

THE
AM LAW LITIGATION DAILYCovington's Stacey Grigsby on the
Changing Legal Landscape for Diversity, Equity,
Inclusion and Accessibility Initiatives

By Ross Todd

March 7, 2024

Last summer while serving as Deputy White House Counsel, **Stacey Grigsby** helped run point on the Biden Administration's response to the U.S. Supreme Court's *Students for Fair Admissions* decision on affirmative action in higher education. Now, back in private practice at **Covington & Burling**, she's helping clients navigate the fallout from the decision as a senior member of the firm's institutional culture and social responsibility practice.

Yesterday the Litigation Daily caught up with Grigsby, also co-head of the firm's government litigation practice, to discuss how her experience in the White House has shaped the work she's doing back at the firm.

What follows has been edited for length and clarity.

Lit Daily: What was your day-to-day like as Deputy White House Counsel?

Stacey Grigsby: It was busy, as you can imagine. At the White House Counsel's Office, I led the racial justice and equity team. What that entailed was making sure that the administration was embedding equity and equity

principles in all the work that we were doing day to day. It was a mix of counseling, advising and coordinating across federal agencies on policies, regulations, and litigation that really impact civil rights issues.

So, I'm curious, how do you draw on that experience now that you're back at Covington?

That is a great question. There are really two parts, I think. There's the substantive match: The civil rights issues map onto the institutional culture and social responsibility practice that we already have.

But then I think the second part is at a higher level. What I really did [at the White House] was try to figure out the answers to complex legal problems in urgent situations that were multi-dimensional and multifaceted. I had to understand the legal field, of course, but I also had



Stacey Grigsby, partner at Covington & Burling.

Courtesy photo

to understand how it might impact the public stakeholders, internal stakeholders, and potentially there could be regulatory implications.

At the White House, we were talking mostly about legislation. But I think all of these types of aspects of problem-solving in a multi-dimensional way are similar to what you do as a lawyer when you're dealing with a crisis for a client.

Tell me more about the institutional culture and social responsibility practice. What's the elevator pitch of the practice?

So there are really three types of investigations in the practice. The first type is more like a misconduct investigation where there is a specific allegation that a person, a company or a department has done something. We would come in backward-looking to figure out whether that allegation is true. So that's one bucket. I think the second bucket is cultural reviews, which really make sure that a company is living up to certain policies or practices or controls that already exist. And then the third bucket is the civil rights audits and racial equity assessments. There we're looking at whether the company's policies, practices and products impact social inequalities. And that's really kind of forward-looking.

So the civil rights audit was the one that I was most curious about. What in practice does that look like? Have you been engaged to do that type of work yet?

I'm not working on an audit right now. But I have worked with the ICSR group before I went to the White House. So I can speak broadly about what we do and what it looks like. One thing I will say is that Covington takes a bespoke approach to every audit. Every service for every company is different. But I

will say that the common thread in almost all of them is that we look at the nature of the company, the work they do, we engage in a thorough examination of the policy practices, and talk to the people there. We engage with the companies and also other stakeholders. Then we generate work product that includes specific recommendations. And finally, for the most part, we publish a report, which either includes those recommendations or more of the aspects of the audit itself.

So how much does that work intersect with litigation, or at least identifying potential sources of litigation risk?

It certainly can identify litigation risk. Certainly, if a company is doing something on the employment side that is potentially in violation of some of the civil rights laws, that would be something that we would examine and flag. That might be more of a privileged-type recommendation. But it does intersect.

I think what your question is getting at though is this: Now I think a lot of times when we're looking at things like diversity, equity, inclusion and accessibility initiatives, we certainly have to be mindful of the changing legal landscape, and what things the company is doing that might actually lead to further risk.

I've been in touch with the leads of the group, including **Aaron Lewis, Lindsay Burke, Jennifer Saperstein**, and obviously **Eric Holder** does this work, too. We are very mindful of trying to explain to companies what is acceptable. And there is a broad range of acceptable things, but also there's a need to be mindful of the shifting legal landscape.

I think, as you're hinting at, it seems like a really fraught moment for corporations right now. You have critics of the DEI movement looking to harness the Supreme Court's

decision in the *Students for Fair Admissions* case to bring their own strategic claims. You have the plaintiffs bar looking at corporate statements and actions on this front. So where do you see the most significant risks in this moment?

I think you captured it well, that there are risks really on both sides. I don't know if I would call it risk, but I would certainly think there's going to be a lot of litigation in the future about programs and policies that are racially neutral, but perhaps are undertaken to add to diversity or accessibility. What I'm thinking about there is something like the Thomas Jefferson High School litigation, and how they changed their admissions standards basically in order to try to diversify the high school. As you can tell, from the dissents to the Supreme Court's decision not to grant cert there, there are definitely two members of the court that think that even these types of racially neutral programs can also be suspect. I think the justices believed it was more than that. I think they thought that there was some kind of animus towards Asian Americans. But I think even in the absence of animus, I do think that people are going to push the boundaries of whether something that seems perfectly neutral and legal on its face can also be categorized as discriminatory under existing civil rights laws.

I know there are certain rules for some lawyers who come out of the DOJ or certain agencies about when they can begin handling matters adverse to their former colleagues. Are there any such restrictions for lawyers coming out of positions in the White House?

There are the same restrictions, it's just that my agency is the Executive Office of the

President. I have a lifetime ban on working on any of the issues I was directly working on. I have at least a one-year ban and in some cases two-year ban in some cases like advocating directly with former colleagues or even assisting people who are advocating with my former colleagues. So I have the same restrictions. I think the difference for me is that I wasn't working at the Department of Justice. So I can appear before the Department of Justice, even though I did work with multiple agencies in my former role.

As someone who's come out of the government into private practice before, is this set of restrictions any more or less difficult to navigate in getting back up to speed into private practice than others that you've dealt with?

I do think in some ways it's actually a little less difficult because in addition to doing ICSR work, I'm a litigator. So I don't have the same restrictions with the Department of Justice or other agencies. So that makes it a little bit easier. Again, I can't work on something that I was directly involved in when I was at the White House. But for new cases coming down the pike, I don't have that restriction against appearing before the leadership offices in the Department of Justice. So in that way, it's a little bit easier.

In terms of the split between the ICSR work and litigating, where do you see yourself? What is the right balance?

I would say right now, I am doing more on the litigation front. So I am focusing on our government litigation practice, which I am co-chairing. But certainly I am excited to do a good chunk of work with the ICSR group.