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What Is Diversity in the Legal Market? Or Is Everyone a Special Snowflake?

By **Jill Backer** | April 25, 2018 at 02:30 PM

In August 2017, it made news that the U.S. Department of Justice, Civil Rights Division would investigate and bring cases over "intentional race based discrimination in college and university admissions." Their hypothesis is that some admissions offices are discriminating against White students. Their allegation is that using race as a factor to admit students who have been historically under-represented on the campus is itself discriminatory. Perhaps this is a way for the Justice Department to try to eliminate affirmative action? This got me thinking about the nature, distinctions, and definitions of diversity in our country—especially in the legal market. What exactly is diversity, or is everyone a special snowflake?

In May 2015, the Washington Post reported that the legal profession was the least diverse profession based on information reported by the Bureau of Labor Statistics (BLS). According to the BLS, 88 percent of lawyers are White, surpassing all other professional fields including architects, which are 81 percent White, accountants 78 percent White and physicians at 72 percent White. When analyzing diversity, including Black, Latino, Asian and Native Americans, these groups comprise about 33 percent of the American population but only about 20 percent of all law school grads.

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Gender diversity is also still not achieved in the legal profession and the "old boys network" is still alive and well in 2018. Law firms can deny this, but the metrics make it an obvious state of affairs. The Diversity Lab created the Mansfield Rule based on the Rooney Rule in the National Football League. The Rooney Rule states that one black person must be interviewed for every head coaching job in the NFL. Likewise, the Mansfield Rule asks that firms consider at least 30 percent women and minority lawyers as part of the pool of candidates for all governance roles, senior lateral positions, and equity promotions. In 2016, there were 44 global mega-firms that had agreed to the Mansfield Rule, hopefully affording a greater number of female attorneys partner track positions to improve upon the meager 20 percent of female partners. So, does this new rule mean all women in the law should be given protected status? Should it just be for leadership roles that women are given special status? Currently, just over half of all law students are women, yet only one-third of lawyers are women. Is it necessary to make adjustments for the loss of women who choose not to enter practice?

In the 2017 study "A Portrait of Asian Americans in the Law," it was stated that Asian American enrollment in law school has gone down 43 percent since 2009. The term "bamboo ceiling" was coined to give context to the struggle for Asian Americans to gain leadership roles at top law firms. It is almost like no one can break the ceilings to gain access to law firm leadership seats. Currently, Harvard University is being sued by both the Justice Department and the Students for Fair Admissions, a non-profit organization that challenges admission policies. The claim is that the university discriminated against Asian American applicants by utilizing a cap, limiting the number of Asian American admitted. This case continues to be litigated.

There is even precedent for a type of limited protected class status among people of White European descent. In 1976, Italian Americans made up 25 percent of the student body at the City University of New York (CUNY), yet only 4.5 percent of the faculty were Italian American. The answer was *Scelsa v. CUNY*, 806 F. Supp. 1126 (S.D.N.Y. 1992), which gave Italian Americans protected status as a designated minority alongside federally protected groups at all CUNY institutions. The holding was based upon the fact that in the NYC area, Italian Americans were part of a historically persecuted minority by being portrayed in the press as all having mafia ties and/or being fascists.

Many White ethnic minorities have attempted to obtain protected status both at CUNY and elsewhere. Jewish Americans, Polish Americans, and many other groups have not succeeded in being included on the EEO-1 form, the federal government's official documentation that delineates protected minorities. Liana Kirillova, in her article "When Affirmative Action Is White: Italian Americans in the City University of New York, 1976-Present," Southern Illinois Univ. (Spring 2016), states that more newly arrived immigrant, White ethnic groups are not being given protected status—including such groups as Arab Americans.

Law firm leadership appears to be concerned about diversity in the profession, but seems to pay the idea more lip service than real change. Frankly, they seem to be like a "deer in the headlights" when confronted with a real call for change. They rush to hire "directors of diversity" and then do not afford diversity professionals much function in the hiring process. It seems like "pushback" from clients demanding to review the firms' diversity is not going to force any change—there needs to be actual

accountability. It is not enough to *try* to hire diverse people in 2018. Even Dodd-Frank tried to codify the hiring of minority candidates by requiring that a certain number of interviewees be from minority groups. However, although well-intentioned, there was little to no policing of this effort and in fact most financial employers did not know the requirement existed. Jill Backer, "**How Does Section 342 of Dodd-Frank Affect Legal Recruiting? (https://www.law.com/newyorklawjournal/almID/1202726909898/How-Does-Section-342-of-DoddFrank-Affect-Legal-Recruiting/)**," N.Y.L.J. (May 22, 2015).

After I thought about and researched diversity in the law, I began to review the myriad of diversity positions at law firms. It seems that most law firms have created scholarships to help their diversity pipeline—a way to prove their dedication to diversity with a single hire from among the very elite law students, as the applicants must meet high standards. However, each firm defines diversity differently. I have seen everything from seeking "underrepresented racial or ethnic groups in the law" to "those groups historically under-represented in the legal profession" to "those with a diverse background" to "those from a socio-economic disadvantaged background." The ever-expansive definition of the word diverse is starting to erode the very reason for its existence.

Affinity groups began in 1970 with Xerox employees forming the National Black Employees Association. From then on, we can see the somewhat flawed underlying assumption that the goal of affinity groups was to assimilate more into the primary White fields to move up the corporate ladder. The lack of progress on this goal has led to the affinity group becoming separate from the power structure rather than an integrated part of it. We still see relatively few minority and women CEO's despite the promulgation of affinity groups in the corporate world. Mirrored in the law firm environment, there was a steady rise in the 2000s of affinity groups and they are still a touted part of law firm culture today.

In August 2017, Deloitte, one of the remaining big four accounting firms, started a new approach to diversity by ending all affinity and women's groups. Instead they have decided to focus on their leadership, comprised mainly of White males, and concentrate on more inclusive policies and actions. Basically, the theory is make the White male patriarchy responsible for diversity or suffer the business consequences as client's demand diversity and thus a better and more inclusive work product. Is this the diversity policy equivalent to the economic "trickle down" theory? The legal market has not made this radical step away from affinity groups, but I am sure firms are watching this closely.

There are all sorts of definitions of diversity in the law firm environment. I have outlined many and how they are dealt with currently. There are more still, though, including sexual orientation, gender identity, socio-economic and the newest "first gen" (first generation American, law student, college student etc.).

The legal market is going to have to stop the rhetoric of diversity initiatives and pipeline programs and figure out how to *actually* increase the number of minorities in the profession, and in positions of leadership. I think there are things that can be done.

First, firms should stop talking about diversity and inclusion efforts and start hiring based on true capability. Firms are more than happy to let everyone know they are interested in diverse candidates. Those candidates are "encouraged to apply" and sometimes they are even courted. However, the candidates still need to be in the top 10 percent—this is the same credential of all the candidates the firms would seek without any diversity initiative. To add insult to injury, firms have undertaken studies time and again to understand what makes an associate successful at their firm. Time and again the results have been that being in the top 10 percent of their class was not necessarily an indicator of success as an associate. Why not hire on the true parameters that can make a successful associate (like work ethic, resiliency and life experience) instead of just the top 10 percent, which sometimes shuts out some diverse candidates? Just over 15 percent of attorneys and less than 9 percent of partners at surveyed law firms identify as a minority. Meanwhile, American Bar Association statistics show that minorities have made up more than 20 percent of law students for almost two decades and recently surpassed 30 percent. Cristina Violante, "Racial Diversity Stagnating at US Law Firms," Law360 (Aug. 20, 2017).

Second, create true pipeline programs that take a chance on someone rather than betting on sure things. We should be starting with pipeline programs that begin with high school students leading them into various professions. Lawyers are usually inherently risk adverse, so taking this risk may be uncomfortable, but to improve the diversity among us, we are going to have to take on the risk of hiring from underrepresented populations of students. Offer ways to interact with young students by helping them in their studies and to navigate college and future application to law school.

Third, do not let the ever-expansive and over-inclusive definitions of diversity give license to hiring non-diverse, non-minority people as diverse. Not everyone is, or can be diverse, by the very definition of the word. Hire based on capabilities and what makes sense to keep your firm from being a pasteurized version of American society—one that does not reflect the wonder of its diverse opinions and people.

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