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A Black Partner Responds to GCs on Law Firm Diversity

We split atoms, we have placed men on the moon, we travel at the speed of sound, yet we cannot figure out the ultra-complex issue of law firm diversity.

By **Don Prophete** | January 30, 2019

Over the last 20 or so years, various general counsel organizations or groups have [penned open letters](#)



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(<https://www.law.com/americanlawyer/2019/01/27/170-gcs-pen-open-letter-to-law-firms-improve-on-diversity-or-lose-our-business/>) chastising law firms for their lack of diversity, while expressing a commitment to the diversification of

the legal profession. Here is what has happened to law firm diversification since the first letter was penned in the early 2000s. Today, law firm racial diversity has either remained stagnant or has decreased significantly. The latest report on black male lawyers in law firms is alarming. Judging by these numbers, the profession has regressed significantly. There are virtually no more black males in law firms. The numbers for Latinos, Asians and "others" remain dreadfully low as well.

These numbers raise a question: How can this be happening with the myriad concerns and commitments to diversity expressed by GCs throughout the country? Let me take a stab at explaining why I believe the profession has regressed in the area of diversity.

First, a bit of personal background to explain why I believe I am qualified to provide the following strong, and no doubt controversial, opinions about the efficacy of these GC letters. I am an émigré of Haiti who moved to the United States at 5. Due to the wealth of opportunities in the U.S., I was able to pay my way through college and law school. After law school, I worked at several large firms as an employment lawyer, and in one (then) Fortune 50 company, where I served as director of labor and employment law. After sharpening my proverbial tools in-house, I returned to law firm practice, with the ideal of making a difference in diversity and client service.

Since then, I have been nominated for every conceivable award doled out to the most meaningful lawyers in the labor and employment law area. I have tried two dozen cases and won 70 percent of them. I have served on the executive committees of major law firms, where I advocated for and was responsible for the hiring and promotion of dozens of racially diverse lawyers. I am, as I have been told, the only black lawyer to ever have his name added to the masthead of an Am Law 250 law firm. I have built an exclusively labor and employment practice that has hit eight figures. I have been successful at a very

high level by every conceivable measure in the context of labor and employment law practice. As my pastor once told me, "God blesses fools and babies." Admittedly, I may be a combination of both.

Despite my success in the profession, my significant name recognition and my trial skills, I have never in 28 years of practice had a single GC reach out to me based on reputation, pedigree or skill to hire me for a major matter, like many of my white counterparts have been. Every single retention I have ever gained, whether common or bet-the-company, has been based on significant marketing and sweat. This is highly unusual for a majority lawyer of my achievements.

So, what am I really saying? Stated in simple English, these signatory letters have been more public relations than actual practice. Except for a handful of GCs, signing on to these letters is a politically necessary thing to do, which ultimately requires zero accountability. So, it's an activity that is all win with no drawback. Ask yourselves how many of these same GCs take any real measures to diversify the lawyers they hire on their meaningful matters. Very few do.

Let's go through a simple exercise to measure whether the GCs you know have engaged in even the most minimal efforts to find solutions to law firm diversity:

How many GCs do you know who have hired, or sought to hire, top racially diverse lawyers to handle matters of high importance to them? Very few. They typically defer to the same cadre of lawyers they have always used on their matters based on the explanation that they already know them, or that they owe them loyalty.

How many times have you heard GCs say during a pitch that they defer to their subject-matter experts on outside counsel decisions, thereby continuing the same hiring process that has always been used? I have, an innumerable number of times.

If you asked most GCs today to identify by name a single racially diverse outside counsel that the company uses, how many could actually identify that lawyer by name, if such a lawyer actually existed within the company's pipeline? Very few, I'm certain because I have asked many GCs that question, and received blank stares.

How many GCs have taken the simple step of identifying the best or most-renowned racially diverse subject-matter experts in the profession for future opportunities? By that I mean how many GCs have engaged in the minimal effort of identifying the top three diverse intellectual property, commercial litigators, labor and employment lawyers, etc., in the profession for upcoming opportunities. A minuscule number, because I have asked many GCs that question, and received blank stares.

If you gave all these GCs truth serum, how many would have to admit that a majority of the RFPs they send to diverse lawyers are pre-decided before they even send the invitation to bid?

I could go on and on, but you get my point. Saying the right thing to appear politically correct is different than taking real measures to diversify the legal profession.

As a student of history, I have learned two general principles: (1) past is prologue and (2) you cannot expect a different result by applying the same old principles and measures. With that said, here's what the most recent history can teach us. There is a core 40 percent of Americans who are fervent supporters of President Trump and who really would vote for him again even if

he shot someone on 5th Avenue. Those 40 percent are uninterested in the concept of racial diversity. Many in-house lawyers either quietly or vocally fall within this 40 percent. A good number of those have signed on to the various iterations of these GC letters. Do we really believe that these same individuals will have any motivation to change the status quo?

The current law firm diversity numbers say resoundingly no. Those with a genuine interest in diversity are frequently uninterested in taking real steps to drive the diversity that they may really believe in. Let's be honest, this problem of diversifying the profession is not as difficult to solve as many would claim. We split atoms, we have placed men on the moon, we travel at the speed of sound, yet we cannot figure out the ultra-complex issue of law firm diversity. The lack of results is a direct result of a lack of true ambition by the GC corps.

Here are some excuses that have been used, some of them genuine, to explain the lack of progress in law firm diversity. Big companies decry their inability to use Namwolf (<https://namwolf.org/>) firms because they are ostensibly too small and lack bench strength. These same companies also complain about their inability to use racially diverse lawyers in big firms, because they can't check a diversity box required by their supply chain management group by using such a lawyer. So, what's left is the un-usability of diverse lawyers in either minority-owned or major law firms. A skeptical reader could perhaps find a plot at hand in this catch-22.

To be clear, my goal in penning this letter is not to ascribe blame or solicit work from GCs. My goal is to voice the frustration of dozens of racially diverse lawyers like me, who are quite frankly tired of these types of letters and pronouncements leading to no meaningful advancement. The desire is simply not there. I could fix many of these problems through broad-stroke, common-sense approaches.

Look, I and many others understand the business reality that majority in-house decision-makers hire other majority lawyers with whom they have personal relationships, without regard to race or other reasons. It makes sense to want to work with your friends. It makes sense that (based on data) most majority lawyers' friends look like them. I'm sure that racially diverse lawyers would also love to work with their black and brown friends if they were so empowered. But that is not the current reality and won't be for some time to come.

My suggestion, and that of many of my colleagues, is that we should stop these grandiose pronouncements that continue to lead to no real improvement. They are viewed as empty PR ploys, devoid of any real measures of accountability. These repeated statements also lead to diversity fatigue in the profession, which is where I think we are now.

When companies are genuinely desirous of committing resources and real efforts to diversify the profession, I can assure you that it will not be this difficult and they will see immediate improvements and result.

With great respect.

These are the opinions of Don Prophete. None of these opinions should be ascribed to the Constangy, Brooks, Smith & Prophete firm or the lawyers employed there.

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