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Law Firm Diversity Scholarships: Good Intentions, Incomplete Solutions

Suggestions from the Eyes of a Diverse Candidate

Tyler W. Garvey*

The economic downturn has affected all aspects of life. In the legal profession, with law school tuition rates skyrocketing and law school applications rapidly declining throughout the country, large law firms face a smaller pool of applicants to choose from. In addition, there is added pressure on firms to make sure that there is diversity among lawyers. To increase diversity in this ever-changing society, firms have responded in different ways – one way has been through diversity scholarships for incoming summer associates. While firms have created diversity scholarships with good intentions, it is no secret that few firms have yet to fully benefit from them. Diverse candidates still face problems regarding stereotypes of incompetence, while firms still face problems regarding perceptual diversity. Furthermore, the non-diverse associate is mistakenly viewed as the “enemy.” Presently, diversity scholarships have yet to make diversity within law firms a “win-win” situation. Instead, law firm diversity scholarships seem more and more as primarily a monetary incentive.

This article suggests ways that firms can fully benefit from diversity scholarships. It aims to discuss issues faced by both diverse and non-diverse associates within the law firm. Furthermore, it proposes solutions to these problems and attempts to highlight ways that firms can get the most out of diversity scholarships, while at the same time reducing costs and overhead. Most important, this article aims to discuss diversity scholarships from the eyes of the individual it was created to benefit – the diverse candidate.

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INTRODUCTION

In the corporate world, diversity is in demand, both in the client context and in the broader, social context. For some, there is the belief that diverse legal teams will better serve existing clients and aid business development. For others, there is a concern that the lack of diversity will continue to fuel popular disillusionment with legal institutions. Whatever the case may be, many individuals view diversity as imperative to the long-term success of any business. In the corporate world, which includes law firms, the lack of diversity is an ongoing problem with no clear-cut solution. Law firms have attempted to solve this problem by employing different methods aimed at increasing the number of diverse candidates within the workplace. One popular method to increase diversity is by awarding scholarships. With these “diversity scholarships” firms look to increase their diversity numbers by offering summer associate positions, often with financial bonuses, to diverse candidates. Traditionally, firms have used the word “diverse” to refer to non-white associates. Essentially, the purpose of a diversity scholarship is to create opportunities for those individuals from disadvantaged backgrounds with the goal of having them succeed in the corporate environment. It is easy to conclude that most firms have good intentions when creating diversity scholarships.

So what’s wrong? Despite these good intentions, problems still persist regarding diversity within law firms. While firms have provided diversity scholarships to attract diverse candidates, the number of diverse lawyers at law firms remains low. As we look further up into management positions, these numbers are bleaker and more disheartening, as smaller percentages of diverse candidates, when compared to other associates, are partners at their firms. Furthermore, the partnership goal for diverse candidates is harder to achieve as a result of predicted partner layoffs. Partnership, once thought of as “lifetime employment” akin to a professor receiving tenure at a university, is now a pipe dream for many diverse lawyers.

1. AMERICAN BAR ASSOCIATION, RAISE THE BAR: REAL WORLD SOLUTIONS FOR A TROUBLED PROFESSION 118 (Lawrence J. Fox ed. 2007); see also Grutter v. Bollinger, 539 U.S. 306, 308 (2003) (“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.”).
2. REAL WORLD SOLUTIONS FOR A TROUBLED PROFESSION, supra note 1, at 244.
6. Id.
The purpose of this article is to investigate this issue regarding law firm diversity. It is not a critique of law firms, and not every law firm will fit the “mold” presented in this paper. Instead, this paper suggests ways to use diversity scholarships to effectively improve diversity within the law firm. This paper’s goal is to help raise awareness about the fact that what seems like a good-hearted idea is not working, and it may actually hurt the population it is meant to help.

To begin my discussion on how diversity scholarships have yet to be fully beneficial to law firms, I will first focus on the perception of diversity within the law firm. I will claim that while individuals outside of the law analyze more factors— including sex, race, gender, and ethnicity— when considering diversity, within law firms, there is a perception of things being just “Black versus White.” While diversity can be accomplished by having just Black candidates, given the growing pluralism of law school populations and of society generally, there are other factors that should be used. To fully understand this narrow perception of diversity, I will evaluate the associate’s point of view regarding diversity. I will also explain the importance of the associate’s viewpoint when analyzing diversity scholarships since associates are the ones within the law firm who diversity candidates tend to interact with the most, not the partners who likely made the decision on a diverse applicant’s candidacy. I will then analyze how diverse associates can be viewed as incompetent within the law firm and how this assumed incompetence implicates larger questions about how organizations achieve diversity. Regarding organizational diversity, I will discuss three different paradigms that researchers present, two that are problematic—one that is ideal, and I will discuss the implications these paradigms have for attaining law firm diversity. Finally, I will suggest ways of improving the perception of diversity within the law firm. The main purpose of this section is to introduce the reader to the broader problem of diversity and indicate the role that diversity scholarships play in trying to solve this problem of diversity for law firms. It attempts to analyze how most diversity scholarships are awarded and the problems that large firms may face in implementing these procedures.

Second, I will discuss the issue of whether law firms are really increasing diversity or whether they are just creating a façade of increased diversity. I will also discuss how the mere appearance of increased diversity negatively impacts the law firm from a financial standpoint. Afterwards, I will examine how good faith attempts by law firms to increase diversity could lead to a “rotational system” that prevents diverse associates from ascending into upper management positions. Lastly, in this part of the paper, I will highlight the

7. This perception raises an interesting question, “What about Latinos and Asians?” One assumption is that Blacks and Whites are easier to tell apart than other races. Physical appearances, such as skin color, may also help play a role in creating this perception of “Black versus White.” This is not to say that firms do not use these scholarships to recruit Latinos or Asians.
effect that outside institutions have on increasing diversity, and I will discuss a frequent problem faced by law firms called the “Chicken or the Egg” problem. The goal of this section of the article will be to show that in attempting to create diversity, firms focus disproportionately on the appearance of increased diversity, which primarily involves hiring diverse associates. There is an emphasis on the satisfaction of “graders” such as Vault or American Lawyer, and there seems to be less focus on retaining those diverse associates they recruit and having diverse partners.

Third, I will suggest ways of overcoming the “Chicken or the Egg” problem and fostering actual diversity instead of the appearance of increased diversity. I will discuss how acknowledging the “Chicken or the Egg” problem and having diverse associates evaluate long term prospects at the firm is beneficial and leads to actual diversity for a firm despite having low diversity numbers in upper management positions. This part of the article will advocate that firms place value on leveling with diverse associates about what circumstances are like at the firm, in relation to diversity and longevity at the firm. In their focus on creating the appearance of diversity, firms tend to neglect important dimensions of firm organization and culture that could actually help diverse candidates to succeed in the firm.

Finally, I will discuss the notion that diversity scholarships have become nothing more than just a “signing bonus” for diverse candidates and that this type of incentive only reinforces a rotational system. I plan to argue that providing additional financial incentives does not help solve the lack of diversity within firms. I also plan to present an analytical viewpoint regarding salary, which I refer to as “The 160.” Using this theory of “The 160,” I will argue that by employing certain methods, firms can actually shift their focus off of salary and onto superior mentorship and sponsorship and still be able to acquire enough elite talent to maintain a diverse environment throughout all levels of management. In this final part of the article, I hope to explain to the reader that part of the failures described above, in both tending towards appearance and in neglecting the more substantive dimensions of the firm environment, is caused by the emphasis on the use of money or salary to incentivize whatever effects within the firm that managing partners want to produce. In general, rather than reflect on whether the firm is working in the way that best serves the interests of those it employs, it simply pays those associates more to work in the way the firm has tended to work in the past.

With diversity scholarships, a special case of increased payment, if firms are not thinking fully about diversity and how the firm might be changed to make diverse associates more comfortable and productive, then firms are using

8. This emphasis on the use of money and salary raises an interesting question – “If you do not care as much about the substance of diversity as the appearance, would it become, or maybe seem, easier to create diversity by paying for it?” In many circumstances, the answer would seem to be yes.
money simply to bring these associates in, assuming that this action will be enough.

I. PERCEPTION

A. Perception Of Diversity Within The Law Firm

What exactly is diversity? Better yet, what exactly is the goal of diversity? These questions seem to have hundreds of different responses. Nevertheless, they are essential to the heart of maintaining a diverse workplace. In order to have diversity at a law firm, you must know what diversity is, and in order to promote diversity effectively, you must have a goal or reason for doing so. This brings us back to the question – “What exactly is diversity?” While it is difficult to specifically categorize what diversity is, it is becoming easier to tell what diversity is not. Diversity is not simply a “mixing” of different races. This “racial mix” is what seems to be the solution for not just firms, but also many other organizations. A person may look physically different, but questions can still remain about whether that person truly contributes to a more diverse environment. In addition, an organization can have a welcoming effect towards diversity but that welcoming effect extends only to people who behave like the organization and adopt its values, language, and culture. Under this standard, finding out who is the right kind of diverse individual is simply a matter of the organization signaling behaviors and rules, labeling these behaviors and rules as the norm, and then finding out who does not fit these norms. After this person is categorized, they are molded to fit the organization’s culture. But true diversity should have the goal of changing, broadening, and pluralizing the firm’s norms through hiring different kinds of associates, rather than bringing in people who are similar in behaviors and norms to those currently in the firm but are members of a different racial group.

I. White v. Non-White Viewpoint and the Problem It Poses For Firms

To discuss the perception of diversity within law firms, it is important to start at the heart of the matter – The White v. Non-White Viewpoint.

Since diversity is not just a “mixing” or “mingling” of different races, moving from race to a broader array of factors involves discussing the goals.

10. Id.
11. Id: Sociologist Robert Park describes this process whereby minorities shed their ethnic identity as a result of being integrated into the majority culture as assimilation. See David A. Thomas & John J. Gabarro, Breaking Through: The Making of Minority Executives in Corporate America (1999). Through contact with mainstream institutions of the society, immigrants develop the sensibilities and taste of the native born majority, thus making ethnicity an irrelevant and preferably nonsalient aspect of identity. Id.
12. A broader array of factors may also help firms when giving thought to which norms and behaviors first should be pluralized when focusing on diversity.
of diversity. These factors include sex, gender, ethnicity, and experience.\textsuperscript{13} Studies have shown that there is power in diversity, and people with different skills and perspectives are able to find better solutions than a group with homogenous skill sets and perspectives.\textsuperscript{14} These same individuals are also able to make more accurate predictions regarding work than the homogenous group – even if the homogeneous members score higher on individual ability tests.\textsuperscript{15} In short, diversity is beneficial to everyone.\textsuperscript{16} Finding better solutions at a time when it has become harder for the large law firm to survive than in previous years is imperative.\textsuperscript{17} Despite this important research regarding a broader array of factors used to define diversity, few in the general public, including public relations professionals, are aware of this information and instead, only define diversity by numbers.\textsuperscript{18} While proponents of numbers consider this method as the first step towards creating a heterogeneous group, often times, however, it is the only step taken. This is where the problem lies.

As a result of defining diversity by numbers, when diversity is analyzed, the first thing that tends to be compared is “whites versus non-whites.” Firms view diversity using a “whites versus non-whites” analysis primarily because lawyers share the same misperceptions with the general public about diversity. Frequently used terms such as “people of color” indicate racial grouping since it refers to those who are white and those who are non-white. The problem with this “white versus non-white” analysis is that when it stops, comparisons and conclusions are made without analyzing further issues. As a result sex, gender, ethnicity, and experience are viewed as secondary factors that judge diversity. It is in any organization’s best interest to let the general public know that diversity extends past the notion of “white versus non-white,” and factors such

\begin{itemize}
\item \textsuperscript{13} “The U.S. Department of the Interior uses the term broadly to refer to many demographic variables, including, but not limited to, race, religion, color, gender, national origin, disability, sexual orientation, age, education, geographic origin, and skill characteristics.” \textit{What is Diversity?}, U.S. DEP’T OF THE INTERIOR (2013), http://www.doi.gov/pmb/eeo/what-is-diversity.cfm. The U.S. Department of Justice website states that diversity involves more than just race and gender. \textit{Valuing Diversity, Our Commitment}, U.S. DEP’T OF JUST. (2013), http://www.justice.gov/careers/legal/diversity.html. It involves “differences in culture, ethnicity, economics, generations, geography, sexual orientation, and includes individuals with disabilities.” \textit{Id}.

\item \textsuperscript{14} \textit{MYERS}, supra note 9.

\item \textsuperscript{15} \textit{Id}.

\item \textsuperscript{16} Improved problem solving is just one goal of diversity. By identifying other goals of diversity, it is easier and more accurate to decide who should be included in the diverse pool.

\item \textsuperscript{17} Jordan Weissmann, \textit{Why Law Firms Are Rigged to Fail}, THE ATLANTIC (May 31, 2012), http://www.theatlantic.com/business/archive/2012/05/why-law-firms-are-rigged-to-fail/257843/ (discussing the reasons why Dewey & LeBoeuf filed for bankruptcy and how most big corporate law firms are not built to run like modern businesses).

\item \textsuperscript{18} PENN STATE: COLLEGE OF AGRICULTURAL SCIENCES, AN OVERVIEW OF DIVERSITY AWARENESS 3 (2001), available at http://www.extension.org/sites/default/files/w/3/30/An_Overview_of_Diversity_Awareness.pdf (providing an in-depth discussion about the changing demographics in the United States); \textit{See also} Elizabeth L. Toth, \textit{Diversity and Public Relations Practice}, INST. FOR PUB. REL. (Apr. 9, 2009), http://www.instituteforpr.org/topics/diversity-and-pr-practice/.
\end{itemize}
as sex, gender, ethnicity, and experience should hold the same level of value as race. This means that if the public has a limited view regarding diversity, firms should lead rather than follow. The more transparency there is, the better the results will be. Corporations have begun to understand this concept of a richer notion of diversity and it has resulted in business advantages. On the other hand, for law firms, it seems that there is much slower adaptation.

2. The Associate’s Potential Perception of Diversity and Effects it Can Have on Diverse Attorneys

Understanding the perception of diversity within the law firm also involves understanding the perception of the people who work there and the effects that their perception can have.

Regarding diversity scholarships, there is little information regarding who designs the recruitment strategy, but diversity committees tend to be the ones in charge of selecting the award recipients. Partners of the firm, as well as associates, comprise the majority of these committees. In a large number of firms, however, partners tend to have leadership positions and outweigh associates as members. They are less likely to leave the firm, which results in stability of the diversity committee and a bigger “voice” regarding the selection of diversity scholarship recipients. Although partners, in most situations, play a significant role in selecting diversity scholars, rarely are they the ones who diversity scholars work with. Instead, diversity scholars tend to interact with other summer, junior, midlevel, or senior associates since the typical law firm structure has more associates than partners and there is a financial incentive to keep associates around as “leverage.” When these interactions with other non-

19. RAISE THE BAR: REAL WORLD SOLUTIONS FOR A TROUBLED PROFESSION, supra note 1, at 244.
21. It is very possible that diversity committees could be in charge of both recruitment strategies and award recipient selections.
23. David B. Wilkins & G. Mitu Gulati, Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis, 84 CAL. L. REV. 493, 538 (1996) (concluding that training is costly to individual partners because that time spent training is time that the partner cannot spend either producing revenue or consuming leisure, and as a result, partners have strong incentives to ration time spent on training and invest only in those associates who are likely to benefit them and their practices directly); see also Raasch, supra note 22.
diverse associates operate against the backdrop of low numbers of diverse lawyers, it is important to try to gauge that associate’s perception of diversity within the law firm structure.25

By understanding the associate’s perception of diversity, especially the senior associate, who tends to serve as a bridge between partners and lower-level associates, we can see why labeling a person as a “diversity scholar” can be problematic.26 While a partner plays a significant role in selecting diversity scholarship recipients and has access to each scholar’s resume, transcript, and other pieces of information that show the scholar’s qualifications and achievements, these things may not be readily available to the senior associate. Thus, the initial level of familiarity with the diversity scholar’s record possessed by the senior associate is much lower when compared to the familiarity with the diversity scholar’s record possessed by the partner. All that the senior associate is left with is a person who is simply diverse. That senior associate is then free to make assumptions, and sometimes the lack of diverse attorneys in the law firm environment might lead that associate to conclude that diverse candidates were not qualified for the job and were only hired because of the diversity scholarship, which is viewed as favoring race.27 The senior associate’s assumption is often made from a position of insecurity about work, and this leads to all types of risk aversion, especially since the next step for that senior associate would be partnership.28 As a result, a diversity scholar, while accomplished and qualified, has an additional layer of trust that must be gained and a smaller margin for error since they are viewed as not being “up to the standard” of other associates.29

This situation indirectly creates a stereotype of incompetence, which the diversity scholar, who then becomes an attorney at the firm, might spend years

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27. ARAVINDA NADIMPALLI REEVES, GENDER MATTERS, RACE MATTERS: A QUALITATIVE ANALYSIS OF GENDER & RACE DYNAMIC IN LAW FIRM 69-73 (2001) (concluding that attorneys at firms looked like White men and that diverse attorneys were consistently mistaken for secretaries and mailroom workers). The law firm environment is not the only place that can lead to this negative stereotyping. Sometimes the law school environment and a variety of other socialization experiences can play a role as well.
28. DOWNEY, supra note 24, at 30 (“An attorney must pass through this [senior associate] rank on way to partnership.”).
29. NADIMPALLI, supra note 27, at 235.
overcoming. It also raises the following important question: what if partners were required to share with senior associates the full range of positive information they had about diversity scholars? While some may feel that this is an easy fix to the problem, it is not. Research shows that when impressions of others in a work setting are being formed, “concrete and objective” information about qualifications is often not available. In addition, recruiters spend an average of “six seconds before they make the initial ‘fit or no fit’ decision on candidates.” Senior associates, in this situation, can be viewed as recruiters since they are typically recruiting other attorneys on tasks.

One counterargument to this analogy is that senior associate will have more and different kinds of information about a diverse associate than a recruiter will have and the senior associate is not trying to winnow down a pool of candidates in the same way – instead they are trying to get a job done. The problem with this counterargument is that it first assumes that the senior associate has information that the recruiter does not have. This is problematic since in the case of diversity scholarships, the label of “recruiter” tends to belong to the partners making decisions on the applicants. On the contrary because of the partner’s role as “recruiter,” the roles may be reversed, and the senior associate might not have access to important pieces of information that could help determine whether a candidate is selected for a diversity scholarship.

When combined with the added pressure of learning how to bring in clients while maintaining high billable hours at the law firm, it follows that there could be multiple tasks being handled and delegated at a time. As a result, it is very possible to imagine a situation where a senior associate glances over a diverse scholar’s resume and does not spend as much time on it as a partner on the diversity committee would. Thus, stereotypes and risk aversion may still be prevalent despite the sharing of positive information from the partner to the senior associate.

Furthermore, this qualification assumption made by senior associates could also hurt diverse attorneys who did not receive a diversity scholarship. When factoring the issues that sex, gender, ethnicity, and experience are viewed as secondary factors to race and that diversity scholarship recipients tend to be based on their race, other lawyers at the firm may assume that the majority or all diverse attorneys at the firm were diversity scholarship recipients, despite information that may state otherwise. As a result, diverse

30. Id.
31. Madeline E. Heilman & Brian Welle, Disadvantaged by Diversity? The Effects of Diversity Goals on Competence Perceptions, 36 J. APPLIED SOC. PSYCHOL. 1291, 1315 (2006) (stating that due to this situation where there is a lack of “concrete and objective” evidence, employees are very much in the same situation as research participants: left to their inferences).
32. Vivian Giang, What Recruiters Look At During The 6 Seconds They Spend On Your Resume, BUS. INSIDER (Apr. 9, 2009), http://www.businessinsider.com/heres-what-recruiters-look-at-during-the-6-seconds-they-spend-on-your-resume-2012-4 (“[T]he study showed recruiters will look at your name, current title and company, current position start and end dates, previous title and company, previous position start and end dates, and education.”).
non-recipients can also be subject to the same problems that diversity scholarship recipients face. Just like the diversity scholar, the diverse non-recipient may spend years overcoming stereotypes of incompetence. Ultimately, this idea about incompetence in law firms implicates larger questions about how organizations achieve diversity and what characteristics firms seem to have from these other organizations.

B. Diversity Within Other Organizations And The Firm Implications

Diversity within organizations can be seen as a constantly evolving process and plays a huge role in influencing perception. Researchers such as David A. Thomas and Robin J. Ely have noted that although organizations differ in many ways, they are united by one similarity – the fact that their leaders realize that increasing demographic variation does not increase organizational effectiveness. From a broader context, this statement is important because it shows that leaders of organizations are aware that diversity extends beyond numbers. In their research on organizational diversity, both Thomas and Ely discuss three paradigms of diversity – discrimination and fairness, access and legitimacy, and the emerging paradigm.

Under the discrimination and fairness paradigm, diversity progress is measured by “how well the company achieves its recruitment and retention goals rather than by the degree to which conditions in the company allow employees to draw on their personal assets and perspectives to do their work more effectively.” A major problem with this paradigm is that it emphasizes colorblindness as well as gender blindness because it promotes the notion that “we are all the same,” or “we aspire to be the same.” As a result, it is unlikely that leaders in this paradigm would explore how people’s differences generate a “potential diversity of effective ways of working, leading, viewing the market, managing people, and learning.” In many instances, this discrimination and fairness paradigm highlights what I stated earlier regarding law firm diversity – the fact that there is a difference between diversity that changes numbers and diversity that actually recruits employees who differ in the way they think, express themselves, and set goals from those employees already in the institution.

Under the access and legitimacy paradigm, there is a predication on the notion of “acceptance and celebration” of diversity. This is unlike the

33. Id. (stating that there is an assumption that African American attorneys have been given positions in law firms because of affirmative action measures instead of their true competence).
35. Id. at 81.
36. Id.
37. Id.
38. Id.
discrimination and fairness paradigm where there is a suppression of differences in the interest of maintaining harmony. With the access and legitimacy paradigm, a quick “pigeonholing” of staff with niche capabilities occurs, and this ultimately results in a lack of understanding of what those capabilities really are and how they could be integrated in the company’s mainstream work. Applying this same concept to law firms, firms recognize, as a result of market pressure, the need for more genuine diversity. However, in trying to achieve more genuine diversity, there is a possibility that a firm overstates its diversity initiatives or segregates diverse attorneys into niches of the firm, which tends to be the case with affinity groups. This is not to say affinity groups are completely problematic. In fact, affinity groups, when they are active and not defunct due to rapid attrition, are beneficial for firms. However, it is more beneficial if a diverse associate or diversity scholar is known more for their work than their position as members of a certain affinity group.

Finally, under the emerging paradigm, there is integration between both the discrimination and fairness paradigm and the access and legitimacy paradigm. This emerging paradigm is what organizations aim to achieve because it creates the ideal situation for them. Thomas and Ely both state that like the fairness paradigm, the emerging paradigm promotes equal opportunity for all individuals. They also state that like the access paradigm, the emerging paradigm acknowledges cultural differences among people and recognizes the value in those differences. In the law firm context, it is important for firms to balance both the fairness paradigm and the access paradigm. Once this occurs, a law firm could create the ultimate goal of the emerging paradigm. This emerging paradigm model for diversity would let a firm internalize differences among employees so that it learns to grow because of it. The emerging paradigm results in members stating that, “We are all on the same team, not despite them.”

39. Id.
40. Thomas & Ely, supra note 34, at 81.
41. Id. at 80 (“African American M.B.A.’s often find themselves marketing products to inner city communities; Hispanics frequently market to Hispanics or work for Latin American subsidiaries. In those kinds of cases, companies are operating on the assumption that the main virtue identity groups have to offer is a knowledge of their own people.”).
43. Firms that have created niches first could use them to change the larger culture. However, this is a bit daunting because there are so many ways that diversity cannot work. Firms really have to want to change their staff and their culture, and they must be persistent about it.
44. Thomas & Ely, supra note 34, at 86 (stating that as a result of the emerging paradigm, both differentiation and assimilation is transcended into one new model).
45. Id.
46. Id.
47. Id.
Ultimately, from this evaluation of paradigms of diversity, firms should be aware of the paradigm that they fall into and find ways of balancing different approaches to diversity.

C. Improving The Perception of Diversity Within the Law Firm

When dealing with diversity scholarships, there are ways to improve perceptual diversity. The steps recommended below could prove to be helpful steps in the right direction.48

1. Actually Define Diversity

In order to improve the perception of diversity within the law firm, one of the first steps that should be taken involves an increased effort to define diversity.49 This increased effort to define diversity also involves identifying the goals of diversity. By having an actual definition of diversity that is visible, the public can analyze a firm from the viewpoint of that definition.50 Furthermore, clients can use this definition of diversity to evaluate the firm. A specific definition does two things. First, it takes the focus away from just race and the stereotypes that may accompany it. This allows a wider group of individuals to be considered for the scholarship and may allow greater emphasis on the diversity scholar’s achievements. This type of approach can also prove to be beneficial to the diverse non-recipient working at the firm since other associates would not just categorize the scholarship with a particular race.

Secondly, a specific definition of diversity may in fact increase the prestige of the scholarship. Because diversity tends to be associated with affirmative action, the two ideas are often confused as being exactly the same.51

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48. While some people may view actual diversity as a perception of diversity, actual diversity is a broader, better-informed perception.
50. One example of visible diversity would be using the firm’s website to define what constitutes diversity. Although some firms may state on applications their definition of diversity, the majority of applications consist of a cover letter, resume, and transcript. Only after a person is hired and has started employment does the issue and definition of diversity arise. Often, diversity is discussed more as a protocol – akin to sexual harassment policies in the workplace. This type of approach limits the effectiveness of the definition since it is often forgotten once the “start of employment” phase is over.
Opponents of affirmative action may feel that diversity falls into the same category since there are unreflective efforts to benefit excluded groups that do not adequately consider the qualifications needed for the job. By removing this association and making it clear that diversity and affirmative action are different ideas and not exactly the same, the stigma that a person is “getting by” because of their race is potentially reduced. Instead of a diversity scholarship being viewed as a “handout,” it can instead be viewed in the appropriate and intended light – which is an award for someone who brings something valuable to the legal field. This approach can also reduce the “undeserved benefit” view that some opponents of affirmative action see in every kind of scheme that confers consideration or benefit on people of color. It is on law firms to be proactive in this distinction and educate the public and others who visit the firm’s website that diversity is not the same as affirmative action, especially when it is being used in the context of diversity scholarships. Clarity is a key element to improving the perception of diversity, and being clear with the definition of diversity can help a firm establish a solid foundation upon which it can build.

2. Removing the Stereotype of Incompetence

Removing the stereotype of incompetence that many diverse attorneys tend to face is another way to improve the perception of diversity within the firm. While firms claim that attaining partnership is based on merit, the incompetency stereotype undermines this meritocracy and prevents diverse attorneys from being successful at the firm. If an associate is viewed as incompetent, this leads to lower quality assignments, which then leads to a lower final evaluation for the associate. Assumptions of incompetence also likely lead to less committed mentorship, as well as fewer opportunities to socialize and meet potential clients. While, this incompetency assumption exists for all associates, the fact that diverse associates may battle this stigma right from the beginning when they enter the firm is concerning.

In order to solve this problem of the assumption of incompetence, firms would first have to evaluate their own system of providing work. While associates are often encouraged to find work from partners and create their own “book” of business, firms should require partners to give associates within their practice group the same number of quality assignments. This brings up the question of—”What can be categorized as a ‘quality’ assignment?” Since each practice group tends to have different assignments, a firm can survey the partners in each practice group and see what the partners consider to be

52. NADIMPALLI, supra note 27, at 236.
53. While it may be somewhat derogatory, some lawyers have referred to a committed mentor as an associate’s “law firm rabbi.”
54. Id.
55. Partners are better suited to give what they consider quality assignments to associates because of their years of experience working in the legal sector.
typically “high quality” and “low quality” assignments within their group. Afterwards, the firm could generate a rating scale on the importance of the assignment. After the rating scale is created, firms can then have partners evenly distribute high and low quality assignments to each associate so that everyone (white and non-white) will have an equal opportunity to prove themselves. Overall, this rating scale benefits the firm and the diverse associate. The firm takes a step in the right direction by attempting to remove the stereotype of incompetence, and the diverse associate avoids consistently receiving lower quality assignments. Partners also benefit since they have the opportunity to develop crucial management skills, which is different than the skills developed in law practice and often viewed as an area that, in general, needs great improvement. By incorporating this rating scale, a firm can directly deal with the widespread notion that partners don’t want to devote the time to properly manage, develop, and mentor any particular associate because they expect that associate to leave within the next few years.

Having stereotypes of incompetence only hinders any progress that a firm is attempting to make regarding diversity. It is important to understand that in order to deal with this stereotype of incompetence, firms should start at the source of the problem – and in this case, the “source” tends to be work product.

3. Non-Diverse Associates

Finally, improving the perception of diversity within the law firm involves directly addressing the issue of “losing” that faces the non-diverse associate. In order to have diversity, there must be inclusiveness from everyone, including non-diverse associates, which tend to make up the most populous group within the law firm. In fact, although non-diverse associates tend to be overlooked in terms of discussing issues regarding diversity, they may be the most important part of improving the perception of diversity and creating actual diversity. Naturally, improving the viewpoint or assessing issues regarding the majority

56. For example, for a transactional practice such as mergers & acquisitions, due diligence might be placed lower on the assignment quality scale than another assignment, which is considered more complex or “exciting.” The same comparison can be made for litigation practices and document review.

57. Some people may feel that this attempt to remove the stereotype of incompetence to help diverse lawyers is another form of affirmative action. However, this notion of affirmative action is incorrect. With this type of assignment allocation, everyone receives the same opportunity to prove themselves. It is not a limiting of opportunities for non-diverse associates. Rather, this type of assignment allocation is a new system where everyone can succeed from the beginning.

58. By using this system, partners would not have to rely heavily on a few associates. This system can also help reduce the effects of associates lateraling out of the firm at important times.

59. Deena Shanker, Why are lawyers such terrible managers?, CNN (Jan. 11, 2013), http://management.fortune.cnn.com/2013/01/11/lawyers-terrible-managers/ (stating that poor management is one of the reasons why associates leave firms).

60. Id.
group would lead to swifter changes within an organization. However, it seems that in this instance, when addressing diversity, “non-diverse” associates in law firms are not being considered on a level that would lead to swifter changes within the firm. This lack of attention may be one of the reasons why law firms continue to lag behind in terms of creating a diverse environment that is reflective of society. Moreover, this lack of attention may indirectly explain why law firms have yet to reap the full benefits of diversity scholarships.

Since diversity should aim to be inclusive, creating a zero-sum environment where diverse associates are viewed as “winners” and non-diverse associates are viewed as “losers” should be avoided. For all law firms, this may seem obvious, but this notion of “winners versus losers” tends to be more prevalent than many realize. Research shows that concerted efforts by organizations to “bolster and embrace” diversity through the use of various diversity programs and structures may create the unintentional consequence of simultaneously repelling their White, or dominant group, constituency. In addition, without adequate buy-in from these organizational members, attempts at launching diversity initiatives (in which significant resources have often been invested) will likely be met with resistance, especially if a sense of inclusion is not being fostered. A non-diverse associate should view increasing diversity as a way of creating more efficient and effective teams of lawyers, not as “punishment” for what some consider misdeeds that their ancestors may have done. Firms should be straightforward and direct with what many refer to as “White Bashing.”

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61. RAISE THE BAR: REAL WORLD SOLUTIONS FOR A TROUBLED PROFESSION, supra note 1, at 244.
62. C.W. Von Bergen et al., Unintended Negative Effects of Diversity Management, 31 PUB. PERSONNEL MGMT., Summer 2002, at 244 (2002) (discussing what can go wrong with diversity training initiatives and how it can be beneficial for everyone if properly incorporated).
64. Research suggests that careful attention should be paid to the inclusion-related processes that help shape support for these efforts. Id. In other words, taking the “What about me?” question seriously may be crucial in stemming the tide of backlash responses to diversity efforts. Id.
65. Non-diverse associates should also not consider increasing diversity as something that the firm does in order to get a good evaluation from Vault or The American Lawyer.
66. “White Bashing” can be defined as a viewpoint by a Caucasian individual that he or she is being unfairly treated and viewed as an enemy because of race. Claims of “White Bashing” tend to arise typically in the workplace and generally involve actions made by non-white workers. Although “White Bashing” is generally characterized as a viewpoint of white men, due to the fact that they are frequently viewed as the racial group in power, the term can also apply to white women who feel that they are being treated differently because of their race. “White Bashing” can interfere with fostering genuine diversity because it hampers inclusion and further adds to the notion of law firms as a zero-sum environment. See REENEE BLANK & SANDRA SLIPP, VOICES OF DIVERSITY: REAL PEOPLE TALK ABOUT PROBLEMS AND SOLUTIONS IN A WORKPLACE WHERE EVERYONE IS NOT ALIKE 172-73 (1994) (showing a longstanding viewpoint on “White Bashing” that continues to this day).
associates should not view diversity as losing matter. Instead, everyone (diverse and non-diverse) should be able to view diversity as a winning situation. If non-diverse associates feel as though they are losing, this indirectly affects diverse associates.

In terms of diversity scholarships, the diverse associate may be considered part of the reason why there is “White Bashing.” Furthermore, the feeling of “loss” on the part of the non-diverse associate may influence that person’s view of diverse associates and may be one of the underlying causes for why diverse associates face incompetency issues at the firm. It may also be one of the causes for why there is a lack of diverse associates, in general, being hired at firms.

In order to create a winning situation for all parties involved and truly reap the benefits of diversity scholarships, firms must take into account the feelings of non-diverse associates. Once this is done, then the perception of diversity in the firm can be improved.

II. APPEARANCE

A. Increasing Diversity or Creating the Appearance of Increased Diversity: An Analysis of How The Law Firm is Negatively Impacted

Although some law firms currently focus more on the “mixing” or “mingling” of different races and less on other factors, there are still problems with maintaining this racial element. Part I of this article provided an analysis on what “we” see regarding diversity and how firms can improve that viewpoint both with diverse and non-diverse associates. This part, labeled “Appearance,” focuses on what firms are currently doing.

Looking at the law firm hierarchy, fewer and fewer attorneys of color are becoming senior associates or partners at firms. The problem is even more prevalent when looking at African American attorneys. Although diverse attorneys make up almost six percent of all partners in law firms, this does not mean that this number is present in all law firms. In fact, the numbers from the NALP Directory of Legal Employers indicate that nearly thirty percent of the

67. Plaut et. al., supra note 63, at 338 (“Whites implicitly associate multiculturalism with exclusion rather than inclusion and that these associations, along with individual differences in need to belong, help account for Whites’ resistance to endorsing diversity efforts.”).

68. Bowatkin, Unemployed Black Woman Pretends to be White, Job Offers Suddenly Skyrocket, TECHYVILLE (Nov. 15, 2012), http://www.techyville.com/2012/11/news/unemployed-black-woman-pretends-to-be-white-job-offers-suddenly-skyrocket/ (discussing an experiment where a Black woman started receiving interviews only after she changed her name and declined to indicate her race on the job search website Monster.com).


offices and firms reported that they had no minority partners. These alarming numbers are evidence that a problem persists for some firms with the recruiting and retention of diverse attorneys. While a diversity scholarship, on its face, may help increase the number of these attorneys at law firms, for some firms, it serves as the only method of recruiting. Over time, what may have started as a good faith attempt to help diversity instead has become a “rotational system,” which harms not only the attorney but also the firm.

1. Law Firm Structure and Outside Influence

Understanding why a firm’s overall approach to diversity may lead to a “rotational system,” and how diversity scholarships are just one part of that ineffective effort first involves understanding the law firm structure. Because a law firm is first and foremost a business, not everyone becomes a partner at the firm. In fact, most associates leave a law firm within five years of being hired. As a result, attrition is an essential and vital part of the overall law firm structure. When attrition is combined with current low numbers of diverse associates, retention of diverse associates become much more important.

The importance of diversity retention has impacted the use of diversity scholarships. Because different career management websites, publications, and organizations such as Vault grade firms in terms of diversity, there is added pressure on the firm to recruit diverse candidates in order to improve or maintain its “grades.” Furthermore, these organizations have their own

71. Id.
72. One of the major barriers to diversity in law firms is the notion of diverse law school candidates being “unqualified.” This “myth of the meritocracy” claims that an attorney’s law school, law school grades, and law review participation will show how likely one is to succeed as an attorney. The Myth of the Meritocracy: A Report on the Bridges and Barriers to Success in Large Law Firms, MINORITY CORP. COUNS. ASS’N. (2003), http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=614. However, a significant number of non-diverse partners at the most profitable firms lack the same “standards” that are a barrier to many minority candidates. Id.
73. Matt Shinners, How to Become a Law Firm Partner, A.B.A. (Jun. 7, 2012), http://apps.americanbar.org/litigation/committees/youngadvocate/email/spring2012/spring2012-0612-how-become-law-firm-partner.html (“Instead, there was an ‘up or out’ philosophy. Those who billed their hours, learned their trade, and made the right connections would be promoted. Those who weren’t promoted were expected to leave the firm. Additionally, the partner track was expected to take six to seven years, and anyone taking more than 10 years was typically shuffled out.”).
74. Kate Neville, How to Become a Law Firm Partner, LAW.COM (Nov. 14, 2008, 3:02 AM), available at http://www.nevillecareerconsulting.com/docs/Associates_Bail.pdf (citing recent data from the National Association for Law Placement that indicated that almost 80 percent of attorneys at large law firms no longer work there five years later, and large firms need significant attrition in order to remain profitable).
75. Id.
77. It is my sense that the publicity surrounding such ratings is what really brought the issue home to firms about diversity retention.
methodologies for defining what constitutes diversity in the law firm. 78 For instance, Vault, considered one of the more well-known organizations for career management, lists that its diversity section separates categories for diversity as it relates to minorities, women, gays and lesbians and that to determine the “Best 25 Law Firms for Diversity,” it uses a formula that weighs the three categories evenly for an overall diversity ranking. 79 Another well-known publication, The American Lawyer, ranks large U.S. law firms based on their percentage of minority attorneys to minority partners. 80 In Vault’s case, there is little information regarding the formula that it uses. Furthermore, because of this limited information regarding Vault’s grading system, it is possible that Vault and The American Lawyer grade diversity using different factors, and a firm may receive a high score on one ranking list but a low score on another. In fact, this instance of varying grades among firms occurs quite frequently. 81 Vault and The American Lawyer are just two of the many “graders” of law firm diversity. The more “graders” there are evaluating law firms, the more likely firms are to make presumptions about what these organizations value. With more “graders,” there is also an increased likelihood of differences in terms of grading methodologies used. While firms can look at the best grades and try to emulate the things that these high scoring firms do, the problem with this strategy is that the rankings change drastically from year to year, and it may be difficult for a firm to evaluate what these high-scoring firms do in terms of diversity. 82

78. Id.; see also Vault, Law Firm Rankings 2013: The Best Law Firms For Diversity (last visited Feb. 26, 2013), http://www.vault.com/wps/portal/usa/rankings/individual?rankingId1=36&rankingId2=-1&rankings=2&regionId=0&rankingYear=2013 (using a score index instead of grades to rank the top firms for diversity).


81. For instance, The American Lawyer ranked Lewis Brisbois Bisgaard & Smith as the top overall firm for diversity in its recent scorecard. Id. However, that same firm was unranked in Vault’s most recent publication of “The Best Law Firms For Diversity.” Vault, supra note 79. Another firm, Shook, Hardy & Bacon, was ranked sixth for diversity in Vault’s recent ranking scorecard but only eighth in The American Lawyer’s recent scorecard. Vault, supra note 79; The American Lawyer, supra note 80.

82. Compare Vault, supra note 78 (showing the change in rankings from 2012 to 2013), with Vault, Law Firm Rankings 2012: The Best Law Firms For Diversity (last visited Apr. 30, 2013), http://careerininsider.vault.com/wps/myportal/careerininsider/rankings/individual?rankingId1=36&rankingId2=1&regionId=0&rankingYear=2012 (showing the change in rankings from 2011 to 2012). Compare The American Lawyer, supra note 80 (showing the scorecard from 2012), with The American Lawyer, Diversity Scorecard 2011 (last visited Apr. 30, 2013), http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202494725139 (showing the scorecard from 2011).
These differences are extremely problematic since a firm may have its own definition of diversity that may not align with another grading organization’s definition. As a result, a firm is sometimes faced with the difficult decision of trying to institute a narrow or specific definition of diversity, which is beneficial, versus a broad and somewhat subjective definition of diversity.

Again, because the grading system for firms is based on diversity and because most firms feel that it is important to be seen as doing well in the public sphere, they may elect to focus on getting the highest grades possible. This emphasis on grades is likely magnified if the firm has already received high marks in terms of diversity. The overall harm is that diversity risks being reduced to simply a numbers game, which is the exact image that firms have tried to dismiss for decades. Reducing of diversity to numbers can lead back to the troubling assumption by some attorneys at the firm that diverse candidates were not chosen because of their success but rather for other reasons. The combination of this assumption plus the fact that a law firm associate’s “lifespan” is rather short can create the image that a diversity scholarship that creates a “rotational system” is simply a quota system for a law firm.

2. Perceptional Quota System

83. VAULT, supra note 79 (showing that websites such as Vault.com use a methodology that gives a firm a score based on only three broad and vague factors: 1) Diversity for Women 2) LGBT Diversity 3) Diversity for Minorities).

84. On the surface, it seems that organizations such as Vault place little emphasis on retention, mentoring practices, and qualitative measures of quality of life when grading firms for diversity. Since few details are known about its methodology, conclusions about emphasis on these factors, such as retention, can only be made from the viewing Vault’s website. See also Liz Ryan, Diversity: Beyond a Numbers Game, BLOOMBERG BUSINESSWEEK (Jan. 10, 2008), http://www.businessweek.com/stories/2008-01-10/diversity-beyond-a-numbers-gamebusinessweek-business-news-stock-market-and-financial-advice (“[T]hirty years ago, corporate diversity mostly referred to efforts to hire and promote women and minorities, and it was a numbers game.”).

85. One troubling assumption that is frequently heard is that a diverse lawyer was chosen by the firm to be the “Sara Lee associate.” This phrase came about due to Sara Lee’s General Counsel Roderick Palmore’s letter “A Call to Action: Diversity in the Legal Profession.” Rick Palmore, A Call to Action: Diversity in the Legal Profession (1999), available at http://www.fed-soc.org/publications/detail/a-call-to-action-diversity-in-the-legal-profession. The term “Sara Lee associate” implies that a diverse associate is chosen to be on a case only to appease client concerns; see NADMPALLI, supra note 27, at 107 (discussing situations where African-American associates were specifically recruited just to maintain a client); see also Ari Shapiro, Why So Few Minority Women Stay at Law Firms, ALL THINGS CONSIDERED (Aug. 3, 2006), available at http://www.npr.org/templates/story/story.php?storyId=5613964 (“When diversity was an asset to landing a government contract or eliciting new business from clients of color, I was included in client meetings, but not otherwise.”).

The perception of a quota system being associated with a diversity scholarship is troubling and raises the question of whether firms are actually increasing diversity or creating the appearance of increased diversity. This idea regarding the appearance of increased diversity comes from research which shows that although American companies aim to create equal opportunity initiatives and there has been a diversity increase in the US workforce, the number of diverse executives remain disproportionately low. As time progresses, this glass ceiling issue is viewed as the norm, and firms are faced with what one scholar refers to as a “Chicken or the Egg” problem. The “Chicken or the Egg” problem states that “in order to attract and retain a significant number of minority lawyers, a firm must have minority lawyers in positions of power, which, of course, is unlikely to happen, unless there is a significant number of minority lawyers.”

The “Chicken or the Egg” problem is one of the major obstacles facing law firms in their current efforts to improve diversity. For some, there is no perceived solution, and avoiding the problem completely and creating other ways to show diversity seems to be a much easier goal to accomplish. However, there are still problems with this approach of opting for other ways to show increased diversity.

3. Problems Created By an Appearance of Increased Diversity

A goal of creating an appearance of increased diversity creates numerous problems. As stated earlier when discussing perceptional quota systems, the appearance of increased diversity instead of actual diversity may cause those diverse attorneys to leave the firm more quickly than their non-diverse peers. As discussed in Table 1 below, it is generally a widespread belief that during an associate’s first few years at the firm, he or she is not considered very profitable, and in some instances, could be considered an expense. After that...
initial point at the firm, which can range anywhere from three to five years, the associate is then extremely profitable to a law firm, as discussed in Table 2 below.\textsuperscript{93} Thus, barring any extraordinary circumstance, it is in the firm’s best interest for an associate to stay at the firm beyond the first few years. When a firm seems to be aiming for an appearance of increased diversity instead of actual diversity,\textsuperscript{94} the morale of the diverse associates may become affected, and they may leave the law firm for what they may consider “better opportunities” before they are valuable to the firm. When this situation is combined with the fact that firms are typically rewarding diversity scholars with a monetary bonus ranging in the thousands of dollars, the appearance of increased diversity may cause a firm to lose much more money in the long term.

### Table 1: Profit Contribution (First-year Associate)*

<table>
<thead>
<tr>
<th>Hours</th>
<th>100%</th>
<th>85%</th>
<th>Salary (k)</th>
<th>Overhead (k)</th>
<th>Total Cost excluding bonus (k)</th>
<th>Profit @ 100%</th>
<th>Profit @ 85%</th>
</tr>
</thead>
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<tr>
<td>1600</td>
<td>320k</td>
<td>272k</td>
<td>160k</td>
<td>200k</td>
<td>360k</td>
<td>(40k)</td>
<td>(63k)</td>
</tr>
<tr>
<td>1800</td>
<td>360k</td>
<td>306k</td>
<td>160k</td>
<td>200k</td>
<td>360k</td>
<td>——</td>
<td>(54k)</td>
</tr>
<tr>
<td>2000</td>
<td>400k</td>
<td>340k</td>
<td>160k</td>
<td>200k</td>
<td>360k</td>
<td>40k</td>
<td>(20k)</td>
</tr>
<tr>
<td>2200</td>
<td>440k</td>
<td>374k</td>
<td>160k</td>
<td>200k</td>
<td>360k</td>
<td>80k</td>
<td>14k</td>
</tr>
<tr>
<td>2400</td>
<td>480k</td>
<td>408k</td>
<td>160k</td>
<td>200k</td>
<td>360k</td>
<td>120k</td>
<td>48k</td>
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</table>

### Table 2: Profit Contribution (Fifth-year Associate)*

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<th>Hours</th>
<th>100%</th>
<th>85%</th>
<th>Salary (k)</th>
<th>Overhead (k)</th>
<th>Total Cost excluding bonus (k)</th>
<th>Profit @ 100%</th>
<th>Profit @ 85%</th>
</tr>
</thead>
<tbody>
<tr>
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<td>555k</td>
<td>225k</td>
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<tr>
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<td>715k</td>
<td>679k</td>
<td>225k</td>
<td>200k</td>
<td>425k</td>
<td>290k</td>
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<tr>
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<td>200k</td>
<td>425k</td>
<td>355k</td>
<td>316k</td>
</tr>
</tbody>
</table>

* For evaluation purposes, assume that the first-year associate is billing at $200 dollars an hour, and the fifth-year associate is billing at $325 dollars an hour.


\textsuperscript{94} Some may ask, “How will the associate be able to judge the appearance of increased diversity versus actual diversity?” There is no direct answer to this question since each situation will likely be different. The associate’s experience will likely be the determining factor in judging whether or not there is actual diversity in the firm or just the appearance of increased diversity.
hour.\footnote{95} The “Hours” column equates to the number of hours in total that associate works for the year. “100%” indicates the profit that associate makes from the hours that he or she works if it is considered all billable. “85%” represents the percentage from the total number of hours that is deemed billable.\footnote{96} Assume that the salary for the associate is the current market price in large cities.\footnote{97} For the “Overhead” category, these expenses generally include the salaries of non-billing assistants and could include supplies and other expenses not passed on to the client.\footnote{98} “Total Cost” does not include bonuses that the associate may earn for billing a specific number of hours.\footnote{99} Bonuses would have led to a further decrease in profits for the firm.

Another problem created by the appearance of increased diversity is that it undermines the efforts of the firm to actually increase diversity in the workplace. The sharing of varied individual experiences is one aspect of diversity that firms can benefit from. However, when there is the appearance of increased diversity instead of actual diversity, those diverse associates may choose to mask their true feelings towards matters,\footnote{100} thus negating one of the major benefits they bring to the firm—opinion.\footnote{101} As a result, both the firm and the diverse candidate are negatively impacted: the firm does not benefit from the associate’s viewpoint, and the associate is unable to voice their opinion for fear that they might be pushed out of the firm due to the lack of diverse

\begin{itemize}
\item For the 2012 National Law Journal billing survey, the average billing rate for law firms that submitted data was $246.52 for first-year associates and 321.98 for fifth-year associates. See Jennifer Smith, On Sale: The $1,150-Per-Hour Lawyer, WALLS. J (Apr. 9, 2013), http://online.wsj.com/article/SB10001424127887332820304578412692262899554.html (noting that many clients now are demanding more and more discounts).

\item Sometimes companies paying for legal services will have firms remove certain expenses. As a result, even though someone may be at work for a specific number of hours, not all of that work time would be considered profit.

\item Median Salary, infra note 124 (showing that in some cities, the market price could be lower than the “160k’ assumed in Table 1).

\item DOWNEY, supra note 24, at 116.

\item Cravath, Swaine & Moore, one of the country’s most profitable firms, is generally the first to announce bonuses paid to its associates, and then other firms follow. For example, Abby Rogers, Elite Law Firm Cravath Just Announced Surprisingly Good Bonuses, BUSINESSINSIDER (Nov. 27, 2012, 9:05 AM), http://www.businessinsider.com/cravath-announces-bonus-scale-2012-11#izz2QB8alb8. In 2012, a first-year associate received a pro-rated bonus of ten thousand dollars, while a fifth-year associate in 2012 received a bonus of twenty-seven thousand dollars. Id.

\item Although reasons may not be fully known as to why this occurs, this may happen because the associates may perceive that the firm is not interested in the way that their diverse life experiences may shape a distinctive perspective. This type of “masking” may still occur even if the firm chooses diversity scholars or candidates who are like non-diverse lawyers in most respects other than race.

\item Michael Freed, Diversity – It’s Good for Business, FIN. NEWS & DAILY REC. (Nov. 11, 2011), http://www.jaxdailyrecord.com/showstory.php?Story_id=534875 (stating that a diverse environment is generally a comfortable one, and uncomfortable employees are less likely to speak up, limiting their development and further impeding the creative problem-solving process).}

\end{itemize}
associates in upper management positions. The associate may also think that he or she is in a highly precarious position and feel more likely to mask any differences in order to lessen the risk.

Lastly, the appearance of increased diversity when there is little or no diversity reinforces the stereotype of a law firm as an “Old Boys’ Club,” since most of the partners at large law firms tend to be predominantly white males. The appearance of increased diversity can hurt firms since it can lead to increased lawsuits against the firm. Many times, these lawsuits are class-action employment discrimination lawsuits, which result in cases worth hundreds of millions of dollars. Due to the expansion of social media sites focused on legal matters such as Above the Law, information regarding lawsuits against firms has become more readily available to the public. With the current economic climate and increased pressure from clients to reduce firm fees, avoiding lawsuits that may affect client relationships and create bad publicity is crucial to maintaining the overall health of the firm.

B. Increasing Diversity Or Creating The Appearance Of Increased Diversity: Solving The “Chicken Or The Egg” Problem

1. Acknowledging the Problem

For any firm attempting to have increased diversity rather than the appearance of increased diversity, solving the “Chicken or the Egg” problem is an important first step. For firms lacking diverse associates, it is better to be upfront with the potential associate than to “mask” diversity with brochures and other informational materials that portray a skewed image of diversity. This straightforwardness starts right from the beginning when a firm is conducting callback interviews for potential summer associates.

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102. Some individuals may argue that the appearance of increased diversity should neutralize the stereotype of an “Old Boys’ Club.” They may claim that there cannot be an “Old Boys’ Club” if there is a diverse individual, such as a person of color or an LGBT individual present. However, this argument fails to recognize that these diverse individuals are not in the upper ranks of management. As a result, the “Old Boys’ Club” should not be viewed as the entire law firm. Instead, the “Old Boys’ Club” should be viewed as a special subset of a firm.

103. People are not necessarily suing over the appearance of increased diversity at the law firm. Instead they may be suing primarily because there is no real diversity when it comes to the leadership of the firm, and this may result in certain groups being unfairly taken advantage of.


106. Many times, the issue with discussion of diversity in firm brochures is that the firm focuses on selling itself rather than giving a realistic viewpoint on diversity in the workplace. See Lisa Wade, *Doctoring Diversity: Race and Photoshop*, SOC. IMAGES (Sep. 2, 2009, 10:48 AM), http://thesesocietypages.org/socimages/2009/09/02/doctoring-diversity-race-and-photoshop/ (discussing instances of “manufactured diversity” by use of photoshop). This “manufactured diversity” tends to backfire once the diverse associate arrives at the firm and realizes the brochures are not completely true. *Id.*
Firms should be proactive in the discussion of diversity with potential summer associates and signal how many diverse attorneys are at the firm, what problems the firm faces regarding diversity, and what they are trying to do to solve those problems. By being transparent in this matter, a law firm does two things. First, it acknowledges the problem. By acknowledging that there is a problem, a firm is essentially avoiding excuses for why there is no diversity in upper management positions. Second, by being transparent with the potential associate, that associate may consider long-term employment at the firm more closely, which is ultimately beneficial for the firm.\(^\text{107}\)

2. Have Diverse Associates Evaluate Long-Term Prospects

The problem with increased diversity versus the appearance of increased diversity centers primarily on retention. Firms are able to get entry-level diverse associates, however they typically leave much more quickly than other associates.\(^\text{108}\) Data show that from 1993 to 2011, the percentage of minority associates in law firms increased from 8.36% to 19.9%.\(^\text{109}\) During that same time, the percentage of minorities as partners rose from 2.55% to only 6.56%\(^\text{110}\) —still at a slow rate, when considering all of the efforts that have been made to increase diversity. Furthermore, during the beginning of the economic downturn, between September 2008 and September 2009, minority attorneys accounted for 22% of the layoffs despite being only 13.9% percent of the attorneys at firms surveyed.\(^\text{111}\) The percentage of African American attorneys dropped by 13%, Asian Americans dropped by 9% and Hispanics dropped by 9%.\(^\text{112}\)

These numbers are startling, but by getting diverse associates to evaluate long-term prospects at the firm, firms may be able to reduce attrition among diverse associates and see return on their investment since they are staying for longer periods of time. With the current economic climate, comfort in a job has become a bigger all-around concern. Even for clients, comfort matters. When there is high attrition, law firms are hurt indirectly.\(^\text{113}\) Those diverse lawyers, who move to in-house positions, may not go back to their old firm for business if the firm treated them poorly.\(^\text{114}\) Current clients may also become upset at the

\(^{107}\) Poll, supra note 93.

\(^{108}\) Goal 6: Increase the retention and advancement of minority lawyers., supra note 89.


\(^{110}\) Id.

\(^{111}\) Id.

\(^{112}\) Id.

\(^{113}\) BUILDING A BETTER LEGAL PROFESSION’S GUIDE TO LAW FIRMS: THE LAW STUDENT’S GUIDE TO FINDING THE PERFECT LAW FIRM JOB 148 (Irene Hahn ed., 2009).

\(^{114}\) Id.
fact that they have built a relationship with one lawyer, only to be told that he or she has left the firm.\textsuperscript{115}

A firm that aims to foster diversity should take the initiative to make sure that the potential diverse associate understands that success at the firm is attainable. If a firm maximizes the diverse associate’s potential and success, the lack of diverse attorneys in upper management positions may not discourage a diverse applicant from applying for an associate position at that firm. Firms should encourage the associate view this lack of diversity in upper management positions as a temporary flaw, which is being addressed.\textsuperscript{116} Thus, the “Chicken or the Egg” problem is on the path to being solved. By removing the current fear of the lack of diversity in upper management, firms can employ diverse associates with a thorough understanding of the current law firm structure and environment before they arrive at the firm. It also puts responsibility on the firm to be proactive in maintaining a “truer” image of diversity since they have made promises to fix the problems regarding diversity in upper management positions. Encouraging a “forward-looking” approach to examining diversity within the law firm can essentially allow the firm to start over with its diversity efforts. This method, slowly but surely, can help create a diverse structure throughout the firm with diverse associates in upper management positions.\textsuperscript{117} Given all the cultivation of perceptions of diversity in law firms these days, a diverse associate would definitely appreciate a firm speaking candidly to him or her about diversity.

The solution to the “Chicken or the Egg” problem cannot be achieved overnight. It is a long-term goal but a goal that can allow a firm to reap major benefits, both financially and in the public eye.

\section*{III. Going Forward}

\subsection*{A. Diversity Scholarships Have Become Just a “Signing Bonus”}

While firms that have diversity scholarships have good intentions, it is clear that diversity scholarships have not helped improve diversity in the legal profession to a level that is reflective of the population. Even in California, one of the most liberal states, numbers show that improvements still need to be

\footnotesize{\textsuperscript{115} Id.}

\footnotesize{\textsuperscript{116} In addition, many diverse associates have attended law schools where there is clearly a lack of diversity. By the time the associate reaches the firm, the lack of diversity is not a new issue. \textit{See} Tamar Lewin, \textit{Law School Admissions Lag Among Minorities}, N.Y. TIMES (Jan. 6, 2010), \url{http://www.nytimes.com/2010/01/07/education/07law.html} (“[A]mong the 46,500 law school matriculants in the fall of 2008, there were 3,392 African-Americans, or 7.3 percent, and 673 Mexican-Americans, or 1.4 percent. Among the 43,520 matriculants in 1993, there were 3,432 African-Americans, or 7.9 percent, and 710 Mexican-Americans, or 1.6 percent.”).}

\footnotesize{\textsuperscript{117} Firms that aim to improve their diversity should not want diverse associates to feel as though they have no shot at becoming partner because of the firm’s past.}
made.\textsuperscript{118} The recent economic downturn has resulted in a disproportionate number of diverse attorneys being impacted.\textsuperscript{119} Therefore, more must be done to fix this issue. However, before improvements can be made, one of the major questions that need to be answered is how should we evaluate the current state of diversity scholarships in the legal profession? This section, titled, “Going Forward,” raises key points that firms should consider when thinking about diversity scholarships.

\section{Incentives Do Not Help Solve Diversity}

Unfortunately, because of the problems diversity scholars face, diversity scholarships, in their current state, have become nothing more than a “signing bonus” for potential diverse associates.\textsuperscript{120} The stigma of diversity scholarships being just a “signing bonus,” reinforces the notion that it serves as just a “rotational system” for firms to show the appearance of diversity. It is no secret to those in the legal field, including law students, that retention of diverse associates has been a serious problem. As a result of being aware of this problem and believing that their chances of making partner are low, the mindset of many diverse associates when they first enter the firm is to work for a few years at the firm; gain as much as they can financially; pay loans; and leave for academia, government, in-house, or public interest jobs. A diversity scholarship then becomes simply a tool to alleviate some of the financial burden\textsuperscript{121} that diversity scholars face.\textsuperscript{122}

\begin{itemize}
  \item \textsuperscript{118} Data from 1993 to 2011 showed that women associates in law firms increased from 38.99\% to 43.35\%. Cuyler, \textit{supra} note 109. Despite this larger associate presence, women as partners in firms rose from 12.27\% to only 19.54\%. \textit{Id.}
  \item \textsuperscript{119} \textit{Id.} (“Approximately 1,300 of the 5,834 attorney layoffs between September 30, 2008, and September 30, 2009, were minority attorneys.”).
  \item \textsuperscript{120} Firms have been known to give out large signing bonuses for lateral hires and clerks who have done prestigious clerkships. \textit{See} CAREY BERTOLET, \textit{DOUBLE DOWN: WHY RISKING YOUR BONUS ISN’T MUCH OF A GAMBLE} 2-3 (n.d.), available at http://www.bcgsearch.com/article/60396/Double-Down-Why-Risking-Your-Bonus-Isn-t-Much-of-a-Gamble/ (stating that law firms sometime give full or prorated bonuses to lateral attorneys); \textit{see also} Reynolds Holding & Richard Beales, \textit{BIGGER BUCKS COME TO SUPREME COURT CLERKS WHO WAIT}, SLATE (Oct. 3, 2012), www.slate.com/blogs/breakingviews/2012/10/03/bigger_bucks_come_to_supreme_court_clerks_who_wait_.html (noting that some top U.S. law firms are offering Supreme Court clerks $280,000 bonuses).
  \item \textsuperscript{121} This is not to assume that all diversity scholars are poor. Even if they are able to finance their education, they may still have some other non-educational financial burden that a diversity scholarship can help alleviate.
  \item \textsuperscript{122} In the past decade tuition for both private and public law schools have risen dramatically – thus increasing the percentage of students who finance their education by taking on debt. Ethan Bronner, \textit{Law Schools’ Applications Fall as Costs Rise and Jobs Are Cut}, N.Y. TIMES (Jan. 30, 2013), www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html?_r=0 (citing that in 2001, the average tuition for private law school was $23,000 and in 2012 it was $40,500. For public law schools the figures were $8,500 and $23,600. Among private law school graduates, the average debt in 2001 was $70,000; in 2011 it was $125,000).}
\end{itemize}
As stated earlier, firms initially view all starting associates, including non-diverse ones, as an expense and tend to profit from them only after a number of years at the firm.\(^\text{123}\) Thus, a diversity scholarship is an expense where the benefits have yet to be reaped. Although critics may point out that the appearance of increased diversity is still a benefit for a firm when compared to having little or no diverse associates, the appearance of increased diversity is not a real benefit. It is simply a misrepresentation or a means of creating a false impression of increased progress. Firms should not strive for this type of diversity. A financial incentive, while helpful, is not the complete solution for solving the issue of diversity within a firm. In fact, there is an argument to be made that there is too much focus on financial incentives regarding law firm diversity, and this has led to what can be referred to as “The 160.”

2. “The 160”

“The 160” has an indirect impact on law firm diversity scholarships because it tends to play a pivotal role in terms of recruiting candidates. The rationale behind what I call “The 160” is that firms have become so enamored with maintaining the market scale of 160 thousand dollars a year for first-year associates that they have overlooked the fact that many diverse candidates, who come from predominately minority backgrounds, have never received a salary close to 160 thousand dollars prior to law school.\(^\text{124}\) For many diverse candidates, a salary lower than market value would not necessarily deter them from applying for employment at the firm.\(^\text{125}\)

As a result, although financial capital may play a role in whether an associate chooses a firm or not, it is important for firms to understand that to diverse associates, financial capital may not be as high a priority as it would initially seem. This is not to say that diverse associates would accept getting paid less than non-diverse associates.\(^\text{126}\) Instead, “The 160” theory alerts firms to focus less on marketplace salary and more on other equally important factors.\(^\text{127}\) A diversity scholarship’s financial incentive, as studies have shown,

\(^{123}\) Poll, supra note 93.

\(^{124}\) It is important to note that in some states the market salary may not be $160,000 per year and may in fact be lower. Median First-Year Big-Law Associate Salary Slumps to $145,000 in 2012, a Median Last Seen in 2007, NALP (Sep. 20, 2012), www.nalp.org/2012_associate_salaries [hereinafter Median Salary](stating that outside of the largest markets such as New York, Chicago, Los Angeles and Washington, DC, salaries of $160,000 were not typical).

\(^{125}\) For example, the median salary in Seattle and Philadelphia was $120,000, and in Minneapolis, $110,000 was the typical starting salary. Id.

\(^{126}\) This statement holds especially true for non-diverse associates who come from upper or middle class backgrounds and expect to make a salary of $160,000 a year. However, even if someone struggled financially growing up, they would not want to be paid less simply because they have less of a sense of financial entitlement – or because this is assumed because of their race.

\(^{127}\) Pamela Skillings, 5 Important Things to Consider Before Accepting a Job Offer, BIGINTERVIEW (Oct. 18, 2012), http://biginterview.com/blog/2012/10/accepting-job-offer.html
does not guarantee that the associate will still be at the firm long-term.\footnote{128} Furthermore, a key point is that the additional financial incentive provided by a diversity scholarship would not make a huge difference when factoring that associate’s salary and bonus at the firm.\footnote{129} This financial incentive currently associated with diversity scholarships would also not be worth the possible stigma, both individually and in the aggregate. Financial incentives do little or nothing in terms of maintaining a diverse environment throughout all levels of management. Instead it may help to enforce the same “rotational system” that firms look to avoid.

B. Correcting The Perception Of Diversity Scholarships As “Signing Bonuses”

1. Shifting the Focus of “The 160”

“The 160” theory should not be viewed as an unsolvable problem for law firms. Higher salaries may lead to happier associates. “The 160” has become a way to induce employees to perform their job competently and efficiently without management.\footnote{130} Those who do not perform their jobs effectively will typically be laid off.\footnote{131} However, for diversity scholarships to be fully successful there must be management within the law firm. In order to solve “The 160” problem the focus must be shifted off salary and onto other factors. Requiring increased diversity within all levels of law firms and improving the effectiveness of diversity scholarships involves a willingness of large law firms to do its own self-evaluation and avoid “legal” groupthink.\footnote{132} Groupthink is problematic because it does not encourage change, and in this case, change is needed.\footnote{133}
One of the ways to shift the focus of “The 160” is by investing and developing superior mentorship and training programs and describing these programs to law students as early as possible. With diverse candidates, now more that ever because of the recent economic downturn and rising costs, “fit” can be considered even more important than “prestige” when choosing a law firm. Most potential associates, including non-diverse ones, are aware that one’s tenure at a law firm can be short. Thus, many people are now considering firms where the attrition occurs much later even though they may have a slightly lower salary. From an economic standpoint this makes sense, as it poses the question, “Would you rather work for a slightly higher salary now and risk higher attrition or a slightly lower salary now and risk lower attrition?”

Over time, by investing in and developing superior mentorship and training programs and exposing law students to these programs as early as possible, law firms should be able to get the best attorneys despite not focusing on “The 160” market salary. Akin to a federal clerkship, a law firm with a superior mentorship program would be considered prestigious. Reaching this level of prestige, however, would require some dedication on the part of the firm, including its partners. While firms often stress the need to bill clients, they can set up a system where partners are financially rewarded for their training efforts and mentorship. Having a system in place that promotes training and mentorship allows that partner to develop the management skills


134. Jerome Kowalski, It Shouldn’t Suck to be an Associate at a Law Firm, JD SUPR ALAW NEWS (Apr. 18, 2011), available at http://www.jdsupra.com/legalnews/it-shouldnt-suck-to-be-an-associate-at-13227/ (“[The] answer [to solving expensive attrition costs] is assuredly not throwing money at associates, either in the form of large salaries or year end or spring bonuses. The real answer is to create an environment in which associates don’t go home daily thinking ‘take this job and shove it.’”).

135. A. Harrison Barnes, A Firm’s Culture Is What Matters Most, BLOOMBERGLAW (2011), http://about.bloomberglaw.com/practitioner-contributions/a-firmsulture/ (discussing why choosing prestige over “culture” of the firm is a grave mistake); see also Teresa Méndez, ‘No thanks, Harvard. I found a better fit.’, CHRISTIAN SC. MONITOR (Apr. 12, 2005), http://www.csmonitor.com/2005/0412/p01s04-legn.html (showing that the “fit” versus “prestige” decision arises even in cases of college selection).

136. Id. (citing attrition rates in large law firms); see also Neville, supra note 74; BUILDING A BETTER LEGAL PROF., supra note 76.

137. 10 Most-Hated Jobs, http://www.cnbc.com/id/44038159?slide=5 (stating that although clerkships are among the most highly sought-after positions in the legal profession, the Bureau of Labor Statistics reported the job brings in a median salary of $39,780 a year).

138. Scholars have referred to this financial incentive as the “tournament theory.” Wilkins & Gulati, supra note 23, at 519. With this theory, a senior employee’s reward depends in part upon the work of that employee’s juniors. Id. This creates a circumstance where experienced employees, such as partners in a law firm, have an incentive to monitor their subordinates more carefully than they would otherwise. Id.
that many senior lawyers lack. It can also create a system of checks and balances between the partner and lower level employees: Those partners that are good mentors will be sought out for work by associates of the firm and will eventually gain a reputation, in addition to being a lawyer, as being a great mentor.

Increased mentorship helps not only the diverse associates but also non-diverse associates at the firms. However, in order to make the use of diversity scholarships successful, firms should realize that mentorship is just the first step. To gain the full potential of diversity scholarships and have diversity in higher levels of management, firms should encourage transitions from mentorship to sponsorship. For firms, a mentor is a counselor who gives career advice and suggestions on navigating certain situations. A sponsor, on the other hand, can do everything a mentor does but also have “the stature and gravitas” to affect whether an associate makes partner. By taking a proactive approach to finding out and understanding what associates hope to learn at a large law firm in terms of training, firms can potentially increase associate happiness and retain a higher number of attorneys. More importantly, this focus on developing a superior mentorship and training program shifts the focus of the firm off of “The 160.” As a result, “The 160” no longer has the same charm and lure as before. Firms can effectively get the same quality of work without having to worry about what other firms are doing in terms of associate compensation.

CONCLUSION

Diversity scholarships have good intentions. However, as it stands, they are incomplete solutions to solving the issues regarding law firm diversity. This article is meant to raise awareness on issues that may not seem initially present on its face. As I stated earlier, not every issue will apply to every firm. Maximizing diversity and the effectiveness of diversity scholarships is a three-

139. Shanker, supra note 59.
141. Id.
142. Id.
144. Timothy Egan, Checking Out, N.Y. TIMES (Jun. 20, 2013), http://opinionator.blogs.nytimes.com/2013/06/20/checking-out/ (“[T]he main factor in workplace discontent is not wages, benefits or hours, but the boss.”).
part endeavor. First, the firm must see what others think about diversity and steer that thinking into a specific direction. Second, the firm must then evaluate current problems with their diversity initiatives. Finally, the firm must avoid pitfalls, such as “The 160,” which does little to improve diversity or motivate diverse candidates to stay at the firm. This article is a not a criticism, it is a suggestion – a suggestion from a member of the group diversity scholarships are meant to help – the diverse candidate.