssga.com/investment-topics/general-investing/2016/she-gender-diversity-index-introduction.pdf (last visited Feb. 10, 2017).
15. *Id.*
16. *Id.*
17. Julie Segal, *SHE-The ETF That Trades on Female Empowerment,* Institutional Investor, May 12, 2016, available at http://www.institutionalinvestor.com/inside-edge/3554005/she-the-etf-that-trades-on-female-empowerment.html#.WKHQIm8rLIU

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