

Competing Interests II:

Balancing the Value Proposition for Diversity & Inclusion with Other Core Values





Competing Interests I:

Balancing the Value Proposition for Diversity & Inclusion with Other Core Values



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How Valuable is the Value of Diversity?

Corporate clients have professed a desire to see greater diversity among their outside counsel for decades.¹ Law firms say they try to satisfy that desire. Yet the lack of diversity persists. Why?

Our own research, and that of other organizations, has shown in a variety of ways that corporate clients do indeed desire to see greater diversity among their outside counsel, but they do not operate in a vacuum. They value diversity, but they also value other considerations, some of which can be in direct – perhaps unintended – conflict with diversity.

One of the earliest indicators for this was in 2005 when Kirkpatrick & Lockhart Nicholson Graham LLP (a predecessor to K&L Gates) released its *Top of Mind* survey results.² The firm found that companies were becoming more selective in their hiring of outside counsel. The most important considerations they used in distinguishing among firms were experience and credentials, communication skills, the ability to work well as a team, and compatible hourly rates. A law firm's diversity and inclusion, while stated to be important, simply wasn't given the same value as these other considerations.³

This leads us to believe diversity proponents have been shortsighted in focusing their efforts on removing barriers to diversity and inclusion without simultaneously emphasizing their value in relation to other business values and objectives. It is not sufficient to simply urge firms to recruit, hire, retain and promote diverse lawyers to partnership, or to encourage corporate clients to hire diverse outside counsel. We also must address the potential conflicts between diversity and other corporate values.

As a profession, we can no longer talk about diversity in a vacuum, as an issue separate unto itself. We must understand how diversity fits into a company's or a law firm's business plan. And we need to ensure the decision-makers in corporate law departments and law firms cease viewing diversity primarily as a cost center or a necessary expense to be contained and minimized. Instead, we must make a concerted effort to shift the legal profession's view of diversity efforts from a luxury item to a necessary investment in our future.

Competing Interests Between Diversity, Economy and Efficiency

Diverse lawyers face significant barriers to their efforts to generate the business necessary to their viability as law firm partners.⁴ Whether this is due to partner discomfort, implicit bias, or active disregard for the value of differences, diverse attorneys generally do not get the same opportunities

1. As recently as August, 2016, a group of corporate counsel under the auspices of the American Bar Association launched the latest effort to encourage their peers to emphasize the value they place upon diversity by requesting their support in promoting diversity in the legal profession.

2. We note that when this research was released, there was some debate about the validity of its methodology given that the pool of respondents included a number of non-lawyers or corporate officers not in the law department and there was some question as to how or whether such respondents were actually involved in the selection of outside counsel. While this is a valid issue, there has been other research – notably from LexisNexis Martindale-Hubbe – to support the assumption that corporate officers may be just as likely to be involved in hiring outside counsel. And, since such decisions are rarely made in isolation, we are comfortable referencing this research.

3. The Institute for Inclusion in the Legal Profession, IILP Business Case for Diversity: Reality or Wishful Thinking, The Institute for Inclusion in the Legal Profession, Chicago: 2011, http://www.theiilp.com/Resources/Documents/BusCaseDivReport_11_Final.pdf. It could also explain our own findings regarding the quantity and quality of business given to African American and other minority partners, the rationale perhaps being that in the interest of diversity they are given some business, the lower margin and less valuable work, which might appease consciences but does little to address the underlying issue of supporting diverse partners.

4. In 2015, 15.7% of all attorneys are minorities yet they only make up 7.52% of NALP firm partners with African Americans being only 1.77% of the partners but 5.7% of all attorneys. January 2016 NALP Bulletin

Nowhere is this conflict more evident than in the use of “convergence,” also known as “preferred/panel counsel lists” by corporate law departments.

as their white male counterparts. Thus, when diversity and inclusion are viewed as conflicting with and/or less important than other organizational values or objectives, it's easy to treat diversity and inclusion as too expensive or too time-consuming a luxury to continuing pursuing.

Nowhere is this conflict more evident than in the use of “convergence,” also known as “preferred/panel counsel lists” by corporate law departments. Convergence is the process by which a corporate client reduces the number of outside law firms that handle its legal work in order to obtain lower billing rates and a firm's greater familiarity with, and dedication to, its business and internal operations. Altman Weil conducts an annual Chief Legal Officer Survey covering a variety of topics including “Law Department Management - Cost Control.” In the 2012 to 2015 surveys, Altman inquired whether corporations intended to institute a law firm convergence program. The affirmative responses were as follows: 2012: 10.3% (20), 204 responses; 2013: 13.5% (28), 207 responses; 2014: 14.5% (27), 186 responses; and 2015: 14.1% (36), 258 responses. In total, 111 corporate law departments responded that they intended to implement a convergence program, a trend that is likely to continue.⁵ If this trend does continue, the potential exists for convergence programs to not only undercut but undo all of the efforts over the last twenty-five years to diversify law firms.

It is possible that while companies pursued their goals of reducing outside counsel spend and increased efficiency by adopting convergence programs, they did not view these programs as having a negative impact on the diversity of their outside counsel or, if they did consider diversity and inclusion, perhaps the companies assumed that the selected law firms would become more diverse as a client-partner with shared diversity objectives. After all, if diversity is a factor in selecting the law firms a company will use, simply reducing the number of firms handling its legal matters isn't necessarily relevant especially where the firms are aware of the clients' diversity objective. The reduction of the number of large law firms with few diverse partners used as outside counsel to a smaller number of large law firms with few diverse partners should simply be a generally proportional decrease. Right?

Wrong.

5. For example, in a 2013 ACC article entitled, *Litigation Roundtable: On Budget, and On Top of All Costs*, Bank of America reported reducing the number of external firms from around 700 to 30” and further offered that “[w]e look at firms’ staffing models—an appropriate mix of partners and associates, provide training, and ask the firms for detailed expectations The Roundtable firms really work with us as partners.” <https://www.acc.com/valuechallenge/valuechamps/2013champ-profileboa.cfm> Bank of America is not alone. Association of Corporate Counsel's 2013 Annual Meeting hosted a program entitled, “*Drive Value Through Convergence, Value-Based Fees & Other Innovations*.” As part of the presentation, Office Depot offered that it implemented Project Abacus from 2009 to 2012 “ . . . to reduce legal spend by at least 25% and to improve predictability of what the Company will spend on outside legal services.” Office Depot reported, “50% of external spending on value based fees, predictability for our clients, and a reduced legal spend by 30% since 2009.” <https://www.multisoft-events.com/ACCAM13/SessionFiles/801%20-%20Full%20Version.pdf> In 2016, Avis Budget Group reported completion of its convergence program. “The Avis Story. They undertook a convergence effort to reduce their legal panel from 700 law firms to seven firms globally. The winning seven firms are guaranteed work, provided they maintain expected quality levels. In addition, these firms work within a “target” (or fixed) fee structure.” <http://aboveandbeyondkm.com/2016/09/law-firms-clients-actually-collaborate-iltacon.html>

Few, if any, large firms have achieved a critical mass in their ranks of diverse partners, and convergence programs are not designed as diversity initiatives even when diversity is included among the stated selection criteria. The primary drivers of convergence programs, as expressed by law departments, are cost savings, efficiencies, and improved quality of legal services. When a company uses a fewer number of law firms it means an even fewer number of diverse attorneys will have an opportunity to work on, or generate, that company's business. That's good for the company but bad for diverse partners and associates. In the absence of other business, firms excluded through convergence are likely to reduce their attorney numbers. Past experience has shown that when firms reduce their numbers, diverse attorneys are among the first to be let go, or to be encouraged directly or through diminished compensation to depart.⁶ As an example, presume a company uses ten law firms in a city, each with 2 diverse partners working on the company's matters. If the company reduces that number to two preferred provider firms, the absolute number of diverse law firm partners handling that company's legal work will be reduced dramatically from 20 to 4. Further, in the eight law firms not selected as preferred providers, 16 diverse partners previously working for the company are now excluded from handling the company's legal work despite having demonstrated the requisite skills and abilities. The result is a direct net loss of diverse attorneys doing the company's legal work, and an indirect decline in the number of diverse partners and associates within those eight firms if they cannot replace the business. Most clients will admit that the decision to reduce the number outside law firms (and the use of diverse partners) has less to do with the quality of the work product and more to do with reducing costs and improving overall efficiencies by having a small number of firms handle a high volume of similar matters. In other words, clients stopped using experienced diverse partners and associates because of a business objective and not because they lacked the talent and ability to handle their matters. When this occurs, the corporation wins by achieving overall costs savings, but diverse partners lose clients, revenue, and stature within their organization.

The conflict between the value placed on diversity versus that of economy and efficiency is not limited to corporate clients. Most law firms value diversity enough that it merits its own page on the firm website. In law firms, the tension commonly manifests as a requirement that expenditures tied to diversity have a direct correlation to current or future business generation. While the rationale is logical, the implications are not always apparent. Insisting that diversity funding be tied to business means that many efforts aimed at addressing less obvious reasons for the persistent lack of diversity – educational inequality, bottlenecks in the pipeline into the profession, scholarships and internships,

6. David B. Wilkins and Mitu G. Gulati, "Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms," 84 *Virginia Law Review* 1581 (1998).

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research into and about the dynamics within the profession, professional development training and opportunities, diversity education for the broader legal profession, etc. – have an ever more limited pool of prospective funding. Chaining diversity funding to business development can inhibit the possibility of truly building solid and deep-rooted relationships between law firm attorneys and corporate in-house counsel based on a shared value of diversity. This construct also saddles diverse partners and associates with the additional pressure to produce immediate “diversity business” or risk being viewed as failing to demonstrate their value to the firm. It also undercuts, consciously or unconsciously, their perception within the firm as “talented professionals” under the theory that if they are talented and corporations value diversity, then they should be able to generate business. If the diverse partners fail to generate business, then perhaps the decision not to engage them has nothing to do with diversity but their talent and abilities. Such attitudes still exist even though most law firms have a cadre of white partners known as “service partners” who are not required to general business because they are “talented and indispensable.”

In many companies and law firms, diversity is still promoted as a core value, but the attitudes and biases that shaped the results of the 2005 *Top of Mind* survey haven’t changed significantly. However, since the 2005 *Top of Mind* survey, our country has changed and grown. We’ve experienced the economic downturn of 2008. We’ve elected our first African American president. We have a Latina on the U.S. Supreme Court. The numbers of racial minorities in the legal profession has grown. The Millennials – with their distinctly different values – have joined the legal profession. So what does that mean and where does it leave us? What happens now when diversity and inclusion conflicts and loses when confronted by other core values or business objectives, such as economy, efficiency, corporate social responsibility, civic responsibility, etc.? Need it be either/or as it has been for years?

We think not.

Consider, for example, the billable hour. It has long been the standard basis by which fees for legal services have been determined. What if we turned to alternative billing arrangements? As Nicole Auerbach pointed out in her article, “Gender and the Billable Hour,”⁷ for women lawyers, Millennial lawyers and others, work/life balance is fundamentally important. But when compensation and promotion to partnership are assessed based upon billable hours rather than outcomes, client satisfaction, economy and efficiency, diversity – in this case women lawyers especially – suffer. Alternative billing can be one way in which the values placed upon diversity, economy and efficiency could jointly improve the profession rather than be in conflict. We know that in the case of Office Depot that

7. Nicole Nehama Auerbach, “Gender and the Billable Hour,” *IILP Review 2012: Gender Diversity and Inclusion Issues in the Legal Profession* (2012): 87-89, accessed May 9, 2016, <http://www.theiilp.com/Resources/Documents/IILPReview2012.pdf>.

The traditional notion that corporate clients should play no role in a law firm's internal decision-making process seems to be fading away in favor of the firm building stronger relationships with key clients.

since 2009, 50% of its external spending was in the form of value-based fees – alternatives to the hourly rate model. Corporations and law firms are capable of change.

We assume going forward that corporations and law firms will continue to have conflicting core values and business objectives. Like an organizational objective of becoming more diverse and inclusive, no one can really argue with corporate law department goals of reducing its outside legal spend, and improving the efficiency and quality of legal services being delivered to the client. To accomplish this objective, however, corporations had to radically change how they conducted business with their law firms. Clients now partner with their law firms and are now involved in the law firm's staffing of their matters and in training. This signals a substantive change in the traditional relationship between corporate law departments and law firms, and a willingness of law firms to permit their clients to be involved in management on some level. We have gleaned from the implementation of corporate law department convergence programs that law firms can and do adjust when their clients demand changes as a condition of doing business going forward. In other words, law firms are adapting to client calls for a convergence-style relationship at a much faster and higher rate than when the same clients made repeated calls over the past twenty five years for more diversity in their outside law firms. The traditional notion that corporate clients should play no role in a law firm's internal decision-making process seems to be fading away in favor of the firm building stronger relationships with key clients. Thus, in theory, law firms should not push back against a client's diversity and inclusion inquires and/or demands on the grounds that the client would be meddling in law firm affairs.

This means that corporate clients (with or without convergence programs) must move away from simply saying that diversity is something they value, and then expecting the law firms to make it happen. Now that clients are becoming entrenched in law firm management, they have the means and opportunity to partner with their firms to pursue diversity and inclusion thereby creating a "win-win" situation for the client, firm and diverse attorneys. To do so successfully, corporations must adopt diversity and inclusion as true core values, giving them equal (or perhaps greater) weight in evaluating the law firms they will use, and then insist that those firms do the same in the way they staff the company's matters. If corporate law departments are now becoming involved in how legal services are delivered to clients, it then follows that they can and should be involved in assuring that their outside counsel teams are diverse and inclusive.

To be successful, corporate clients must also become better-educated consumers of legal services. As clients have increasingly expanded the amount of data they collect regarding who is handling their legal work, this should be less of an issue. However, it's not enough to simply collect data from their

law firms; the data collected must be significant and relevant, carefully analyzed, and the results used in making hiring and firing decisions. After decades of supposedly 'client-driven' diversity efforts, the legal profession's progress has been disappointingly slow. However, we now know that the firms can accommodate the client as a partner under a convergence program with a value-based billing structure, and as important, the firm has demonstrated the capacity and ability to change. The only remaining question is whether diversity is a true core value? If it is, the corporation and its law firms will change.

At its core, we are talking about learning how best to integrate law firms with diverse talent when the product being sold to clients is the collective intellect, wisdom and experiences of the attorneys. The resistance to fully embrace diversity as a true core value in law firms is often because of implicit and unconscious biases that derail all efforts – resulting in a belief that diverse lawyers collectively lack the requisite intellect, wisdom and experience, or that their different experiences do not provide important insights into client service. The difficulty lies in learning how to trust and respect those who are different from us, and to value what they contribute to the team. Many of those in charge are not well versed or experienced in working with people different from themselves and have difficulty getting beyond race and ethnicity implicitly or unconsciously. Rather than seeing this as a problem they should address, they tend to rely upon a set of standardized predictors of success – law school rank, GPA, law review – that are either outdated or not necessarily proven predictors of aptitude for or success in the practice of law. This is much easier than learning to manage race, gender, ethnicity, religious or sexual orientation differences: just send someone “pre-packaged,” who has everything they need to make them feel comfortable. So in the end, diversity must fit nicely in the slot or it doesn't fit at all. This approach is lazy, unproductive and lacks foresight.

Perhaps the legal profession needs to be better educated to understand the true value of diversity – the brain-power, the intellect, the creativity and imagination, and the life experiences that could be



Lawyers can change the world

I met Roza when she received a California Bar Foundation scholarship. After immigrating to the US, Roza worked hard to make it to law school. She never gave up.

That's why I'm proud to call her a California Bar Foundation Scholar.

-Eric Casher
VP California Bar Foundation

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brought to bear for the benefit of our clients and society – so that diversity and inclusion need no longer “compete” with efficiency or economics but rather supplement and support those values.

Conclusion

The legal profession’s continuing challenge to diversify its ranks persists. Diversifying the ranks of law firm partners is not only a problem but, in the case of some groups, such as African Americans, is fast reaching a crisis that has dire implications for corporate clients and their outside counsel. Some of the “solutions” implemented to address other important issues such as the cost of legal services have yielded short-term gains but with negative consequences for diversity and inclusion that are likely to result in long-term future problems for these companies and firms and damage to the profession. Corporations need to consider whether their convergence programs can survive if they create a diversity exception that simply requires diverse partners to agree to the same terms and conditions as their preferred firms.

As a profession, we must move from treating diversity and inclusion as something “nice to have”, to making it a true “core value” that is measured in everything we do. Rather than allowing “either-or” situations to undermine our diversity efforts, we must seek “win-win” scenarios and implement those with clear, unambiguous action.



CMCP – The California Business
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About IILP

The Institute for Inclusion in the Legal Profession (“IILP”) is a 501 (c) (3) organization that believes that the legal profession must be diverse and inclusive. Through its programs, projects, research, and collaborations, it seeks real change, now, and offers a new model of inclusion to achieve it. IILP asks the hard questions, gets the data, talks about what is really on people’s minds, no matter how sensitive, and invents and tests methodologies that will lead to change. For more information about IILP, visit www.TheIILP.com.

About “Competing Interests”

Each year, IILP presents Symposia on the State of Diversity and Inclusion in the Legal Profession around the US, based in large part on our *Review* of the State of Diversity and Inclusion in the Legal Profession. These symposia have given us a unique opportunity to observe geographic differences in attitudes toward and perspectives on diversity and inclusion within the legal profession. As a result, we’ve seen firsthand that where one stands has profound impact upon one’s perspective. The *Review* and Symposia are different from traditional diversity and inclusion publications and programs in that they bring together a cross-section of diversity issues which allows us to challenge preconceived notions about diversity and to offer an examination of intersectionality and diversity within diversity and inclusion.

Adding yet another dimension to our thought processes was our joint program with the Chicago Bar Association, “Diversity, Equality and Inclusion in a Global Legal Profession” which we presented in Lausanne, Switzerland in March, 2016. To the best of our knowledge, this was the first conference devoted to discussing diversity, equality and inclusion in the profession to be held outside the U.S. or the U.K. There, we found ourselves engrossed in conversations among our American and European participants that when synthesized resulted in a basic question: Given competing demands, declining resources, institutional barriers, implicit biases, and outright prejudices, are we as diverse a profession as we can ever hope to be? If the answer is, “no,” then can anything still be done? If so, what? When? And by whom? The discussions were thought-provoking to say the least.

Publications like the *IILP Review* and programs like the symposia and the Switzerland conference afford IILP a non-traditional perspective because we do not look at or think about diversity and inclusion issues from only one vantage point. We consider race and ethnicity, gender, disability and LGBT status as well as generational, religious, and geographic concerns. This creates unique opportunities and perspectives from which to examine and think about diversity and inclusion. The three “Competing Interests” papers are an example of that.

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E. Macey Russell is a partner at Choate Hall & Stewart LLP, where he practices in the area of complex commercial litigation and is listed in Best Lawyers in America. He is a member of the firm's Hiring and Diversity Committees. Russell is a member of the Trial Lawyer Honorary Society of the Litigation Counsel of America and The Fellows of the American Bar Foundation. He serves on the Boston Lawyers Group's executive committee. Advisory Board of the Institute for Inclusion in the Legal Profession. He is a nationally recognized speaker on diversity and inclusion in corporate law firms. From 2011 until 2014, Russell served as chair of the Massachusetts Judicial Nominating Commission. His honors and awards include: the 2011 Burton Award for Exceptional Legal Writing from The Burton Foundation and the Library of Congress for his co-authored article "Developing Great Minority Lawyers for the Next Generation." In 2009, he was named "Diversity Hero" by Massachusetts Lawyers Weekly. Before joining the Board, he served on the dean's advisory committee for Suffolk University Law School. Russell received a JD from Suffolk University Law School in 1983 and a BA from Trinity College.



Marci Rubin

Marci Rubin has a long history of diversity advocacy within and outside the legal profession. From December 2009 through July 2015, she served as Executive Director of the California Minority Counsel Program. In 2013, Marci was named one of the National Diversity Council's Most Powerful & Influential Women in California.

Prior to joining CMCP, Marci was Deputy General Counsel at Wells Fargo where she practiced law for 29 years & managed the company's commercial credit legal work. While at Wells, Marci served on the CMCP Steering Committee from 1998-2005, & 2 terms on the California State Bar, Business Law Section UCC Committee. She has been, and continues to be, an active speaker for a wide variety of organizations on diversity, inclusion & women's issues in the legal profession.

Marci currently is on the California Bar Foundation Board of Directors, The Institute for Inclusion in the Legal Profession Advisory Committee, and the Beyond Law Advisory Board. She is a past Board member & Board Chair, and current Emeritus Director, of Equal Rights Advocates, Inc. fighting for economic equality & justice for women & girls, and the Freight & Salvage traditional music venue in Berkeley.



David Douglass

David Douglass is a partner in Sheppard Mullin Richter & Hampton's Washington, D.C. office. He is an experienced trial attorney who has won trials as a prosecutor, plaintiff, and defense counsel. David has represented numerous companies and individuals in criminal and civil, investigations and litigation. A large portion of David's practice consists of representing companies and individuals in criminal and civil fraud investigations and litigation, including False Claims Act litigation.

A distinguishing feature of his practice has been working on behalf of the government, as well as private companies. In 2013, David was appointed by the U.S. District Court for the Eastern District of Louisiana as the deputy federal monitor over the New Orleans Police Department. David has also led two high-profile government investigations. In 1994, he served as executive director of the White House Security Review, which resulted in the closing of Pennsylvania Avenue in front of the White House. In 1993 he served as assistant director of the Treasury Department's investigation of the raid on the David Koresh compound in Waco, Texas.

David earned his J.D. from Harvard Law School, 1985, cum laude and his B.A. from Yale University, 1981. He is admitted in the District of Columbia, the Commonwealth of Massachusetts and the U.S. Court of Federal Claims.



Martin Greene

Martin Greene has represented many private and public corporations in a variety of matters including: employment law, civil rights, municipal law, commercial and contract litigation, construction litigation and contract negotiations. He has extensive experience trying federal cases, especially employment discrimination cases. Martin served as a member of the presidential transition team for President-Elect Ronald Reagan and on the transition team for Chicago Mayor-Elect Harold Washington. Included among the awards he has received are: 2016 NAMWOLF Yolanda Coly Advocacy Award, 2015 Leading Lawyer - Leading Lawyers Magazine, Saint Ignatius College Prep Alumni Award for Excellence in the Field of Law 2014, Listed in the 2006 inaugural edition of Who's Who in Black Chicago, and Recipient of the Rainbow/PUSH Coalition Scales of Justice Award, 2001



Sandra S. Yamate

Sandra S. Yamate is the CEO of the Institute for Inclusion in the Legal Profession. Previously, she spent ten years as the Director of the American Bar Association's Commission on Racial and Ethnic Diversity in the Profession. She was the first Executive Director of the Chicago Committee on Minorities in Large Law Firms. Prior to that, Sandra was a litigator in Chicago for ten years.

Outside the legal profession, Sandra is best known for her interest in multicultural children's literature. She and her husband are the founders of Polychrome Publishing Corporation, the only company in the country dedicated to producing children's books by and about Asian Americans. Sandra authored Polychrome's first two books, *Char Siu Bao Boy* and *Ashok By Any Other Name*. Polychrome books have been described as exemplary examples of anti-bias children's literature by *Teaching Tolerance Magazine*, a publication of the Southern Poverty Law Institute, and are included in the Anti-Defamation League's World of Difference Program bibliography of recommended children's books.

Sandra was a founding member of the Asian American Bar Association of the Greater Chicago Area and the National Asian Pacific American Bar Association, where she served as the first Central Region Governor. She is a former president of the Japanese American Service Committee, the oldest Asian American social service agency in the Midwest and the Harvard Law Society of Illinois. She is a former member of the boards of the Japanese American Citizens League, the Asian American Institute, the National Women's Political Caucus of Metropolitan Chicago, the Girl Scouts of Chicago, Friends of the Chicago Public Library, the Asian Pacific American Women's Leadership Institute, and Asian Americans for Inclusive Education. Sandra is a member of the Board of Trustees of The National Judicial College, an organization that offers courses to improve judicial productivity, challenge current perceptions of justice and inspire judges to achieve judicial excellence. She has written and spoken extensively on diversity in the legal profession and on multicultural children's literature.

Sandra earned her AB in Political Science (cum laude) and History (magna cum laude) from the University of Illinois at Urbana Champaign where she was elected to Phi Beta Kappa. She received her JD from Harvard Law School.

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