American Legal System Diversity: *Stare Decisis* in a Changing World

by Cathy Havener Greer

**Traditional principles**

The American legal system was founded on the principle of *stare decisis et non quieta movere*, i.e., to adhere to precedents, and not to unsettle things which are established. While this principle of precedent, stability and continuity is intended to govern the rule of law in our society, in many ways it is a principle that is descriptive of the legal profession itself. To the extent that the legal profession, including the judiciary as well as attorneys, is seen as a key player in maintaining social stability, it is also a profession that is often regarded as traditional and resistant to change.

An emphasis on tradition has kept many in the legal profession from embracing change and welcoming diversity. Although the United States Supreme Court recently recognized that the “benefits [of diversity] are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints,”¹ the statistics demonstrate that the legal profession remains more than 90% white, while the general population of the United States is approximately 70% white.² In addition to the challenge of racial and ethnic diversity in the legal profession is a continuing challenge to the progression and retention of women lawyers.³

**Why is diversity important in the legal profession?**

In holding that the University of Michigan Law School has a compelling interest in attaining a diverse student body, the United States Supreme Court in a split decision, authored by Justice Sandra Day O’Connor, acknowledged that “In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity
of the educational institutions that provide this training . . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society participate in the educational institutions that provide the training and education necessary to succeed in America.”

Not only is it important for the leadership of the citizenry, including the legal profession, to include talented and qualified individuals reflecting the diversity of society itself, concerns of a lack of diversity in the legal profession reflect concerns about the quality of justice rendered (McDonough, 2003). As noted by the EEOC in its report, “If race, gender, and social class are determinants for entry into the profession and for the attainment of certain positions within the profession, it may apply that these same attributes affect the sorts of treatment individuals will receive by legal institutions, in part because they do not have access to lawyers who share a similar social background.”

Certainly to the extent that an attorney or a judge is limited by his or her own background from understanding the perspective of a client, an opposing party in litigation, or that party’s attorney, or a witness, as a result of race, ethnicity, gender, or religion of the person, the quality of the attorney’s representation and the quality of justice may suffer. To that end, diversity in the ranks of attorneys and members of the judiciary is critical to the goals of providing equal access, equal opportunity, and equal rights in the United States.

There is no question but that the landscape of the legal profession changed dramatically with the enactment of the Civil Rights Act of 1964, 42 U.S.C. §2000, et seq. (Title VII), which outlawed discrimination in employment based on race, gender, national origin, and religion. Obviously, the legal imperative provided by this Act made more transparent the hiring of women and people of color by law firms and other employers both public and private. Although the Act covers virtually every aspect of the employment relationship from hiring through compensation and training to discipline and termination, the Act applies only to employers with 15 or more employees. Significantly, partners of a law firm are not counted as employees, but associates of a law firm are employees and consideration for partnership is a “term, condition or privilege” of employment in a law firm and covered by the Civil Rights Act.

Many law firms have come to the realization that diversity within the ranks of their employees and partners is in the financial interest of the firm as a reflection of the heterogeneous nature of American society. As increasing numbers of women and people of color move to employment, and particularly management positions in governmental organizations and corporations, lawyers in law firms representing those entities are called upon increasingly to demonstrate the same commitment to diversity that is made by their clients.

Finally, for more altruistic reasons, diversity is in the best interest of the legal profession because of the special powers, rights, and opportunities afforded to attorneys in American society. Many people are called to the practice of law because of a desire to serve, whether in the defense of a client charged with