

Despite Progress, Firms Still Slow To Track LGBT Data

By Erin Coe

Law360 (July 7, 2019, 8:02 PM EDT) -- Larry McFarland, managing partner of Kilpatrick Townsend & Stockton LLP's Los Angeles office, was interviewing an associate candidate a few years ago when he couldn't help but notice that the male attorney kept dropping casual references to his husband.

The candidate's openness about being gay was a far cry from how comfortable McFarland felt when he was an associate at BakerHostetler decades earlier. As a sixth-year associate in 1993, he hadn't come out to any of the partners and wasn't aware of any who were gay, but he decided he needed to talk to a partner in order to find out if being gay was going to stall his career there.

"It took me a while to work up the courage to talk with [a partner] for a lot of reasons including the fact that I really liked my job, and I did not want to have to leave," McFarland said. "But on the other hand, I did not want to be naïve and wait a couple of years and then be passed over for partner, which would make it much harder for me to move to another firm."

Fortunately, the meeting went well. The partner assured him being gay would not be an impediment to climbing the ranks and said he would speak with his colleagues to ensure McFarland would be judged on his merits, according to McFarland.

"To the firm's credit, I was voted in as a partner when I first became eligible," he said.

McFarland has since moved on to Kilpatrick, where he represents some of the firm's biggest clients, such as Facebook Inc. and Live Nation. He's part of the trademark and copyright practice, and 9% of the practice group's attorneys firmwide identify as lesbian, gay, bisexual or transgender, he said.

He has welcomed many positive changes over the years, from the U.S. Supreme Court's 2015 decision allowing same-sex marriage nationwide to the growing visibility of young LGBT attorneys, like the associate candidate he interviewed in 2016 who is now at the firm. At the same time, many firms are still struggling to diversify their ranks.

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LARRY MCFARLAND
Kilpatrick Townsend & Stockton

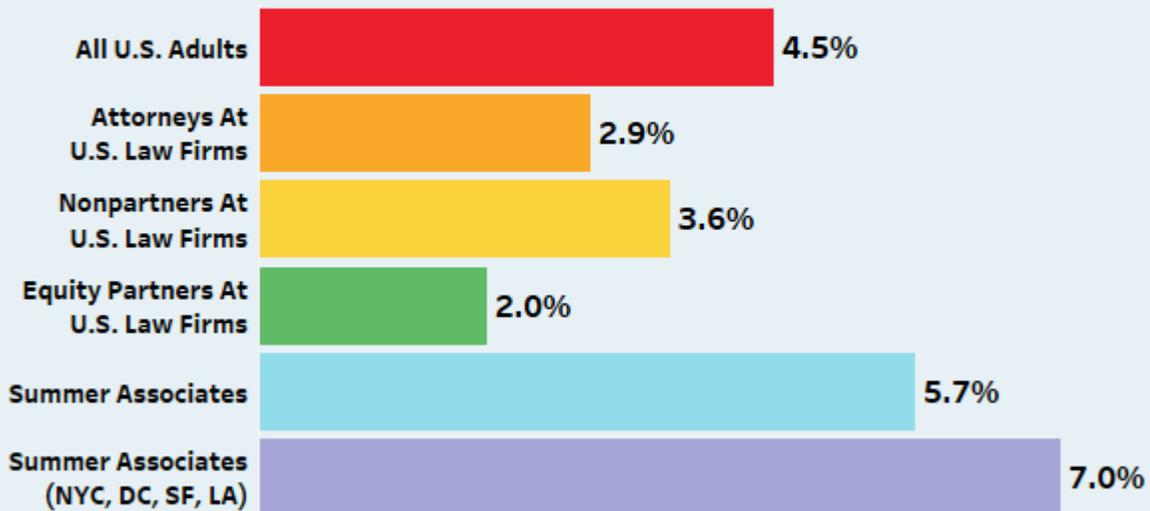
“They don’t have an LGBT attorney in a position of power, and they have problems attracting attorneys of color and women,” McFarland said. “When you look at some firms, they are basically straight, white, male organizations.”

To be more inclusive of a minority group, firms have to try to measure it in some way. But when it comes to information on LGBT attorneys, many law firms aren’t asking for it, according to data Law360 collected for the first time as part of its Diversity Snapshot.

Law360 found that out of the 260 firms that provided data, 2.9% of all attorneys and 2% of equity partners reported identifying as LGBT. However, the U.S. Equal Employment Opportunity Commission does not require firms to disclose LGBT data as it does for gender and race, and 65 firms told Law360 that they don’t collect it. Five others declined to disclose it.

Counting The LGBT Population

The percentage of people who identified as LGBT is lower among law firm attorneys than among the population at large.



Source: 2017 Gallup Poll, National Association for Law Placement and Law360 data

Plenty of firms still feel it’s none of their business to ask about attorneys’ sexual orientation, but sources told Law360 that without more robust data collection practices, firms will continue to lag on the diversity front and miss out on opportunities with clients.

‘Invisible Diversity’

The overall LGBT representation at law firms is slightly lower than that of the general population. According to a Gallup poll, 4.5% of U.S. adults identified as LGBT in 2017, up from 3.5% in 2012. And that increase is mainly driven by the subset of millennials, of whom 8.1% identified as LGBT in 2017, according to the poll.

The law firms’ figures, though, are likely understated since they tend to rely on attorneys to self-report their sexual orientation, and some attorneys simply aren’t going to divulge such personal information.

Because the data is sensitive, many firms are reluctant to ask for it.

“Firms are bumping into what I call ‘invisible diversity,’” said Katie Herzog of Eastern Point Consulting Group Inc. “It’s only if an attorney self-identifies that firms will know about it. While some law students may be involved in an LGBT group in law school that becomes part of the dialogue [during a firm interview], for many people that’s not the case.

“There are very sensitive and substantive reasons why some attorneys may not be comfortable being out in society or a law firm,” she said.

But many firms that collect LGBT data think it’s essential to give attorneys an opportunity to volunteer diversity information.

Firms that aren’t providing a mechanism of self-identification are doing a disservice to themselves, said Bendita Cynthia Malakia, Hogan Lovells’ senior inclusion manager who also serves as secretary of the board of directors of the National LGBT Bar Association. About 4.8% of the firm’s U.S. attorneys identify as LGBT, as well as about 11% of its current summer associate class in the U.S.

“You can’t help people when you don’t know who’s there,” Malakia said. “It can be a challenge to decide as a business what to invest and how much to invest in a world of limited resources, but figuring out a way to make sure these populations, however small, are supported is important.”

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BENDITA CYNTHIA MALAKIA
Hogan Lovells

Some firms might be worried about the confidentiality of the data and whether its disclosure could put attorneys at risk in countries where being LGBT is illegal, said Mary Ellen Connerty, director for diversity and engagement at O’Melveny & Myers LLP, which has about 4.4% of its U.S. attorneys identifying as LGBT.

“We try to be careful with the data, and if there is any risk, we’ve decided the risk is worth it to be responsive to this population,” she said. “It’s much more important to know what this population is thinking, what it needs and how we can be responsive.”

Collecting LGBT data is critical for attracting diverse lawyers to firms as clients increasingly demand more diverse legal teams.

“Attorneys want to know how firms like ours do with diverse lawyers and how diverse we are,” said James Reeder Jr., a Vinson & Elkins LLP partner who is set to become chair of the American Bar Association’s litigation section next year. “It can’t just be done anecdotally.”

Making Inroads

Affinity groups are one fundamental way firms can connect and support LGBT attorneys. These networks provide strength in numbers that can put attorneys at ease about disclosing their sexual orientation with their firm.

“When firms create an LGBT affinity group, then it’s possible attorneys in the group will decide that they are comfortable self-identifying at the firm,” Herzog said. “That’s one of the most diplomatic and effective ways of getting the data.”

It also can be helpful for a firm to have a self-identification system that allows attorneys to make changes at any time, like the one at Hogan Lovells. Some firms provide attorneys with a form to fill out when they join, but oftentimes new attorneys are still feeling out a firm’s culture.

“That’s how you know your organization’s culture is advancing to support LGBT people – when they are willing to raise their hands,” Malakia said. “We’ve gotten to the point where every person who was on a back-of-the-envelope list is openly identifying.”

If firms want to encourage attorneys to self-identify and be out at the workplace, the only way to foster that culture is by setting it at the top. Selendy & Gay PLLC, a New York litigation firm that formed nearly a year and a half ago, has a co-founder, Faith Gay, who is openly gay, and the firm said about 21 percent of its approximately 45 attorneys identify as LGBT.

“Employees are most productive when they can express themselves freely,” said David Flugman, a partner at the firm. “Having people who are openly gay and out at the law firm and proud of that fact sets the tone and creates an environment where people feel comfortable being themselves. All good things flow from that.”

Several firms are tailoring recruitment efforts. Jenner & Block LLP, which has nearly 8.5% of its U.S. attorneys identifying as LGBT, works closely with LGBT groups at almost every law school where it recruits, said Courtney Carter, the firm’s diversity and inclusion associate director. The firm might sponsor a panel of speakers, have “fireside chats” between lawyers and a group of students, or participate in mentoring programs. It prefers to have students lead the way and tell the firm how it can be most helpful to them, she said.

“We don’t just give groups money for a party,” Carter said. “Students have a chance to ask questions, meet with our attorneys and develop relationships to find out what it means to be openly LGBT and practicing at large law firms.”

For firms to retain talent, LGBT attorneys need to see role models in leadership positions, be exposed to substantive work assignments and successful partners, and believe a firm’s commitment to diversity isn’t just for show.

O’Melveny, for instance, has two LGBT office heads out of seven, one of whom is also a practice group leader, as well as two LGBT members on the firm’s policy committee.

Some firms have a diversity credit program tied to partners’ and associates’ performance evaluations. At Shook Hardy & Bacon LLP, attorneys can participate in diversity-related trainings and events — such

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DAVID FLUGMAN
Selendy & Gay

as a recent showing of “Milk,” a film about historic politician and LGBT rights activist Harvey Milk — to meet criteria that counts toward attorneys’ evaluations, said Patrick Oot, who co-leads the firm’s data and discovery strategies practice.

“The diversity credit program really fosters how to think about advancing diversity at the firm and in your practice generally,” he said. “As a lawyer, you want to be all inclusive and consider all clients, not just one type or specific gender or diverse group. You want to have that rainbow available to you.”

Firms that fail to reflect their clients and communities are missing out on business opportunities, said McFarland, the Kilpatrick partner. And while clients might not be requiring firms to staff matters with a diverse team today, they will be tomorrow.

“We all have to remind ourselves to break out of our mold,” he said. “If we look at the leadership of law firms, the highest paid partners are straight, white males. If firm leaders continue choosing their own image, they’re not going to effect the most change. ... We need everything, all types of diversity.”

--Editing by Pamela Wilkinson, Jocelyn Allison and John Campbell.