

# Professional Development Quarterly

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## Law Firm Diversity Management: Migrating to More Meaningful Models

*Andi Cullins*

Over the past ten years, law firms have struggled – with varying degrees of success – to become more diverse institutions. For most, the goal is still elusive as the complexity of the problem makes the solutions non-instinctive. Under increasing scrutiny from clients,<sup>1</sup> where women and minorities have begun to make headway in the corporate counsel's suite, law firms have tried to grapple with the challenge in a variety of ways.

What has emerged are a number of models; indeed, some firms have migrated from one format to another over time. Looking at the evolution of these models in terms of their pros and cons can help us to see where the trend is headed and why the role of Diversity Director<sup>2</sup> is emerging. Finally, a case study illustrates one firm's recent deliberations and decisions in filling such a position.

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<sup>1</sup> In 2004, Sara Lee's general counsel, Rod Palmore, issued *A Call to Action* aimed at increasing diversity in the legal profession. By December of that year, Sara Lee was joined by 72 major corporations who began to ask their law firms for accountability on diversity practices within the firms. Today, many major corporations as well as the Minority Corporate Counsel Association regularly ask law firms to reveal their diversity policies and efforts. [http://www.cmcp.org/FileLib/9/cr\\_handouts.pdf](http://www.cmcp.org/FileLib/9/cr_handouts.pdf).

<sup>2</sup> We have used the title *Director of Diversity* to signify any diversity professional who is responsible for strategy, formulation and implementation of firm-wide diversity programs. We acknowledge that various law firms use various titles to describe similar positions in the professional management field. Some firms opt to title these individuals as *Chief* while others use *Director*.

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According to proprietary research commissioned by The New York Times and published in 2003,<sup>3</sup> companies that branded themselves as "diversity friendly" had a competitive advantage in the recruiting marketplace. Consider these findings:

### *Among job seekers:*

- Most job seekers (91 percent) said that diversity programs make an organization a better place to work.
  - Nearly all minority candidates (97 percent) would rather work in a diverse workplace than not.
- A company's image is critical to attracting minority candidates: 65 percent of minority candidates said that an organization's reputation for supporting workplace diversity was an important factor in their decisions of where to apply.

### *Among recruiters:*

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<sup>3</sup> Jason Forsythe, "Creating a culture of inclusion." September 14, 2003 in *The Boston Globe Magazine* and *The New York Times Magazine*. [http://www.boston.com/jobs/diversity/092003/div\\_0903\\_2.shtml](http://www.boston.com/jobs/diversity/092003/div_0903_2.shtml)

- Minority candidates are in great demand: 67 percent of recruiters were actively involved in diversity recruiting

Accordingly, law firms responded with what was instinctive. One early approach was to identify a woman or person of color to act as a focal point for the firm's diversity efforts.

## Model 1: The Diversity Associate

As most firms had few women or minorities among the partnership ranks, the role of diversity coordinator often fell to an associate. Most frequently the associate was expected to continue to produce billable hours, tending to diversity issues in addition to his or her regular work. Even today 64% of all attorneys involved in their firm's diversity efforts receive no billing credit at all for these activities.<sup>4</sup>

This model fulfilled the need to show prospective candidates that there were people in the firm who "looked like them," but that aspect alone was not enough to keep minority and female associates at the firm. It ignored other major issues: lack of role models and mentors, lack of quality assignments, and lack of advancement potential for the newly recruited associates. At some firms, this arrangement also allowed the disengagement of partners and firm management in supporting diversity initiatives.

As a search firm involved in the placement of attorneys, The McCormick Group often hears unfiltered comments from candidates seeking to change jobs. Early into the evolutionary cycle, we began to hear second- and third-year minority associates tell us that, after being recruited heavily, they were ignored by partners; were not given substantive work; and had no mentors, role models, or

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<sup>4</sup>MCCA/ALFDP 2008 Law Firm Diversity Professional Survey, Minority Corporate Counsel Association. <http://alfdp.com/clientimages/42560/2008finaldiversityprofessionalsurveyexecutivesummary052308.doc>.

champions within the firm. By the third year these associates were swimming upstream and drowning. Their answer was often to leave the firm, ideally moving to the corporate side where these problems were perceived to be less prevalent.

A benchmarking survey conducted by NALP <sup>5</sup> indicates that this trend has continued. According to the report, women attorneys leave their firms at an almost 10% higher rate than men during the mid-level associate years, and minority lawyers leave at increasingly larger percentages as seniority mounts. The attrition rate for minority lawyers at the senior associate level is 39.1% versus 31.7% as compared to their Caucasian counterparts, and more than twice the frequency, 34.4% vs. 15%, at the Counsel level.

At the same time, we began to hear from the mid-level and senior associates who had been placed into the diversity champion role. As recently as May 2008, a minority associate at a Women's Bar Association conference in Washington, D.C., lamented that her role as diversity manager was "ineffective." She reported holding events in the firm to raise awareness only to have the partners completely blow them off. "The only people who come," she said, "are the ones [minority lawyers] who don't need it."

Without the clout of partnership, and without the weight of the management or executive committee, these efforts were marginally successful at best; and that success was confined largely to recruitment. Firms that still employ this model may find first year hires are often achievable, but the churn at the mid- to senior-associate level is likely to continue.

## Model 2: The Diversity Committee

At some firms that had no minority presence at all, the initial response was the diversity committee approach. Under this model, partners (perhaps including women, but generally white males) were tapped to form and serve on diversity committees. As in the associate-based model, partners on the diversity committee were typically expected to carry fully the responsibility for practice development and billable hours, usually without much modification on time demands, as well as to carry out the diversity task force function.

While this model attempted to send a clear message regarding the importance of diversity from the top, many of the issues present under the associate-based model persisted under this model. In fact, some firms without minority presence at all found it increasingly difficult to recruit any minority attorneys, as candidates often favored firms where there was at least some affinity group versus being the "only one." Those who were targets of our lateral recruiting efforts for these firms frequently told us they preferred to stay in firms where they had an existing comfort level. Some phrased it as staying were they were already known and no longer had to "prove themselves" [among their non-minority peers]. More tenured partners told us they had already fought the fights of being the only one at their current firms. They could see no advantage in going to a new firm to do it all over again.

These partners also clearly understood that a lateral move to a firm with no minority presence at the upper echelon brought with it the added responsibility of stepping into a diversity leadership role. Again, in most instances, stepping into the diversity role meant more work with no relief in the demand for billable hours and practice development. They were committed to being role models and mentors for those coming behind them; but, as with most practicing

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<sup>5</sup>National Association for Law Placement, 2006 Benchmarking Report, New York City Bar Association. <http://www.abcnv.org/Diversity/FirmBenchmarking06.pdf>.

attorneys, their focus of choice was developing their law practice.

### Model 3: The Diversity Partner

Firms who have women and minority partners have frequently tapped those individuals to step into the diversity management role, either leading the effort or sitting on the diversity committee. For a time, the most prevalent law firm model was the formulation of a diversity committee along with the identification of a female or minority partner to head the effort and tend to the day-to-day implementation of programs.

Assigning such a partner to the lead role appeared to answer many of the needs left unaddressed in other models. It provided instant credibility to young associates regarding the involvement of the partners in the diversity effort, and it provided role models and potential mentors. As partners, these individuals had sufficient clout to move programs and agendas forward. Finally, it served to signal to potential female or minority partner candidates that the firm was a good place to work; there were peers there.

What suffers in this model is again the diversity partner's billable hours. As recently as spring of 2008, when the Minority Corporate Counsel Association and the Association of Law Firm Diversity Professionals conducted a joint survey of Am-Law 200 firms, only 20% of all responding firms gave billing credit for diversity activities, and only 13% gave full credit.<sup>6</sup> A separate survey compiled this year by Altman Weil found that 44% of the diversity managers who are also lawyers balance their duties with an active law practice (65% of

that number have billable hours requirements as high as 1,500 to 2,000 annually).<sup>7</sup>

Regardless of how committed the partners in question might be to the value of diversity or the concept of responsibility to others, most eventually have to make a decision: to practice law or to practice diversity management. Some have chosen to move squarely into the diversity management role (34% of those currently in the role are non-practicing attorneys).<sup>8</sup> Others decided to focus the majority of their efforts on the practice of law and confined their commitment to participation on the firm's diversity committee over the more dedicated central role of diversity management.

Firms using this model still had varying degrees of success. It became apparent to some that, while there was benefit in this model, there was also a good deal of unexplored territory to conquer. Trained as lawyers, individuals taking on this role eventually learned there was real substance needed to propel successful diversity programs through the firm. Those moving into the role needed real grounding in organizational development, program development, conflict resolution, and other areas not necessarily found in a law school curriculum.

Turnover numbers among women and minorities, especially at the mid-level associate ranks, continue to be well above that of white males at most firms. Firms reasonably asked themselves if the problem was intractable or if it needed another approach.

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<sup>6</sup>MCCA/ALFDP 2008 Law Firm Diversity Professional Survey.

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<sup>7</sup>"Flash Survey on the Diversity Director Position, Altman Weil." American Bar Association, *Law Practice Magazine*, June 2008. <http://www.abanet.org/lpm/magazine/articles/v34/is4/pg34.shtml>.

<sup>8</sup>MCCA/ALFDP 2008 Law Firm Diversity Professional Survey.

## A New Paradigm – Acknowledgment of the Professional

The law firms' corporate clients were making the case for diversity quite clear. On its corporate website, Chubb, one of the nation's largest casualty insurers, lists a diversity statement that has become typical of modern corporate thinking:

“Those who perceive diversity as exclusively a moral imperative or societal goal are missing the larger point. Workforce diversity needs to be viewed as a competitive advantage and a business opportunity.”

Even as far back as the 2003 New York Times study, it was noted that “while just over half of the hiring managers in the study considered workplace diversity to be of benefit to a company's business performance, an even higher percentage of hiring managers at the companies with diversity programs said this.”<sup>9</sup> So, while the business imperative couldn't be clearer, workable solutions still seemed to elude most larger firms.

Those firms willing to consider a different approach are now moving to the Diversity Professional model. Of the 89 Am-Law 200 law firms responding affirmatively to the MCCA/ALFDP survey as having a diversity professional, 74% have created the position in the last three years. Of these diversity professionals, 59% were hired from outside of the firm.<sup>10</sup>

Going outside of the firm is often required to get the experience base necessary: Firms who decide not to spend time reinventing the wheel, but to learn from those who have been successful in other venues, are more likely to find answers with real impact. Although law firms can be a bit unique in their structure,

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<sup>9</sup>70%, according to Jason Forsythe in “Creating a culture of inclusion.”

<sup>10</sup>MCCA/ALFDP 2008 Law Firm Diversity Professional Survey.

and the challenges inherent in those differences can present a bit of a learning curve, a professional who already possesses the necessary skills but who needs to learn the environment can prove to be more productive than the other way around.

## Non-Lawyer Model vs. Non-Biller Lawyer Model

2008 saw an increase in the overall number of firms employing a director of diversity. While some firms have brought in non-lawyer diversity professionals, according to the MCCA/ALFDP study only about 21% of the current diversity directors do not have a JD. Conversely, 69% of those in the position now hold a JD degree, but of that number only 34% are non-practicing attorneys, and less than 5% are now practicing attorneys who are exempted from billable hours requirements.

Much like they did when creating the law firm Professional Development Director, Marketing Director, HR Director, and Executive Director roles, firms are beginning to recognize the value of bringing professional expertise into the diversity area. These diversity professionals work along with the standing diversity committees and executive committees in the same way their director-level counterparts do -- addressing policy, strategy, and tactics. The goal is to help firms move to more effective strategies not only to recruit but to maintain a diverse team of professionals that maximizes opportunities for the firm.

## Finnegan – A Case Study in Getting It Right

When Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, one of the market leaders in intellectual property law, decided to hire a Director of Diversity, the move put the 350-attorney firm on the leading edge of a trend. This is how they got there.

Finnegan's reputation in its field makes it one of the go-to firms for young lawyers of any gender or ethnicity who want to practice intellectual property law. That is not to say the firm had an easier task than other law firms in recruiting and maintaining a diverse attorney group. The highly technical and scientific backgrounds of those who enter IP law has historically attracted fewer women and minorities than might be found among the general population of newly-minted lawyers each year.

But Finnegan's reputation gives it a drawing power that did make it a bit easier to gain access to a more diverse pool of summer and first-year candidates. Layer on top of that a Diversity Partner, HR Director, and Director of Recruiting all committed to the ideal, an environment of respect for diversity, and an understanding by partners in key positions that diversity is important; and the result was an entering class in 2007 that was almost 30% female or minority.

But Finnegan wasn't satisfied with that. They recognized that, as at many other firms, the ranks of women and minorities began to thin during the march to partnership; and they were determined to do what they could to stem that tide.

At the same time, the firm was beginning to get questionnaires from clients and organizations wanting to know about its formal diversity programs. The message of the business case for diversity was becoming apparent.

Management at the firm embraced the idea that it was time to migrate from its existing diversity model – a full-time practicing partner who happened to be a minority -- to a new model featuring a dedicated professional in the diversity world. It's important to note here that the partner fulfilling the diversity role was one of the major champions of the change. He'd stepped into the diversity role out of a sense of commitment to the initiative and to the firm but found that, over time,

the position required the attention of a full-time professional.

In some ways being an IP firm moved Finnegan faster and farther down the track than it may have first intended. As The McCormick Group began to approach partners at other firms about taking on the role, it became clear that those who were most experienced with moving a law firm forward on diversity issues and those who were experienced IP attorneys were groups without a great deal of overlap. Truth be told, there weren't many practicing (non-IP) attorneys who were willing to step entirely away from the practice of law to take on the diversity role at a firm where they knew they could never practice at all; in other words, they preferred to go to a place where they could keep their options open. It was back to the drawing board.

What emerged next set the firm on the path to the right decision. With the weight of the management team behind it, Finnegan decided it was more important to have someone who could impact the diversity issue in real and meaningful ways than it was to have another IP attorney. It made a clear and affirmative decision on the importance of putting a true diversity professional into the role.

The firm held discussions among the major stakeholders on where the position would report and set up pathways to access the managing partner and the chairman of the firm. They sought and interviewed only candidates with extensive credentials in diversity management issues and who had track records of program development and change management.

And, while they were willing to talk with diversity professionals who were non-lawyers, they were ultimately persuaded that the JD credential would be an advantage because the firm's lawyers would see the new director as a peer.

## Critical issues

Finnegan addressed four critical issues in this process:

1. They understood the business case for diversity. Firm management recognized the business and economic drivers. They saw diversity as something that was important to everyone in the firm – not just other minority lawyers.

2. There was support from the top of the firm. The management team fully supported the idea of bringing in a committed professional. They were prepared to communicate the importance of the initiative throughout the partnership and made sure there was clear access for the director of diversity to firm management.

3. They understood the need to focus on more than just hiring. An acknowledgment that it was necessary to look beyond the initial phase of recruitment and focus on the long range objective of retention was a critical factor. Retention is a much more complicated issue than hiring.

4. They were willing to acknowledge the need for a specialized professional. Recognizing the complexity of the issues helped to lead them to the decision to hire an experienced diversity professional. They decided it was worth the investment to hire someone who wouldn't need to spend time reinventing the diversity wheel but who had dealt successfully with the issues they were facing.

In the end, Finnegan hired a veteran diversity professional who is not only a JD, but also holds a masters degree in organizational development and has a background in consulting on a range of diversity and human capital issues.

### What it looks like now

Surveys from MCCA and Altman Weil provide a statistical look at the role of Diversity Professional in Am-Law 200 firms today. Altman reported that virtually every firm that responded to its inquiry now has a formal diversity committee.

- 58% have a designated diversity manager or director, up 8% from 2007, and 13% from fall 2005.
- 79% of these diversity managers are lawyers in their firms, compared to 67% in 2007 and 57% in 2005.
- 53% of diversity managers hold the position full-time, down from 61% in 2007.
- 54% of Diversity professional have less than 5 years of paid diversity experience.
- 36% have more than 10 years of unpaid diversity experience.
- Almost all have dual reporting responsibility, including sitting on the firm's diversity committee. 64% sit on the committee, 15% chair it.
- 50% report to the managing partner.
- 25% report to the Exec. Director.
- 88% are female. 62% are African American, 8% are Hispanic, 5% are Asian, 21% are Caucasian.

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# Mobile Learning for Lawyers

Heather Edes

**T**echnology is changing everything. Massive investment in connectivity infrastructure has put the world at one's fingertips. With a connection to the internet, one can easily access information formerly available only to those with specialized expertise, specific interests, and/or significant resources. With the proliferation and popularity of mobile communication devices, one can now connect to this vast reservoir of information virtually anytime from virtually anywhere.

At the same time that the amount of accessible information has exploded, reaching sometimes overwhelming levels, demands on workers are multiplying. Subject to escalating billable hour requirements, burgeoning business development obligations, and elder and child care responsibilities -- not to mention the pursuit of hobbies and interests, lawyers are seriously pressed for time. Lawyers are expected to be available, to one another and to clients, around the clock; and work time and playtime are no longer separated by clearly defined space and time.

These technology and lifestyle trends are converging to make mobile connectivity a significant and convenient – if not yet absolutely necessary – feature of daily activity. Mobile devices are often criticized as the catalyst for clients' expectations that lawyers be available 24/7; but, used appropriately, wireless technology allows lawyers the freedom to be involved in non-work activities and still remain available to serve internal and external clients. Lawyers can email clients or colleagues from a Little League game or electronically edit documents while sitting in a waiting room. They can enjoy an out-of-the-office event secure in the knowledge that, if an important call comes in, they can attend to it no matter their location.

The ease of connectivity provided by mobile devices also offers the potential to reshape lawyer education in a number of exciting ways. Most basically, mobile connectivity allows for easy access to learning and information at the exact moment it may be wanted or needed. Further, mobile learning can shift the focus on continued learning from isolation in the classroom, where it has been relegated over the last two decades, back into real life scenarios. Finally, mobile learning provides an opportunity to move beyond the traditional, one-way instructor/learner paradigm into a potentially more effective approach that leverages the social connectivity enabled by technology.

I recently attended the 4th Annual Innovations in e-Learning Symposium offered by George Mason University and Defense Acquisition University. There, I had the opportunity to learn from and exchange ideas with individuals at the forefront of mobile learning theory and application. I emerged with new insights and several ideas that I am sharing in this article, in the hope of beginning an exploration of how mobile technology can help lawyers learn. I review what mobile learning actually is, survey the trends that make a mobile learning revolution imminent, explore some current uses of mobile learning, consider the potential application of mobile learning to law firms and law departments, and suggest guidelines for implementation.

## What is m-learning?

Given the ubiquitous nature of personal mobile technology, it is tempting to conceptualize mobile learning – or “m-learning” as I will refer to it throughout – in terms of gadgets and hardware. In fact, the focus of this article is the use of exactly such

gadgets, most specifically “personal digital assistants,” (or “PDAs,” including Blackberries and Palm devices) in learning. However, mobile learning has actually existed since at least the Industrial Revolution, when technological advances allowed print media to reach a broad market. Mobile learning has always had a place in the legal profession: lawyers have been learning from portable books, journals and manuals since as far back as anyone working today can remember. What is new is the proliferation of devices and the corresponding empowerment of learners to access information when they need it in a manner convenient to them, regardless of location and time.

Much of the discussion around m-learning necessarily focuses on technology, because it is both exciting and complicated; but those of us responsible for helping lawyers learn would do well always to remember that, while the technology makes m-learning possible, it is the user and the user’s needs that ultimately must drive the role of technology in the learning.

## Why do I have to think about m-learning?

The technological innovations required to support widespread and user-friendly m-learning are rapidly falling into place. Until very recently, to achieve optimum performance and accessibility, one carried a personal cell phone, a laptop, a PDA, perhaps a second cell phone for work, and an iPod. Some of us additionally carried a digital camera. Fortunately, phone calls, email, photos, and entertainment can now be captured on the same device; and quality and performance are improving all the time. Cell phones in the US are increasingly third generation or “3G,” meaning that they are very fast and offer full motion video, videoconferencing, and Internet access, as well as cameras, music players, smart card inserts, and access to office applications.

“Smart phones” are already prominent tools of daily life in other countries. Japanese consumers, for example, use their cell phones to unlock doors, charge items to their credit or debit accounts, scan nutritional data on bar-coded labels and check in for airline flights. Even though use of “smart phones” in the U.S. currently lags behind other countries, U.S. workers exhibit signs of dependency on even our behind-the-times devices. A survey conducted earlier this year by the market research firm IDC and sponsored by Nortel Networks Corp. found that more than one-third of workers surveyed would choose their mobile phone over their wallet, keys, laptop, or digital music player if they had to leave the house for 24 hours and could take only one item.<sup>1</sup>

It’s only a matter of time before 3G technology arrives and is embraced in more markets in the U.S. When that happens, our phones will become even more integral to our daily operations – and will provide a natural, easily-accessible platform for learning. As we use our phones for more and more applications, having the option to learn on them inevitably becomes attractive.

## Everyone talks about m-learning, but is anyone doing it?

An oft-heard justification for m-learning is that younger workers are demanding it. Admittedly unscientific surveys of summer and first-year associates in at least one firm disprove that notion, as far as it relates to lawyers. But schools are experimenting with different forms of m-learning and other professions have begun to explore and embrace its potential.

The most striking examples of the use of mobile technology to support learning in schools come from countries other than the U.S. To cite only two of the many current

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<sup>1</sup>“Mobile Phones More Important Than Wallets.” Dabrowski, Wojtek. May 13, 2008. <http://uk.reuters.com/article/technologyNews/idUKN1336793620080513?sp=true>.

and exciting projects: Researchers in Spain (<http://enlace.uned.es>) have been experimenting with using mobile technology in collaborative learning activities that “extend the scholastic framework not only in terms of...physical location but also the methodology and the realism of the scientific context, the participants and the temporal dimension of the work, moving the learning scope away from the school.”<sup>2</sup> A fascinating and successful pilot project recently conducted with second-year students in an Irish secondary school explored the potential of mobile technology to enhance the teaching and learning of the Irish language and to facilitate school-based oral assessment.<sup>3</sup>

An interesting example of m-learning in U.S. schools is the “Million.” The New York State Department of Education and Verizon Wireless have formed the “Million” partnership, which intertwines mobile digital technology and education by distributing free phones to students in certain schools. By doing well in classes and exhibiting good behavior, these students acquire points that they use to purchase talk minutes and text messages. The Million’s web site ([www.millionnyc.com](http://www.millionnyc.com)) states that eventually teachers will be able to “engage” students through the phones, which also include tools such as calculators and thesauruses.

Similarly, Apple has partnered with educational institutions via iTunes University ([http://www.apple.com/education/itunesu/mobilelearning/mobile\\_learning.html](http://www.apple.com/education/itunesu/mobilelearning/mobile_learning.html)), which helps colleges, universities, and other education organizations provide “continuous access to educational materials, along with easy ways for learners to connect,

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<sup>2</sup>Described in full at “Sustaining Activity Flow in a Framework For Ubiquitous Learning.” Verdejo, M. Felisa; Celorrio, Carlos; Lorenzo, Emilio J.; Ruis, Alberto and Sastre, Teresa. Proceedings of the Beyond Mobile Learning Workshop. Trinity College Dublin Press. 2007.

<sup>3</sup>“Use of Mobile Phones for Language Learning and Assessment for Learning, a Pilot Project.” Cooney, Favin and Keogh, Katrina. <http://www.learnosity.com/files/learnosity-use-of-mobile-phones-for-language-learning-and-assessment-for-learning.pdf>

collaborate, and share.” While these examples are not as sophisticated as some of the activities underway in Europe (indeed, the Million Project was announced at an advertising conference), the trend is clear: m-learning has a future in our schools.

Beyond educational institutions, several professions are beginning to explore mobile learning’s potential. The U.S. military has contracted with Florida Community College to convert existing classes to a format that soldiers in Afghanistan and Iraq can access on mobile devices with or without an internet connection. Similarly, mobile learning has found a toehold in industries as varied as the oil and gas and emergency medical services, and Merrill Lynch has begun offering training to investment bankers over Blackberry.<sup>4</sup>

Even if our newest lawyers are not yet demanding m-learning, much has been made of their observed comfort with technology and their tendency to take their gadgets for granted. More experienced lawyers currently use mobile devices as well. It’s impossible not to expect that future lawyers will be increasingly comfortable with technology in a learning environment and will soon require that learning be available on demand and independent of the physical office or personal computer environment. Let’s be ready for that.

### **This will never work in my firm.**

How can m-learning help lawyers? As is well documented, law firms, and perhaps to a lesser degree law departments, struggle with a number of trends that stem from a conflict between traditional law firm life and changing social norms and expectations. With the pressure to bill hours, partners have largely turned over the educational

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<sup>4</sup> For a description of the Merrill Lynch project, see “Case Study – Merrill Lynch: Bullish on Mobile Learning.” Swanson, Kristofer. April 2008. <http://www.clomedia.com/includes/printcontent.php?aid=2135>.

aspect of their responsibilities to professional development experts; and lawyers find most of their continuing education at lunch-and-learns, via webinars and other e-learning channels, and at retreats. Most state-required CLE is measured by 50-minute or 60-minute hours.

Annual associate attrition in law firms is well-documented and hovers at nearly 20%.<sup>5</sup> While the reasons for departures vary widely, even associates who remain in law firms struggle to meet their billable hour requirements, engage in networking and business development activities, and fulfill their CLE needs. While not a panacea, m-learning holds the promise of personalized learning by offering a learning experience at a time and in a place and with a focus convenient for and directly relevant to the lawyer.

Rather than have to carve out an hour or two during a busy day to sit through a lecture, a lawyer could spend time learning how and where to find relevant information and then access it at whatever time is convenient or necessary. Further, the inherent capacity of mobile technology for social networking allows learners separated by space and/or time to facilitate one another's learning via asynchronous discussion, problem-solving, and the like. Moving some training to an m-learning format offers added benefits of reducing the pressure on partners to be trainers and allowing professional development experts to spend less time signing up subject matter experts and more time designing effective delivery channels.

What's more, done properly, m-learning can have positive results for the bottom line. In the Merrill Lynch project cited above, the mobile learners scored 1.21% higher on assessments, completed their training sooner, and spent an average of 45% less

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<sup>5</sup> See, e.g., "Update on Associate Attrition: Findings from a National Study of Law Firm Associate Hiring and Departures – Calendar Year 2007." NALP Foundation, 2008.

time on training than non-mobile learners.<sup>6</sup> If education delivered over mobile devices helps lawyers learn as much as their classroom-educated peers in less time, the potential cost savings to a firm or department quickly accumulate.

Regardless of m-learning's promise, it's important to recognize the unlikelihood of converting all learning to mobile learning anytime soon. While younger lawyers are generally fluent in and comfortable with mobile devices, a significant portion of established lawyers are "mobile immigrants," who may need to learn mobile technology skills that are a given for younger lawyers or who may never become comfortable with PDAs, let alone the concept of m-learning.<sup>7</sup> Lawyers as a general matter have proven slow to adopt approaches more quickly leveraged in the business world. Even though mobile learning may assist some lawyers who struggle with physical challenges, other lawyers may find mobile devices too difficult to operate.

M-learning should, therefore, primarily be offered as an alternative or elective delivery channel to more traditional learning, but it is difficult to imagine m-learning displacing traditional learning altogether at this point.

## Should I give it a try?

Remember, m-learning is an appropriate tool only if it suits a learning population's needs. Lawyers consult their devices when traveling, when commuting, when working off site and when expecting an important communication. They consult these devices frequently,

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<sup>6</sup> For a description of the Merrill Lynch project, see "Case Study – Merrill Lynch: Bullish on Mobile Learning." Swanson, Kristofer. April 2008. <http://www.clomedia.com/includes/printcontent.php?aid=2135>.

<sup>7</sup> "Learner-centric Design of Digital Mobile Learning." Low, Leonard and O'Connell, Martha. Unpublished paper presented at Learning on the Move, Brisbane, Australia, September 2006. [https://olt.qut.edu.au/udf/OLT2006/gen/static/papers/Low\\_OLT2006\\_paper.pdf](https://olt.qut.edu.au/udf/OLT2006/gen/static/papers/Low_OLT2006_paper.pdf).

but usually not for sustained periods of time. Consider the different scenarios in which lawyers need to learn: when encountering a concept, skill, or process for the first time; when adding to their existing knowledge about a concept, skill, or process; when remembering or applying what has already been learned; when things go wrong; and when circumstances or contexts change.<sup>8</sup> Mobile learning likely has a role to play in supporting learning at each moment of need; but, given lawyers' current use of mobile technology, the latter three scenarios probably offer the opportunity for the greatest initial impact.

In light of the foregoing, it's unlikely that a mobile device is the best platform for delivering your international tax partner's latest highly-intellectual presentation on the pros and cons of new proposed IRS regulations, at least until a critical mass of lawyers is comfortable with m-learning. However, m-learning could provide participants an opportunity to reflect on and further solidify their understanding of the content after the fact, an important step in making learning "stick." Associates who attend a traditional class on accounting or financial statements could take a vocabulary quiz on their commute home via PDA or participate in an asynchronous discussion of the information a particular set of financial ratios reveals about a company's financial health.

Additionally, attorneys who have attended classes in the past but need to recall the information at some point in the future might benefit from having the information available on demand in an m-learning format. For example, an attorney who attended the international tax partner's substantive lunch presentation and is now en route to a client meeting might appreciate easy mobile access to a concise, bullet-pointed list of the proposed regulations. Attorneys needing to recall skills-based training could benefit from m-learning. For

example, an associate preparing for a lunch with a potential client might find it useful to review a series of video role-plays of partners asking for business; or a partner preparing to deliver a difficult performance evaluation might want to view a graphic showing how to retain control of the message during a potentially emotional conversation.

## So how do I get started?

First, review again whether a mobile platform is the best way to deliver your content:

- Who needs the information?
- Is the target audience generally using mobile devices and are the learners ready to leverage them for learning?
- Why is a mobile format best in this situation?
- Do the target learners need, or are they more likely simply to want, information on the go?
- What information do the learners need in order to succeed?
- How will they access the information?
- Will they be learning collaboratively or in a one-way relationship?

Next, consider your resources:

- What devices and platform will be used?
- Does the content exist?
- May you convert it from another format or will it be built from scratch?
- Who will convert or build it?
- What support is available for your learners as they access the technology?
- What activities do you need to track and how will that work?
- How will data be secured?
- Does IT have sufficient resources to provide adequate support?
- Do you need new tools?
- Who will pay for them?

Then consider delivery:

- What will the user interface look like?

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<sup>8</sup> Adapted from the "Five moments of need" articulated by Dr. Conrad A. Gottfredson at [www.performancesupport.blogspot.com](http://www.performancesupport.blogspot.com).

- For how long will the content be available, and to whom?
- Will learners be able to exit the application and easily pick up where they left off when they return?

This list of considerations sounds daunting – and it is only a partial list. However, training programs for lawyers are constantly being created, updated, and improved. As you consider your entire training curriculum, remember that, when you are planning your content, develop it once to deliver it everywhere. That is, build your program to specifications that will work, for example, both on your existing live and/or e-learning platforms and also on the devices carried by your attorneys.

Specifically, make learning objects both small and discrete, and keep content streamlined and simple. Chunk content into brief segments of only a minute or two, and make it easy for learners to access multiple segments sequentially. If video works well on a computer but less well on your firm’s model of Blackberry, consider using audio instead. Use readable fonts and make appropriate use of formats, white space, and the like. Avoid interfaces that require users to scroll both up/down and also right/left. No matter how relevant the content or how sexy the device, learning will fail if mobile training is hard or inconvenient to use.

Remember that you should probably use m-learning first to enhance and supplement existing classroom and “traditional” e-learning, moving to a fully-mobile course design only when you, your IT group, and the lawyers are truly comfortable with m-learning.

M-learning holds tremendous promise, but we are only at the frontier. As with any innovation, there are likely to be plenty of setbacks and “learning experiences” as we experiment with m-learning. It will be important to start slowly, building lawyers’ confidence and experience using a mobile device to access learning. Only then will it make sense to fully explore the possibilities offered by the unique connectivity and flexibility offered by mobile devices.

We haven’t even begun to speculate how mandatory CLE jurisdictions, accustomed to measuring and controlling teaching when isolated in a classroom or measured every 6 minutes by the click of a mouse, will adjust to m-learning. But, if we start by providing easily-accessible content in concise, relevant, and informative chunks and teach lawyers how to access it at a time and place convenient to them, we will have taken an important step toward moving content out of its isolation in the classroom into contexts and formats conducive to more meaningful development.



# The Seven Biggest Opportunity Blockers in Professional Development

*Ari Kaplan*

**J**ust as superheroes have their archenemies, opportunity makers have their career blockers. Individuals motivated by possibility and inspired by their peers can be stifled in their efforts, whether they are related to business or professional development, by a few key characteristics that have varying degrees of influence. Purge them at the right times, and success will be much easier to capture and maintain.

## 1. Regret

Everyone misses an opportunity. Some accept its passing and move forward, while others let it linger. The regret of missed opportunities is a strong impediment to those available in the present and awaiting discovery in the future. The issue is one of focus. When concentration is placed on the past, there is no movement. Adjusting perspective (and taking an occasional deep breath) helps reduce the impact of yesterday and spotlight a second chance tomorrow.

## 2. Envy

Envy and regret are the opposite sides of one coin that play a very tricky game on business and professional development potential. Both lead to stagnation that prevents one from seeing the next opportunity. When one misses a goal or fails in an attempt (whether it is programming-related or career-shaping), remaining positive and being more methodical in a future approach is an ideal response.

## 3. Insecurity

That methodical approach helps to alleviate the insecurity that prevents one from sharing an idea. This is critical because the first step in embarking on a new venture is often

broadcasting a concept, then selling its value to that audience. By incorporating others into an endeavor, you force yourself to bring it to fruition by putting your reputation on the line. Whether that endeavor is pitching an article on training best practices, meeting with management about intergenerational recruiting dynamics or simply encouraging others to brainstorm, unwelcome yet ever-present self-censoring is counterproductive.

## 4. Pride

Self-censoring is part of one's effort to avoid embarrassment at all costs. That is, however, ultimately an excuse for inaction. Gauge where you fall on the risk aversion spectrum and tailor a strategy that meets your level of risk tolerance. Some people feel more comfortable writing a note or sending an email than picking up a phone. Do what makes you most comfortable, but combine the comfortable with the uncomfortable in order to achieve your ultimate goal.

## 5. Caucusing

Regardless of how you communicate, don't listen to everyone. Too many voices can cloud your mission and your message. It is generally easy to recognize good advice because it tends to appear as honest and constructive. Other guidance simply projects those terminal opportunity blockers on to your effort, often unintentionally.

## 6. Boredom

Also unintentional is the fatigue that comes with hard work and intensity. For that reason, incorporate a certain element of fun or inspiration into your daily routine because it more seamlessly connects you to the people with whom you are trying to connect.

Levity, whimsy, and excitement often make the possibility of a result more apparent.

## 7. Solitude

What is equally apparent is that opportunity makers collaborate. They engage with the community and celebrate the work of their peers. That celebration helps to spotlight the contribution of the subject individual, but also emphasizes the character of the messenger. Those who work alone and focus narrowly miss prospects that only come from conversation and interaction.

Professional development is often about honing the skills necessary to perform, but part of that training is associating with others who are excited about showing up. Those who feel excited about what they do and who they are tend to be more successful.

The key is to customize the means of interaction to your style and personality, while eliminating those characteristics that block opportunity.



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## Quote of the Quarter

“Without the help of a crystal ball, I am willing to go out on a limb and say that I think in the next ten years we will see dramatic changes in the ownership structure of large law firms, and in the economic models that drive them forward, and those changes, surely, will have an impact on the work that we do.

“It is an exciting time to be working in this industry. Hold on to your hat.”

– James Leipold, NALP Executive Director (in the June *NALP Bulletin*)

# A Common Sense Guide to Workplace Law for Law Firm Professional Development (Part 2 of 2)

Andrew B. Cripe

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This is the second in a two-part series addressing workplace law issues applicable to law firm professional development personnel.

As noted in Part 1, law firm workplace issues can arise in a variety of contexts but typically involve one of the following: (1) the workplace environment (*i.e.*, claims of a hostile work environment based on race, sex, etc.); (2) hiring and promotions; (3) evaluations; and (4) terminations. Of these, professional development personnel are most likely to be involved in the last three contexts. This article addresses practical considerations for professional development personnel in minimizing the risks presented by these situations.

## I. Hiring and Promotions

Law firms are among the highest-paying employers in the United States today. The law firm hiring and promotion process, particularly for new associates, is generally extensive; applicants do not simply fill out form applications and sit for interviews. Potential new associates are often evaluated over the course of a summer associate internship or law clerk position. Once hired, associates are then evaluated over many years for partnership consideration. Objective and subjective judgments are made as to whether the candidate has the education, experience, competence, character, and personality to succeed in the profession and at the firm. Firms must also consider their hiring needs, including the firm's strategic vision, the availability of work, and the firm's hiring budget. Finally, firms must compete with one another for a limited pool of top applicants, attempting to

be competitive in the terms and conditions of employment offered.

Failure to hire cases appear to be less common in the law firm context than are failure to promote cases. However, firms have encountered both types of claims. Moreover, firms can encounter significant bad publicity or damage to reputations as a result of problems in the hiring or interviewing process. Thoughtless or unlawful questions to applicants may become the subject of gossip in law schools or on associate Internet discussion forums.

Although firms are free to hire and promote according to any criteria they reasonably determine appropriate, firms cannot engage in unlawful discrimination based on race, sex, national origin, religion, disability, or any other protected status. Selective or inconsistent application of criteria may support a claim of discrimination based on a failure to hire or promote. Inconsistency in setting the terms and conditions of hire (*i.e.*, pay, hours, etc.) may also support a claim of discrimination. Finally, failing to exercise care in the hiring process may give rise to contractual obligations that the firm is not prepared to discharge.

### The Process

To establish a claim for discrimination based on a failure to hire or promote, a plaintiff must generally establish that: (1) he or she is a member of a protected class; (2) he or she applied for an open position; (3) he or she was not selected; and (4) the employer filled the position with a non-protected class member, or the position remained open and the employer continued to attempt to fill the

position with someone with similar qualifications to the plaintiff.<sup>1</sup>

### **Case Study: The Law Clerk Who Wanted to Be An Associate**<sup>2</sup>

In one case a former firm law clerk asked to be considered for an associate position upon her graduation from law school and was told that the firm would not have any open positions. She sued for failure to hire and asserted claims of sexual harassment based on conduct she was allegedly subjected to during her tenure as a law clerk with the firm. The sexual harassment claims were found untimely; but a judgment in the amount of \$101,144 plus interest was entered against the firm for gender discrimination in failing to hire her.

On appeal, the firm argued that it could not be liable for failure to hire since it did not have an open position. However, the court noted substantial evidence contradicting this assertion, including that the firm did hire a new associate with little experience shortly after telling the plaintiff there was no position available.

The court further noted substantial evidence supporting the conclusion that the failure to hire the plaintiff was “tainted by sex discrimination.” Specifically, the court noted alleged comments by the plaintiff’s supervising partner suggesting that he “would not have hired [her] as a law clerk had he known that she was pregnant, and that [her] priorities were ‘elsewhere,’ presumably with raising a family instead of the practice of law. The court concluded that the statements “were made by the person with the power to make employment decisions” and “related to the decisional process itself.” Thus, there was sufficient direct evidence of discriminatory animus to support a finding against the firm.

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<sup>1</sup> *Wynn & Wynn, P.C. v. Mass. Comm’n against Discrimination*, 729 N.E.2d 1068 (Mass. Sup. 2000).

<sup>2</sup> The facts and quotes in this section are from the opinion in *Wynn & Wynn, P.C.*, 729 N.E.2d 1068.

Significantly, although the court found the claims of harassment untimely, it noted that the lower tribunal had credited the plaintiff’s testimony that she was subjected to harassing conduct on almost a daily basis during her employment as a law clerk by the partner who supervised her. The findings suggested a specific intent to demean or insult the plaintiff, as opposed to a general insensitivity. Of course, such facts likely influenced the court’s ultimate conclusion that the plaintiff had been subjected to discrimination by virtue of the firm’s failure to hire her; a court or jury in such a situation would likely be reluctant to leave a plaintiff without any remedy, even if the claims of harassment were time barred.

### **Terms of Employment**

A firm may face both contract and discrimination claims based on the terms and conditions set at the time of hire, when a promotion is later denied. The following is an example.

### **Case Study: The Associate Who Wanted to be Partner**<sup>3</sup>

In another case, an associate who was terminated in an “up or out system” of promotion after being denied partnership sued for breach of contract and discrimination. Her complaint included allegations that the firm used the possibility of partnership as a recruiting device to induce her and other young lawyers to become associates at the firm; that advancement to partnership after five or six years was presented as a “matter of course” for associates who received satisfactory evaluations and that associates would be considered for partnership “on a fair and equal basis”; that she relied on these representations when she accepted employment; that the firm’s promise to

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<sup>3</sup>The facts and quotes in this section are from the Court’s opinion at *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

consider her on a “fair and equal basis” created a binding contract; and that the firm discriminated against her on the basis of her sex when it failed to invite her to become partner.

The case, appealed to the U.S. Supreme Court, was initially dismissed by the trial court on the grounds that an invitation to become a partner is not a matter subject to Title VII; that partnership does not constitute an employment relationship governed by employment laws such as Title VII. The Supreme Court’s opinion, however, underscores the significance a firm’s recruitment efforts may have on subsequent decisions: If associates are led to believe that partnership is a “lock” if they perform satisfactorily, the firm should be prepared to make all satisfactorily performing associates partner.

Even in the absence of such representations, a firm should treat the partnership decision as one likely to be subject to the requirements of Title VII and ensure that it will be prepared to demonstrate the legitimate, non-discriminatory reasons for its partnership decisions.

### **Consistency & Fairness**

Although a law firm is free to apply whatever criteria it deems appropriate in the hiring or promotion process, those criteria will be evaluated in light of the totality of the surrounding circumstances. Evidence of an inappropriate or hostile work environment, or evidence of the inconsistent, unfair, or arbitrary application of criteria, will undermine a firm’s ability to defend its decisions. Toward that end, professional development managers who have legal personnel responsibilities should ensure that all involved in the hiring or promotion process, or in any summer associate or other internship programs, thoroughly understand the common potential “pitfalls” in the interviewing, hiring, or promotion process. Perhaps the biggest pitfall, as in the

preceding example, is creating expectations (*i.e.*, that an associate position exists or that partnership is assured) that the firm is not prepared to satisfy. Other major pitfalls generally relate to comments or questions by the relevant decision makers within the firm.

In the discovery process in litigation, lawyers are entitled to ask about or comment on anything that is relevant or anything that may lead to the discovery of relevant information. For the purpose of personnel decisions, however, a law firm must confine itself to only those questions designed to elicit relevant information concerning the essential functions of the job. Care should be taken to avoid asking questions in the interview, hiring, training, or promotion process that may suggest an unlawful bias. This includes questions that may directly or indirectly elicit information based on an applicant’s protected status, such as information concerning an applicant’s race, color, sex, age, marital status, religion, veteran status, sexual preference, national origin, medical condition, disability, or other protected status. Some of the most common possible mistakes are:

- ☑ **Name.** It is unlawful to inquire about an applicant’s maiden name or to ask for information about the derivation of an applicant’s name that would divulge marital status, lineage, ancestry, national origin and descent.
- ☑ **Race, Color.** Inquiries about an applicant’s race or color, including questions about complexion, eye color, or hair, are unlawful since such inquiries are deemed to be discriminatory *per se*.
- ☑ **Age.** It is unlawful to ask an applicant to state his or her birth date unless proof of age is required to perform a job (*e.g.*, a bartender) or to comply with applicable child labor laws. Generally, proof of age should be requested only after hiring.
- ☑ **Birthplace and Citizenship.** It is unlawful to inquire about the birthplace or citizenship of an applicant or that of an applicant’s spouse and relatives. Only after acceptance of a job offer should an employer request an applicant to verify his or her eligibility for employment in the United States for

immigration control purposes. An interviewer can ask a candidate if he or she is legally authorized to work in the United States; however, selectively asking this question to some candidates (i.e., Hispanic applicants) and not others may give rise to a claim of discrimination.

☑ **National Origin.** Any question about an applicant's nationality or ancestry, or that of his or her parents or spouse, is strictly unlawful.

☑ **Marital And Parental Status, And Child-Bearing.** Inquiries about an applicant's marital status, number of children or dependents, sexual orientation, plans for having children, provisions for child care or family arrangements are generally unlawful. Interviewers should resist the urge to ask about these matters even if they are concerned about an applicant's ability to work late on little or no advance notice. However, an interviewer can ask if an applicant would be available and willing to work late hours on little or no notice and can make such availability a requirement of the job. Information needed for tax, insurance, and social security purposes may be obtained after the applicant is employed.

☑ **Economic Status.** Inquiries as to an applicant's finances, credit rating, bankruptcy, residential ownership or garnishment of wages may be off limits and should generally be avoided unless directly relevant to the job.

☑ **Physical Description.** Inquiries about an applicant's height or weight are generally unlawful, particularly if they screen out a disproportionate number of minority group members and the employer cannot show that this information is essential to the safe performance of the job in question. In the law firm context, such inquiries are not likely relevant.

☑ **Religion.** It is unlawful to ask an applicant questions about his or her religious affiliation, beliefs, or denomination.

☑ **Military Service.** It is unlawful in many states to inquire about the type or condition of an applicant's discharge from military service. It is not, however, unlawful to inquire about an applicant's military experience or training.

☑ **English Language Proficiency.** So long as the ability to speak fluent English is a requirement to

perform the job, this inquiry is lawful. In the law firm context English language proficiency is likely required for most professional positions. If this skill is not required of the job, use of a language proficiency test which has an adverse effect on a minority group is unlawful.

☑ **Criminal Arrests And Convictions.** In most states is unlawful to inquire as to whether an applicant has ever been arrested. However, it is generally lawful to inquire as to whether an applicant has been convicted of a recent felony or misdemeanor, provided that the inquiry reasonably relates to the applicant's fitness to perform the particular job in question. In some states, such inquiries must expressly state that the employer is not asking about sealed or expunged records.

☑ **Disability.** An employer is prohibited from inquiring as to the existence, nature or severity of any disability or asking any questions designed to elicit such information. Because the Americans With Disabilities Act ("ADA") can pose some difficulty for interviewers, the EEOC has prepared a list of do not ask questions that every interviewer should be familiar with.

## II. Evaluations

Evaluating work performance for purposes of promotions, discipline, termination or otherwise is an imprecise science: It often requires subjective judgments about complex questions of ability, achievement, and promise of future achievement. In the law firm context, these subjective judgments are made more difficult by the need to work closely with the individual being evaluated. In this context, negative performance evaluations may be perceived as creating an unduly negative working relationship. The temptation may be to engage in "grade inflation": rating performance at levels that have not been achieved, either subjectively or objectively. This may not pose a problem until the employee perceives that he or she has been treated in a manner that is inconsistent with prior evaluations; *i.e.*, he or she is denied a promotion to partnership after years of positive performance reviews.

While courts and juries may understand that the evaluation process is not an exact science, inconsistencies between an evaluation and an employment decision such as a termination may be admissible as possible evidence of discrimination.<sup>4</sup> The following is a summary of considerations in preparing evaluations and other personnel records.

### **Understand The Audience**

Though they are generally regarded as confidential, an employee's personnel records may find a surprisingly broad audience, including: (1) the employee; (2) the employee's lawyer or other representatives; (3) a judge, jury, or government investigator; and (4) the public at large. Personnel records must be prepared with such a broad and critical audience in mind.

Law firms should not assume that their communications about employees will be considered privileged in the way that their communications may be privileged in the context of client matters. Generally speaking, communications, even by lawyers or between lawyers and professional development personnel, addressing personnel matters are not considered attorney-client privileged unless the disclosure of such information would disclose a client confidence. In some

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<sup>4</sup>See, e.g., *Hishon v. King & Spalding*, 467 U.S. 69 (1984) (Former associate claimed gender discrimination after not being promoted to partner and alleged that firm represented that advancement was a "matter of course" for associates who received satisfactory evaluations); *Wynn & Wynn, P.C. v. Mass. Comm'n Against Discrimination*, 729 N.E.2d 1068 (Mass. 2000) (Former law clerk claimed gender discrimination after she was not hired as an associate upon graduation from law school and alleged that partner informed her that her evaluations were excellent and that there was "not a black mark on them."); *Dow v. Donovan*, 150 F.Supp.2d 249 (D. Mass. 2001) (Female associate presented question for jury on failure to promote to partner claim, where a key partner made a number of comments that suggested a discriminatory animus; her evaluations did not support the conclusion that she was not qualified and various partners admitted to considering gender as a factor).

instances, the interests of employees and clients may collide, such as where a law firm may not be able to discuss all aspects of employee performance because doing so may result in the disclosure of client confidences. This is an issue that has been reportedly raised in a recent and highly-publicized sexual-orientation discrimination lawsuit brought by an associate against his former firm in New York, with the plaintiff reportedly claiming the details of a confidential settlement conference as relevant to his claims against the firm. A firm should anticipate client confidentiality issues before terminating an employee by considering whether the reasons for the termination can be substantiated without exposing client confidences.

### **Think Outside The HR File**

Most states have enacted personnel records laws providing employees the right to inspect any personnel documents which are, have been, or are intended to be used in determining that employee's qualifications for employment, promotion, transfer, additional compensation, discharge, or other disciplinary action.<sup>5</sup> Courts generally construe such statutes broadly, finding that they permit an employee to access documents, wherever maintained in an employer's records, so long as those documents relate to the employee's terms and conditions of employment.

Thus, access may not simply be limited to those documents a firm chooses to place in an employee's "official" personnel file maintained by its HR department. If a firm withholds documents from an employee who has requested access to his or her personnel records, the firm may be barred from using those documents as evidence in a subsequent judicial or quasi-judicial proceeding.

In the event a lawsuit is filed, an employee may be entitled to even broader access to

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<sup>5</sup>See, e.g., 820 ILCS 40/1.

records than is permitted by the relevant state personnel records access law. Through written discovery, an employee may request and a firm may be required to produce any documents relevant to an employee's employment *or likely to lead to the discovery of such relevant information*. This may even include information pertaining to sensitive or embarrassing matters, such as other incidents of sexual harassment, misconduct, or sexual relationships.<sup>6</sup>

This may also include the personnel records of other employees, which may be used as a basis for comparison in judging whether the employer has treated employees consistently. Inconsistent treatment may be regarded as evidence of possible unlawful discrimination, harassment or retaliation. For example, an associate might claim discrimination based on disparate pay for the same work by an individual with similar qualifications.<sup>7</sup>

Given the broad requirements of state personnel record access laws and the broad scope of discovery in the event of litigation,

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<sup>6</sup>Courts have recognized some common sense limits to protect against the potential for abuse in the litigation process. For example, in *K.S. and B.S. v. ABC Professional Corporation*, 749 A.2d 425 (N.J.Super.A.D. 2000), an associate alleged she was raped by the partner she worked for and sought discovery concerning sexual relationships between other individuals in the firm. The plaintiff claimed that these "rampant" sexual relationships created a pervasive "libal and licentious atmosphere" that condoned rape. The trial court ordered the production of this information. The appellate court overturned, holding that "what K.S. is really arguing is that if a member of this law firm had a private, discreet, consensual and welcomed sexual relationship with an employee, he would likely condone the rape of another employee by another partner. In our view, that proposition is contrary to logic, common sense and common experience."

<sup>7</sup>In a 1996 case in New Jersey a female attorney brought action against a law firm alleging that she was paid less than her male counterparts and pointed to evidence that the male associate hired approximately 5 months after she left was paid 20% more even though he had similar qualifications and did similar work. The court concluded that the law firm's defense presented an issue of fact for a jury to decide.

law firm supervisors should regard virtually any document directly or indirectly discussing or impacting any employee, whether on paper or electronic (i.e., email), as a document that may find a very broad audience outside of the firm.

### **The "New York Times Standard"**

In the event an employee files a lawsuit alleging that he or she has been subjected to illegal treatment (*i.e.*, discrimination or harassment), personnel records will be closely scrutinized, most likely by a jury. Juries tend to sympathize with employees – while few jurors have probably had to terminate an employee, most jurors will understand the hardship that comes from losing a job. While jurors are bound to apply the law, they will be reluctant to find in favor of a firm that they regard as arbitrary, unfair, callous, or malicious, even if the employer has not technically violated any law.

Likewise, plaintiffs' lawyers will be more likely to sue a firm that has created documentation that would inflame a jury or engender sympathy for the employee. From a law firm's perspective, poorly conceived statements in personnel records, even when they are defensible or do not support a legal claim, can cast a firm in a negative light when disclosed in a public forum in view of judges, other lawyers, and potential clients.<sup>8</sup>

Professional development personnel should, therefore, abide by the "New York Times Standard" in preparing any personnel

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<sup>8</sup>In a 1995 case in the District of Columbia a former female senior associate brought an unsuccessful gender discrimination claim after being terminated by the law firm defendant. In support of her claim, she pointed to a written evaluation by a law firm partner which included the word "bitch". Similarly, in a 2006 case in Illinois a legal secretary claimed that she was subjected to a sexually and racially hostile work environment and was terminated in retaliation for complaining about her work environment. Among other things, she alleged that she came across an email not directed or addressed to her in which a partner allegedly referred to her as a "hooker."

records. In other words, nothing should be written in an employee's personnel records that a firm would not want to see published on the front page of the New York Times.

Thus, records should reflect a professional tone and a sincere effort to treat the employee fairly. Records should not simply appear to constitute an effort to create a "paper trail" that singles out an employee or appears to put his or her conduct "under a microscope."

Records should be consistent from one employee to the next. If one employee is disciplined in a particular way for a violation of company policy, discipline should be administered in a similar manner for future violations. Firms should expect that a jury will eventually see and compare the personnel files of multiple employees and will perceive any inconsistencies.

Of course, personnel records should not contain any off-color or potentially derogatory comments or reflect any personal animus. Personnel records should not comment on matters unrelated to an employee's employment. While difficult personnel situations may strain a manager or supervisor, such strain should not be reflected in any personnel documentation.

For this reason, it is a good practice for immediate supervisors (*i.e.*, firm partners) to closely consult with professional development personnel within the firm or even outside legal counsel before committing anything to writing. Talking through the situation will help the supervisor focus on only the relevant issues and will, in turn, facilitate both better personnel decisions and better documentation.

### **Documenting Fairness**

The legitimate, non-discriminatory reasons for every employment decision (hiring,

promotions, terminations, etc.), particularly adverse decisions, should be clearly documented. An employee's personnel records should readily answer the questions that would logically occur to any employee, as well as his or her lawyer, a government investigator, a judge or a jury. These records should show:

- that the employee had notice of the relevant work rules or criteria used for evaluating his or her performance;
- that the firm considered input from the employee (*i.e.*, the employee's version of events) before making any decision;
- that the firm thoroughly investigated any relevant issues before making a decision (the facts surrounding the incident as revealed through the investigation should be clearly laid out);
- if reasonable under the circumstances, that the employee was given a chance to improve performance or correct behavior;
- that the employee's conduct or performance failed to conform with firm standards such that it warranted the action taken.

Firms that document the substantive fairness of their decisions will not only be better positioned to prevail in a lawsuit, they will be better positioned to avoid a lawsuit in the first place. Since plaintiffs' employment lawyers typically work on a contingent fee arrangement, an employee will have a difficult time persuading a lawyer to take a case in the face of thorough documentation supporting his or her employer's actions.

Likewise, an employee will be more likely to accept an employer's decision when he or she feels that the employer has considered all the facts and made a good faith determination.

## **Pitfalls: Careless & Incorrect Emails And Records**

When firms commit careless or incorrect information to writing, they may unwittingly undermine the firm's ability to defend an otherwise defensible personnel decision. Email and other instant electronic communications such as text messaging can facilitate such blunders.<sup>9</sup>

While individuals typically put considerable thought into written memos or letters before sending them, emails are often sent with as little thought as is put into idle chit-chat. Email fosters a false sense of security – that the email may simply be deleted along with any potentially embarrassing, inappropriate, or factually incorrect comments.

Unlike idle chit-chat, however, email creates a near-permanent written record, which is discoverable. As lawyers are well aware, deleted emails are almost always recoverable from a computer's hard drive or a computer server. Thus, email can provide a rich source of information for plaintiffs' lawyers. Moreover, juries tend to find email highly persuasive as it represents a contemporaneous and unabridged record of events.

As a general matter, and to avoid the pitfalls associated with email, personnel decisions should not be discussed via email. While a careful manager or human resources professional may well be careful in the course of discussing personnel matters via email, such emails may prompt less careful or thoughtful responses from email recipients. To the extent personnel decisions must be discussed via email, care should be taken to ensure that all parties involved understand the value of appropriate personnel records.

Finally, to the extent documentation, whether email or otherwise, is created which is either incorrect or inappropriate, a firm should take immediate corrective action.

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<sup>9</sup>See *e.g.*, note 8 above.

Simply destroying the offending documentation is neither a proper nor effective response (particularly since electronic records are virtually always recoverable). Rather, corrective documentation or a corrective email should be issued. To the extent the individuals involved acted inappropriately, disciplinary action should be taken.

## **Technical Issues**

An employee's formal personnel file should generally contain only information that is relevant to his or her employment. Other types of information concerning the employee, which a firm may obtain and maintain in the ordinary course of business, should be maintained separately. These include the following:

- Payroll records;
- Medical records;
- Charges of discrimination filed with the EEOC or a state agency, complaints filed with OSHA, and any other legal proceedings instituted by an employee against the employer;
- Workers' compensation records;
- Security reports on suspected internal misconduct;
- Results of drug tests;
- Documents regarding an employee's credit records;
- Form I-9;
- Employee benefit documents showing employee's race, ethnicity, age disability, marital status, number of dependents.

## **Conclusion: Clarity & Honesty**

Common sense and an acute awareness of the potential audience that may ultimately review and pass judgment on an employer's personnel records should guide a firm in documenting all personnel decisions. Clearly and honestly documented employment decisions foster fairness in the workplace, discourage employment lawsuits, and,

ultimately, allow a firm to better serve its clients by ensuring that its employees understand and work to meet the firm's expectations.

### III. Terminations

While most states recognize the "at-will" employment doctrine, permitting employers to terminate an employee at any time, for any reason or no reason at all, and without advance notice, the exceptions to the "at-will" employment doctrine such as those under Title VII and the equivalent state and local fair employment laws have effectively swallowed up the "at-will" rule.

A firm that terminates an employee "at will," or without cause, runs a high risk of being named as a defendant in a costly employment lawsuit, with the firm ultimately having the burden of proving that its decision was made for legitimate and non-discriminatory reasons. Such a firm also runs the risk of discarding a potentially salvageable employment relationship, a "friendship" of utility that may have been and may once again prove to be productive.

Again, common sense, fairness, and reasonableness should prevail in any employment decision, including the decision to terminate an employee, even when the circumstances warranting termination (chronic underachievement, gross misconduct, etc.) may provoke anger, frustration, or other such emotions that tend to cloud a manager's sense of fairness and reasonableness.

By considering the issues discussed below, a firm can ensure that fairness and reasonableness as opposed to personal animosity, frustration, the heat of the moment, etc., ultimately prevail in the decision making process.

### Contract Rights

The "at-will" employment relationship may be modified by contract.<sup>10</sup> Contractual rights may arise by express promises, whether written or oral, or from implied promises, whether implied from words or actions. Clearly, if a written employment contract exists, the terms and conditions of that agreement must be reviewed to determine when, why, and how the employment relationship may be terminated. Of particular interest are provisions requiring "cause" for termination, any particular notice requirements, procedural requirements such as multi-step disciplinary procedures, severance requirements, or fixed periods of employment.

Contractual rights arising out of oral or implied promises may pose considerable difficulties to a firm. For example, if a partner advises an associate that "you have got a job here as long as I'm here," the associate may claim a right to continued employment. Alternatively, if a firm has historically followed a particular multi-step disciplinary process prior to terminating an employee, an employee may claim that he or she cannot be terminated without adhering to that procedure.

An "at-will" employment disclaimer with a written acknowledgment of the "at-will" employment relationship signed by employees will greatly reduce the risk posed by oral or implied contractual claims. Likewise, a binding arbitration clause can be a useful tool for resolving disputes in an alternative, non-public, forum.<sup>11</sup>

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<sup>10</sup>See, e.g., *Hishon v. King & Spalding*, 467 U.S. 69, discussed above.

<sup>11</sup>See, e.g., *Williams v. Katten, Muchin Zavis, 837 F.Supp. 1430 (N.D.Ill. 1993)*; *Swiderski v. Millberg, Weiss, Bershad, Hynes & Lerach*, 114 Cal.Rptr. 513 (Cal.App.Ct. 2003); *Panepucci v. Honigman, Miller, Schwartz and Cohn, LLP*, 408 F.Supp.2d 374 (E.D. Mich 2005); *Shore v. Groom Law Group*, 877 A.2d 86 (D.C. Cir. 2005).

## **Risk Factors**

Even within the context of an "at-will" employment relationship, a firm may not terminate an employee if that decision is based on the employee's race, color, sex, national origin, age, medical condition or disability (if the employee is otherwise qualified to perform the essential job functions), religion, veteran status, or other protected status (some states and municipalities also prohibit discrimination based on sexual preference, marital or familial status, criminal arrests, etc.).

Moreover, both state and federal laws include "whistle blower" or anti-retaliation provisions protecting employees from retaliation based on an employee's cooperation, involvement, or participation in a government charge, investigation, or other legal action.

Finally, states generally prohibit employers from retaliating against an employee when doing so might be deemed contrary to the "public interest," as that interest has been recognized by the laws of the state. For example, it is generally deemed contrary to the public interest to terminate an employee for refusing to engage in criminal conduct and any such termination is, therefore, unlawful.

Before terminating an employee, a firm must identify any and all potential risk factors (i.e., minority status, involvement in a potential "whistle blower" action, etc.) for two reasons:

1. To ensure that the risk factor has not intentionally or unintentionally influenced the decision-making process, and
2. To determine the appropriate terms and conditions of the termination (i.e., severance pay) to minimize the exposure associated with the risk factor.

## **Comparable Situations**

Every challenged termination decision will be judged against every prior comparable situation. Thus, if a firm places a white employee on probation for insubordination and terminates a similarly situated black employee for the same or similar conduct, the termination decision will likely not pass muster.

By identifying prior comparable situations involving similarly situated employees, a firm can ensure consistency and fairness in the decision making process.

## **Supporting Documentation**

Again, and as discussed in the preceding section, the strength of any challenged termination decision will ultimately rest on the strength of the documentation supporting that decision. Because memories and perceptions fade or change with time, written documentation is vital to the defense of any employment claim.

Supporting documentation should be prepared on a contemporaneous basis, record the essential facts leading to the termination decision, demonstrate the legitimate, non-discriminatory reasoning underlying the termination decision, and demonstrate the fairness and reasonableness of the termination decision. Thus, the documentation should reflect that the employee was provided with sufficient notice of what conduct would lead to termination.

Such documentation includes employee handbooks, signed acknowledgements, written warning notices or memos, supervisor's notes, performance reviews, etc. These documents should be maintained in a personnel file and retained throughout the employment relationship or as may be required by state and federal record retention requirements.

## Review Process

As an extra precaution to ensure fairness and consistency, an internal review process should be established before any termination is implemented so that all such decisions within a firm, practice or office are evaluated by a common decision maker aside from an employee's direct supervisor.

Typically, this review is best performed by a professional development person, human resources director, or a more senior partner. This review process helps bring an added level of objectivity to the decision-making process by involving an individual who may not be directly involved in the events leading to the termination decision. The objective perspective of such individuals may be particularly important in situations involving a potential claim of retaliation; an employee cannot claim that a decision maker acted out of retaliation if that decision maker had no knowledge of the prior protected activity upon which the claim is based.<sup>12</sup>

Moreover, an objective, third-party review may help identify any weaknesses in the supporting documentation that may need to be addressed before the termination decision is finalized.

## Terms of Separation

Before communicating the termination decision, a firm must decide on the terms of the separation (*i.e.*, timing, severance benefits, references, etc.). The terms and conditions of separation will be largely dictated by firm policy, past practice, and the circumstances leading to termination. Of particular interest in reviewing firm policy or past practice are:

1. any severance requirements;

2. bonus payment or calculation procedures;
3. advance notice requirements; and
4. the handling of requests for references from prospective employers.

In considering the circumstances leading to the termination, a firm should consider whether it is appropriate or advisable to permit the employee to make a "graceful exit" (*i.e.*, continued use of office or equipment pending a new job) or whether the potential for violence to persons or property warrants an immediate and escorted exit from the premises.

As an additional consideration in the law firm context, the firm must consider whether and to what extent professional responsibility issues need to be addressed in connection with the separation. For example, the firm must make arrangements to ensure that matters will be appropriately staffed and must ensure that any necessary client disclosures are made, such as by advising a client of a lawyer's departure and the client's right to direct the future handling of the file (*i.e.*, by keeping it with the firm or sending it with the departing lawyer).

Setting the terms and conditions of separation should be done in a manner designed to facilitate a smooth transition from employment and thereby minimize the risk of potential employment claims. Whenever possible, employees should be allowed to make a "graceful exit," which will help ease the trauma of the termination and minimize the anger and animosity that often fuels employment litigation. Likewise, a firm should adopt a "neutral" reference policy, whereby the dates of employment, position, and rates of pay are simply confirmed for prospective employers.

Departing employees should further be given every opportunity to "save face" and move on with their career endeavors. Vindictiveness in the termination process will do nothing to advance a firm's business and may simply expose the firm to claims for wrongful

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<sup>12</sup> See, e.g., *Dooley v. Brown & Woods, LLP*, 2006 WL 2044877 (Cal.App.Ct. 2006) (Firm obtained summary judgment based on fact that decision maker had no knowledge of the plaintiff's prior involvement in a sexual harassment investigation).

termination, defamation, tortious interference, or other similar employment claims.

Finally, a severance payment offered in exchange for a release of claims may help eliminate uncertainty and potential employment practices liabilities, particularly where a firm has identified one or more "risk factors."

### **Communicating the Termination Decision**

In communicating the termination decision, the tone and tenor is as important as the terms and conditions of the separation. A firm that unduly injures the pride or emotions of an employee may be subject to costly litigation, regardless of how generous the proposed severance package. The following pointers should be considered.

*"On the spot" terminations should be avoided.* If at all possible, an employee should never be surprised by a termination decision. In situations where an employee may not have advance notice of a potential termination (*i.e.*, he or she is not on probation), the employee should be given a chance to mentally prepare for the decision.

For example, if a firm determines that it is necessary to terminate an employee for cause such as misconduct, the employee should be suspended pending investigation of the alleged misconduct. The suspension will give the employee an opportunity to reflect on the misconduct and, possibly, to find alternate employment. The suspension will give the firm the opportunity to ensure that it has correctly assessed the situation.

*The termination decision should be communicated humanly, face to face, with a confirming written termination letter.* Terminations by anonymous "pink slip," email, voicemail, blind letter, or phone call are perceived as cowardly and arbitrary. While an employee may not agree with the reasons for termination, a face-to-face

meeting in which the decision is explained in a calm and reasonable manner will help the employee accept the fairness of the decision.

*The face-to-face meeting should be attended by the direct supervisor or primary decision maker and at least one more detached or objective individual (*i.e.*, a human resources manager). Contemporaneous notes of the termination meeting should be made by each individual.*

*The initial termination meeting should be kept relatively short and to the point.* The meeting should not devolve into a debate, argument, or extended discussion. The reasons for the termination should be stated candidly but not harshly.

*The employee should be given the chance to ask questions* to address any concerns or anxieties he or she may have, particularly as to administrative matters such as the continuation of benefits.

### **Moving Forward**

The ultimate objective in the termination process is not necessarily to gain a consensus between the employee and firm with respect to the termination decision. Nor is it to force the employee into submission or to inflict a misplaced sense of vengeance.

Rather, the objective is to provide for a smooth transition from employment that will enable both the firm and the employee to move forward in the most productive manner possible under the circumstances. From the employee's perspective, moving forward will be difficult if the firm acts in a way that creates a lasting sense of anger or loss of pride, esteem, or income.

By avoiding surprise firings, following a thoughtful termination process that takes into account contract rights and potential risk factors (*i.e.*, age, race, disability discrimination), and structuring an appropriate separation agreement, a firm can

help minimize the chances of becoming involved in a law firm workplace lawsuit.

## Conclusion

*The strongest bond of human sympathy, outside of the family relation, should be the uniting of all working people, of all nations, and tongues, and kindreds.*

- Abraham Lincoln

Lawyers understand that the law cannot be written to address every situation that may arise, that laws are written to provide guiding principles that should aid in the exercise of common sense. In the workplace context, these principles are fairly easily understood: The workplace must be free of discrimination or harassment that interferes with equal employment opportunities, and an employer must live up to its contractual obligations.

Given the role lawyers play in enforcing workplace laws, law firms must be particularly vigilant in adhering to these principles, since their employment decisions are likely to be subjected to a heightened degree of scrutiny by regulators, judges, and juries. Technical defenses will, in this context, not likely serve a law firm well. Every firm should, therefore, strive to provide the workplace environment and

opportunities that have historically been expected of the profession, where lawyers model the workplace behavior others are expected to follow.

Moreover, the firm that follows common-sense employment procedures – including clear expectations; fair and consistent processes for hiring and promotions, evaluations, and terminations; and respectful treatment at every step of those processes and throughout the workplace – will have the most productive and satisfied employees. Isn't that what professional development is all about?



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## Controlled Creative Brainstorming

Nominal Group Technique (NGT) is an effective way to generate and evaluate ideas in a group planning or problem-solving session in a law office. It is especially useful on contentious issues, or in groups where a few outspoken members might rush or dominate the proceedings. Some of its advantages:

- By allowing members of the group private time to think before offering their ideas, it improves the quality of the ideas generated.
- It separates idea generation from idea evaluation.
- It balances participation, and prevents any participant from either withdrawing from or dominating the discussion.
- It doesn't require any technology support but can use it if available.
- It is more orderly and easier to manage than the typical oral brainstorming free-for-all.

I've used NGT for everything from planning a management retreat to identifying and prioritizing the coordination problems in a department. Here are the steps in the process:

1. **Seat 5-10 participants around a table.** (Larger groups should be subdivided into smaller ones at separate tables, each with its own facilitator and flip chart or other recording tool.)

2. **Provide the group with a written question** (for example, "If you could change anything at all about X, what changes would you make?" or "What do you see as the most valuable topics for us to cover at the upcoming retreat?"), and ask them to write down their answers to the question, privately and silently. Give them a 5-10 minute time limit unless the issue is especially complex. You can also limit the number of answers provided, say to their top 5.

3. **Ask each participant in turn** for the first idea on his/her list, and post each idea on a flip chart, white

board, or computer screen.<sup>1</sup> (Make clear that the ideas are not to be evaluated at this stage, but may be explained to make sure everyone understands them.) Keep going around the table in successive rounds, collecting one idea at a time from each participant and moving to the next, until everyone's ideas have been collected and clarified. Record all ideas, even those that may seem duplicative.

4. **Have some further discussion** (a) as needed to eliminate or combine duplicative ideas, and (b) to get the participants' knowledge and opinions about the ideas that remain – resources required or available, examples from the past or from other organizations, etc. At this stage or the previous one, any idea can be refined or restated with the agreement of its contributor, and new ideas may be added.

5. **Have the participants vote** on the ideas. In the absence of technology support, my favorite voting tool is colored dots (also known as "color coding labels"), which office supply stores stock in a range of colors and sizes. Give each participant an equal, limited supply<sup>2</sup> of dots and have them tack one dot next to each of their preferred choices. It's simple and quick, it gets everyone up and moving, and everyone can immediately see the results. Voting could also be by show of hands or privately, on paper or on a keypad polling system.

6. **Tally the votes** and rank-order the ideas by the number of votes they received.

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<sup>1</sup>You can also have the participants write their answers on post-it notes, one post-it for each answer. Then as the ideas are collected they can be arranged on the table or on a wall, with related ideas grouped together.

<sup>2</sup>For example, if you are voting on topics for a retreat at which there will be four sessions, you might give each participant four dots. At a maximum, they should get a number of dots equal to no more than 1/3 of the total number of possible choices to be voted on (e.g., 5 dots for 15 choices).

7. If you have multiple groups, combine their separate lists into a single rank-ordered list, or – depending how many solutions are needed – take only the top choice from each group.

NGT also poses some challenges:

- It requires a strong and objective facilitator who will enforce the process and avoid influencing the group's thinking.
- The quality of the question that is posed to the group in Step 2 is key to the quality and relevance of the ideas the group will generate. That question needs careful thought and perhaps even an advance test with a few people who are similar to the target group.

- NGT typically does not achieve consensus, but only a voting majority. If consensus is important, several rounds of discussion and voting may be needed.

Finally, as in any group decision-making process, the quality of your results will be greatly influenced by the expertise, representativeness, and diversity of perspectives and thinking styles of the participants, and by the quality of the information available to them at the time.

– Gaye Mara

## Classic Quotes

“I’m not a person who thinks he can have it all, but I certainly feel that with a bit of effort and guile I should be able to have more than my fair share.”

“The worst thing about e-mail is that you can’t interrupt the other person. You have to read the whole thing and then e-mail them back, pointing out all their mistakes and faulty assumptions. It’s frustrating and it’s time-consuming. God bless phone calls.”

“Here are a few parental bumper stickers I’d like to see:

“We are the proud parents of a child whose self-esteem is sufficient that he doesn’t need us promoting his minor scholastic achievements on the back of our car.’ That would be refreshing.

“We are the proud parents of a child who has resisted his teacher’s attempts to break his spirit and bend him to the will of his corporate masters.’ A little Marxist, but what’s wrong with that?”

– George Carlin (1937-2008), *in memoriam*

## Professional Developments

### Events

Upcoming PD-related conferences, seminars, and workshops:

#### Legal Profession:

- ❖ 8/2-5/08, Vancouver, BC, Canada. *44<sup>th</sup> Annual Meeting*. Association for Continuing Legal Education, [www.aclea.org](http://www.aclea.org).
- ❖ 8/5/08, Online. *NALP/ALI-ABA Webinar: Managing Recruitment & Retention in a Downturn*. National Association for Law Placement, [www.nalp.org](http://www.nalp.org).
- ❖ 12/3/08, Toronto, ON. *2008 Winter Meeting*. National Association for Law Placement, [www.nalp.org](http://www.nalp.org).
- ❖ 12/4-5/08, Washington, DC. *2008 Professional Development Institute*. National Association for Law Placement, [www.nalp.org](http://www.nalp.org).
- ❖ 1/31-2/3/09, Santa Ana Pueblo, NM. *45<sup>th</sup> Mid-Year Meeting*. Association for Continuing Legal Education, [www.aclea.org](http://www.aclea.org).
- ❖ 4/1-4/09, Washington, DC. *2009 Annual Education Conference*. National Association for Law Placement, [www.nalp.org](http://www.nalp.org).
- ❖ 6/5/09, Chicago, IL. *2009 Diversity Summit*. National Association for Law Placement, [www.nalp.org](http://www.nalp.org).
- ❖ Late 2009 (location and date TBA). *The ALI-ABA/ACLEA Critical Issues Summit: "Equipping Our Lawyers: Law School Education, Continuing Legal Education, and Legal Practice in the 21<sup>st</sup> Century."* ALI-ABA, [www.theclesummit.org](http://www.theclesummit.org).
- ❖ 12/3-4/09, Washington, DC. *2009 Professional Development Institute*. National Association for Law Placement, [www.nalp.org](http://www.nalp.org).

#### General Audience:

- ❖ 8/6-8/08, New York, NY. *AMA's Myers-Briggs Type Indicator (MBTI) Qualification Program*. American Management Association, [www.amaseminars.org](http://www.amaseminars.org). (Repeated in San Francisco 8/20-22; in New York City 9/15-17, 10/20-22, 11/3-5, and 12/15-17; in Atlanta 10/13-15; in Chicago 12/8-10.)
- ❖ 8/11-13/08, Atlanta, GA. *Training the Trainer*. American Management Association, [www.amaseminars.org](http://www.amaseminars.org). (Repeated in New York 8/18-20, 10/1-3, 11/5-7, 12/8-10, 2/11-13, 3/9-11, and 4/6-8; in Arlington, VA 9/22-24 and 3/4-6; in Atlanta 11/12-14 and 2/11-13; in Chicago 12/15-17 and 3/16-18; in San Francisco 9/3-5; in Las Vegas 1/14-16.)
- ❖ 8/11-13/08, Chicago, IL. *Accelerated Learning Training Methods Workshop*. The Center for Accelerated Learning, [www.alcenter.com](http://www.alcenter.com). (Repeated 9/15-17 in Dallas, 10/6-8 in Lake Geneva, NY, 11/3-5 in Seattle, 12/8-10 in Phoenix.)
- ❖ 9/17-19/08, New York, NY. *Instructional Design for Trainers*. American Management Association, [www.amaseminars.org](http://www.amaseminars.org). (Repeated 12/1-3 in San Francisco, 3/25-27 in New York, 4/15-17 in Arlington, VA.)
- ❖ 9/18-19/08, Chicago, IL. *The 2008 Succession Management Conference*. The Conference Board, [www.conference-board.org/succession2](http://www.conference-board.org/succession2).
- ❖ 9/24-26/08, San Jose, CA. *Innovations in Learning Conference* (9/25-26), with optional pre-conference workshops 9/24. Brandon Hall, [www.brandonhallconference.com](http://www.brandonhallconference.com).
- ❖ 9/22-27/08, Albuquerque, NM. *ISPI Fall Conference: "Achieving Business Results through Performance Improvement: Connecting People, Processes, and the Organization."* (Pre-conference Institute and workshops 9/22-24.) International Society for Performance Improvement, <http://www.ispi.org/fall2008/default.htm>.

- ❖ 9/25-26/08, New York, NY. *Kirkpatrick's Four Levels: Increasing Training Effectiveness Through Evaluation*. American Management Association, [www.amaseminars.org](http://www.amaseminars.org). (Repeated 10/20-21 in Chicago, 11/6-7 in San Francisco, 3/2-3 in New York, 4/6-7 in Atlanta.)
- ❖ 10/2-3/08, New York, NY. *Learning from Legends and Thought Leaders*. The Conference Board, [www.conference-board.org](http://www.conference-board.org).
- ❖ 10/21-22/08, Alexandria, VA. *The 2008 Annual Diversity Seminars: "A Cultural Blueprint for Workplace Diversity: Strategies & Solutions."* The Conference Board, [www.conference-board.org/diversityseminars](http://www.conference-board.org/diversityseminars).
- ❖ 10/21-22/08, New York, NY. *The 2008 Succession Management Conference*. The Conference Board, [www.conference-board.org/succession2](http://www.conference-board.org/succession2).
- ❖ 10/21-22/08, Chicago, IL. *The Telling Ain't Training Conference*. American Society for Training & Development, [www.tat.astd.org](http://www.tat.astd.org).
- ❖ 10/26-29/08, Orlando, FL. *Elliott Masie's Learning 2008 Conference*. <http://www.learning2008.com>.
- ❖ 11/6-7/08, Arlington, VA. *The Telling Ain't Training Conference*. American Society for Training & Development, [www.tat.astd.org](http://www.tat.astd.org).
- ❖ 11/11-14/08, San Jose, CA. *Training Technology in Action Conference & Awards*. Training Magazine, [www.trainingmagevents.com](http://www.trainingmagevents.com).
- ❖ 11/17/08ff, Online. **Clark Training Workshop Series**, Clark Training & Consulting, [www.clarktraining.com](http://www.clarktraining.com):
  - 11/17-21/08. *Building Expertise: How to Apply Learning Psychology to Instructional Design*.
  - 12/1-5/08. *E-Learning and the Science of Instruction*.
- ❖ 12/3-5/08, Orlando, FL. *Training Magazine Institute Certificate Programs*. [www.TrainingMag.com/Institute](http://www.TrainingMag.com/Institute).
- ❖ 4/18-22/09, Orlando, FL. *The 2009 Performance Improvement Conference*. International Society for

Performance Improvement, [www.ispi.org](http://www.ispi.org).

## Certificate and Degree Programs

### American Society for Training & Development Certificate Programs:

- ❖ 8/11-13/08, Chicago, IL. *Designing Learning Certificate Program*. American Society for Training & Development, [www.astd.org](http://www.astd.org). (Repeated 9/8-10 in Las Vegas, 10/6-8 in Chicago, 10/15-17 in Alexandria, 11/17-19 in Miami, 12/8-10 in Chicago, 12/15-17 in New York.)
- ❖ 8/12-13/08, Dallas, TX. *E-Learning Instructional Design Certificate Program*. American Society for Training & Development, [www.astd.org](http://www.astd.org). (Repeated 9/3-4 in Boston, 9/16-10/9 online, 9/24-25 in St. Louis Park, MN, 10/7-8 in Atlanta, 10/22-23 in San Francisco, 10/28-11/19 online, 11/6-7 in Orlando, 11/18-19 in Cincinnati, 12/3-4 in Phoenix, 12/8-9 in Washington, DC, and 12/15-16 in New York.)
- ❖ 8/18-20/08, Alexandria, VA. *Measuring and Evaluating Learning Certificate Program*. American Society for Training & Development, [www.astd.org](http://www.astd.org). (Repeated 9/15-17 in New York, 10/27-29 in Scottsdale, 11/17-19 in Miami, 12/8-10 in Chicago.)
- ❖ 8/20-22/08, Chicago, IL. *Analyzing Human Performance Certificate Program*. American Society for Training & Development, [www.astd.org](http://www.astd.org). (Repeated 9/10-12 in Fort Worth, 12/3-5 in Alexandria.)
- ❖ 8/20-22/08, Chicago, IL. *Human Performance Improvement in the Workplace Certificate Program*. American Society for Training & Development, [www.astd.org](http://www.astd.org). (Repeated 9/15-17 in New York, 10/27-29 in Alexandria, 12/8-10 in Chicago.)
- ❖ 8/20-22/08, Chicago, IL. *Training Certificate Program*. American Society for Training & Development, [www.astd.org](http://www.astd.org). (Repeated 10/20-22 in Atlanta, 11/6-7 in Boston, 12/4-5 in New York, 12/11-12 in Chicago.)
- ❖ 9/8-9/08, Las Vegas, NV. *Coaching Certificate Program*. American Society for Training &

Development, [www.astd.org](http://www.astd.org). (Repeated 9/8-10 in Las Vegas, 9/15-17 in Alexandria, 10/20-22 in Atlanta, 10/27-29 in Scottsdale, 11/5-7 in Lincoln, 11/17-19 in Miami, 12/8-10 in Chicago, 12/15-17 in New York.)

❖ 9/8-9/08, Alexandria, VA. *Project Management for Trainers Certificate Program*. American Society for Training & Development, [www.astd.org](http://www.astd.org). (Repeated 10/23-24 in Atlanta,, 12/4-5 in New York.)

❖ 9/10-11/08, Fort Worth, TX. *ROI Skill-Building Certificate Program*. American Society for Training & Development, [www.astd.org](http://www.astd.org). (Repeated 10/23-24 in Alexandria, 11/17-18 in Las Vegas, 12/8-9 in Chicago.)

❖ 9/29 - 10/1/08, Chicago, IL. *Selecting HPI Solutions Certificate Program*. American Society for Training & Development, [www.astd.org](http://www.astd.org). (Repeated 11/5-7 in Fort Worth.)

**Online Certificate Program in Performance Improvement Management.** Designed by Diane Gayeski, innovative and gifted teacher at Ithaca College, and sponsored by the International Society for Performance Improvement, this is a series of interactive two-week online seminars with 10 to 20 participants in each. Completion of any four seminars earns a certificate from Ithaca College. The schedule:

9/3-16:

- *Leadership and Coalition Building*
- *Strategic Planning*

9/24 - 10/7/08:

- *Managing Across the Generations*
- *Managing Projects with In-House and Outsourced Teams*

10/15-28/08:

- *Change Management*
- *Designing & Modeling Communication Systems and Infrastructures*

11/5-18/08:

- *Evaluating Emerging Technologies*
- *ROI and Beyond*

[www.ispi.org/pim](http://www.ispi.org/pim)

### **Training Live+Online Certificate Programs.**

- *E-Learning Design*, 9/8
- *Producing Great Audio and Video Podcasts*, 9/9
- *Talent Management and Succession Planning*, 9/9
- *Strategic and Systems Thinking*, 9/22
- *Power Point for Web-Based Training*, 10/2
- *Kirkpatrick Four-Level Evaluation*, 10/14
- *Crafting Instructional Strategies*, 10/16
- *Training Manager*, 10/24
- *ROI Fundamentals*, 11/3
- *Advanced E-Learning Design*, 11/3
- *Second Life Basic Design*, 11/4
- *Creating E-Learning with Flash*, 11/6
- *Manager of Learning and Learning Technologies*, 11/12-14
- *Training Instructor*, 11/18
- *Managing and Communicating the Instructional Design Process*, 12/1
- *Reinventing Strategic Planning*, 12/15

[www.trainingliveandonline.com](http://www.trainingliveandonline.com).

### **Executive Education for Chief Learning**

**Officers.** Penn's Wharton School and Graduate School of Education have teamed to create the "Executive Program in Work-Based Learning Leadership." The program offers "blended learning approaches that include onsite classes, virtual sessions, individual and team project work, and application work" in five curriculum blocks:

1. Organizational/strategic leadership
2. Workplace learning and performance leadership
3. Business analysis
4. Evidence-based decision making and analysis
5. Use of technology in workplace learning.

Students in the program may obtain a certificate from Wharton for any single course block, or may use the curriculum to pursue a master's or doctoral degree from the Graduate School of Education.

[www.executiveeducation.wharton.upenn.edu/clo.htm](http://www.executiveeducation.wharton.upenn.edu/clo.htm).

## News

This fall, the National Association for Law Placement is launching the **NALP/Street Law Legal Diversity Pipeline Program**, which pairs each participating firm with a local high school to expose its students to legal concepts and career paths. A pilot program in the 2008-09 school year will include five firms: Holland & Knight in DC, Hunton & Williams in Richmond, Kirkland & Ellis in San Francisco, Troutman Sanders in Atlanta, and Wachtell, Lipton, Rosen & Katz in New York City. NALP is now seeking participating firms for 2009-2010. Inquiries or letters of interest may be directed to James Leipold, NALP Executive Director, at [jleipold@nalp.org](mailto:jleipold@nalp.org) or (202) 835-1001. An article describing the program appears in the July issue of the *NALP Bulletin*.

**The ultimate competency model.** In May, the Center for Public Leadership at Harvard's Kennedy School of Government, in cooperation with the Ken Blanchard Companies, held a "Conversation on Leadership and the Next Presidency" with a panel of 5 experts and over 200 business, political, educational and civic leaders. "In an effort ... to get at the heart of leadership, the capacities and values that make a difference," the panelists formulated an initial list of interview questions to be posed to the presidential candidates in some appropriate forum.

The questions were based on six critical Presidential competencies the panelists had previously identified:

- teamwork
- coalition building
- creating a culture of openness, trust, accountability, and creativity
- sound judgment
- the recruitment of talented advisors
- substantial knowledge of other cultures

The participants voted on the panelists' questions and developed additional questions of their own.

There is an archive of fascinating posts on the meeting, the questions, and the nature of leadership and the Presidency, at <http://67.212.164.235/?cat=14>.

**I Spy on Distance Learners.** *The Chronicle of Higher Education* reports that the Higher Education Act renewal that is now before Congress contains a paragraph requiring that any "institution that offers an online program must prove that an enrolled student is the same person who does the work."

Some colleges are interpreting this as a technological mandate for fingerprint scans, Webcams, or keystroke recording to authenticate students' identities. Various vendors are promoting these technologies at higher education conferences (and no doubt vigorously lobbied Congress for the provision). One such device, the Securexam Remote Proctor, incorporates a fingerprint scanner, a microphone, and a camera with a 360° view around an exam taker to pick up anything suspicious, such as the presence of another person in the room.

Some college officials complain that these technologies are an invasion of privacy, that they will vastly increase the cost of online learning, and that the requirement falsely implies "that cheating is more of a problem among students online than ... in a classroom."

What we want to know is, if colleges across the nation implement these technologies, can State CLE Boards be far behind?

<http://chronicle.com/free/v54/i46/46a00103.htm>

## Resources

**Dr. Will Thalheimer**, a researcher and consultant on workplace learning, has published some of the results of his work on his web site, [www.work-learning.com](http://www.work-learning.com). On his blog, which can be linked to from the web site or directly at [www.willatworklearning.com](http://www.willatworklearning.com), there is currently a thought-provoking discussion on how to structure "smile sheets" (*i.e.*, evaluation forms for training sessions) to collect more in-depth and useful information from course participants. Thalheimer also produces a free e-mail newsletter ([www.work-learning.com/subscribe.htm](http://www.work-learning.com/subscribe.htm)) and conducts periodic half-hour "brown bag lunch" webinars on workplace learning topics. (Our favorite bit on his home page is the warning that reproducing or distributing any material from the site "is a violation of moral and legal principles....")

## Studies

### **Merrill Lynch profiles “the new retirement.”**

Merrill Lynch has done an annual study of attitudes toward and preparations for retirement since 2005. The initial *2005 Merrill Lynch New Retirement Survey*, which surveyed baby boomers, found that “three-quarters ... had no intention of seeking a ‘traditional’ retirement. Instead, boomers intend to create a whole new life stage that includes a balance of work and active living.”

In 2006, in partnership with Harris Interactive®, Merrill Lynch expanded the scope of the study to include over 1,000 employers with 100 or more employees and over 5,000 adults aged 25-70. In 2007, survey data from small businesses and their employees were collected.

Key survey findings on the employee side:

- “The ideal retirement for 71% of adults surveyed is to work in some capacity, and almost half of those U.S. adults who plan to work in retirement say they don’t plan to stop working – ever.”
- “Employers who are counting on keeping their older workers may lose them to competitors. Two-thirds of those who want to work in retirement would like to do so on their own schedule, in a *different* line of work.”

Findings on the employer side:

- “Highly skilled professionals” are the employees organizations are most concerned about losing to retirement, because they are “the most knowledgeable and least available.” Yet, “Only one in four employers said they are on track with preparing for the boomer outflow..., and almost one-third (31%) say there hasn’t been much thought about it.”
- “Employers who have taken steps to prepare for future labor shortages focus on recruitment but tend to focus on recruiting younger workers (61%). Only 38% of companies have identified specific actions to retain older, skilled workers.”
- The “pioneers on the employment front,” by “permitting telecommuting and more flexible schedules, providing coaching and mentoring services, [and] offering increased access to

health insurance,” among other strategies, are taking “new approaches... to leverage a very valuable workforce segment that still has the desire to work.”

*The 2006 Merrill Lynch New Retirement Study*, <http://www.ml.com/media/66482.pdf>.

**Leadership Coaching in Corporate America.** A survey by Right Management of 656 human resources professionals in North America found that organizations are providing leadership coaching to:

- “35 percent of executive/strategic leaders (chief executive officers, department heads, and senior vice presidents).
- “29 percent of developing leaders (vice presidents, directors, and managers).
- “23 percent of new leaders (supervisors and high-potential employees).”

*(Inside Training Newsletter, 7/9/08)*

## Miscellany

**Beijing-Bound?** You may have seen the news that one strategy for reducing air pollution in Beijing during the Olympics is to stagger driving times in the city: Cars with odd-numbered plates may drive only on the odd-numbered days, and even-numbered plates on the even days.

Now we hear (thanks to *Dwell* magazine) that the China Meteorological Administration plans to ensure good weather for the occasion by firing anti-aircraft guns and rocket launchers carrying special cloud additives into the Beijing skies, to prevent cloud formation and/or precipitation over the city.

We were concerned that what goes up must come down. Fortunately, Article 6 of the *Regulations on Administration of Weather Modification*, adopted in 2002 by China’s State Council, requires that “Weather modification operations shall be implemented under appropriate weather and climatic conditions, while local needs for preparing against and mitigating disasters and results of such operations shall be taken into full account.”

[Www.cma.gov.cn/english](http://www.cma.gov.cn/english).

