BY DIANE E. LEWIS

WHERE THERE'S A WILL, IS THERE A WAY?

Despite gains, the legal profession still struggles to get the "minor" out of minority

WHETHER YOU ARE AN AFRICAN AMERICAN ATTORNEY SUCH AS WALTER PRINCE '74 with years of law firm experience or a young Cuban American woman such as Ileana Espinosa '03 at the beginning of her legal career, if you are a minority practicing law in America, chances are your experiences and paths to success remain quite different from those of your majority counterparts.

In a field where advancement to partner is a grueling process, law firms say they are struggling to retain minorities. And although the profile of law school graduates now reflects the varied ethnic and racial backgrounds of the US population, keeping minorities on staff long enough for them to become partners is a daunting challenge, they say.

As a result, just 4.6 percent of all partners at US law firms are people of color, up from 2 percent in 1999, according to the National Association of Law Placement (NALP). In fact, regardless of race, the path to partnership is such an exhausting eight-year process that 8.3 percent of all associates quit before finishing their first year. Just over 59 percent resign after the fifth year.

The attrition rates are even higher for minorities, says NALP. Its 2000 report, based on a survey of more than 5,500 US attorneys, reveals that nearly 13 percent of minority men and 12 percent of minority women leave after the first year. Within five years, just over 70 percent of minority men and 74 percent of minority women leave to work for corporations, as professors, or for government institutions. Others join smaller law firms.

David Wilkins, the Kirkland & Ellis Professor at Harvard Law School and the director of the school's Program on the Legal Profession, has been studying minority lawyers for years. He says legal professionals of color must have access to the right mentors, the right training, and good work assignments in order to hone their skills and advance. But oftentimes, they are viewed in stereotypical ways that inhibit their success. Wilkins notes that they are scrutinized more than their white peers and are perceived differently.

African Americans are viewed as intellectually inferior and must constantly prove themselves; Latinos are seen as hot-tempered; Asians are regarded as intelligent, but passive. "Minorities have a harder time getting access to good mentoring and good work assignments," says Wilkins. "But talented minorities have lots of opportunities to move. In fact, corporations are trying to recruit the same mid-level

MICK WIGGINS

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minority associates that the law firms are trying to keep. At the same time, the firms need to recognize that people leave because they do not have the same pathways to success. So, there is a push and pull that makes it very complicated."

"It's much more complicated than just race and the firm," agrees Garland Stillwell '88, senior associate at Pilsbury Winthrop Shaw & Pittman LLP in Washington, DC, and a participant in the recent BC Law Black Alumni Reunion Conference, "Forty Acres and a Mule: Affirmative Action Now." At partnership level, he says, "there is extreme pressure to justify your existence," in terms of bringing in a well-developed client base. And many minority attorneys find themselves excluded from the social networks in which client relationships are fostered.

Speaking at the same conference, Steven Wright '81, partner in the corporate department of Holland & Knight LLP in Boston, said that the current "free agency" model of partnership, in which "you strike a deal based on what you bring to the firm and what they need," has made the transition from associate to partner much more challenging than it was when he entered the profession, and that many men and women of color are leaving law firms because they see other opportunities in the corporate and financial world that are "more compatible with the quality of life." But he expressed some optimism that pressure from corporate clients, for whom diversity is becoming an economic imperative, will force law firms to update their "antiquated mentality," and noted that most of his own clients are people of color.

Texas attorney Kathleen J. Wu, a partner at Andrews Kurth LLP whose online comments on such issues are widely read, notes that minorities who "give their all to their firms" have had to work harder than their white male peers for the same recognition. "Like it or not, if you're a woman or a minority, you're going to be judged by a tougher standard than the white males at your firm," she says.

Not surprisingly, these factors affect retention. Nationwide, minorities represent 15.6 percent of all associates and about 20 percent of all US law graduates. Yet, slightly more than 3 percent of legal professionals are Latino, up from 1.5 percent thirty years ago. By contrast, about 6.5 percent of the nation's legal professionals are Asian, up from 1.3 percent in 1975. African Americans represent 4 percent, a 2 percent increase since 1975, says the Equal Employment Opportunity Commission. Released in 2004, its report found the most pressing problem facing minority lawyers was getting promoted from associate to partner.

Nevertheless, some law firms are taking matters into their own hands. Realizing that their future success may depend on big corporate clients who wish to align themselves with diverse firms, they are trying to attract, retain, and promote minority and women attorneys. Even big corporations like Wal-Mart Stores, Inc. and Sara Lee are taking action.

Wal-Mart has refused to send work to some law firms because they lack diverse staffs. Sara Lee's general counsel, Roderick A. Palmore, has reportedly urged lawyers at several hundred large companies to cut ties with law firms that show no interest in diversity.

"I would say that the business reasons for promoting diversity are compelling," says Steven P. Rosenthal, co-managing partner at Mintz Levin Cohn Ferris Glovsky & Popeo PC in Boston. Last year, his firm made a bold statement when it hired a dozen senior attorneys to staff an employment practice in Washington, DC.

The attorneys include nine African Americans and one Latino. Then, Mintz Levin promoted two Asians to partner in its Boston office, increasing the number of partners to thirteen, from four. Today, twenty-two or just over 10 percent of Mintz Levin's 206 partners are minorities. Says Rosenthal, "We have opened an office in San Diego and there is important diversity work there as well. Diversity is part of our business plan."

SOME FIRMS ARE ESTABLISHING PROGRAMS designed to mentor women and minorities. Others are putting diversity specialists or managers on the payroll and making them responsible for recruiting and retaining lawyers of color. In all, 46 percent of seventy-six law firms surveyed say they have hired a diversity specialist or manager and more than 90 percent have created a diversity committee, reports the *National Law Journal*.

Walter Prince, an African-American partner at Prince Lobel Glovsky & Tye LLP in Boston, conceded there are barriers, but says individual skills and personal effort as well as assistance from the right mentor can make all the difference. "I do not think there are any challenges in this profession that you cannot overcome, but I also know that I was very fortunate to have a great mentor," says Prince.

In fact, minority lawyers contend that mentors who understand the unwritten and often unspoken rules that define how to handle power struggles at work are invaluable. So, too, are mentors who have access to informal legal networks, they say.

Certainly, Jeffrey Hsi, former president of the Asian Lawyers Association of Massachusetts and a partner at Edwards Angell Palmer & Dodge LLP of Boston, can attest to that. A chemist, Hsi credits a former mentor with making him aware of new opportunities in intellectual property law. He says his mentor, a senior scientist, encouraged him to apply to a legal program that was offering to pay for scientists to study law free of charge, with the proviso that they had to remain with the firm for a designated period of time.

Roberto Braceras, a partner at Goodwin Procter LLP in Boston, feels it is important that young lawyers of color seek out and develop relationships with legal professionals they admire and respect inside—and outside—their law firms. Braceras spoke recently at a retreat organized for first-year minority law students at Boston College Law School. "I

always tell associates that they cannot rely solely on a firm's assigned mentor," Braceras says in an interview. "They must find their own."

That was certainly the case with Prince. Support from a BC Law alumnus and former mentor, the late Massachusetts Judge David Nelson '60, was an important factor in his own success. "Judge Nelson took an interest in me and helped me get into law school," Prince recalls. "He was one of the first black law partners in Massachusetts. He was a young, upstart African American from Roxbury and when he ran for the ninth Congressional seat, I worked for his campaign."

After the campaign ended, Prince went to see Nelson and talked about his interests and goals. Nelson suggested he go to law school and then recommended he apply to Boston College Law School. Later, Prince decided he enjoyed litigation and accepted a position with a public defender office in Roxbury, later becoming an assistant US attorney for the district of Massachusetts. He left that to open a small law firm with a friend. Then, in the mid-1980's he became general counsel to the MBTA, remaining there until 1988.

A former president of the Massachusetts Black Lawyers Association, Prince has been an adjunct professor at BC Law for many years and serves on the Board of Overseers. Over the years, the judge was an ally as Prince worked to establish his legal career.

Today, Prince advises law students to think carefully about what they wish to accomplish with their law degrees. He says that after leaving the MBTA, he returned to private practice and joined a group of friends who had started a law firm called Peckham Lobel Casey & Tye. Two months later, Prince's name was added.

"I had a chance to go to some of the big firms, but I realized that the money I could generate in fees would not amount to a significant figure," says Prince. "I would have become a senior associate and would have been doing someone else's work. I did not want that. So, I went to a smaller place where the business I generated would have more significance. That was my strategy, and it was the best decision I could have made. They felt I offered some cachet and I felt I had an opportunity to grow."

Renee M. Landers '85, an associate professor of law at Suffolk University Law School and former President of the Boston Bar Association, says she clerked for a federal judge who helped broaden her horizons. "My most significant mentor was [the late] Edward F. Hennessey '61, former chief justice of the state Supreme Judicial Court," she says. "He was incredibly supportive and he appointed me to a committee that studies gender bias in the court system. That opened my mind to a whole range of issues. It has even influenced how I teach my courses, and it brought me together with huge numbers of people in the legal profession whom I would never have known."

Nevertheless, Landers says the mentoring programs established by many big law firms are not always effective.

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A DILEMMA that won't go away

IN 1996, BC LAW GRADUATED TWENTY-FOUR AFRICAN AMERICANS, A RECORD FOR THE school. The following year there were twelve, and the Law School has struggled ever since to get back to that peak. Meanwhile, formalized affirmative action programs have been under siege in the courts. In the wake of two United States Supreme Court cases in 2003, *Grutter v. Bollinger* and *Gratz v. Bollinger*, and the continuing threat of litigation designed to end affirmative action initiatives, the Black Alumni Network coordinated a symposium to analyze the current situation and explore strategies for increasing the numbers and success of people of color, and specifically of African Americans, in the legal community. Stacy Best '95 organized the event with the support of Professor Ruth-Arlene Howe '74 and Associate Professor Anthony Farley.

The symposium title, "Forty Acres and a Mule," explained keynote speaker Charles J. Ogletree Jr., refers to an event that took place just before the Civil War. General Sherman promised a group of former slaves that if they would fight for the Union cause, and if the Union defeated the Confederacy, they would each be granted "forty acres of tillable land," in reparation for their years of slavery.

"We never did receive those forty acres," said Ogletree, who is the Jesse Climenko Professor of Law at Harvard Law School. Even the promise of *Brown v. Board of Education* in 1954, which Ogletree called "the high water mark of the [Supreme] Court's jurisprudence on race," and was widely held to signal a sea change in America's way of thinking about race, was undermined by the Court's inclusion of the words "all deliberate speed" (i.e., no speed at all) in a second decision calling for the end of school segregation.

After decades of, at best, lukewarm endorsement of affirmative action, Ogletree warned, there is now a real danger that the Supreme Court will "take away the forty acres and a mule that we don't have," when it hears on December 4 the cases of two voluntary school integration programs, in Seattle, Washington, and Louisville, Kentucky, in which "racial balancing" programs are being challenged by white parents as unconstitutional. "This is our *Brown*," said Ogletree, calling on participants to reaffirm their commitment to the "American creed" of justice for all.

Ogletree's themes resonated throughout a series of panel discussions and focus groups. At every stage, from law school admissions to the achievement of partnerships in law firms, participants identified substantial barriers to advancement for people of color.

Suggested remedies ran the gamut from incremental, individualized approaches such as careful choice of law firms and mentors, to a radical challenging of the institutions of the dominant culture. On the positive side, Paul Murphy of Foley Hoag LLP noted that "the color of diversity is green," as major corporate clients increasingly insist on being represented by lawyers of color.

The unfulfilled promise of forty acres and a mule, said Professor Howe in a telephone conversation following the symposium, is a challenge to BC Law School to live up to the vision that spurred former Dean Robert F. Drinan, SJ, to actively recruit African Americans to attend the school in the mid-1960s. As a next step, she said, the symposium recommendations will be reviewed and edited for circulation to participants, and the debate will continue at a meeting in the spring of 2007.

—Jane Whitehead

1994. This year's alumni excellence award is her third honor from the university, as she received the St. Thomas More Award in 2003 and the Founder's Medal in 2004. As one of the founding members of the Law School's Board of Overseers, Lukey has been a forceful voice for the pursuit of excellence, says Dean John Garvey. "She is ambitious for her alma mater," he says. "She is always pushing to admit the best students, hire the best faculty without regard to politics, and make it affordable to the best students." And, he adds, "she puts her money where her mouth is," referring to her establishment of the endowment fund.

Although Lukey's early childhood was peripatetic, vacations abroad were not within her family's means, and it was only in adulthood that she discovered the pleasures of foreign travel. "I don't do technical climbing," says Lukey, but she and her family have enjoyed high-altitude trekking in some of the high places of the world, from New Zealand to the Alps, and she and her daughter are planning a trip to the Himalayas in summer of 2007.

One of her most memorable trips was the ascent of Mount Kilimanjaro in Tanzania in 2004. Every night she would lie awake in the thin air, unable to sleep because of the lack of oxygen, thinking, "Why am I here?" The question was answered when she reached the summit. "It's an incredible sense when you finish," she says. "You feel as if, having accomplished that, there's nothing you couldn't accomplish." And somehow, coming from Joan Lukey, that barely sounds like exaggeration.

Jane Whitehead is a regular contributor to this magazine.

Where There's a Will

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"The pressure to bill hours is so immense, but mentoring takes time," says Landers. "So, a lot of times it just doesn't happen. Law firms don't seem to have the time anymore to bring people along of any race. The impact of that is particularly hard on women lawyers of color."

As recently as this year, according to a report by the American Bar Association (ABA), minority women attorneys said they felt excluded from formal and informal networks, were isolated or marginalized, and had been subject to demeaning comments. The ABA said when it asked the attorneys to grade their career experience, white males gave their career experience an "A," white women and minority males said "B," and minority women graded their experience "B minus" or "C plus."

Minority women also said they were more likely to receive "less choice" assignments, with fewer billable hours. Just 46 percent of the minority women said they met the billable hourly rate of 1,800 to 1,900 hours per year. By contrast, 53 percent of minority males, 59 percent of white women, and 58 percent of white males reported meeting the yearly rate of billable hours.

Kathleen Wu, who worked extremely long hours to become partner at her Texas firm and did not have a mentor, says she made sure that she was the "MVP on every project I worked on."

"Minority lawyers need to recognize that assumptions and stereotypes exist and they should work to overcome them," says Wu. "The best antidote to racism is just being an extraordinarily competent lawyer. Is it unfair that you have to give 120 percent? Of course, but you'll also be a better lawyer."

Ileana Espinosa is a young attorney of color who believes minorities must assume some responsibility for trying to create more diversity at work and in law school. The twenty-eight-year-old is a fourth-year associate at Katz Barron Squiterol Faust in Miami, Florida.

She is involved in mentoring programs that encourage children and teens to stay in school and she mentors law students. "There were only a few Hispanics at Boston College Law School, but the support there was tremendous," says Espinosa, who was president of the Law Students Association.

She advises young lawyers of color not to wait for a mentor. "The old boys' club still exists," says Espinosa. "But that doesn't mean you shouldn't accept challenges. Just apply and impress. Then, if you cannot change the way things are, go someplace where they will appreciate you."

Diane Lewis is a business reporter for the Boston Globe.

Scholar's Forum

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and the clause describing the Supreme Court's jurisdiction appeared to give textual authorization for judicial enforcement of constitutional constraints on state and federal legislation. Indeed, before *Marbury*, Justice Chase noted that, although the Court had never adjudicated whether the judiciary had the authority to declare laws contrary to the constitution void, general opinion, all the Supreme Court bar, and some of the Supreme Court justices had so decided.

By 1803, as Chief Justice Marshall acknowledged in *Marbury*, "long and well established" principles answered "the question, whether an act, repugnant to the constitution, can become the law of the land." Marshall concluded that "a law repugnant to the constitution is void; and that courts . . . are bound by that instrument." Accepting the well-established and long-practiced idea of limited legislative authority, American constitutional law recommitted itself to a practice over four centuries old.

This account suggests new boundaries with respect to what history can tell us about the modern practice of judicial review. Because the practice presumed by the Founders emphasized the bounded nature of legislation limited by the laws of the nation, this history casts doubt on arguments that general "natural law" was regularly accepted as a legitimate basis for review. This history also helps to explain why federal courts embraced review of state courts relatively easily while the implications of review of congressional legislation were less well contemplated.

Equally important, other modern concerns may be hard to resolve by looking to the history of the Founding era. The ambiguity and certainty of "repugnant to the Constitution" meant that judges did not have to confront whether they were engaged in what we would call narrow or broad constructions of the Constitution. Similarly, because judicial review arose out of a prior practice rather than an idea about separation of powers, it was easy to accept judicial power but less clear whether the judiciary alone was the ultimate interpreter of the Constitution—the modern issues of judicial supremacy and departmentalism. As separation of powers became increasingly accepted as the highest constitutional principle, these questions came into focus. While the Founding history can provide a guide to some concerns, others we must wrestle with unaided.

Modern discussions of judicial review often may dwell too much on judicial review as imposed by judges on democratic politics. The Founders believed deeply that American constitutionalism was based, first and foremost, on constraining legislation by the laws of the nation and, most importantly, the Constitution. This history can remind us that both legislative and judicial power are legitimated by the belief that the Constitution delegates the power of the people—an entity that exists over time—and thus may reinforce a bounded, yet changing, Constitution.

This history of the repugnancy practice