Inclusive Excellence: Diversity Pipeline from School to Practice in AZ

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Corporate Counsel

Tech Puts Customers First
Alan Grebene is vice president and general counsel of Medallia Inc., which is a software company that helps businesses understand and improve their customer satisfaction.

Small Business Profile
Simplifying the Complex
Chris Cardinal is the principal at Synapse Studios in Tempe, which has 14 developers that design software that turns complicated webs of data into manageable information.

Judicial Profile
In Her Father’s Footsteps
Judge Cele Hancock of the Yavapai County Superior Court spent time as a prosecutor for the Maricopa County Attorney’s Office, and was an FBI agent in Los Angeles, before returning to her hometown in Prescott.
In 2012, according to the American Bar Association (“ABA”), racial minorities accounted for approximately 10 percent of attorneys and 24 percent of law students in the United States. This moderate increase in the number of attorneys and law students of color represents a statistically significant improvement as compared to previous decades. By Tracy Sanders | Arizona Summit Law School
In 2012, according to the American Bar Association (“ABA”), racial minorities accounted for
approximately 10 percent of attorneys and 24 percent of law students in the United States.1 This
moderate increase in the number of attorneys and law students of color represents a statistically
significant improvement as compared to previous decades.

For example, in 1950, there were approximately 0.65 percent of African-Americans in the legal
profession.2 In 1960, there were approximately 0.76 percent of African-Americans in the legal
profession.3 Comprehensive statistics on African-American law school enrollment during the
1960s are difficult to analyze.4 The ABA and other national organizations did not collect data on
Latino, American Indian and Asian Pacific American law students until 1969.5 While advocates
remain devoted to promoting diversity in the legal profession, challenges are possibly on the
horizon.

In 2013, the United States Supreme Court decision in Fisher v. University of Texas at Austin
provoked concern regarding our nation’s commitment to diversity in higher education.6 Abigail
Noel Fisher (“Fisher”) alleged that the University of Texas at Austin (“UT”) used racially
discriminatory policies and procedures in administering the undergraduate admission program.
UT offered undergraduate admission through use of the Texas Top 10 Percent Law, which
guaranteed college admission to the top 10 percent of high schools students in the state.

Alternatively, UT considered admission through the holistic review process. The holistic review
process consists of Academic Index (“AI”) and Personal Achievement Index (“PAI”) scores. UT
had included race as a factor in applicants’ AI/PAI scores. Fisher claimed that UT’s use of race
in the holistic review process purportedly granted an advantage in the admission process to
African Americans, Hispanics, and Native Americans rather than other students. As such, Fisher
asserted that UT’s denial of her application for admission violated the Equal Protection Clause of

In Fisher, the Supreme Court ruled that (1) use of race in undergraduate admission policies is not
prohibited; (2) race conscious admission programs must be narrowly tailored to further a
compelling government interest; and (3) strict scrutiny review must be applied to any admission
policies using racial classifications.7 The Supreme Court reasoned that the Fifth Circuit and
United States District Court for the Western District of Texas failed to apply the strict scrutiny
review standard articulated in Grutter v. Bollinger and Regents of University of California v.
Bakke.8 Under Grutter, the judiciary may defer to a higher education institution’s diversity goal
in accordance with the educational mission.9

However, a higher education institution must thereafter prove that the method to achieve any
diversity goal through the admission process is narrowly tailored pursuant to the Equal
Protection Clause.10 Narrow tailoring requires the admission process to “(1) ensure that each
applicant is evaluated as an individual without using race as a defining feature; (2) verify that the
use of race is necessary in achieving educational benefits of diversity; and (3) certify that there
are no workable race-neutral alternatives that would produce the educational benefits of
diversity.”11
The Supreme Court remanded *Fisher* to the 5th Circuit for strict scrutiny review.12 The Supreme Court stated that the Fifth Circuit erred by (1) presuming UT acted in good faith rather than performing the required strict scrutiny review and (2) shifting the burden of rebutting that presumption to Fisher.13 The Supreme Court ordered the 5th Circuit to judge the admission process under a correct constitutional analysis and determine whether the Western District of Texas properly granted summary judgment in favor of UT.14

In 2014, the 5th Circuit heard oral arguments in *Fisher* on remand from the Supreme Court. Two judges of the three-judge panel ruled in favor of UT and held that it is equally settled that a higher education institution may use race as part of a holistic admission program if it cannot otherwise achieve diversity.15 The 5th Circuit affirmed the Western District of Texas’ grant of summary judgment to UT upon additional briefing, oral argument, and strict scrutiny review. The latest *Fisher* opinion may be decided on appeal en banc in the 5th Circuit or return on petition for certiorari to the Supreme Court.

What does *Fisher* mean for the future of diversity in higher education and the legal profession? First, *Fisher* requires a higher education institution to show that racial classifications are narrowly tailored to achieve a compelling state interest. Higher education diversity policies are subject to the same legal standard as other affirmative action plans to satisfy strict scrutiny review. Second, there may be additional litigation on the dockets if denied applicants similar to *Fisher* challenge admission policies that include racial classifications. Finally, on appeal, the 5th Circuit or Supreme Court could rule in favor of *Fisher* and prohibit race as a factor in the admission process.

Consequently, the percentage of minorities in higher education and the legal profession would more than likely decrease. For example, *Hopwood v. Texas* ended all consideration of race in admission to the University of Texas School of Law (“UT Law”).16 Without using race as a criterion, minority enrollment dwindled at UT Law.17 African-American enrollment dropped more than 90 percent, from 38 to 4.18 “Mexican-American enrollment dropped nearly 60 percent, from 64 to 26.”19 The Supreme Court abrogated *Hopwood* in *Grutter* and held that higher education institutions in the Fifth Circuit may use race as factor in the admission process.20

Seeking a “critical mass” of minority students is beneficial in law schools and the legal profession.

In law schools, supporting diversity increases perspectives in education through representation from various backgrounds.21 Numerous studies have shown that “student body diversity” better prepares students as professionals.22 Moreover, a diverse student body in law schools improves civic engagement in the nation. 23

In the legal profession, diversity provides various viewpoints leading to innovative outcomes. Diversity programs offer professional development opportunities, access and exposure for minority law students and attorneys. Best practices to encourage sustainability for minorities in the legal profession include scholarships, internships, bar passage workshops, mentoring, and
partnerships with the State Bar of Arizona or minority bar associations. While the impact of Fisher is unclear, it is clear that minority law students and attorneys add value in society through service in corporations, law firms, government agencies, and non-profit organizations.

Tracy Sanders is a faculty lecturer at the Arizona Summit Law School. She earned a Juris Doctor at Syracuse University College of Law in 2002, a Master of Public Administration at University of South Carolina in 1998, and a Bachelor of Arts at the University of South Carolina in 1995. Sanders has made TV appearances on networks such as ABC, FOX, MSNBC, WE and TLC. She can be reached by email at tsanders@azsummitlaw.edu.

End Notes
3 Id.
4 Id.
5 Id.
6 Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013).
7 Fisher, 133 S. Ct. at 2419-21.
10 Grutter, 539 U.S. at 333-34.
11 Fisher, 133 S. Ct. at 2420-21.
12 Id. at 2421-22.
13 Id. at 2420-21.
14 Id. at 2421.
15 Fisher v. Univ. Tex. at Austin, 758 F.3d. 633, 660-61 (5th Cir. 2014).
16 Hopwood v. Texas, 78 F.3d 932, 935 (5th Cir. 1996).
18 Id.
19 Id.
20 Grutter, 539 U.S. at 333-34.
21 Fisher v. Univ. Tex. at Austin, 631 F.3d 213, 237 (5th Cir. 2011).
22 Id.
23 Id.