

**The Levey White Paper Opposing Law Firm Diversity –  
A House Built on Shaky Foundations**

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# **The Levey White Paper Opposing Law Firm Diversity – A House Built on Shaky Foundations**

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## **Preface**

What follows is a rebuttal of the arguments, both expressed and implied, in the White Paper entitled *The Legal Implications of Complying with Race and Gender-Based Client Preferences* that was issued by Curt Levey in March of this year (2007). While Levey's controversial article has generated some critical commentary and press coverage, there has not been a definitive response directly addressing and putting to rest the contentions which he raises regarding the legal validity of diversity efforts in law firms and corporate legal departments. This article seeks to fill that void.

While Levey's article was styled as a scholarly address of the legal issues surrounding diversity programs, its substance and conclusions were based on misinformation and erroneous assumptions about the actual practices being engaged in by corporate law departments and law firms. In preparing this response, we were mindful not to fall into the same trap by merely pointing out his errors and failure to research the issues. Rather, we were determined to issue this response only after thoroughly researching all the factual and legal issues involved. This factor, more than anything else, explains why we are presenting this now rather than several months ago. Our research team addressed the following issues and pursued them wherever they might lead all the way to our ultimate conclusions:

- Research on the relationship between law school credentials and success in a corporate law firm; whether law firms rely on such credentials exclusively or consider other factors; and any reported lawsuits or claims alleging that a law firm decision to hire a candidate with lesser law school credentials while rejecting one with higher law school credentials violated employment discrimination or any other laws.

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- Statistical research on the representation of women and minorities in the major American corporate law firms at all levels of participation.
- Review and analysis of the Sander article, Richard H. Sander, *The Paradox of the Corporate Law Firm*, 84 N.C.L. Rev. 1755 (2006) for faults, including the review of any subsequent law review level counter analysis and legal commentary.
- Research on any lawsuits threatened, filed or settled against companies signatory to the Workplace Statement of Principles and /or the Call to Action Commitment Statement alleging that such signing is an element of claimed discrimination.
- Research re any malpractice claims filed or threatened based on a claim that the assignment of minority or women attorneys to a project resulted in sub par quality work to the detriment of the client.
- Research on any lawsuits threatened, filed or settled alleging or relating to a claim that law firm diversity efforts have resulted in discrimination against non-minority and male attorneys in hiring, assignment and/or promotion.
- Research on any lawsuits threatened, filed or settled alleging or relating to a claim that corporate diversity initiatives constitute proof of intentional or impact discrimination against non-minorities and male applicants or employees.
- Research on the various practices of corporate law departments as clients requesting or demanding law firms provide diversity data, and/or the assignment of diverse attorneys or attorney teams. Particular attention should be paid to any practices that are more aggressive than the Diversity in the Workplace Statement of Principles and /or the Call to Action Commitment Statement (especially any demands for specific numbers or percentages of minorities and/or women to be achieved.)
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## Introduction

On March 13, 2007, Curt Levey, who helped lead the high-profile fight against the University of Michigan's affirmative action programs, presented a controversial research White Paper entitled *The Legal Implications of Complying with Race and Gender-Based Client Preferences*<sup>1</sup> at a Washington, DC, forum on law firm diversity sponsored by the American Enterprise Institute (AEI).<sup>2</sup> Under the title, "Are Law Firms Breaking the Law? Racial and Gender Preferences in Attorney Hiring and Promotion," Levey appeared on the AEI panel with UCLA School of Law Professor Richard Sander, who presented findings from his recent empirical study of the negative effects of large law firm diversity policies and affirmative action efforts on minority attorneys.<sup>3</sup> Levey's White Paper purports to be based in substantial part on the findings presented in Sander's law review article.

Following shortly after Levey's appearance at AEI, his White Paper was adopted by Roger Clegg, the President and General Counsel of the Center for Equal Opportunity (CEO).<sup>4</sup> On April 17, 2007, Clegg packaged the Levey White Paper in a mailing sent to an undetermined but presumably substantial number of corporate general counsels across the nation. Clegg's intention in bringing the Levey White Paper to the attention of the general counsels of corporate America was revealed in the heart of his cover letter:

The paper analyzes a recent and disturbing trend among many companies, namely their practice of demanding that outside counsel take race ethnicity, and sex into account in personnel decisions, including which lawyers will be assigned to work on company matters. And the paper, quite rightly in my view, concludes that this discriminatory practice violates the civil-rights laws.

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<sup>1</sup> See, text published on line at <http://www.americanlawyer.com/pdf/levey.pdf> (hereinafter "White Paper").

<sup>2</sup> *American Enterprise Institute Home Page*. Ed. Drinkwine, Laura. 13 March 2007. American Enterprise Institute 10 Sept. 2007. [http://www.aei.org/events/eventID.1470.filter.all/event\\_detail.asp](http://www.aei.org/events/eventID.1470.filter.all/event_detail.asp). The neoconservative AEI is arguably the nation's most influential think tank, having played a major role in shaping U.S. economic, social, foreign, and military policies since World War II. See, <http://rightweb.irc-online.org/profile/1431>. 10 Sept. 2007. At the time of the presentation, Levey was officially the Executive Director of the Committee for Justice, a group whose stated mission is to promote the appointment of "constitutionalist" judges. *The Committee for Justice Home Page*. 10 Sept. 2007 <http://committeeforjustice.org/contents/about/members.shtml>. Levey disavowed any connection between his current position and the subject matter of his presentation. See, Todd, Ross. "Diversity Scorecard - Building Diversity, Breaking the Law?" *The Minority Law Journal* 1 May 2007. 10 Sept. 2007. <http://www.law.com/jsp/mlj/PubArticleMLJ.jsp?id=1177405461307&hubtype=Scorecard>. Prior to joining the Committee for Justice, he served as the director of legal and public affairs for the Center for Individual Rights, which filed the lawsuits that led to the University of Michigan affirmative action cases at the U.S. Supreme Court.

<sup>3</sup> Sander, Richard H., *The Racial Paradox of the Corporate Law Firm*, 84 N.C.L. Rev. 1755 (2006), (hereinafter "Sander").

<sup>4</sup> The CEO, another conservative Washington, DC think tank, states that it is "devoted exclusively to the promotion of colorblind equal opportunity and racial harmony" and "uniquely positioned to counter the divisive impact of race conscious public policies." CEO focuses on three areas in particular: affirmative action (which it refers to as racial preferences), immigration and assimilation, and multicultural education. CEO states that it "supports colorblind public policies and seeks to block the expansion of racial preferences and to prevent their use in employment, education, and voting." See *Center for Equal Opportunity Home Page*. 2007. CEO 10 Sept. 2007. [http://www.ceousa.org/index.php?option=com\\_content&task=view&id=40&Itemid=52](http://www.ceousa.org/index.php?option=com_content&task=view&id=40&Itemid=52).

“I hope you will find the paper useful in setting your company’s own policies, ensuring that it complies with the civil-rights laws and avoids costly liability.”

Clegg, Roger. Anti-Law Firm Diversity Letter to Corporate General Counsels. 17 Apr. 2007. Center for Equal Opportunity, Falls Church, Virginia.

This response to the Levey White Paper was commenced under the auspices and with the resources of the law firm DLA Piper US LLP. Volunteers from around the firm undertook research to examine the legal and factual framework for law firm diversity programs in order to provide an exhaustively researched basis for analysis of the legal implications of customer influence on such programs. Additionally, others, from both in and outside the firm, have reviewed, edited, critiqued and commented on this response as it was advancing to this final form. As a result, this response is offered with a level of confidence in its findings and recommendations that go beyond the mere dictates of ideology.

Levey’s White Paper says little that should result in wholesale changes in the practices of corporations and legal employers. This is so despite the explicit threat that there are anti-affirmative action organizations out there scanning for rejected white male law students or associates to serve as plaintiffs in challenges to law firm diversity policies. Levey’s arguments combine a complete lack of understanding of the complexity involved in law firm employment decision making with the anti-affirmative action mindset of the author and his sponsors. Accordingly, any consideration of the White Paper as a warning to law firms of dire consequences from continued diversity efforts has to be tempered by an understanding of the agenda that the messenger carries along with the message. However, prudence does require that such policies be constantly monitored to assure they are postured in the most legally defensible way possible.

### **Levey’s Weak Foundations**

The arguments advanced in Levey’s White Paper fail to demonstrate a complete analysis of Title VII and related discrimination laws, their history and, most importantly, the statistics related to the demographic composition of law firms. Levey should recognize that the legislation enacting these laws was based on the history of discriminating against racial minorities and women and was designed to move the country toward a “leveling of the playing field” in this regard. There is no similar history of denial and discrimination against white men to serve as a backdrop for this discussion. In fact, the large and elite corporate law firm is and has been more dominated by white males than most other industries. Moreover, by choosing either to ignore or selectively cherry pick the relevant history of discrimination, and by assuming an unrealistically simplistic view of the highly complex processes of hiring, promotion, assignment of work, and maintenance of client relations which characterize the operations of such law firms, Levey has built his arguments on the sandy foundation of misinformation at the best and willful ignorance at the worst.

When stripped bare of their distractions and misdirections, the foundations of Levey’s White Paper arguments and conclusions are as follows:

1. **[Customer Preference Foundation]**. That **any** efforts of corporate clients to influence outside law firms to increase the representation of minorities and women attorneys in their firms or to assign minority or women attorneys to work on the corporations' projects constitute unlawful customer preference discrimination and violate Title VII and §1981
2. **[Affirmative Action – Manifest Imbalance Foundation]**. That **any** efforts by law firms to increase the representation of minority and women attorneys in their firms, whether prompted by clients or self-motivated, are per se unlawful because they consider race or gender in employment decisions, or constitute unlawful affirmative action plans because there is no “manifest imbalance” of minority attorneys in these firms.<sup>5</sup>
3. **[Counter Productivity Foundation]**. That in addition to being unlawful and unjustified by the numbers, **any** law firm affirmative action or diversity efforts are counterproductive because they bring in unqualified minority attorneys who cannot compete and are thus doomed to fail, leading to the often cited low minority retention and partnership rates.

### *The Customer Preference Foundation*

Levey cites to the legislative history on amendments to provide an affirmative defense for employers compelled to act in a racially discriminatory manner in order to satisfy the preferences of their customers as the ultimate starting point for his analysis:

These [congressional] opponents tried to amend Title VII with an exception that would permit employers to discriminate on the basis of race to satisfy customer preferences. This amendment was defeated, and it is not difficult to see today that America is better off for doing so.

White Paper at p. 1. The proposition that customer preference is not a valid basis for race discrimination is sufficiently ingrained in the jurisprudence of Title VII as to be a matter of black letter Law. Further, however, the history of the systematic oppression and exclusion of blacks based on their race as the precipitating cause of the 1964 Civil Rights Act is too well known to require extensive recounting here. This history provides the relevant context for consideration of Levey's most basic premise: that Title VII rejected the notion that there might be valid business reasons to use race in hiring and thus, corporations or law firms that are using it today are no better than the segregationists of yesterday.

As noted above, there is no dispute that the defeat of those amendments and the subsequent development of the case law and regulations establishes that customer preference does not provide a lawful basis for an employer to exclude employees of a particular race or gender.<sup>6</sup>

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<sup>5</sup> In fact, Levey argues that Blacks in particular are overrepresented in large corporate law firms. See White Paper at pages 8-9. While Levey's real focus is on law firm diversity initiatives benefiting Blacks, almost as an afterthought he also argues here that any efforts to benefit women, whether prompted by clients or self-motivated, are equally unlawful because gender is not a valid Bona Fide Occupational Qualification (BFOQ) for the job of attorney. Id at pages 12-14.

<sup>6</sup> See e.g., "Compliance Manual Sec. 15, "Race and Color Discrimination, Subsection 15-VA.1, Evaluating Employment Decisions, Racial Disparate Treatment, Recognizing Racial Motive." [EEOC Home Page](#). 19 Apr 2006.

Clearly, in the historical context of the denials of opportunity and access to minorities and women, the term “customer preference” became a short hand notation for exclusionary practices based on the unlawful consideration of race, sex, etc. It is this exclusionary behavior that the civil rights laws prohibit. However, Levey never directly states or offers factual support for the concept that corporations or law firms are acting to exclude individuals or groups from their ranks on the basis of race or sex.<sup>7</sup> He does state that: “Over the last few years, large corporations have placed considerable pressure on the law firms they hire to provide them with legal teams of a particular racial composition.” White Paper at 2. That phrase “particular racial composition” implies the imposition of quotas or other fixed numerical standards, but the point is never substantiated. At no point does Levey establish that any corporation has imposed a set percentage, set aside or other inflexible standard upon any law firm.

Moreover, despite Levey’s branding of the current efforts by corporate clients as customer preference, it is obvious that they are neither the moral or legal equivalent of unlawful, exclusionary, customer preference demands seen in the past. Basically, this is because these corporations and law firms have no intention of excluding anyone from participation in the provision of legal services. To the contrary, the entire focus of these efforts is to facilitate the inclusion of attorneys from all EEO demographics. The prime tenet of diversity as a workplace concept is that it excludes no one and includes everyone.<sup>8</sup> As an avowed opponent of affirmative action, it is not surprising that Levey would view this situation in terms of the “zero sum game” model in which any gains for minorities or women would be interpreted as losses for white men.

The central problem with Levey’s customer preference foundation is his failure to examine the actual practices of corporations advancing diversity initiatives. Upon this examination, he would have discovered that the facts do not support his conclusion of reverse discrimination.

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US EEOC. 12 Sep 2007 <http://www.eeoc.gov/policy/docs/race-color.html#VA1>; *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 743-44 (7th Cir. 1999) (African American Plaintiff who alleged discharge based on race survived summary judgment because a jury could infer from unlawful segregation and job limitations – i.e., Black salespersons required to serve predominantly African-American accounts, Whites required to serve Whites – that the employer’s stated nondiscriminatory reason for firing Plaintiff was pretext); *Rucker v. Higher Educational Aids Bd.*, 669 F.2d 1179 (7th Cir. 1982) (Black employee had viable retaliation claim for opposing employer’s rejection of White person for promotion to youth counselor on grounds that the predominantly Black community preferred a Black counselor. “[I]t is clearly forbidden by Title VII to refuse on racial grounds to hire someone because your customers or clientele do not like his race.”).

<sup>7</sup> It does occur to us that the unspoken point of Levey’s customer preference argument may be to establish that Title VII law has to have universal application such that white men adversely affected by hiring practices have the chance to avail themselves of the statute’s protections. As detailed in the following discussion of affirmative action validity, the authors do not dispute the availability of such relief to all persons.

<sup>8</sup> See, e.g., Lockwood, Nancy. "Workplace Diversity: Leveraging the Power of Difference for Competitive Advantage." *HR Magazine* 01 Jun 2005 10 Sep 2007 (Workplace diversity has taken on a new face. Today, workplace diversity is no longer just about anti-discrimination compliance. Workplace diversity now focuses on inclusion and the impact on the bottom line. Leveraging workplace diversity is increasingly seen as a vital strategic resource for competitive advantage. More companies are linking workplace diversity to their strategic goals and objectives--and holding management accountable for results. Thus, HR plays a key role in diversity management and leadership to create and empower an organizational culture that fosters a respectful, inclusive, knowledge-based environment where each employee has the opportunity to learn, grow and meaningfully contribute to the organization's success.) [http://findarticles.com/p/articles/mi\\_m3495/is\\_6\\_50/ai\\_n14702678](http://findarticles.com/p/articles/mi_m3495/is_6_50/ai_n14702678).

Bar associations at the national, state and local levels have sponsored initiatives promoting diversity in the legal profession going back many years.<sup>9</sup> These typically have included pledges by the signatory legal departments and law firms to focus efforts on increasing diversity within their ranks and working to assure that all members of the bar can participate equally and fully in the legal profession. Recently, two national level initiatives have captured the attention of the media. The first was the 1999 "Diversity in the Workplace: A Statement of Principle" authored by the General Counsel of BellSouth Corporation Charles R. Morgan.<sup>10</sup> About 500 major corporations signed on the Statement of Principle evidencing their commitment to diversity in the legal profession. In spring 2004, Sara Lee General Counsel Roderick Palmore, seeking to further the goals of the Statement of Principle, created a second initiative, the Call to Action.<sup>11</sup> Ninety to 100 corporations have signed on to the Call to Action to date, pledging to:

- Take action consistent with the diversity statement
- Make an abiding commitment to diversity in their own departments
- Actively look for opportunities with law firms that distinguish themselves in diversity issues
- End or limit relationships with firms whose track records reflect a lack of meaningful interest in diversity.

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<sup>9</sup> See e.g., American Bar Association Home Page, Commission on Racial and Ethnic Diversity in the Profession, <http://www.abanet.org/minorities/home.html>, Association of the Bar of the City of New York Home Page, Statement of Diversity Principles, <http://www.nycbar.org/Diversity/index.htm>, and The Chicago Bar Association Home Page, Diversity Initiative, <http://www.chicagobar.org/diversity/initiative.asp>. [10 Sept. 2007].

<sup>10</sup> Diversity in the Workplace: A Statement of Principle, *American Corporate Counsel Association Home Page*, 2 June 2003 <http://www.acc.com/public/accapolicy/diversitystmt.html> [12 Sept. 2007].

(As the Chief Legal Officers of the companies listed below, we wish to express to the law firms which represent us our strong commitment to the goal of diversity in the workplace. Our companies conduct business throughout the United States and around the world, and we value highly the perspectives and varied experiences which are found only in a diverse workplace. Our companies recognize that diversity makes for a broader, richer environment which produces more creative thinking and solutions. Thus, we believe that promoting diversity is essential to the success of our respective businesses. It is also the right thing to do.

We expect the law firms which represent our companies to work actively to promote diversity within their workplace. In making our respective decisions concerning selection of outside counsel, we will give significant weight to a firm's commitment and progress in this area.)

<sup>11</sup> A Call to Action: Diversity in the Legal Profession, viewed online at <http://www.clocalltoaction.com> [12 Sept. 2007]. The commitment statement reads as follows:

(As Chief Legal Officers, we hereby reaffirm our commitment to diversity in the legal profession. Our action is based on the need to enhance opportunity in the legal profession and our recognition that the legal and business interests of our clients require legal representation that reflects the diversity of our employees, customers and the communities where we do business. In furtherance of this renewed commitment, this is intended to be a *Call to Action* for the profession generally, in particular for our law departments, and for the law firms with which our companies do business.

In an effort to realize a truly diverse profession and to promote diversity in law firms, we commit to taking action consistent with the referenced *Call to Action*. To that end, we pledge that we will make decisions regarding which law firms represent our companies based in significant part on the diversity performance of the firms. We intend to look for opportunities for firms we regularly use which positively distinguish themselves in this area. We further intend to end or limit our relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse.)

Pursuant to and in addition to these initiatives, many corporate law departments have developed programs in which they request and receive regular reports from outside counsel and, to varying degrees, track, evaluate and compare the diversity status and progress of the firms. The design, scope and operation of these programs vary greatly from corporation to corporation, although there are central tenets which are common to most of them. An examination of the details of a few of the more publicized programs will serve to flesh out the field and provide a basis for the type of analysis which this situation requires.<sup>12</sup>

### *E. I. du Pont de Nemours and Company*

E. I. du Pont de Nemours and Company (DuPont) has pioneered a systematic approach known as the DuPont Legal Model (DLM).<sup>13</sup> Initiated in 1992, the DLM predates both the Statement of Principle and the Call to Action. It is an integrated approach for managing the delivery of legal services to DuPont by both in-house and outside counsel. DuPont selected a number of strategic partners to form a network of Primary Law Firms (PLFs) based on consideration of whether each firm's practice matched DuPont's needs and standards and the firms' commitment to:

- Competence, excellence and getting results,
- Mutual financial success,
- Technology and work process re-engineering,
- Taking risks and advancing creativity,
- Being innovative and progressive, and
- The recruitment, retention and promotion of minority and female lawyers and their integration into the teams representing DuPont.<sup>14</sup>

DuPont's General Counsel Tom Sager described the role of the PLFs and the importance of diversity as follows:

We refer to them as the "Network" and their collective role is to collaborate with DuPont Legal to achieve three primary goals: (1) high-quality legal representation that produces maximum value; (2) the most efficient use of resources; and (3) cost-effective results. . . . DuPont is a global company operating in a diverse world. [O]ur customers, suppliers, regulators and employees come from all races, ethnicities and socioeconomic segments of society. So do the judges and juries that adjudicate our cases. It therefore can't be any different with respect to our outside counsel. A demonstrated commitment to diversity was one of the criteria used to select PLFs. . . . We believe that diverse teams produce better results and experience has confirmed that belief. I have seen time and time again how

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<sup>12</sup> The following examples of corporate diversity initiatives and their interactions with outside law firms are based on published and public source materials. The inclusion of the noted corporations does not signify their authorization or support of this document.

<sup>13</sup> See <http://www.dupontlegalmodel.com>, 12 Sept. 2007.

<sup>14</sup> Minority Corporate Counsel Association, Pathways to Diversity Series, A Study of Law Department Best Practices, page 38 (2006), [hereinafter "MCCA Best Practices"].

diversity and cultural sensitivity enhance the creativity and effectiveness of our legal teams.<sup>15</sup>

Annually, DuPont asks each of its PLFs to provide specific data concerning its diversity performance through a computerized "Benchmark Survey" that solicits information about the recruitment and retention of women and minorities and the diversity of lawyers working on DuPont matters. While most of the American firms representing DuPont have minorities or women as the relationship partners, the company has never made that a requirement of PLF status. DuPont has "parted ways" with at least one firm that did not adequately support its diversity efforts.<sup>16</sup>

### *Sara Lee Corporation*

Under the leadership of its General Counsel Roderick A. Palmore, Sara Lee Corporation is also a role model in this area. The "Sara Lee Preferred Partner" program is described as follows:

Sara Lee annually analyzes several years' worth of data from its primary law firms, including information on the number of minorities and women in each firm, the numbers of such by level and the firms' attrition rates. In addition, external recruiting and promoting of female and minority lawyers is assessed as is the composition of each firms' most senior leadership. Each firm is classified into one of three categories based on the analysis, with the Preferred Partners representing the uppermost category. Firms in the middle category are deemed by the company to have provided excellent legal services but to have had inconsistent diversity performance. While the company commends these firms and recognizes their efforts, it also challenges them to show improvement. The third category consists of those firms which, despite having provided legal services of a very high quality and espousing a commitment to diversity, have failed to demonstrate what Sara Lee deems to be a sufficient degree of accomplishment in diversity. Firms which fall into this category for more than one year put their relationship with Sara Lee at risk.<sup>17</sup>

General Counsel Palmore expects that all firms representing the corporation will be excellent in all categories of service and performance, including talent and diversity. "[W]e strongly believe that performance should be rewarded. Consistent with that belief, firms that distinguish themselves in all service and performance categories will have enhanced opportunities to represent Sara Lee in matters in which they have expertise and experience."

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<sup>15</sup> Interview by Editor. "Minorities *Can And Do* Succeed in Large Law Firms - DuPont's Experience vs. Sander's Article." *The Metropolitan Corporate Counsel*, Vol. 15, No. 2, Feb 2007: at pages, 61-62, and 67-68.

<sup>16</sup> Tucker, Kathryn Hayes. "BigLaw Firm Credited with Great Improvements in Diversity by MegaClient." *New York Lawyer* 20 Aug 2007 10 Sep 2007 <http://www.nylawyer.com/display.php/file=/news/07/08/082007i>.

<sup>17</sup> "Sara Lee Corporation Names Two Law Firms as Preferred." *News*. 27 Mar 2007. Sara Lee Corporation. 16 Sep 2007 <http://www.saralee.com/~media/6D8F4B4FB4B7486F824C1F012D833940.ashx>. See also profile of this program in MCCA Best Practices, supra note 21, at page 29.

### ***Wal-Mart Stores, Inc.***

Wal-Mart seeks to ensure that the lawyers who represent the company are as diverse as America. Under the leadership of General Counsel Thomas A. Mars, it has overhauled both its in-house legal department and its top 100 outside law firms. The 2003 questionnaire sent to such firms contained questions on “basic metric stuff” based on the Call to Action: the total number of attorneys at the firm, how many minorities and women, at the level of associates and partners. It sought historical data, such as attrition rates among various minority groups, and their diversity efforts, leadership philosophies, and culture. Firms were asked to submit three to five names of attorneys—including at least one minority and one female—who could serve as relationship partner for the firm.

After its review, Wal-Mart chose 40 new relationship partners who were minority or female attorneys.<sup>18</sup> Mars said he realized he had to do something when he saw that 82 of the top 100 relationship partners handling the company's business were white men. The goal is to increase the number of women and minorities meaningfully engaged in the work and directly responsible for the Wal-Mart relationship at those law firms. He also ended the company's relationship with at least two law firms for failure to meet diversity requirements, although “Both of those firms were performing well, exceeding expectations, in the category of performance and in the category of cost.”

### ***Shell Oil Company***

Shell Oil General Counsel Catherine Lamboley says: "When you use people with diverse backgrounds and different ways of looking at things, you get to a better solution." While it is common practice to have diverse legal teams appear in court so that the lawyers look and think like diverse juror pools, Lamboley believes it is also vital to staff corporate work diversely. "It is critical that you have new thinking on deals." In 2003, Shell interviewed a number of firms on the basis of quality, cost-effectiveness, professionalism, and a commitment to diversity, including reports on the number of women and minorities at their firms. Shell chose 27 firms for its strategic partner list, all or which ranked at least in the top half of the diversity scorecard published by *The Minority Law Journal*.<sup>19</sup>

Shell Legal stresses with its strategic law firm partners the belief that creating an inclusive environment is fundamental to the ability to provide the best counsel and representation for the company. Shell encourages the law firms to assign women and minority attorneys to matters given to them. Through this initiative, Shell:

- Defines expectations for delivery of diverse teams,
- Tracks the demographics of strategic partnership firms,
- Reports back to the firms and compares results, and

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<sup>18</sup> See Levs , Melanie Lasoff . "Wal-Mart's Watershed Moment." *Diversity & The Bar* May/June 2006 12 Sep 2007 <http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=1046>,

<sup>19</sup> Nathan, Koppel. "Courting Shell." *The American Lawyer* 24 June 2004, 12 Sep 2007.

- Discusses the consequences, specifically the expectation of commitment and improvement – not overnight success and not lip service.

Each year, Shell adds up the totals for each firm and compares their totals to the previous year. Those figures are reported back to the law firms along with a blind comparison of how their totals compare to other firms in the program. Although no specific goals are set for each firm, it is made clear that this information is being tracked and that their commitment to continuous improvement in diversity is important to Shell.<sup>20</sup>

None of these programs impose specific quota demands on law firms for the delivery of teams composed of designated numbers of women and minority attorneys. To the contrary, the primary objective in each instance, regardless of the specific mechanism adopted, is to assure that such teams are inclusive. The general counsels who have adopted these systems all espouse the concept that the services rendered to their companies are improved by the diversity of perspectives brought to their matters by attorneys from diverse backgrounds. Most also acknowledge the belief, which is carried through all other aspects of their business, that as a group, employees who are diverse and inclusively reflective of the diversity of the customers whom they serve will provide an improved quality of service. Most importantly for this analysis, what is not revealed in all of this is (1) any intention to exclude white males from the pool of attorneys providing services and (2) any willingness or expectation to accept an inferior quality representation for their companies.

At the bottom line, each of these general counsels have demonstrated the ability to attract and retain highly qualified minority and women attorneys for their in house legal departments. Thus, they are no longer willing to accept the old excuse that law firms cannot find qualified applicants. Further, to the extent that the focus of any law firm's failure of diversity is tied to the low retention rates for middle and senior level women and minority associates, the general counsels are offering mechanisms to assist the firms in providing the type of meaningful work, client contacts and business generation opportunities that in the absence of discrimination will lead to partnerships.

A showing of unlawful customer preference would require some demonstration that clients are demanding discriminatory actions or that firms are interpreting client requests as requiring discriminatory actions. Neither result is made out by Levey in his White Paper. Nor does any information otherwise available demonstrate that these programs are discriminatory either by design or in application. In short, customer preference is not a violation of Title VII if what the customers prefer is equal opportunity and not discrimination. Thus, Levey's first foundation must fall.

### ***The Affirmative Action – Manifest Imbalance Foundation***

Levey's White Paper argument merely assumes the most crucial element in any employment discrimination analysis: namely, that the selection decision at question was based on race or

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<sup>20</sup> Lamboley, Catherine . "Diversity and Inclusiveness." 25 Sep 2003. Shell Oil Co. 16 Sep 2007  
[http://www.shell.com/home/content/us-en/news\\_and\\_library/speeches/2003/cathy\\_lamboleys\\_remarks\\_1612.html](http://www.shell.com/home/content/us-en/news_and_library/speeches/2003/cathy_lamboleys_remarks_1612.html).

gender. This assumption is based on the equally false larger assumption that a race or gender basis exists any time a law firm attempts to increase its numbers of minority or women attorneys.

It is well-settled that Title VII and related laws against discrimination extend not only to underrepresented groups but also to members of historically favored groups such as whites and men.<sup>21</sup> A plaintiff may establish a Title VII claim by either presenting direct evidence of discrimination or, absent that, relying on the burden-shifting test set forth in McDonnell Douglas v. Green, 411 U.S. 792 (1973).<sup>22</sup> To establish a prima facie case of discrimination under McDonnell Douglas, a plaintiff must set forth evidence sufficient to show that (1) he is a member of a protected class; (2) he was qualified for the position held; (3) he was subject to an adverse employment action; and (4) the person selected to replace or instead of him was not within the same protected class.<sup>23</sup>

When evaluating reverse discrimination claims, courts have altered the first McDonnell Douglas prong in one of two ways: they have either ignored it altogether or required that such a plaintiff must show either (a) that the employer has a reason or inclination to discriminate against whites or men or (b) that there is something procedurally irregular or otherwise strange surrounding the adverse employment action against the employee.<sup>24</sup> Many factors have been considered in determining the sufficiency of such a claim, including (a) allegations of the plaintiff's superior qualifications,<sup>25</sup> (b) irregular acts of favoritism toward minority employees,<sup>26</sup> and (c) inconsistency in the employer's selection procedures.<sup>27</sup>

Once a plaintiff has established his prima facie case, the burden shifts back to the defendant employer to produce a non-discriminatory reason for the adverse employment action. This is generally satisfied by setting forth any justification which is not itself discriminatory, such as poor work performance by plaintiff, superior qualifications by the selected applicant, or that the decision was made pursuant to a valid affirmative action plan (AAP).<sup>28</sup> The plaintiff can counter

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<sup>21</sup> McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). See also Mastro v. Pepco, 398 F. Supp. 2d 67 (D.D.C. 2005).

<sup>22</sup> See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141-42 (2000).

<sup>23</sup> See, e.g., Frank v. Xerox Corp., 347 F.3d 130, 137 (5th Cir. 2003).

<sup>24</sup> See Leadbetter v. Gilley, 385 F.2d 683 (6th Cir. 2004); Nowak v. Int'l Truck and Fire Engine Corp., 406 F. Supp. 2d 954 (N.D. Ill. 2005). Cf. Iadimarco v. Runyon, 190 F.3d 151 (3d Cir. 1999) (holding that a reverse discrimination-plaintiff can meet his burden of establishing a prima facie case by presenting sufficient evidence to allow a reasonable finder of fact to conclude that given the totality of the circumstances, the employer treated the plaintiff less favorably than others due to his race, color, religion, sex or national origin).

<sup>25</sup> Harding v. Gray, 9 F.3d 150 (D.C. Cir. 1993).

<sup>26</sup> Machakos v. Meese, 647 F. Supp. 1253 (D.D.C. 1986), judg. aff'd, 859 F.2d 1487 (D.C. Cir. 1988).

<sup>27</sup> Rivette v. U.S. Postal Service, 625 F. Supp. 768 (E.D. Mich. 1986).

<sup>28</sup> See Plott v. General Motors Corp., Packard Elec. Div., 71 F.3d 1190 (6th Cir. 1995), (A white male denied admission to an apprenticeship program that admitted a number of women applicants sued alleging gender discrimination. Summary judgment dismissal was upheld where the employer acted in compliance with a federally approved affirmative action plan entered into with EEOC in response to prior discrimination action.). See also Loomis v. General Motors Corp., 70 Fair Empl Prac Cas (BNA) 691, 1994 WL 900454 (E.D. Mich. 1994) and 29 C.F.R. § 1608 – Affirmative Action Appropriate Under Title VII, § 1608.1 - Statement of purpose:

(a) *Need for Guidelines.* Since the passage of title VII in 1964, many employers, labor organizations, and other persons subject to title VII have changed their employment practices and systems to improve employment opportunities for minorities and women, and this must continue. These changes have been undertaken either on the initiative of the employer, labor organization, or

by showing that the stated reason was merely a pretext for illegal discrimination. Where the adverse action is justified by an AAP, the plaintiff can also proceed by showing either that the plan is invalid or that the employer has not acted in accordance with the provisions of its own plan. Failing to make one of such showings will likely subject a plaintiff's claim to summary dismissal.

The leading case addressing voluntary affirmative action efforts in private employment is Steelworkers v. Weber.<sup>29</sup> There a white employee challenged the legality of an AAP that reserved for black employees 50% of the openings in the craft training program until the percentage of black craft workers was commensurate with the percentage of blacks in the local labor force. In upholding the training program, the Supreme Court set forth the seminal three-part test for AAP validity. A plan is valid provided it: (1) is justified by a manifest imbalance in traditionally segregated job categories; (2) does not unnecessarily trammel the interests of the groups not benefited by the program, nor create an absolute bar to the advancement of non-minority employees; and (3) is temporary in duration, being timed to eliminate a manifest racial imbalance rather than to maintain racial balance.

Weber was reaffirmed by the Court in Johnson v. Santa Clara County,<sup>30</sup> in which a male employee passed over for promotion in favor of a woman alleged his employer impermissibly took gender into account in violation of Title VII. The employer's actions were taken pursuant to a voluntary AAP. The Court upheld the plan, finding that it represented a moderate, flexible, case-by-case approach, effecting a gradual improvement in the representation of minorities and

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other person subject to title VII, or as a result of conciliation efforts under title VII, action under Executive Order 11246, as amended, or under other Federal, State, or local laws, or litigation. Many decisions taken pursuant to affirmative action plans or programs have been race, sex, or national origin conscious in order to achieve the Congressional purpose of providing equal employment opportunity. Occasionally, these actions have been challenged as inconsistent with title VII, because they took into account race, sex, or national origin. This is the so-called "reverse discrimination" claim. In such a situation, both the affirmative action undertaken to improve the conditions of minorities and women, and the objection to that action, are based upon the principles of title VII. Any uncertainty as to the meaning and application of title VII in such situations threatens the accomplishment of the clear Congressional intent to encourage voluntary affirmative action. The Commission believes that by the enactment of title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement. Such a result would immobilize or reduce the efforts of many who would otherwise take action to improve the opportunities of minorities and women without litigation, thus frustrating the Congressional intent to encourage voluntary action and increasing the prospect of title VII litigation. The Commission believes that it is now necessary to clarify and harmonize the principles of title VII in order to achieve these Congressional objectives and protect those employers, labor organizations, and other persons who comply with the principles of title VII.

(b) *Purposes of title VII.* Congress enacted title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life. The Legislative Histories of title VII, the Equal Pay Act, and the Equal Employment Opportunity Act of 1972 contain extensive analyses of the higher unemployment rate, the lesser occupational status, and the consequent lower income levels of minorities and women.

<sup>29</sup> United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193 (1979).

<sup>30</sup> Johnson v. Transportation Agency, Santa Clara County, California, 480 U.S. 616 (1986).

women in the work force and was fully consistent with Title VII. It also took the opportunity to elaborate on the issue of “manifest imbalance.” The Court explained that an employer need not admit to past acts of discrimination before adopting a voluntary AAP.<sup>31</sup> Rather, as it would apply to a position requiring specific training or skills, the employer can determine whether a manifest imbalance exists by comparing the percentage of minorities or women in the employer's work force with the percentage possessing the relevant skills and qualifications in the applicable labor force and relying on a resultant showing of underutilization as the key to the required manifest imbalance.<sup>32</sup> In sum, Weber and Johnson make clear that voluntary affirmative action efforts are legally permissible under Title VII provided that employers comply with the legal standards set forth therein, and the Supreme Court has not revisited this issue since 1986.

As a threshold matter, research uncovered no case stating that the existence of a diversity initiative or AAP was per se evidence of discrimination. Moreover, a few cases have established, in one manner or another, the mere fact that employers maintained diversity initiatives is not sufficient to establish the existence of discrimination.<sup>33</sup>

Defense of the type of challenge to diversity programs that Levey predicts in the White Paper would not commence with the assumption that the employment decision in question is discriminatory. Rather, the approach would be that the programs promote inclusion and do not serve to exclude white males. In fact, given that the likely target of such an action would be the “large corporate law firm,” the available data indicates that white males hold a significant majority of the attorney positions at all levels of every such firm. For example, even the data contained in the Sander law review article, on which Levey relies so heavily, demonstrates that racial minorities (Blacks in particular) and women are underrepresented in such firms.<sup>34</sup>

Moreover, simply asserting that a white law school applicant was rejected with higher grades than an accepted minority applicant will not be nearly enough to prove discriminatory law firm hiring practices. While law firms certainly consider grades, the available evidence shows a broad range of other factors that come into play. Among these are law review status, extracurricular activities, interview performance, initiative, signs of being a team player,

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<sup>31</sup> It is noteworthy that Levey misstates this standard claiming at page 10 of the White Paper that an admission of prior discrimination is required to validate the type of diversity efforts he attacks and speculates that few law firms will be willing to admit to such past violations as the price of defending their plans.

<sup>32</sup> Johnson at 631-33, nn. 10-11.

<sup>33</sup> See, e.g., Balamut v. Abraham, 2004 WL 3021395, \*3 (N.D. Ill. Dec. 29, 2004), aff'd as Mlyneczek v. Bodman, 442 F.3d 1050 (7th Cir. 2006) (plaintiff's proposal that the employer's affirmative action and diversity plans supported his claims of discrimination was rejected by the court.), Donaldson v. Exelon Corp., 2006 WL 2668573 (E.D. Pa. 2006) (the court held that the existence of a corporate diversity initiative itself is not sufficient to establish that a proposed class of white male employees was discriminated against in any manner.), and Peterson v. Hewlett-Packard Co., 358 F.3d 599, 2004 WL 26580 (9th Cir. 2004) (“Fundamentalist Christian” plaintiff argued that a workplace diversity initiative that promoted tolerance of differences, including homosexuals, created hostile environment discrimination against him and led to his ultimate termination based upon his religiously-held beliefs that homosexuality is immoral. The court granted summary judgment for the defendant when the plaintiff failed to produce any evidence beyond the diversity plan itself in support of the alleged disparate treatment) Cf. Frank v. Xerox Corp., 347 F.3d 130 (5th Cir. 2003), reh. den., 2003 U.S. App. LEXIS 26733 (5th Cir. Tex. Dec. 23, 2003) (The Fifth Circuit reversed summary judgment finding validity in allegation that actions pursuant to a diversity plan could constitute direct evidence of discrimination if the plan was not valid. Since the summary judgment cut off any chance to consider plan validity, the court remanded the matter for further proceedings)

<sup>34</sup> See Sander at 1757-59, 1780-81 (law firm demographic data) & 1772 (law student population data).

motivation and ability to excel, creativity, prestige or rank of law school attended, language skills, Moot Court, life/work experiences, obstacles overcome, personal/social skills, practicality, maturity, judgment, enthusiasm for private law practice, knowledge of/interest in the hiring firm, and that ethereal quality known as "fit."<sup>35</sup>

Where the defendant offers some plausible, non-discriminatory basis for its selection decision, there is little or no chance that the plaintiff would prevail in establishing the race basis of the decision. Accordingly, pursuant to the McDonnell Douglas proof model, a plaintiff would have to offer some additional circumstantial evidence of racial discrimination to survive summary judgment.

Likewise, so-called pressure from the diversity initiatives and requirements of its corporate clients to hire more minority lawyers should not be equated with unlawful discrimination. For reasons discussed under the Customer Preference Foundation section above, this argument too must fail. The focus of the Statement of Principle, the Call to Action and all of the corporate plans reviewed is on inclusion and not exclusion. Nothing on the face or in the clear meaning of any of them directs any firm not to hire or to limit the opportunities of anyone. To the contrary, the language used is totally inclusive, and the idea conveyed is assuring that men and women attorneys of all colors, including white, have access to the type of opportunities that promote success in law firm careers. Even the companies that have worked to assure that firm relationship partners include women and minorities have not mandated the exclusion of white men from that role. Further, the programs do not apply quotas or other numerical standards to the results of firm diversity efforts. Rather, the firms are rewarded for their diversity efforts as a whole and not just on a numerical head count.

Indeed, even if a rejected applicant is able to tie the hiring decision to the diversity initiative either by his own evidence or by the defendant law firm's admission, the relevant consideration becomes a determination of whether the diversity plan, analyzed as an AAP, is valid under the standards articulated in Weber and Johnson. The focus is on whether the diversity plan responds to a manifest racial imbalance in the job of large corporate law firm attorney. While the data showing that women and minorities have recently recorded noteworthy increases in their numbers among both American law school graduates and law firm lawyers<sup>36</sup> demonstrates

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<sup>35</sup> Shuchman, Lisa. "Mind the Gap -- Large law firms fire back at Richard Sander's controversial study of their minority hiring practices." ("Mind the Gap") The Minority Law Journal 01 May 2007, 12 Sep 2007 <http://www.law.com/jsp/PubArticle.jsp?id=1177405461329>. See also, Law Firm Listings, Hiring Criteria on NALP forms at <http://www.nalpdirectory.com> and VAULT 2008 Prestige Top 100 Law Firm Rankings at [http://vault.com/nr/lawrankings.jsp?law2008=1&ch\\_id=242](http://vault.com/nr/lawrankings.jsp?law2008=1&ch_id=242).

<sup>36</sup> See, e.g., U.S. Equal Employment Opportunity Commission, Diversity in Law Firms (2003), 10 Sept 2007, viewed on line at <http://www.eeoc.gov/stats/reports/diversitylaw/index.html>, reporting that between 1982 and 2002 the following percentage increases in women and minorities receiving law degrees were recorded:

- Women from 33% to 48.3%;
- African Americans from 4.2% to 7.2%;
- Latinos from 2.3% to 5.7%; and
- Asians from 1.3% to 6.5%.

Likewise, the percentage of women and minorities obtaining positions in larger law firms demonstrated a similar increase between 1975 and 2002. For example:

- Women from 14.4% to 40.3%;
- African Americans from 2.3% to 4.4%;

positive trends in participation, it also reveals a lagging discrepancy between the number of degrees conferred and the number of positions obtained. In general, employment at large law firms for women and minorities did not keep pace with the growth in law degrees obtained. Again, the data on this is both abundant and consistent.<sup>37</sup>

These discrepancies are only exacerbated when law firm partnerships are considered. In 1993, NALP found minorities and women accounted for 2.55% and 12.27% of partners respectively. Over the next twelve years, there was only marginal improvement with minorities at 4.63% and women at 17.29%. These partnership figures failed to keep pace with the large simultaneous increase in women and minority law graduates: women accounted for 40-50% of law degrees received and minorities accounted for 10-20%.<sup>38</sup> Other studies have examined these issues from different angles and shown similar results. Thus, minorities represented 18.8% of studied pre-partner pools and 7.4% of the newly made partners. Their white counterparts, on the other hand, represented 81.2% of the pre-partner pools and 92.7% of the new partners.<sup>39</sup> In summary, greater than one-third of the white candidates in the pre-partner pools were made partners in comparison to approximately one-tenth of similarly situated minorities.<sup>40</sup>

Despite this tide of contrary evidence, Levey attempts to create the impression that there is no racial imbalance in law firms by repeatedly referencing data from the Sander article.<sup>41</sup> He never states outright that law firm populations are racially balanced. Instead, he misdirects our focus to Sander's statistics on the numbers of Blacks hired as first year associates by large law firms.

“[T]here is no existing manifest imbalance -- no less evidence of segregation -- between the racial composition of the lawyers at large corporate law firms and the racial composition of the qualified labor market. In fact, [Sander's]

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- Latinos from 0.7% to 2.9%; and
  - Asians from 0.5% to 5.3%.

<sup>37</sup> For example, a benchmarking survey conducted by the Association of the Bar of the City of New York reported African Americans account for 7.4% of law school graduates and just 5% of associates, while Latinos account for 6.9% of law school graduates and just 4.7% of associates. New York City Bar Association, *2006 Diversity Signatory Law Firm Report* (2006) at 21, <http://www.abcny.org/Diversity/FirmBenchmarking06.pdf> (last visited August 29, 2007) [hereinafter *Benchmarking Report*]. Similarly, according to an analysis conducted by the National Association of Legal Professionals (NALP), minorities and women who are employed in large law firms are underrepresented by about five percentage points as compared to the population of recent law school graduates. National Association of Legal Professionals, *Women and Attorneys of Color*, available at <http://nalp.org/press/details.php?57> (last visited August 29, 2007).

<sup>38</sup> National Association of Legal Professionals, *Women and Attorneys of Color*, available at <http://nalp.org/content/index.php?pid=253> (last visited August 29, 2007).

<sup>39</sup> Benchmarking Report, *supra* note 45 at 13 and 22. The disaggregated data shows that of the 18.8% minority total, each group with the following gaps between partnership consideration and promotion: Asian Americans as 11.8% of the pre-partner pool and 3.7% of the new partners; African Americans as 4.2% of the pre-partner pool and 1.2% of the new partners; and Latinos as 2.9% of the pre-partner pool and 1.6% of the new partners.

<sup>40</sup> Benchmarking Report, *supra* note 45, at 23. Overall, there continues to be a gross under-representation of women and minorities in law firms. This continuing fact was most recently reported in the 2007 *NALP Directory of Legal Employers*. Almost 39% of law firm offices surveyed nationwide reported no partners of color and 66.6% had no minority women partners. In addition, about 21% of the law firms reported no associates of color and about 31% of offices reported no minority women associates. National Association of Legal Professionals, *Women and Minorities in Private Practice*, available at <http://nalp.org/content/index.php?pid=484> (last visited August 29, 2007).

<sup>41</sup> See White Paper at 8-9, 12 & nn.53, 62 & 75.

evidence indicates that large corporate law firms hire black attorneys in numbers that exceed their proportion among law students.”<sup>42</sup>

While Sander’s statistics may be interpreted as showing that Blacks in law firm hiring classes exceed their representation in law school student bodies, this difference (which is the sole basis for Levey’s claim of “overrepresentation”) is very small: Blacks make up 8.1% of new associates at large law firms, as compared to 7.8% of law school matriculates.<sup>43</sup> Moreover, even this slight difference disappears once minority statistics are combined. Sander states: “Nonwhites as a group are as represented among first-year associate classes of large law firms as they are among law students in the United States.” He also notes that, while Blacks and Asians are overrepresented amongst law firm hires, Hispanics are underrepresented.<sup>44</sup> Most importantly, Sander’s statistics confirm that, despite the recent trend of large law firms hiring minorities in greater numbers, they are still underrepresented overall in large law firm populations. While only 78.5% of law students are white, between 82.9% and 84.9% of large law firm associates, and 95.6% of large law firm partners, are white.<sup>45</sup>

Thus, by any reasonable consideration of the available data, it appears Levey’s claim that no racial disparity or manifest imbalance remains for law firms to address through the voluntary efforts of their diversity programs is factually unsupported. The net result, of course, is that this second foundation of his White Paper argument also crumbles.

### ***The Counter Productivity Foundation***

Finally, Levey closes out the White Paper by advising that these law firm diversity efforts are not only unlawful, they also are completely counterproductive, doing grievous harm to the legal careers of the very minority associates they claim to help. This Counter Productivity proposition is the central conclusion and most controversial portion of Sander’s article.<sup>46</sup> Although it plays no real role in Levey’s legal analysis, he adopts Sander’s thesis as one last anti-affirmative action-based swipe at diversity programs. In essence, Levey is saying, “Not only will Roger Clegg and I come and sue you for these programs, but you are also risking this potential disruption and liability when your efforts don’t do any good.”

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<sup>42</sup> Id at 8-9

<sup>43</sup> Sander actually uses summer associates as a proxy for new hires since he could not find a racial breakdown of new hires at large law firms. See Sander Article at 1780-81 & T. 7.

<sup>44</sup> Id at 1780.

<sup>45</sup> Id. at 1772 & T. 3, and at 1782 & T. 7.

<sup>46</sup> Sander’s counter productivity argument has three components:

- Large law firms employ racial preferences and, as a result, hire minority associates with lower average law school GPAs than their white counterparts.
- Either because they are less capable, or because their firms perceive them as less capable (or both), large law firms neglect minority associates. Minority associates receive fewer opportunities to do meaningful work, less mentorship assistance, and fewer opportunities to interact with partners.
- As a result of this neglect, minority associates are significantly more likely than whites to leave large law firms, and few remain at firms long enough to make partner.

To the extent that Levey's White Paper seeks to dissuade law firms from continuing diversity efforts by adopting Sander's thesis as the third foundation of his anti-diversity house, a limited recounting seems appropriate here. In their response published simultaneously with the Sander article, Professors James Coleman and Mitu Gulati counter what Sander calls the "benign neglect" of minority associates that results in their high attrition rates at large law firms as actually being dual-track discrimination.<sup>47</sup> Sander argues that this treatment of minority associates could be based on merit, but even he acknowledges that negative racial stereotypes could also explain the noted behaviors. Thus, either the mistaken belief that minority associates hired under a "racial preference-driven system" are less qualified than their white counterparts or traditional bigotry might be partly to blame for minority neglect. Coleman and Gulati argue that Sander misunderstands large firm dynamics and underestimates the vulnerability of minority associates to discrimination in a large firm environment.<sup>48</sup>

The same criticism, a lack of understanding of the dynamics of law firm operations, has been made herein as clearly applying to Levey in many of the assumptions he makes to reach his unfounded conclusions. Since Levey adds nothing to and provides no interpretation of Sander's counter productivity argument, no further critiques will be offered here. Simply allowing him to share in those already directed at the original should be sufficient to crumble this third foundation of Levey's house built to destroy law firm diversity or affirmative action programs.

### **Conclusion and Recommendations**

While his work has been heavily criticized in both academic and legal circles, his critics have conceded that their disagreement "should not take away from the fact that Professor Sander has identified a real problem that needs serious study, and that his study has added considerably to the limited body of available, public research, even though his conclusions are, at best, premature."<sup>49</sup> Professor Sander may have offered his theories in a sincere effort to make sense of the racial demographics of corporate law firms, but Levey, on the other hand, reveals himself as an unabashed, anti-affirmative action advocate in single-minded pursuit of his objective. His legal theories are unsupported by the statute, the case law, and even the statistics which he cites. Moreover, he speaks with limited understanding of the history and purpose of the civil rights laws, attempting to rewrite both to suit his own purposes. As such, his arguments against the diversity efforts of corporate law firms do not merit the serious consideration of their target audience.

As detailed above, there is no reason to believe that law firm diversity efforts are inherently unlawful under Title VII and related discrimination laws. The commendable efforts of law firms and corporate law departments to broaden the representation of minorities and women in the legal profession are not solely acts of social and professional responsibility. Experience has

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<sup>47</sup> James E. Coleman & Mitu Gulati, A Response to Professor Sander: Is It Really All About the Grades?, 84 N.C.L. Rev. 1823, 1826, 1828-29. (2006) ("Response").

<sup>48</sup> Response at 1837-38. The difference between large and small firm dynamics might also explain why blacks working at small firms do not experience neglect. Small firms are less likely to maintain enough surplus capacity to permit an associate to languish, and an associate at a small firm is more likely to be assigned to assist with all aspects of a particular case, rather than work on a series of discreet projects.

<sup>49</sup> "Response" at 1839.

shown that diversity and cultural sensitivity also enhance the creativity and effectiveness of the legal teams and the quality of the services provided to the firm's clients. As such they represent a cost effective method of maximizing client services and providing the best possible representation. While the threat may or may not be imminent, depending upon the levels of interest and intent on the part of anti-affirmative action forces, the possibility of a serious legal challenge to such programs does exist. Accordingly, law firms should posture their programs so as to provide the most legally defensible operative facts.

If and when such challenges are mounted, they will target particular firms and programs that have not observed the necessary factual and procedural prerequisites for plan validity. Firms that make employment-related decisions that arguably could be based on race or gender will only be able to defend them from legal challenge if they can establish that minorities or women are "underutilized." In broad overview, establishing plan validity involves the preparation of a "utilization analysis" of the numbers of minorities and women in the firms as compared with the availability of women and minorities possessing the requisite skills and qualifications in the immediate labor area and/or an area in which the firms can reasonably be expected to recruit. In this analysis, "underutilization" is defined as having fewer minorities or women in a particular job level (associate, counsel, partner) than would reasonably be expected by their availability. Given the data previously discussed, most "large corporate law firms" should be able to make this analysis and demonstrated underutilization without necessarily admitting to past acts of discrimination. A firm only creates a serious vulnerability where it acts without such an analysis in making arguably race or gender conscious employment decisions.