Women and Leadership Series Day 2

Breaking In: Advocating for Yourself Early in Your Career, An Interactive Session

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DON'T CALL ME SWEETHEART! WHY THE ABA'S NEW RULE ADDRESSING HARASSMENT AND DISCRIMINATION IS SO IMPORTANT FOR WOMEN WORKING IN THE LEGAL PROFESSION TODAY

Popular culture has recently shone a spotlight on the inequality and discrimination faced by women in many professions. With the "Me Too" and "Time's Up" campaigns in full swing it is clear that women are ready to fight to be respected and receive equal treatment. Although there are a plethora of news stories highlighting the issues that women are facing today, this Article will focus specifically on the effect of bias, prejudice, harassment, and discrimination against women in the legal profession. This discrimination and marginalization of women finds its way into law firms, courtrooms, and the corporate arena generally, and impacts not only the female attorneys and judges themselves, but also the clients and litigants that these women are serving. The American Bar Association ("ABA"), long committed to diversity and leading the professional legal community regarding "appropriate" conduct, has finally put an anti-discrimination, anti-harassment provision into effect to combat discriminatory behavior on a national level.

This Article argues that although the ABA's adoption of Resolution 109 to amend Rule 8.4 is a necessary first step to remedy the issues that women in the legal profession are currently facing education and training initiatives must also be established. This training should take the form of Bias Training in law schools (as part of the Professional Responsibility requirements), in law firms, and as mandatory CLE requirements for practicing attorneys. The Article provides an overview of the history of women in the legal profession in the United States, as well as examines the status of women in the profession and judiciary today from a statistical standpoint. The Article goes on to examine how the New Rule 8.4 of the ABA Model Rules came to be, the language ***264** *of the Resolution, and criticisms of the New Rule. Finally, the Article suggests that we, as a community of professionals, institute education and training initiatives as students begin law school and then continue that training throughout a lawyer's career.*

"For so long, women were silent, thinking there was nothing you could [do] about it. But now the law is on the side of women or men who encounter harassment, and that's [a] big thing."

--Ruth Bader Ginsburg, Supreme Court Justice[1]

***265 I. INTRODUCTION**

Popular culture has recently shone a spotlight on the inequality and discrimination faced by women in many professions. With the "Me Too" and "Time's Up" campaigns in full swing, it is clear that women are ready to fight to be respected and receive equal treatment. It is a new reality that we are bombarded weekly with another high-profile male figure's face plastered on the news for his sexually inappropriate behavior. As recently as January 20, 2018, the one-year anniversary of President Trump's inauguration, women are still fighting for their rights, this time in the form of Women's Marches throughout the country.[2]

Although there are a plethora of news stories and issues that women are facing today, this Article will focus specifically on the effect of bias, prejudice, harassment, and discrimination against women in the legal profession.[3] Although women have "earned a place at the table" to some extent, they are still paid less, harassed, and discriminated against regularly.[4] Sexual discrimination takes the form of female diminution, where, in a professional setting, women are constantly told that they are not smart enough, strong enough, or good enough to be there, either in the form of outright comment or implication. In the legal profession, this discrimination and marginalization of women finds its way into law firms, courtrooms, and the corporate arena generally, and impacts not only the female attorneys and judges themselves, but also the clients and litigants that these women are serving.

Recently, a prominent federal judge, Alex Kozinski, was called out for his inappropriate sexual conduct and comments.[5] Despite many accounts detailing his ***266** inappropriate behavior, Kozinski was still on the bench until he announced his retirement amid the probe of sexual allegations.[6] However, for every negative story that we hear, we should feel hope in the fact that there are good stories out there as well. For example, Jack B. Weinstein, a senior federal judge in Brooklyn, has taken the lead to try "to chip away at the traditional old-boy network that has dominated the legal profession for decades."[7] "It is common for judges to publish guidance for lawyers who appear in their courtrooms on how to conduct themselves with regard to minor matters like how and when to file motions."[8] Judge Weinstein "used this typically mundane process to address an issue of growing concern to many in the legal profession: the lack of female lawyers in leading roles at trials and other court proceedings. Following the lead of a handful of other federal judges, Judge Weinstein issued a court rule urging a more visible and substantive role for young female lawyers working on cases he is hearing."[9]

The American Bar Association ("ABA") has long been committed to diversity and has consistently tried to lead the professional legal community regarding "appropriate" conduct. Since the Model Rules of Professional Conduct ("ABA Model Rules") were first adopted by the ABA in 1983, they have served as a guidepost for outlining how each of us, as members of the legal community, should behave to maintain fairness within the legal system.

In 2018, it would seem like common sense that an attorney should not refer to a colleague as honey, sweetie, or darling, however the ABA has finally put such a rule into effect to combat discriminatory behavior. Although many states have chosen to address this behavior through specific provisions in their Model Rules of Professional Conduct, until this rule went into effect, there was no national statement regarding such discriminatory behavior in the legal profession, other than weak language in a Comment to the Model Rules. Thankfully, when the ABA adopted Resolution 109 to amend Rule 8.4 of the Model Rules to add an anti-discrimination, anti-harassment provision, it took a large step on a national level ***267** to begin to remedy the issues that women in the legal profession are currently facing.[10]

This Article argues that although the ABA's adoption of Resolution 109 to amend Rule 8.4 of the Model Rules to add an anti-discrimination, anti-harassment provision is a necessary step on a national level to begin to remedy the issues that women in the legal profession are currently facing, education and training initiatives must also be established in law schools, at the start of a lawyer's career, and that training must be continued once attorneys enter the work force in the form of Bias Training in law firms and mandatory CLE requirements.

Section II will provide a brief overview of the history of women in the legal profession in the United States. Section III will provide an overview of women in the profession and judiciary today from a statistical standpoint. Section IV will examine the history of how Resolution 109 amending Rule 8.4 of the ABA Model Rules came to be, and will address the language of the Resolution itself. Section V will examine criticisms of the new rule. Section VI will examine how a sample of states has handled this issue in their own Model Rules. Finally, Section VII will address where we, as a community of professionals, can and should go from here.

II. A HISTORY OF WOMEN IN THE LEGAL PROFESSION IN THE UNITED STATES

Although women today have a foothold in the legal profession, this position only came after an enormous amount of effort on the part of many women fighting for these rights. The presence of female attorneys in the profession of law in the United States has dramatically changed since this country began, as there has been a dramatic progression from non-existence to full integration in the field.[11]

***268** *A. A Brief History from 1787 to 1960*

In 1638, Margaret Brent arrived in Maryland and claimed a right to land based on orders from Lord Baltimore, as well as "engaged in numerous business ventures, trading in tobacco, indentured servants, and land."[12] In 1648, she appeared before the Maryland Assembly and requested two votes, "one for herself as a landowner and one as Lord Baltimore's attorney."[13] Although Brent made this stand, "[t]he first period in the development of the legal status of women in the United States lasted from 1787 to 1872."[14] As the Founding Fathers did not have women's rights on their minds when they met in Philadelphia in 1787 to draft a new constitution, the period is characterized as one of constitutional neglect.[15]

In the 1820s and 1830s, the codification of American law at the state level caused additional changes in the legal status of women.[16] This change continued and made slow strides over the coming years.[17] Even after the end of slavery in the United States, women were still denied the rights and privileges equal to men.[18] The recognition of the right to be treated equally under the Fourteenth Amendment did not occur until the twentieth century.[19]

There is a long history of women attempting to join the legal profession, as traditionally, being a lawyer was not recognized as a woman's right and privilege as a citizen of the United States.[20] Although there were a handful of women that were able to break through the barriers, it was extremely difficult for women to train for the profession, earn bar membership, and practice.

In 1869, Lemma Barkeloo and Phoebe Couzins became what many believe were the first female law students in the nation at Washington University School of Law in St. Louis.[21] Their entering class at the law school, which had only opened its doors two years prior, had twenty-one students, two of which were ***269** women.[22] Lemma Barkeloo attended law school for approximately one year and, prior to completing her degree, chose to take the Missouri bar.[23] The day after passing the rigorous, day-long oral bar exam and receiving the highest marks out of a group of five applicants, Barkeloo took the oath and became the second licensed female attorney in the United States and the first in Missouri.[24] In her first few months of practice, she became the first female attorney to try a case in court.[25] Shortly thereafter, Barkeloo fell ill with typhoid fever and died.[26] Barkeloo's classmate and colleague, Phoebe Couzins, now had the responsibility of "advancing equality for women in the legal profession."[27] In 1871, Couzins completed her two years of study and graduated with her degree, becoming the law school's and university's first female graduate.[28] Couzins was admitted to the state bars in Missouri, Arkansas, Utah, Kansas, the Dakota Territory, as well as the federal courts.[29] In 1887, President Grover Cleveland appointed her the first female U.S. Marshal in the United States.[30]

Arabella Mansfield was one of the first women admitted to a state bar in 1869 when she was admitted in Iowa.[31] "She had not studied at a law school but rather had studied in her brother's office for two years before taking the bar examination."[32] In her case, she was permitted to practice due to Judge Francis Springer's interpretation of "male gender references in the statute as terms of convenience rather than exclusion."[33]

There were some notable "firsts" in 1870. Ada Kepley graduated from Union College of Law in Chicago (now Northwestern College of Law) and became what is believed to be the first woman to graduate from law school in the United ***270** States.[34] In that same year, "Esther Morris was appointed as a justice of the peace in Wyoming Territory--the first woman in the United States appointed to a judicial position."[35]

In 1873, in *Bradwell v. Illinois*, the United States Supreme Court "upheld the Illinois bar examiners' refusal to permit Myra Bradwell to sit for the Illinois bar exam and refused to hold that such a denial violated her right to equal protection under the Fourteenth Amendment to the U.S. Constitution."[36] The Court held that the right to practice law "was not the right and privilege of every citizen in the United States, and individual states could choose to exclude women from their bar associations on the basis of their sex."[37] As a result, the issue was returned to the individual states, which ultimately led judges and state legislatures to have control based on their personal opinions.[38] Myra Bradwell was finally admitted to the Illinois bar in 1890, as James Bradwell, Myra's husband, quietly convinced the Illinois Supreme Court to admit her, dating her admission back to 1869 (the date of her original application).[39] Ultimately, Bradwell received her license to practice in front of the United States Supreme Court in 1892.[40]

During this same time, in *Minor v. Happersett*, the United States Supreme Court ruled definitively that the Fourteenth Amendment's Privileges and Immunities Clause did not have the effect of extending suffrage to woman.[41] The Court noted:

> We have given this case the careful consideration its importance demands. If the law is wrong, it ought to be changed; but the power for that is not with us. The arguments addressed to us bearing upon such a view of the subject may perhaps be sufficient to induce those having the power, to make the alteration, ***271** but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us. No argument as to woman's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we find it is within the power of a State to withhold.[42]

Thus, as women were attempting to gain the right to practice law, they still did not have the right to vote. After this case, the women's suffrage movement focused on the revision of voting laws and the ratification of a new amendment to the United States Constitution.[43]

The ABA was formed in 1878, when seventy-five prominent lawyers from twenty states and the District of Columbia met in Saratoga Springs, New York.[44] The first president, a male, was elected in the same year.[45]

In 1879, Belva Ann Lockwood was the first woman admitted to the United States Supreme Court bar and was "responsible for lobbying Congress to pass the Lockwood Bill, which gave women lawyers the right to practice before federal courts."[46] Prior to her admission to the Supreme Court, in 1873, she graduated from law school and was admitted to the bar of the District of Columbia, however she was not allowed to speak in front of the Supreme Court because of "custom."[47] In 1884, Lockwood was the first woman to run a full-fledged campaign for the presidency of the United States as a candidate of the National Equal Rights Party.[48] She did so a second time in 1888.[49] Her run for presidency was rooted in her belief that it would bring prominence to women's rights issues, specifically the right to vote and participate in politics.[50]

On February 1, 1896, two women founded a law school aimed at educating female attorneys, as they realized that the opportunities available to women in the ***272** legal profession were limited.[51] Based on the fact that "earnest women year after year were denied the privilege of entering the white schools, these two pioneers realized that out of their experience a service to others was possible and they decided to do what they could to open the door of opportunity in the legal profession to women."[52] Ellen Spencer Mussey and Emma Gillett held the first session of the Women's Law Class, with an enrollment of three women; early on, classes were held in Mussey's law office.[53] Within just a few years, interest grew as more women sought a career in the legal profession.[54] Thus, in order to meet the demands of their own law practice, yet continue the law school, Mussey and Gillett "obtained the teaching assistance of several prominent Washington attorneys."[55] When the school began, the women did not intend on creating a full-fledged law school and requested that Columbian College accept the now six women ready to begin their final year of study.[56] When the school refused, the two women set out to create a law school from which the women could graduate.[57]

Progress continued and women began to enter the academic arena. In 1898, Lutie A. Lytle, one of the first female African-American attorneys, became the first woman law instructor in the world when she joined the faculty of the Central Tennessee College of Law.[58] In 1919, Barbara Armstrong became the first woman appointed to a tenure-track position at an accredited law school when she joined the faculty of the University of California at Berkeley.[59]

As time progressed, the professional ethics of attorneys became a topic of interest. Thus, in 1908, the ABA adopted the Canons of Professional Ethics to begin to deal with setting a code of behavior within the legal profession and, in 1913, the Standing Committee on Professional Ethics was created.[60]

Although women were entering the legal profession as practicing attorneys and educators, women were still denied the right to vote until 1920 and denied the right to sit on juries in sixteen states until as recently as 1947 (with Alabama ***273** holding out until 1966 when it was compelled by judicial intervention to accept female jurors).[61]

Moreover, the states and the federal government continued to enact laws permitting sex-based distinction.[62] Additionally, even after women gained the legal right to practice law and began to enter the profession, their reception into the legal field was not easy, as many schools were reluctant and slow to open their doors to women.[63] A few Midwestern state universities were

open to women; however, these "were exceptions to the rule of not permitting women to study law."[64] Many continued to fight for women to be allowed admission to law schools around the country. As women were admitted to law school, many were accused of taking the place of worthier men and wasting the resources of the school, as they were not seen to be intellectually prepared for law school.[65]

Although the federal court system was established in 1789, it took nearly 140 years for the first woman to sit on a federal bench.[66] In a speech in 1995, Justice Ginsburg stated, "If the first women judges were here today, they would rejoice at this achievement."[67] Justice Ginsburg referred to these women judges as "way pavers" and noted that "[t]heir examples made it less difficult for the rest of us to gain appointment or election to the judiciary."[68] Nominated by President Calvin Coolidge in 1928, Genevieve Cline became the first female federal judge when she was appointed to the U.S. Customs Court (now known as the Court of International Trade); she ultimately served on the U.S. Customs Court for 25 years.[69] Prior to becoming a judge, Cline "became the first woman assigned by the U.S. Department of the Treasury to be the appraiser of merchandise at the port of Cleveland, Ohio."[70]

Florence Allen became the first woman judge in a federal appeals court, when, in 1934, she was appointed by President Franklin D. Roosevelt to the United ***274** States Court of Appeals for the Sixth Circuit.[71] Allen had earned her law degree from New York University School of Law in 1913, and began her legal career by establishing her own law practice.[72] In 1919, she was appointed Assistant Prosecutor of Cuyahoga County, Ohio.[73] Allen was then elected as a judge to the Court of Common Pleas, and, in 1922, she earned a seat on the Ohio Supreme Court.[74] With this accomplishment, Allen was the first woman to serve on Ohio's highest court and, even more notably, the first woman to serve on the supreme court of any state.[75] In 1958, Allen ultimately became chief judge of the United States Court of Appeals for the Sixth Circuit until her retirement in 1959.[76] Then, in 1949, Burnita Shelton Matthews was appointed to the United States District Court for the District of Columbia.[77] In the next decade, only one more woman was appointed to the federal bench, such that in 1955, President Dwight Eisenhower nominated Mary Honor Donlon to the United States Customs Court to fill the vacant seat of Genevieve Cline, who had been nominated previously by President Calvin Coolidge.[78] Donlon earned her LLB (Bachelor of Laws) from Cornell Law School and went on to become the first woman partner at a Wall Street firm.[79]

B. 1960s to 1990s--Civil Rights Act, EEOC, and the Task Forces

Although many women played a key role in the Civil Rights movement during the 1960s, their gender "role" was very much stagnant generally in society as a whole.[80] The free-thinking attitude associated with the 1960s "raised the consciousness of women," prompted them to challenge the status quo and, in turn, encouraged them to believe that they could have careers.[81] Women continued to join forces and mobilize to demand equal treatment and equal pay.[82]

In 1964, the Federal Civil Rights Act was passed, including Title VII, which prohibited employers from discriminating against employees on the basis of sex, ***275** race, color, national origin, or religion.[83] The Equal Employment Opportunity Commission (EEOC) was created by the Civil Rights Act,[84] and is responsible for enforcing the Federal Civil Rights Act, including the discrimination provision, as well as other federal statutes.[85] Additionally, the EEOC is responsible for enforcing laws preventing harassment as well. According to the EEOC's website:

> It is unlawful to harass a person (an applicant or employee) because of that person's sex. Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.

> Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex.[86]

By the 1970s, women were entering law school and the profession at higher rates, though still not equal to men, as the number of women law students was only nine percent nationally.[87] Women were still dealing with expectations of family and society, while trying to make their mark in the professional arena.[88]

In 1978, the Center for Professional Responsibility was established by the ABA, and the Standing Committee on Ethics and Professional Responsibility (formerly known as the Standing Committee on Professional Ethics) was the first entity organized under the Center.[89]

***276** Also in 1971, Ruth Bader Ginsburg, then a law professor at Rutgers and now a Supreme Court Justice, established the ACLU Women's Rights Project.[90] In the early years, the "Women's Rights Project was the major, and sometimes the only, national legal arm of the growing movement for gender equality, recognized as the spokesperson for women's interests in the Supreme Court, and the 'premier' representative of women's rights interests in that forum."[91]

During that same year, the Women's Rights Project challenged the constitutionality of sex discrimination in *Reed v. Reed*, where the Supreme Court ultimately extended "to women equality with men under the equal protection clause of the Fourteenth Amendment."[92] In *Reed*, the Supreme Court laid out that:

> The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[93]

Despite the fact that women were gaining more statutory rights and case law support for their equal treatment, discrimination was still prevalent in the professional world. In 1980, the National Organization for Women's Legal Defense and Education Fund established the National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP).[94] The National Association of Women Judges organized in 1979 and co-sponsored the NJEP.[95] There was now a national focus on gender bias in the profession and, as a result, changes began to occur at an accelerated pace.

In 1981, Sandra Day O'Connor was nominated by President Ronald Reagan as the first woman appointed to the Supreme Court of the United States of America.[96] At the same time, the first director of the NJEP, sociologist Norma J. ***277** Wikler, joined New York lawyer Lunn Hecht Schafran, "to work at a national level on setting the course for judicial education regarding gender bias."[97] The women decided to develop state-specific findings and to accomplish this through a task force system.[98] The "task force idea was that a group of distinguished people in each state would use traditional social science research methods to gather data about that state's court system. Where the groups discovered problems, they would recommend solving them through judicial education."[99]

The leaders of the task forces decided to sacrifice efficiency in the national movement in order to make local progress.[100] Thus, the focus was on creating local task forces, rather than keeping the issue on a solely national level. Additionally, Wikler and Schafran published a how-to book in 1986 that advocated "consistency of philosophy and method across task forces" and urged "organizers in each state to involve the chief justice from the beginning of the task force effort, thus establishing judicial commitment to the project if not to the actual goal of gender equality in the court system."[101]

Judge Marilyn Loftus of the Superior Court of New Jersey learned of the preliminary findings of the NJEP of gender bias in state court systems and was moved to take action.[102] She suggested the idea of using a task force to gather data about the New Jersey courts.[103] Judge Loftus found support for the task force in Chief Justice Robert N. Wilentz, which gave strength to the task force movement.[104] When the New Jersey task force presented its finding at the 1983 New Jersey Juridical College, the reactions were mixed.[105] Furthermore, "[a]lthough the New Jersey study sparked national interest in gender bias initially, the task force idea did not exactly spread to other states like wildfire."[106] Eventually:

> On May 31, 1984, Judge Lawrence H. Cooke, then Chief Judge of the State of New York, announced the creation of a New York State Task Force to "examine the courts and identify gender bias and, if found, to make recommendations ***278** for its alleviation." When Judge Sol Wachtler was appointed Chief Judge in 1985, he communicated to the Task Force his understanding of the urgency of their work, and it was to Judge Wachtler that the Task Force ultimately submitted its final report on April 2, 1986.[107]

In the Report of the New York Task Force on Women in the Courts submitted in 1986, "[t]he Task Force concluded that gender bias against women litigants, attorneys, and court employees is a 'pervasive problem with grave consequences,' as '[w]omen are often denied equal justice, equal treatment, and equal opportunity.'"[108]

Additionally, the idea of sexual harassment was formally recognized when, in 1986, a key decision came down highlighting the unequal treatment being suffered by women.[109] In *Meritor Savings Bank v. Vinson*, the United States Supreme Court held that sexual harassment creating a hostile or abusive work environment was in violation of Title VII of the Civil Rights Act of 1964.[110]

In 1987, the ABA created the Commission on Women in the Profession with the purpose of assessing the status of women in the legal profession, identifying barriers to advancement, and recommending to the ABA actions to address problems identified.[111] Hillary Rodham Clinton served as the first chair of the Commission.[112] The Commission issued a:

> groundbreaking report in 1988 showing that women lawyers were not advancing at a satisfactory rate. From this report, the Commission found that a variety of discriminatory barriers remained a part of the professional culture, the significant increase in the number of women attorneys would not eliminate these barriers and a thorough reexamination of the attitudes and structures in the legal profession was needed.[113]

"At its 1988 annual meeting, the Conference of Chief Justices adopted a resolution urging every Chief Justice to establish a task force 'Devoted to the study of gender bias in the courts.'"[114] Finally, the issue of gender bias was truly gaining ***279** steam, and, at the same time, women were entering the political and legal field at a steady pace. Over the next few years, many states formed task forces, whether willingly or after significant push back.[115]

In 1991, the first annual Margaret Brent Women Lawyers Achievement Awards were presented to women lawyers who had "influenced other women to pursue legal careers, opened doors for women lawyers, and advanced opportunities for women within a practice area or segment of the legal profession."[116] In the same year, the Senate Confirmation Hearing for Supreme Court nominee Clarence Thomas troubled many American women, as the televised hearing made it ***280** blatantly clear that the committee was comprised entirely of white men.[117] At this time, there were only two female United States senators and neither of them were on the Judiciary Committee.[118] Spurred by the confirmation hearing, numerous women began senate campaigns and four women went on to be elected to the Senate in 1992.[119] As American voters elected more women to Congress than ever before, newspapers headlined this as the "The Year of the Woman."[120] A female senator responded, "Calling 1992 the Year of the Woman makes it sound like the Year of the Caribou or the Year of the Asparagus. We're not a fad, a fancy, or a year."[121]

In 1995, Roberta Cooper Ramo of New Mexico became the first woman to serve as president of the ABA.[122] As women's rights issues came to the forefront, the task force movement continued and

> [i]n 1999, the National Conference on Public Trust and Confidence in the Justice System, attended by teams from every state that included the chief justice, state court administrator and state bar president, voted to make implementing the recommendations of the task forces on gender, race, and ethnic bias in the courts a priority.[123]

III. CURRENT STATISTICS REGARDING WOMEN IN THE LEGAL PROFESSION: WOMEN IN PRACTICE AND THE JUDICIARY

Although women have been graduating from law school in roughly equal numbers to men for approximately thirty years, there are still huge gaps in salary, leadership positions within law firms and corporations, and representation on the bench compared with their male counterparts.[124] This Section examines current ***281** statistics regarding women in the legal profession, both in practice and the judiciary, to show the stark reality of the effects of discrimination against women.

A. Women in Practice

The National Association of Women Lawyers (NAWL) conducts an annual survey aimed at providing "objective statistics regarding the position and advancement of women lawyers in law firms in particular, and the NAWL Survey remains the only national survey that collects this industry benchmarking data in such detail."[125] Additionally, "[t]he National Association of Women Lawyers (NAWL') issued the One-Third by 2020 Challenge in March 2016,[126] renewing the call for the legal field to increase its representation of women to one-third of General Counsels of Fortune 1000 companies, of new law firm equity partners, of law firm lateral hires, and law school deans."[127]

To provide an understanding of women in law school and in the profession, according to the 2016-2017 Annual Report of the Section of Legal Education and Admissions to the Bar of the ABA, as of 2016, women made up 50.2% of total JD enrollment.[128] For the first time ever, women comprised more of the total JD enrollment than men. The section examined attendance in 2015, 2010, and 2000 as ***282** well, and the following chart details the attendance of total JD enrollment of women and men during those timeframes.

	TOTAL JD ENROLLMENT (FALL)[129]			
	2016 (204 schools)	2015 (204 schools)	2010 (200 schools)	2000 (185 schools)
Women	50.20%	49.42%	46.78%	48.44%
Men	49.56%	50.55%	53.22%	51.56%

Additionally, as of 2016, women in private practice in law firms made up 48.7% of summer associates and 45% of associates.[130]

The NAWL Survey, however, showed that, as of 2017, in the 200 largest law firms, women made up only 19% of equity partners.[131] This is a small increase from the 2012 and 2007 surveys showing that women made up 15-16% of equity partners.[132] Although there is clearly an increase, this very small increase comes nowhere near the 30% goal set by the NAWL back in 2006.[133] Furthermore, according to an ABA survey, in law firms generally, as of 2017, women made up approximately 22% of partners,[134] and women held only 24.8% of the general counsel positions in Fortune 500 corporations and 19.8% of those positions in Fortune 501-1000 corporations.[135] The NAWL Survey also showed that specifically, in the top 200 law firms, women made up 46% of associates, 30% of non-equity partners, 42% of non-partner-track attorneys (including staff attorney, counsel attorneys, etc.), and 39% of "other" attorneys (including any attorney not captured by the above categories).[136] Additionally, the NAWL survey asked responding firms to indicate how many partners were promoted to equity partnership in the previous two years.[137] "On average, 15 individuals were promoted during that period," ***283** and "[o]f those 15 new equity partners, about five (33 percent) were women."[138]

Thus, despite graduating from law school and attaining entry-level positions (as first year associates) in roughly equal numbers to their male colleagues, many women are never reaching the top positions in those firms. It is clear that even though women have been practicing for years, and should have been able to establish themselves in the profession, women still only make up a small number of those professionals in top positions in law firms and some are leaving the profession altogether.[139]

The NAWL Survey Report went on to state that "[t]he gender pay gap persists across all levels of attorneys, with men out-earning women from associates to equity partners. Women earn 90-94% of what men in the same position earn."[140] It further noted that "[m]en continue to dominate the top earner spots," with "97% of firms report[ing] their top earner is a man, and nearly 70% of firms hav[ing] 1 or no women in their top 10 earners."[141] Furthermore, the Report stated that women "make up 25% of firm governance roles, such as serving on the highest governance committee, the compensation committee, or as a managing or practice group partner/leader, nearly doubling in the last decade."[142] Although this number has doubled, it still shows that men are dominating these top spots.

B. Women in the Judiciary

As of 2018, three women sit on the Supreme Court of the United States, with those three women being three (out of only four total women ever) of the 112 justices to sit on the Supreme Court bench.[143] Sandra Day O'Connor was the first woman

appointed to the Supreme Court of the United States of America in 1981,[144] followed by Ruth Bader Ginsburg, appointed in 1993.[145] Two male associate ***284** justices were appointed in 1994 and 2006, followed by Sonia Sotomayor in 2009 and Elena Kagan in 2010.[146]

Additionally, according to the National Women's Law Center (NWLC) Fact Sheet dated October 2016, "sixty of the 167 active judges currently sitting on the thirteen federal courts of appeal are female," representing only approximately 36%.[147] Moreover, of the active United States district (or trial) court judges, only 33% are women.[148]

"Since 2008, Forster-Long, Inc. and the National Association of Women Judges have partnered to raise awareness of gender representation in American courts" and publish a Gender Ratio Summary, "which is a yearly glance at the distribution of male and female judges throughout the United States in both federal and state judiciaries."[149] In the almost ten years since the information has been gathered, there has been some improvement in the representation of women in the state court systems, though there is still a large gender gap.[150]

U.S. STATE COURT WOMEN JUDGES[151]	2016			2008		
	# of Women	Total	Percentage	# of Women	Total	Percentage
State Final Appellate Jurisdiction Courts	122	353	35	106	362	29
State Intermediate Appellate Jurisdiction Courts	344	991	35	264	932	28
State General Jurisdiction Courts	3,502	11,778	30	2,332	10,406	22
State Limited and Special Jurisdiction Courts	1,628	4,884	33	1,477	5,105	29

***285** Additionally, the American Constitution Society for Law and Policy published a report entitled The Gavel Gap where it gathered demographics on state court judges in all 50 states, further demonstrating the continued attempt to address the composition of the bench compared to the communities they serve.[152]

Thus, it is clear that although women have made improvements in their representation in the judiciary, there are still great strides to be made to assure equal representation.

IV. RESOLUTION 109 AND THE NEW MODEL RULE 8.4

The ABA Model Rules were first adopted by the Association in 1983 and they have served to help the ABA meet its responsibility of representing the legal profession and promoting the public's interest in justice for all.[153] Although they served this noteworthy purpose, they made no mention of condemning bias, prejudice, harassment, or discrimination in the legal profession.[154]

In August 2016, the ABA adopted Resolution 109 to amend Rule 8.4 of the Model Rules ("New Rule") to add an anti-discrimination, anti-harassment provision.[155] When Resolution 109 was adopted, a Report, General Information Form, and Executive Summary accompanied it. In the Report accompanying Resolution 109, the ABA indicated that it has long been committed to diversity and realizes its importance as a leader in the profession for lawyers, judges, law students, and the public.[156] The information accompanying Resolution 109 provided an overview of how the new Model Rule came to be as a result of the need for change and explained the language and terminology selected to provide a clear understanding of the new rule. Thus, this section examines the process used by the Standing ***286** Committee on Ethics and Professional Responsibility to determine the language, prohibited activities, and application of the New Rule.

A. How Model Rule 8.4(g) Came to Be

The Report stated that in February 1994, both the Young Lawyers Division and the Standing Committee on Ethics and Professional Responsibility proposed resolutions to specifically address anti-discrimination and anti-harassment in the ABA Model Rules, however both resolutions were later withdrawn as a result of opposition to the proposals.[157] In August 1995, the ABA adopted Resolution 116C, submitted by the Young Lawyers Division, which:

> condemn[ed] the manifestation by lawyers in the course of their professional activities ... of bias or prejudice against clients, [opposing parties and their counsel, other litigants, witnesses, judges and court personnel, jurors ...]; oppose[d] unlawful discrimination by lawyers in the management or operation of a law practice ...; ... condemn[ed any conduct by lawyers that would] threaten[], harass[], intimidat[e] or denigrat[e any other person] ...; discourage[d] members from belonging to organizations that practice invidious discrimination ...; and ... encourage[d] affirmative steps [such as continuing education, studies, and conferences] to discourage harassing or discriminatory speech and conduct ....[158]

The Report accompanying the Resolution, signed by the Chair of the Young Lawyers Division, noted that "[t]he immediate impetus for the proposed policy is the continuing debate over proposals to modify the Model Code of Professional Responsibility to prohibit discrimination or harassment by lawyers in the course of their professional activities against individuals based on their sex, race or ethnicity."[159] Although this was a step in the right direction, it was not enough to adequately address the clear problems of bias, prejudice, discrimination, and harassment against women (and other groups) in the profession.

The General Information Form accompanying Resolution 109 went on to state that a few years later, in August 1998, a joint resolution of the Standing Committee on Ethics and Professional Responsibility and the Criminal Justice Section was submitted and adopted which "created Comment [3] to Rule 8.4 suggesting that it could be misconduct that is prejudicial to the administration of justice when a lawyer, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, ***287** disability, age, sexual orientation or socioeconomic status."[160] The Report noted that although this was another positive step to address the issue of bias, prejudice, discrimination, and harassment on a grand scale, there was still much work to be done and specifically addressed the fact that that this was merely a Comment within the Rules, not an actual Rule.[161] Per the Model Rules of Professional Conduct: Preamble and Scope, as they stand today, specifically paragraph [14] of the Scope section, "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules."[162] Additionally, paragraph [14] of the ABA Model Rules states that:

> Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term

> "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment.[163]

Thus, although language was added to begin addressing the issues of bias, prejudice, discrimination, and harassment, it is clear that Comments serve as guides for behavior, rather than being authoritative.[164]

The Report accompanying Resolution 109 went on to state that, in 2007, the ABA adopted revisions to the Model Code of Judicial Conduct to include Rule ***288** 2.3, entitled, "Bias, Prejudice and Harassment" which prohibited "judges from speaking or behaving in a way that manifests, 'bias or prejudice,' and from engaging in harassment, 'based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation,"' as well as urged judges to require lawyers to refrain from these activities in proceedings before the court.[165]

In 2008, the ABA organized its objectives into four goals adopted by the House of Delegates.[166] Goal III, entitled "Eliminate Bias and Enhance Diversity" states that its objective is as follows:

> 1. Promote full and equal participation in the association, our profession, and the justice system by all persons.
>
> 2. Eliminate bias in the legal profession and the justice system.[167]

After this, the process to amend Rule 8.4 began when, on May 13, 2014, the ABA's Standing Committee on Ethics and Professional Responsibility received a letter from the Chairs of the ABA's four Goal III Commissions, those being the Commission on Women in the Profession, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Disability Rights, and the Commission on Sexual Orientation and Gender Identity, requesting that the Committee:

> [D]evelop a proposal to amend the Model Rules of Professional Conduct to better address issues of harassment and discrimination and to implement Goal III. These Commissions explained that the current provision is insufficient because it "does not facially address bias, discrimination, or harassment and does not thoroughly address the scope of the issue in the legal profession or legal system."[168]

According to the Report accompanying Resolution 109, in Fall 2014, a Working Group, chaired by the past SCEPR chair, was formed with the support of the Standing Committee on Ethics and Professional Responsibility, consisting ***289** of a representative from each of the Goal III Commissions, the Standing Committee on Ethics and Professional Responsibility, the Association of Professional Responsibility Lawyers, and the National Organization of Bar Counsel.[169] In May 2015, after about a year of work via phone conferences and in-person meetings, the Chair presented a memorandum to the Standing Committee on Ethics and Professional Responsibility concluding that there was a need to amend Model Rule 8.4 "to provide a comprehensive antidiscrimination provision that was nonetheless limited to the practice of law, in the black letter of the rule itself, and not just in a Comment."[170] The Report accompanying Resolution 109 went on to state:

> On July 8, 2015, after receipt and consideration of this memorandum, SCEPR prepared, released for comment and posted on its website a Working Discussion Draft of a proposal to amend Model Rule of Professional Conduct 8.4.

> SCEPR also announced and hosted an open invitation Roundtable discussion on this Draft at the Annual Meeting in Chicago on July 31, 2015.[171]

Furthermore, the Report stated that at the Roundtable and through written communication, SCEPR received comments regarding the Working Discussion Draft, which they studied and, in December 2015, eventually published a revised draft of a proposal to amend Rule 8.4(g), together with proposed new Comments to Rule 8.4.[172] The Report also explained that SCEPR announced that it would host a Public Hearing at the Midyear Meeting in February 2016 and that written comments were also invited.[173] "After further study and consideration SCEPR made substantial and significant changes to its proposal, taking into account the many comments it received on its earlier drafts."[174] Finally, in April 2016, the Standing Committee on Ethics and Professional Responsibility approved filing the resolution.[175]

*290 *B. Language of the New Rule*

Based on Resolution 109 adopted by the House of Delegates on August 8-9, 2016, Model Rule 8.4 of the ABA Model Rules of Professional Conduct entitled Misconduct was amended and the New Rule now reads as follows:

> RESOLVED, That the American Bar Association amends Rule 8.4 and Comment of the ABA Model Rules of Professional Conduct as follows:
>
> Rule 8.4: Misconduct
>
> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;
>
> (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these rules.[176]

Comments 3, 4 and 5 of the new rule reads as follows:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law ***291** of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).[177]

Prior to the adoption of Resolution 109, the old 2016 version (hereinafter “old 2016 version”) stated the following:

It is professional misconduct for a lawyer to:

> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;
>
> (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
>
> ***292** (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.[178]

Additionally, Comment [3] to Rule 8.4 of the old 2016 version stated as follows:

> [3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.[179]

The Resolution adopted by the House of Delegates on August 8-9, 2016[180] which amended Rule 8.4 and Comment of the ABA Model Rules of Professional Conduct created a new paragraph (g) establishing a clear prohibition of discrimination and harassment, as well as amended Comment [3] which further elaborates on the reasons behind paragraph (g), as well as explains included behavior, and creates new Comments [4] and [5].[181]

C. Prohibited Activity Under the New Rule

The Report accompanying Resolution 109 clearly explained the purposeful nature of the language selected. For example, the New Rule does away with the "'manifests ... bias or prejudice' that appear in the current provision. Instead, the New Rule "adopts the terms 'harassment and discrimination' that already appear in a large body of substantive law, antidiscrimination and antiharassment statutes, and case law nationwide and in the Model Judicial Code."[182] The Report stated that:

> For example, in new Comment [3], "harassment" is defined as including "sexual harassment and derogatory or demeaning verbal or physical conduct .... of a sexual nature." This definition is based on the language of Rule 2.3(C) of the ABA Model Code of Judicial Conduct and its Comment [4], adopted by the House in 2007 and applicable to lawyers in proceedings ***293** before a court.[183]

Additionally, the Report noted:

> Discrimination is defined in new Comment [3] as "harmful verbal or physical conduct that manifests bias or prejudice towards others." This is based in part on ABA Model Code of Judicial Conduct, Rule 2.3, Comment [3], which notes that harassment, one form of discrimination, includes "verbal or physical conduct," and on the current rule, which prohibits lawyers from manifesting bias or prejudice while representing clients.[184]

According to the language of Comment [3], "[t]he substantive law of anti-discrimination and antiharassment statutes and case law may guide application of paragraph (g)."[185] The Report accompanying Resolution 109 also explained that:

> This provision makes clear that the substantive law on anti-discrimination and anti-harassment is not necessarily dispositive in the disciplinary context. Thus, conduct that has a discriminatory impact alone, while possibly dispositive elsewhere, would not necessarily result in discipline under new Rule 8.4(g). But, substantive law regarding discrimination and harassment can also guide a lawyer's conduct. As the Preamble to the Model Rules explains, "A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs."[186]

D. Where and How Does This Rule Apply?

Paragraph (g) of Rule 8.4 of the ABA Model Rules of Professional Conduct refers to "conduct related to the practice of law" and Comment [4] explains that this includes:

> representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.[187]

The Report explained that "[s]ome commenters expressed concern that the phrase, 'conduct related to the practice of law,' is vague," however the phrase ***294** "conduct related to" is clearly explained in the Comments to the new Rule.[188] Additionally, the Report noted that "[t]he definition of the practice of law is established by law and varies from one jurisdiction to another."[189]

The Report goes on to state that:

> Proposed new Comment [4] explains that conduct related to the practice of law includes, "representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities

> *in connection with the practice of law."* (Emphasis added.) The nexus of the conduct regulated by the rule is that it is conduct lawyers are permitted or required to engage in because of their work as a lawyer.[190]

The SCEPR indicated that the New Rule 8.4(g) is broader than the current provision, as it applies to conduct related to the practice of law.[191] The rationale was that since the role of a lawyer goes beyond representation of a client, such as being a manager of a law firm, officer of the court generally, public citizen, as well as engaging in mentoring, and attending social activities related to the practice of law, and all of these situations can be considered part of the practice of law, the ethics rules should apply to all of these situations.[192]

*295 *E. Proposed New Rule 8.4(g) Does Not Use the Term "Knowingly"*

According to the Report, SCEPR:

> [R]eceived substantial and helpful comment that the absence of a "mens rea" standard in the rule would provide inadequate guidance to lawyers and disciplinary authorities. After consultation with cosponsors, SCEPR concluded that the alternative standards "knows or reasonably should know" should be included in the new rule. Consequently, revised Rule 8.4(g) would make it professional misconduct for a lawyer to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination ....[193]

The Model Rules define both "knows" and "reasonably should know."[194] The Report explained that Rule 1.0(f) of the Model Rules "defines 'knows' to denote 'actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.'"[195] The Report indicated that this is a subjective standard and the inference to be made is "whether one can infer from the circumstances what the lawyer actually knew," rather than "what the lawyer should or might have known."[196] The Report also explained that Rule 1.0(j) "defines 'reasonably should know' when used in reference to a lawyer to denote 'that a lawyer of reasonable prudence and competence would ascertain the matter in question.'"[197] Thus, this is an objective standard that "does not depend on a particular lawyer's actual state of mind," as the test "is whether a lawyer of reasonable prudence and competence would have comprehended the facts in question."[198]

The Report confirmed that SCEPR believed that "any standard for the conduct to be addressed in Rule 8.4(g) must include as alternatives, both the 'knowing' and 'reasonably should know' standards as defined in Rule 1.0," since "one standard is a subjective and the other is objective," thus one cannot "serve as a substitute for the other."[199] The Report clarified that "[t]aken together, these two standards provide a safeguard for lawyer against overaggressive prosecutions for conduct they could not have known was harassment or discrimination, as well as a safeguard against evasive defenses of conduct that any reasonable lawyer would have known is harassment or discrimination."[200] The Report also noted that the ***296** "knows or reasonably should know" language has been part of the Model Rules since 1983 and, thus, there is "ample precedent for using" it.[201]

Additionally, the Report went on to state that:

> "Harassment" and "discrimination" are terms that denote actual conduct. As explained in proposed new Comment [3], both "harassment" and "discrimination" are defined to include verbal and physical conduct against others. The proposed rule would not expand on what would be considered harassment and discrimination under federal and state law. Thus, the terms used in the rule--"harass and discriminate"--by their nature incorporate a measure of intentionality while also setting a minimum standard of acceptable conduct. This does not mean that complainants

> should have to establish their claims in civil courts before bringing disciplinary claims. Rather, it means that the rule intends that these words have the meaning established at law.[202]

Finally, the Report confirmed that "the addition of 'knows or reasonably should know' as part of the standard for the lawyer supports the rule's focus on conduct and resolves concerns of vagueness or uncertainty about what behavior is expected of the lawyer."[203]

V. CRITICISMS OF THE LANGUAGE OF THE NEW RULE

Although the New Rule is clearly necessary to begin to remedy the discriminatory and marginalization issues that women in the legal profession still face, there are critics of the rule. The House of Delegates refers to the critics as minority views.[204] Despite being minority views, the House of Delegates still addressed many of the concerns and made edits accordingly prior to the presentation of the final Resolution.[205] However, some of the concerns ranged from whether this Rule infringes on legitimate advocacy of attorneys representing their clients, to whether social activities in connection with the practice of law should be more clearly defined, and whether or not conduct inside and outside of a law firm should be distinguished.[206]

In the Report, The House of Delegates addresses many of the concerns raised by commenters throughout the process. First, the Report discusses how the New Rule clearly permits legitimate advocacy and "does not change the circumstances under which a lawyer may accept, decline or withdraw from a representation. To ***297** the contrary, the proposal makes clear that Model Rule 1.16 addresses such conduct."[207]

The Report explained that some other critics of the New Rule commented that:

> because legal remedies are available for discrimination and harassment in other forums, the bar should not permit an ethics claim to be brought on that basis until the claim has first been presented to a legal tribunal and the tribunal has found the lawyer guilty of or liable for harassment or discrimination.[208]

The Report noted that SCEPR "considered and rejected this approach for a number of reasons. Such a requirement is without precedent in the Model Rules."[209] The Report went on to state that the "[l]egal ethics rules are not dependent upon or limited by statutory or common law claims" and that "[t]he ABA takes pride in the fact that 'the legal profession is largely self-governing.'"[210] Thus, the ABA believes that a failure to comply with a Rule is the basis for invoking the disciplinary process, and does not indicate that there is necessarily a cause of action that should be brought in the civil legal system.[211] Moreover, the Report clarified that: "The Association has never before required that a party first invoke the civil legal system before filing a grievance through the disciplinary system."[212]

VI. WHAT HAVE THE STATES DONE TO COMBAT DISCRIMINATION AND HARASSMENT?

Many states did not wait for the ABA to act and have had provisions in their Model Rules for years. The Report notes that as of the date of the adoption of Resolution 109, twenty-four states, as well as the District of Columbia, have put provisions into their states' Model Rules of Professional Conduct to deal with discriminatory and harassing behavior by lawyers.[213] Additionally, fourteen states do ***298** not address the issue at all in their Model Rules of Professional Conduct.[214] The ABA has an entire

webpage of materials dedicated to showing how each jurisdiction has modified each of the ABA Model Rules of Professional Conduct.[215]

As Florida, Texas, California, and New York are currently the four largest states by population and by number of practicing attorneys,[216] and are spread geographically across the United States, a brief sampling of how these states have addressed discrimination and harassment up to this point in their state model rules and what impact, if any, the ABA's new rule will have on the states, has been compiled and provided.

As far back as 1994, the Florida Bar implemented a rule addressing harassment and discriminatory conduct.[217] Florida's current provision, effective since ***299** 2006, Rule 4-8.4 Misconduct includes an additional section (d), beyond what the ABA Model Rules include, which states:

> engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic;[218]

Additionally, it has a fifth comment, which states:

> Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such conduct, when directed towards litigants, jurors, witnesses, court personnel, or other lawyers, whether based on race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, physical characteristic, or any other basis, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality. This subdivision does not prohibit a lawyer from representing a client as may be permitted by applicable law, such as, by way of example, representing a client accused of committing discriminatory conduct.[219]

Thus, although the language is similar, it adds the Comment, which further clarifies the individuals and type of behavior that is protected.

Texas has not amended its Texas Disciplinary Rules of Professional Conduct ("Texas Rules of Conduct") since the ABA has approved Model Rule 8.4(g). Currently in Texas, Rule 5.08 Prohibited Discriminatory Activities has been in effect since 2005 and states that:

> (a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.
>
> (b) Paragraph (a) does not apply to a lawyer's decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications ***300** protected as

> confidential information under these rules. See Rule 1.05(a), (b). It also does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors out in paragraph (a) if that advocacy:
>
> (i) is necessary in order to address any substantive or procedural issues raised by the proceeding; and
>
> (ii) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice and procedure.[220]

Ken Paxton, Attorney General of Texas, wrote an Opinion Letter dated December 20, 2016 on the topic in which he stated that:

> [T]he Texas Supreme Court has not adopted Model Rule 8.4(g), and it is not currently part of the Texas Rules. However, if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent.[221]

Paxton went on to state that he believes a court would likely conclude that Model Rule 8.4(g) infringes upon the free speech rights of members of the State Bar, upon an attorney's First Amendment right to free exercise of religion, and upon an attorney's right to freedom of association.[222] He further argued that "[b]ecause Model Rule 8.4(g) attempts to prohibit constitutionally protected activities, a court would likely conclude it is overbroad," and, when "applied to specific circumstances, a court would likely also conclude that Model Rule 8.4(g) is void for vagueness."[223] Additionally, he stated that "[t]he Texas Rules of Disciplinary Conduct sufficiently address attorney misconduct to prohibit unlawful discrimination."[224]

Although Paxton argued that the rule is overly broad, he never directly addressed which language is overly broad. If he was referring to the language "the practice of law," both New York and California have similar language in their provisions and have not run into any constitutionality concerns.[225] It is unclear how ***301** Texas will address this rule or if it will, at some point, move in the direction of the ABA's New Rule.

Paxton's concerns seem unfounded as "[t]he proposed scope of Rule 8.4(g) is similar to the scope of existing antidiscrimination provisions in many states."[226]

For example, New York's Rule 8.4(g)-(h) Misconduct, effective since 2009, state:

> A lawyer or law firm shall not:
>
> (g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the

lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.[227]

Comment [5A] states that it is "[u]nlawful discrimination in the practice of law on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation is governed by paragraph (g)."[228]

***302** Additionally, California's proposed Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation, which was adopted by the Board on March 9, 2017, states the following:

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:

(1) unlawfully harass or unlawfully discriminate against persons on the basis of any protected characteristic; or

(2) unlawfully retaliate against persons.

(b) In relation to a law firm's operations, a lawyer shall not:

(1) on the basis of any protected characteristic,

(i) unlawfully discriminate or knowingly permit unlawful discrimination;

(ii) unlawfully harass or knowingly permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract; or

(iii) unlawfully refuse to hire or employ a person, or refuse to select a person for a training program leading to employment, or bar or discharge a person from employment or from a training program leading to employment, or discriminate against a person in compensation or in terms, conditions, or privileges of employment; or

(2) unlawfully retaliate against persons.

(c) For purposes of this rule:

> (1) "protected characteristic" means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;
>
> (2) "knowingly permit" means to fail to advocate corrective action where the lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);
>
> (3) "unlawfully" and "unlawful" shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and
>
> (4) "retaliate" means to take adverse action against a person because that person has (i) opposed, or (ii) pursued, participated in, or assisted ***303** any action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of this rule.[229]

In neither New York nor California has the similar "practice of law" language that the ABA has incorporated caused an influx of discrimination and/or harassment complaints as some of the critics have suggested.

VII. WHERE DO WE GO FROM HERE?

In order to ensure that the progress that women have made, and are currently making, does not slow down or stop entirely, it is necessary to not only put rules into effect banning the discriminatory or harassing behavior, but also to establish education and training initiatives in law school, at the start of a lawyer's career, and to continue that training once attorneys enter the work force through firm training and CLE requirements. This continuation of training is necessary because although including the training in law schools is a positive start, training is necessary at all levels since some of the offenders are already practicing attorneys or sitting judges. This training will need to take the form of bias, discrimination, and harassment training, such that those practicing in the field of law are made aware of issues facing females in today's legal environment and learn how to combat behaviors that are direct and indirect bias, harassment, and discrimination. For the purposes of this discussion, such training will be referred to as Bias Training.

A. Require Bias Training in Law Schools as Part of the Professional Responsibility Requirements for Graduation

Although many law schools have professional responsibility requirements for graduation, they do not require that students receive training and/or education specifically in the areas of discrimination and harassment. In order to ensure that the new crop of attorneys entering the profession are as prepared as possible, it would seem to be a logical step to require students to receive Bias Training as part of their law school education. Such training could occur during 1L orientation, be a required seminar that all students must attend prior to graduation, and/or be included as a component of the Professional Responsibility course that all students are required to take prior to graduation.

At the University of California Berkeley School of Law, a 2L spearheaded a student-led initiative to bring implicit bias training to the student body and faculty.[230] Additionally, in January 2018, the Human Rights Law Society at Duke Law ***304** School held an Implicit Bias Training Workshop conducted by Dr. Benjamin Reese, Vice President of the Office for Institutional Equity at Duke University and Duke University Health System, "geared towards understanding the impact of biases in the workplace generally and in the legal professions specifically, focusing in particular on issues of social justice and human rights."[231] Dr. Reese's office "oversees diversity, inclusion, affirmative action/equal opportunity activities and harassment/discrimination prevention for the university."[232]

Although these examples show a promising start to educating law school students, aka soon-to-be practitioners, about bias in the profession, these trainings have only begun to creep into schools slowly and are not yet the norm at law schools across the country. Moreover, despite this positive beginning, it should be noted that much of the training currently being offered deals specifically with implicit bias generally and not necessarily specifically with harassment and discrimination against women. Thus, I would argue that law schools need to require training that includes a component dealing with bias, harassment, and discrimination faced by women.

B. Require Bias Training in All Law Firms

Law firms have increasingly realized the importance of women's initiatives aimed at educating members of the profession and increasing women's participation in the governance aspects of law firms. According to the NAWL 2017 Survey Report on Promotion and Retention of Women in Law Firms, which surveyed the top 200 law firms in the United States, "[e]ssentially all responding firms (99 percent) reported having a Women's Initiative [.]"[233] Additionally, "95 percent of firms report that their Women's Initiatives are established to mature, and 31 percent reported that although their initiative is established, they're still actively growing."[234]

***305** The survey results suggest that there is widespread participation with women partners and partner-track associates being the most active participants, with "91 percent of firms reporting that at least half of their women partners participate in Women's Initiative events and programs and 87 percent of firms reporting that at least half of their women associates participate."[235] Additionally, it was reported that "72 percent of women non-partner track attorneys (e.g., staff attorneys, counsel attorneys) also participate in the programming."[236] Although women are participating in great numbers, only "85 percent of firms report that at least *some* men participate in the Women's Initiative events and programming," which is not particularly encouraging.[237] Although women will logically lead the fight, men can and must understand and join the fight to create positive change, as diversity and bias initiatives are most successful when they are comprehensive in their composition. According to the study, "[w]hile most firms left the leadership of their initiatives to women, 45 percent of firms report that they have men who participate in the leadership roles of the Initiatives (e.g., serving on the planning committee)."[238] Moreover, it is encouraging to note:

> Most firms report having support from men in the law firm for both the Women's Initiative and their female colleagues in the firm: 98 percent of firms report that there are men in the firm who advocate for the Women's Initiative specifically, and on a more interpersonal level, 99 percent of firms report that there are men who advocate on behalf of women in the firm, including by serving as mentors and sponsors.[239]

Additionally, according to the survey results, nearly all of the firms reported that they attempt to monitor the outcomes of their initiatives and look at the career trajectories of women in their firm, as well as the business development, relationship development, and representation of women in leadership positions within the firm.[240] Along those lines, of the firms surveyed, "firms who reported having established to mature Women's Initiatives" had a higher percentage (18-19%) of women equity partners compared to firms with newer initiatives.[241]

> In addition, the pay gap between women and men equity partners was smaller in firms with more established to mature initiatives than those with newer initiatives (the median woman equity partner is earning 94 percent of what the median male equity partner makes in firms with more established ***306** initiatives compared to 82 percent in the handful of firm [sic] reporting relatively new initiatives).[242]

Finally, although many of the firms responded indicating that they have a Women's Initiative, most firms reported "offering programming and events focused on business development training, soft skills training, and development in topic areas like negotiation, navigating the law firm world, and management and leadership training."[243] Although this training is beneficial to women trying to advance their careers, it does not attack the issue of harassment and discrimination plaguing women in the legal profession. Some of the firms who responded to the survey indicated that they also participate in training outside of the Women's Initiatives such as offering implicit bias training and diversity and inclusion training.[244] Again, although this is beneficial, if the training is not specifically focused on anti-harassment and anti-discrimination against women, then it is not directly addressing the issue.

My suggestion is that training which focuses on direct and indirect forms of harassment and discrimination be instituted at all firms. Training should occur for any and all attorneys currently with the firm. This training should take the form of annual or semiannual sessions and should be mandatory for all practicing attorneys, regardless of the attorney's years of practice, to ensure consistency across the firm. Additionally, any summer associate and legal interns at the firm should be required to participate in the training as well.

C. Require Bias Training As Part Of the CLE Requirements

Many, if not all, states have a professional responsibility component in their Continued Learning Education (CLE) requirements for members of the bar in the state, however some have taken it a step further to require bias and inclusion training as part of the CLE requirements.

In both New York and California, for example, individuals are required to complete both a professionalism and bias training component during their reporting cycle. In New York, experienced members of the bar,[245] those who have been admitted to the New York Bar for more than two years, must complete a total of ***307** 24 accredited CLE credit hours during each biennial reporting cycle (the two-year period between attorney registrations) and at least four of the credit hours be in the Ethics and Professionalism category,[246] and, effective July 1, 2018, at least one of the credit hours must be in the Diversity, Inclusion and Elimination of Bias category, with the remaining credit hours being in any category of credit.[247] The new rule, as of January 1, 2018, provides Categories of CLE Credit as Defined in the Program Rules 22 NYCRR 1500.2(c)-(g) and states the following:

> (g) Diversity, Inclusion and Elimination of Bias courses, programs and activities must relate to the practice of law and may include, among other things, implicit and explicit bias, equal access to justice, serving a diverse population, diversity and inclusion initiatives in the legal profession, and sensitivity to cultural and other differences when interacting with members of the public, judges, jurors, litigants, attorneys and court personnel.[248]

This new requirement is directly in line with the ABA's New Rule and shows New York's clear charge to ensure that its attorneys understand the harassment and discrimination issues currently plaguing the legal system.

Additionally, the California rules regarding CLE requirements are as follows:

> Rule 2.72 Requirements
>
> (A) Unless these rules indicate otherwise, a member who has been active throughout a thirty-six-month compliance period must complete twenty-five credit hours of MCLE activities. No more than twelve and a half credit hours may be self-study. Total hours must include no less than 6 hours as follows:
>
> (1) at least four hours of legal ethics;
>
> ***308** (2) at least one hour dealing with the recognition and elimination of bias in the legal profession and society by reason of, but not limited to, sex, color, race, religion, ancestry, national origin, physical disability, age, or sexual orientation; and
>
> (3) at least one hour of education addressing substance abuse or other mental or physical issues that impair a member's ability to perform legal services with competence.[249]

Again, based on the language of 2.72(A)(2), it is clear that California is trying to educate its attorneys on discrimination and harassment issues within the profession.

In Florida, each member of the bar must complete "a minimum of 33 credit hours of approved continuing legal education activity every 3 years. Five of the 33 credit hours must be in approved legal ethics, professionalism, bias elimination, substance abuse, or mental illness awareness programs ...."[250] Although this rule is a solid first step towards including harassment and discrimination training, since members of the bar can choose to attend substance abuse or mental illness awareness programs, for example, instead of the bias-geared courses, Florida attorneys are not required to have any continued learning and training in the area of harassment and discrimination.

Some states, however, appear to have no requirement at all specifically aimed at bias education and training. For example, in Texas, attorneys are required to complete fifteen total hours of continuing legal education during each compliance year and a minimum of three of the credit hours must be completed in legal ethics and/or professional responsibility.[251] Although there are required ethics credits, the Texas CLE rules do not appear to provide a description of specifically what the ***309** ethics requirement covers, thus it appears that there is no push towards educating its attorneys on bias issues.[252]

Thus, my suggestion is that all states should include a CLE requirement that a certain number of CLE credit hours be taken in the area of Bias Training, harassment, and discrimination. Through the years, states have amended their CLE requirements to deal with issues that are important at the time. For example, in Florida as of January 2017, each member of the bar must ensure that three of the 33 credit hours completed are in approved technology programs, which are included in, not in addition to, the regular 33 credit hours requirement.[253] In September 2016, the Florida Supreme Court approved a rule requiring state lawyers to take technology-related CLE courses and held that "[i]n order to maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education, including an understanding of the risks and benefits associated with the use of technology."[254] As the court noted that a lawyer should engage in continuing study to understand the importance of technology,

based on our ever-changing world, it would seem only logical that a bias training CLE requirement would be equally, if not more, important.

Although not all states require Bias Training, some practicing attorneys realize the importance of such training and have put together CLE programs specifically on this topic. For example, in January 2017, Stanford Law School alumni held an MCLE Workshop entitled Implicit Bias for Lawyers, which was designed for attorneys "to become educated on the concept of implicit bias, to recognize the importance of bias as it relates to their professional and personal lives and to reduce bias in order to make better decisions."[255] Thus, some practitioners realize the importance of such training and the benefits that will transpire as a result.

VIII. CONCLUSION

The ABA's addition of anti-harassment and anti-discrimination language in the Model Rules of Professional Conduct makes it clear that the self-governing legal profession will not tolerate such conduct among its members. This monumental progress on a national level is only a beginning step towards finding a solution to end the harassment and discrimination that women in the legal profession face ***310** daily. As members of the legal profession, we need to remedy these harassment and discrimination issues through education and training initiatives in law schools and that training must be continued once attorneys enter the work force in the form of Bias Training in law firms and mandatory CLE requirements.

Footnotes

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1 John Lynch, *Justice Ruth Bader Ginsburg Praised the #MeToo Movement, and Shared Her Own Experience of Sexual Harassment*, Bus. Insider (Jan. 22, 2018), http://www.businessinsider.com/justice-ruth-bader-ginsburg-praises-the-metoo-movement-at-sundance-2018-1 (quoting Supreme Court Justice Ruth Bader Ginsburg when she praised the #MeToo movement in a talk at the Sundance Film Festival).

2 Georgett Roberts et al., *Women's March Descends on NYC on Anniversary of Trump's Inauguration*, N.Y. Post (Jan. 20, 2018), https://nypost.com/2018/01/20/womens-march-descends-on-nyc-on-anniversary-of-trumps-inauguration/.

3 Additionally, it should be noted that although Rule 8.4(g) and associated Comments of the ABA Model Rules of Professional Conduct deals with harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, the focus of the Article will be women.

4 *The Wage Gap: The Who, How, Why, and What To Do*, Nat'l Women's L. Ctr (Sept. 19, 2017), https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/.

5 Nina Totenberg, *Chief Justice Roberts Sends Kozinski Inquiry to Another Judicial Council*, NPR (Dec. 15, 2017), https://www.npr.org/2017/12/15/571234947/chief-justice-roberts-sends-kozinski-inquiry-to-another-judicial-council; Matt Zapotosky, *Federal Appeals Judge Announces Immediate Retirement Amid Probe of Sexual Misconduct Allegations*, Wash. Post (Dec. 18, 2017) [hereinafter Zapotosky, *Kozinski Retires*], https://www.washingtonpost.com/world/national-security/federal-appeals-judge-announces-immediate-retirement-amid-investigation-prompted-by-accusations-of-sexual-misconduct/2017/12/18/6e38ada4-e3fd-11e7-a65d-1ac0fd7f097e_story.html (listing examples of the inappropriate behavior that Kozinski is accused of, including showing separate women pornographic images and asking if they thought that the image was photoshopped or if it aroused them sexually, touching women inappropriately, and making inappropriate comments and jokes); Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual*

Misconduct, Wash. Post (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html.

6 *See* Zapotosky, *Kozinski Retires*, *supra* note 5.

7 Alan Feuer, *A Judge Wants a Bigger Role for Female Lawyers. So He Made a Rule.*, N.Y. Times (Aug. 23, 2017), https://www.nytimes.com/2017/08/23/nyregion/a-judge-wants-a-bigger-role-for-female-lawyers-so-he-made-a-rule.html.

8 *Id.*

9 *Id.*

10 Additionally, in 2018, the ABA released *Zero Tolerance: Best Practices for Combating Sex-Based Harassment in the Legal Profession*, and, according to the ABA website, the ninety-two-page paperback is:
a comprehensive update to the ABA Commission on Women in the Profession's previous sexual harassment material. The primary goal of this manual is to provide all too necessary tools to legal organizations and victims of harassment and bullying. It strives to enhance the common understanding of workplace abuse and expand it to include non-sexual abusive behavior, while introducing protections for individuals with a range of sexual orientations, genders, and racial and ethnic identities.
Zero Tolerance: Best Practices for Combating Sex-Based Harassment in the Legal Profession, A.B.A. (2018), https://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=309131379&term=4920050.

11 Maria Pabón López, *The Future of Women in the Legal Profession: Recognizing the Challenges Ahead by Reviewing Current Trends*, 19 Hastings Women's L.J. 53, 60 (2008).

12 Ann Baker, *Margaret Brent*, Md. St. Archives (1998), http://msa.maryland.gov/msa/speccol/sc3500/sc3520/002100/002177/html/brochure.html.

13 *Id.*

14 Joan Hoff, Law, Gender, and Injustice: A Legal History of U.S. Women 117 (rev. ed. 1993).

15 *Id.*

16 *Id.* at 122.

17 *See id.* at 123.

18 Phyllis Horn Epstein, Women-at-Law: Lessons Learned Along the Pathways to Success 10 (2004).

19 *Id.*

20 *Id.*

21 Hedda Garza, Barred from the Bar: A History of Women in the Legal Profession 54 (1996); Karen Tokarz, *Lemma Barkeloo and Phoebe Couzins: Among the Nation's First Women Lawyers and Law School Graduates*, 6 Wash. U.J.L. & Pol'y 181, 181 (2001).

22 Tokarz, *supra* note 21, at 182.

23 *Id.* at 183; Garza, *supra* note 21, at 54.

24 Tokarz, *supra* note 21, at 183; Garza, *supra* note 21, at 54.

25 Tokarz, *supra* note 21, at 183.

26 *Id.*; Garza, *supra* note 21, at 54.

27 Tokarz, *supra* note 21, at 184.

28 *Id.* at 185.

29 *Id.* at 186; Garza, *supra* note 21, at 54; Maggie MacLean, *Phoebe Couzins*, Civil War Women (Aug. 8, 2017), https://www.civilwarwomenblog.com/phoebe-couzins/.

30 Garza, *supra* note 21, at 54 (indicating that Couzins served as a U.S. Marshal, completing her father's term when he died suddenly); Tokarz, *supra* note 21, at 186; Kimberly Harper, *Phoebe Couzins*, St. Hist. Soc'y Mo. Historic Missourians, https://shsmo.org/historicmissourians/name/c/couzins/ (last visited Sept. 5, 2018).

31 Epstein, *supra* note 18, at 11.

32 Kelly Buchanan, *Women in History: Lawyers and Judges*, In Custodia Legis L. Libr. Congress (Mar. 6, 2015), https://blogs.loc.gov/law/2015/03/women-in-history-lawyers-and-judges/.

33 Epstein, *supra* note 18, at 11; Gwen Hoerr Jordan, *Agents of (Incremental) Change: From Myra Bradwell to Hillary Clinton*, 9 Nev. L.J. 580, 604 (2009).

34 Epstein, *supra* note 18, at 11. Ada Kepley was married to Henry B. Kepley who had his own law practice and, at his urging, she attended law school. *See* Maggie MacLean, *Ada Kepley*, Civil War Women (July 24, 2014), https://www.civilwarwomenblog.com/ada-kepley/("When Kepley applied for a license to practice law, she was informed that Illinois law did not permit women to enter the learned professions: law, medicine and theology. Henry Kepley helped his wife challenge this ruling by drafting a bill forbidding sex discrimination in the learned professions. Although the bill was passed and became law in 1872, by then Ada's efforts had been diverted to reform issues; most notably women's suffrage and temperance. She did not apply for and receive her license to practice law until 1881, and while she occasionally appeared in court, she had no steady practice.").

35 Buchanan, *supra* note 32; *Esther Hobart Morris*, Architect Capitol (Apr. 29, 2016), https://www.aoc.gov/art/national-statuary-hall-collection/esther-hobart-morris.

36 Epstein, *supra* note 18, at 10.

37 *Id.*

38 *Id.*

39 Epstein, *supra* note 18, at 11; Garza, *supra* note 21, at 33.

40 Epstein, *supra* note 18, at 11.

41 Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874).

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43 *Minor v. Happersett*, Encyclopaedia Britannica (Apr. 16, 2014), https://www.britannica.com/event/Minor-v-Happersett.

44 Howard Kaplan **&** Tiffany Willey Middleton, *ABA Timeline*, A.B.A. (2015), http://apps.americanbar.org/members/history-timeline/timeline-assets/timeline.html#!date=1876-02-15_23:03:26! [hereinafter *ABA Timeline*].

45 *Id.*

46 Epstein, *supra* note 18, at 11; Jill Norgren, *Belva Lockwood: Blazing the Trail for Women in Law*, 37:1 Prologue: Q. Nat'l Archives & Rec. Admin. 14, 15 (2005), *available at* https://www.archives.gov/publications/prologue/2005/spring/belva-lockwood-1.html.

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48 Norgren, *supra* note 46, at 15; *Belva Ann Lockwood, supra* note 47.

49 Norgren, *supra* note 46, at 16.

50 *Id.* at 15.

51 *History: Our Founding Mothers*, Am. U. Wash. C.L., https://www.wcl.american.edu/impact/history/ (last visited Sept. 5, 2018).

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Lutie Lytle*, Kan. Hist. Soc'y (May 2018), https://www.kshs.org/kansapedia/lutie-lytle/12136.

59 Herma Hill Kay, *The Future of Women Law Professors*, 77 Iowa L. Rev. 5, 5 (1991).

60 *ABA Timeline, supra* note 44.

61 Epstein, *supra* note 18, at 11.

62 Epstein, *supra* note 18, at 14-15.

63 Epstein, *supra* note 18, at 20.

64 Garza, *supra* note 21, at 54 (referencing legal education access for women in the late nineteenth century).

65 Epstein, *supra* note 18, at 20.

66 *Women as 'Way Pavers' in the Federal Judiciary*, U.S. Cts. (Feb. 26, 2015), http://www.uscourts.gov/news/2015/02/26/women-way-pavers-federal-judiciary.

67 Ruth Bader Ginsburg **&** Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 Fordham L. Rev. 281, 281, 289 (1995).

68 *Id.* at 281.

69 *Women as 'Way Pavers' in the Federal Judiciary, supra* note 66.

70 *Id.*

71 *Florence E. Allen*, Ohio Hist. Cent., http://www.ohiohistorycentral.org/w/Florence_E._Allen (last visited Sept. 4, 2018).

72 *Id.*

73 *Id; Florence Ellinwood Allen*, Encyclopedia World Biography (2004), http://www.encyclopedia.com/people/history/historians-miscellaneous-biographies/florence-ellinwood-allen.

74 *Florence E. Allen, supra* note 71.

75 *Id.*

76 *Id; Florence Ellinwood Allen, supra* note 73.

77 Ginsburg **&** Brill, *supra* note 67, at 284.

78 *Women as 'Way Pavers,' supra* note 66.

79 *Id.*

80 Garza, *supra* note 21, at 153.

81 Epstein, *supra* note 18, at 17.

82 *Id.*

83 42 U.S.C. § 2000e-2 (2012).

84 *Pre 1965: Events Leading to the Creation of EEOC*, Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/eeoc/history/35th/pre1965/index.html (last visited Sept. 4, 2018).

85 *Laws Enforced by EEOC*, Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/laws/statutes/ (last visited Sept. 4, 2018). Additionally, the EEOC is responsible for enforcing The Equal Pay Act of 1963, which "makes it illegal to pay different wages to men and women if they perform equal work in the same workplace. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit." *Id.*

86 *Sexual Harassment*, Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/laws/types/sexual_harassment.cfm (last visited Sept. 16, 2018).

87 Garza, *supra* note 21, at 160; Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. Cal. Rev. L. & Women's Stud. 1, 7 (1996).

88 Epstein, *supra* note 18, at 17.

89 *ABA Timeline, supra* note 44. Per the ABA website, "[t]hrough its coordinating efforts, the Center for Professional Responsibility promotes discussion and resolution of pressing issues of professional responsibility and regulation and fosters communication among diverse bar organizations and the various agencies that supervise and regulate the conduct of lawyers and judges." *Committees & Commissions*, Am. Bar Ass'n, https://www.americanbar.org/groups/professional_responsibility/committees_commissions.html (last visited Oct. 5, 2018). Currently, there are more than 700 ABA entities including the ABA Standing Committees housed within the Center. *Id.*

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91 *Id.*

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93 *Reed*, 404 U.S. at 75-76 (citing F.S. Royster Guano Co. v. Commonwealth of Virginia, 253 U. S. 412, 415 (1920)).

94 Swent, *supra* note 87, at 7; *History of the National Judicial Education Program*, Legal Momentum, *https*://www.legalmomentum.org/history-national-judicial-education-program (last visited Sept. 3, 2018).

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96 *Sandra Day O'Connor, First Woman on the Supreme Court*, Sup. Ct. U.S., https://www.supremecourt.gov/visiting/SandraDayOConnor.aspx (last visited Sept. 3, 2018).

97 Swent, *supra* note 87, at 7.

98 *Id.* at 7-8.

99 *Id.* at 8.

100 *Id.*

101 *Id.* at 8-9.

102 *Id.* at 8-10.

103 *Id.* at 10.

104 *Id.* ("[A]ccording to interview participants, Loftus and the state court administrator initially drafted press releases announcing that the New Jersey task force would study 'whether and if so to what extent gender bias exists in the New Jersey judicial system.' Wilentz crossed out the phrase 'whether and if so,' announcing that the task force would 'investigate the *extent* to which gender bias exists.' With this stroke of his pen, he affirmed the task force's importance and challenged it to move ahead boldly and unapologetically.").

105 *Id.* at 10-11.

106 *Id.* at 12.

107 Amy Barasch, *Gender Bias Analysis Version 2.0: Shifting the Focus to Outcomes and Legitimacy*, 36 N.Y.U. Rev. L. & Soc. Change 529, 531 (2012).

108 *Id.* at 532.

109 *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-67 (1986).

110 *Id.*

111 *Commission on Women in the Profession: About Us*, Am. Bar Ass'n, https://www.americanbar.org/groups/women/about_us.html (last visited Sept. 3, 2018).

112 *Id.*

113 *Id.*

114 *State and Federal Court Task Forces on Gender Bias in the Courts*, Legal Momentum, https://www.legalmomentum.org/state-and-federal-court-task-forces-gender-bias-courts (last visited Sept. 3, 2018) [hereinafter *State and Federal Court Task Forces*]. Legal Momentum is the Women's Legal Defense and Education Fund whose "mission is to ensure economic and personal security for all women and girls by advancing equity in education, the workplace, and the courts" and to "provide an expert legal voice to seek justice for women." *Mission and Vision*, Legal Momentum, https://www.legalmomentum.org/mission-and-vision (last visited Sept. 3, 2018).

115 Swent, *supra* note 87, at 12, 15-17. ("The story of persuasion in Florida was so complex and riddled with gender bias that a member of the core group has published a law review article about it. Members of the Florida Association of Women Lawyers met with the chief justice in 1985 and urged him to create a gender bias task force. When he discussed their proposal with his male colleagues later, they chose not to include their only female colleague (Florida's first woman on the supreme court bench) in their colloquy. The chief justice wrote to the core group that the supreme court declined to sponsor the task force because the justices 'didn't think there was any gender bias in Florida,' but he invited them to advise the supreme court 'if [they] ever got any additional information.' The letter specifically said that '[n]ot one [member of the supreme court] has agreed that a task force or a commission on the matter is necessary at this time.' This response was emblematic of the problem the group sought to address. The core group 'realized that we were caught in the essence of the gender bias issue--the inability of judges and lawyers to recognize the existence and seriousness of bias as an issue.' At the suggestion of, and with financial support from the male dean of Florida State University Law School, a woman attorney documented serious gender bias problems in the Florida court system. Armed with this report, the core group asked the Florida Bar Board of Governors to pass a resolution in 1986 supporting a gender bias task force. When the resolution passed, the male president of the group took the resolution back to the supreme court. There was a new chief justice by this time, a man who had opposed the original request for a task force. On this approach, however, he was 'amenable' to the proposal. He had just attended the pivotal 1986 Conference of Chief Justices, and besides, as one interview participant noted dryly, the new request 'carried the imprimatur of ... the Florida bar, which carried a lot more weight than the Florida Association of Women Lawyers.' The new chief justice created a steering committee to determine the mandate, composition and budget for a task force. The committee included the women 'instigators of the whole project,' a well respected female judge and two respected male bar leaders who, according to one interview participant, 'would rein in us hysterical women.' The persuasion phase continued within the steering committee, as the respected bar members came to realize that the 'instigators' were not really 'hysterical,' but actually well within the normal personality range. Once committed to the project, interview subjects felt that these bar members were 'quite helpful [and] brought [to the group significant] political sophistication.'") (footnotes omitted).

116 *ABA Timeline, supra* note 44.

117 *Year of the Woman*, U.S. Senate (Nov. 3, 1992) [hereinafter *Year of the Woman U.S. Senate History*], https://www.senate.gov/artandhistory/history/minute/year_of_the_woman.htm; *see also The Year of the Woman, 1992*, U.S. House Representatives, http://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Essays/Assembling-Amplifying-Ascending/Women-Decade/ (last visited Sept. 3, 2018) [hereinafter *Year of the Woman U.S. House History*].

118 *Year of the Woman U.S. Senate History*, *supra* note 117.

119 *Id.*; *see also Year of the Woman U.S. House History*, *supra* note 117.

120 *Year of the Woman U.S. Senate History*, *supra* note 117; *see also Year of the Woman U.S. House History*, *supra* note 117.

121 *Year of the Woman U.S. Senate History*, *supra* note 117.

122 *ABA Timeline, supra* note 44.

123 *State and Federal Court Task Forces*, *supra* note 114.

124 Dana Alvaré, *Vying for Lead in the "Boys' Club"*, Temple U. Beasley Sch. L. https://www2.law.temple.edu/csj/cms/wp-content/uploads/2017/03/Vying-for-Lead-in-the-Boys-Club.pdf (last visited Sept. 3, 2018); Hilarie Bass, *ABA Will Study, Recommend Steps to Address Issue of Too Many Women Leaving Profession*, ABA J. (Nov. 2017), http://www.abajournal.com/magazine/article/ABA_will_study_recommend_steps_to_address_issue_of_too_many_women_leaving_p/.

125 Destiny Peery, *2017 NAWL Annual Survey Report*, Nat'l Ass'n Women Law. 1-2 (2017), http://www.nawl.org/p/cm/ld/fid=1163 ("The 2017 NAWL Survey was sent to the top 200 U.S. law firms in February 2017, and responding law firms had until April 30, 2017 to submit their responses. This year, 90 of 200 law firms completed all or significant portions of the survey, an overall response rate of 45 percent. As discussed in more detail in the results below, firms completed questions regarding the demographics of attorneys at various levels, especially women, as well as the structure of the partnership track, compensation and hours, and Women's Initiatives and their programming designed to support women in law firms.") Footnote 4 stated that, additionally, "[a]s noted in more detail in the compensation sub-section, fewer law firms completed questions about compensation and hours, with many declining to provide the data, often noting that it's either considered confidential or is not collected in a way that matches the reporting format requested on the survey. As in most survey administrations, very few questions receive 100 percent response rates for various reasons." *Id.*

126 Full details of the One-Third by 2020 Challenge are available at *NAWL Challenge*, Nat'l Ass'n Women Law., http://www.nawl.org/page/the-nawl-challenge (last visited Sept. 4, 2018).

127 Peery, *supra* note 125, at 2. The "NAWL issued its first NAWL Challenge in 2006, which included a goal to increase women equity partners in law firms to at least 30 percent. The One-Third by 2020 Challenge was issued on the ten-year anniversary of that original NAWL Challenge, demonstrating NAWL's continued commitment to increasing the representation of women and the diversity of the legal profession." *Id.*

128 *2016-2017 ABA Legal Education Annual Report*, Am. Bar Ass'n 17 (2017), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/16_17_legal_ed_annual_report_final.authcheckdam.pdf.

129 *Id.*

130 *A Current Glance at Women in the Law*, Am. Bar Ass'n 2 (Jan. 2017), https://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf. The ABA published a report entitled A Current Glance at Women in the Law in January 2017 which provides some general statistics of women in the profession in firms, academia, and the corporate world. *Id.* (citing to the *2016 Report on Diversity in U.S. Law Firms*, Nat'l Ass'n for L. Placement (Jan. 2017), www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirms.pd).

131 Peery, *supra* note 125, at 2.

132 *Id.*

133 *Id.*

134 *A Current Glance at Women in the Law*, *supra* note 130, at 2.

135 *Id.* at 3.

136 Peery, *supra* note 125, at 2.

137 *Id.*

138 *Id.* The NAWL Survey Report indicated that "[t]his suggests early success in the strong push from some firms to promote more gender equity in newer classes of equity partners, in line with the One-Third by 2020 Challenge." *Id.* at 3.

139 Bass, *supra* note 124.

140 Peery, *supra* note 125, at 6.

141 *Id.*

142 *Id.*

143 *Women in the Federal Judiciary: Still a Long Way to Go*, Nat'l Women's L. Ctr. 1 (Oct. 2016), https://nwlc.org/wp-content/uploads/2016/07/JudgesCourtsWomeninFedJud10.13.2016.pdf.

144 *Sandra Day O'Connor*, *supra* note 96.

145 *Current Members*, Sup. Ct. U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Sept. 4, 2018).

146 *Justices 1789 to Present*, Sup. Ct. U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Sept. 4, 2018).

147 *Women in the Federal Judiciary: Still a Long Way to Go, supra* note 142, at 1.

148 *Id.*

149 *Statistics*, Nat'l Ass'n Women Judges, https://www.nawj.org/statistics (last visited Sept. 4, 2018).

150 *Id.* (Click the link for 2008 US State Court Women Judges showing women judges accounted for 25% of state court judges in 2008, and compare to the link for 2018 US State Court Women Judges showing women most recently accounted for 33% of state court judges.).

151 *2016 U.S. State Court Women Judges*, Nat'l Ass'n Women Judges, https://www.nawj.org/statistics/2016-us-state-court-women-judges (last visited Sept. 4, 2018); *2008 U.S. State Court Women Judges*, Nat'l Ass'n Women Judges, https://www.nawj.org/statistics/2008-us-state-court-women-judges (last visited Sept. 4, 2018).

152 *The Gavel Gap*, Am. Const. Soc'y for L. & Pol'y, http://gavelgap.org (last visited Sept. 4, 2018).

153 *H.D. Revised Resolution 109 & Report*, Am. Bar Ass'n 1 (Aug. 2016) [hereinafter *Revised Resolution 109 & Report]*, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

154 *Id.* at 2.

155 *Id.* at 1.

156 *Id.*

157 *Id.* at 2.

158 *H.D. Resolution 116C & Report*, Am. Bar Ass'n (Aug. 8-9, 1995), https://www.americanbar.org/content/dam/aba/directories/policy/1995_am_116c.authcheckdam.pdf.

159 *Id.*

160 *H.D. Proposed Resolution 109 & Report*, Am. Bar Ass'n 16 (Aug. 8-9, 2016) [hereinafter *Proposed Resolution 109 & Report]*, https://www.americanbar.org/news/reporter_resources/annual-meeting-2016/house-of-delegates-resolutions/109.html (click on "Proposed Resolution and Report" which will open the document in MS Word format and scroll to the General Information Form). It should be noted that "[i]n February 1998, the Criminal Justice Section recommended that the Model Rules of Professional Conduct include within the black letter an anti-discrimination provision. At the same meeting, the Standing Committee on Ethics and Professional Responsibility submitted a resolution recommending a Comment that included an anti-discrimination provision. Both resolutions were withdrawn." *Id.* Additionally, the joint provision started out as separate proposals and were eventually combined to create the Comment which was eventually submitted and approved. *Id.*

161 *Revised Resolution 109 & Report, supra* note 153, at 4.

162 Model Rules of Prof'l Conduct Preamble & Scope (Am. Bar Ass'n 2016). It should be noted that paragraph [14] in the Scope section states that: "No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term 'should.' Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules."

163 *Id.*

164 *Id.*

165 *Revised Resolution 109 & Report*, *supra* note 153, at 1. Rule 2.3(C) of the ABA Model Code of Judicial Conduct reads: "[a] judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others." ABA Model Code of Judicial Conduct r. 2.3 (Am. Bar Ass'n 2007).

166 *ABA Mission and Goals*, Am. Bar Ass'n, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Sept. 3, 2018).

167 *Id.*

168 *Revised Resolution 109 & Report*, *supra* note 153, at 3 (referencing the Letter to Paula J. Frederick, Chair, Am. Bar Ass'n Standing Comm. on Ethics and Prof'l Responsibility 2011-2014).

169 *Id.*

170 *Id.* at 4.

171 *Id.*

172 *Id.*

173 *Id.* ("President Brown and past President Laurel Bellows were among those who testified at the hearing in support of adding an antidiscrimination provision to the black letter Rule 8.4.").

174 *Id.*

175 *Proposed Resolution 109 & Report, supra* note 160, at 16 (General Information Form) ("Co-sponsors, the Civil Rights **&** Social Justice Section, the Commission on Disability Rights, the Diversity **&** Inclusion 360 Commission, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Sexual Orientation and Gender Identity, and the Commission on Women in the Profession signed on during the months of April and May 2016. The Commission on Hispanic Legal Rights **&** Responsibilities and the Center for Racial and Ethnic Diversity voted to support the resolution in May 2016.").

176 *Id.* at 1.

177 Model Rules of Prof'l Conduct r. 8.4 cmt. 3-5 (Am. Bar Ass'n 2016).

178 Model Rules of Prof'l Conduct r. 8.4 (Am. Bar Ass'n 2016) (amended 2016).

179 *Id.* at cmt. 3.

180 *H.D. Res. 109 Executive Summary*, Am.Bar Ass'n (2016) [hereinafter *Executive Summary*], https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2016_hod_annual_meeting_executive_summaries_index.authcheckdam.pdf.

181 *Id.* at 4.

182 *Revised Resolution 109 & Report*, *supra* note 153, at 7.

183 *Id.* (citing ABA Model Code of Judicial Conduct r. 2.3 (Am. Bar Ass'n 2007)) (Comment [4] reads: "Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.").

184 *Id.*

185 *Id.*

186 *Id.* (citing Model Rules of Prof'l Conduct Preamble & Scope).

187 Model Rules of Prof'l Conduct r. 8.4 cmt. 4 (Am. Bar Ass'n 2016).

188 *Revised Resolution 109 & Report*, *supra* note 153, at 9. Furthermore, the Report notes that the phrase is "consistent with other terms and phrases used in the Rules that have been upheld against vagueness challenges." *Id.* The Report, in a footnote, cites to the following as examples of other language that were upheld against vagueness challenges. *Id.* at n.21. *See, e.g.*, Canatella v. Stovitz, 365 F. Supp. 2d 1064, 1074-1075 (N.D. Cal. 2005) (rejecting a vagueness challenge to these terms regulating lawyers in the California Business and Profession Code: "willful," "moral turpitude," "dishonesty," and "corruption"); Chief Disciplinary Counsel v. Zelotes, 98 A.3d 852, 868 (Conn. App. 2014) (rejecting a vagueness challenge to "conduct prejudicial to [the] administration of justice"); Florida Bar v. Von Zamft, 814 So.2d 385, 388 (Fla. 2002); Grievance Adm'r v. Fieger, 719 N.W.2d 123, 128 (Mich. 2006) (rejecting a vagueness challenge to rules requiring lawyers to "treat with courtesy and respect all person involved in the legal process" and prohibiting "undignified or discourteous conduct toward [a] tribunal"); *In re* Anonymous Member of S.C. Bar, 709 S.E.2d 633, 637 (S.C. 2011) (rejecting a vagueness challenge to the following required civility clause: "To opposing parties and their counsel, I pledge fairness, integrity, and civility ...."); Motley v. VA State Bar, 536 S.E.2d 97, 99 (Va. 2000) (rejecting a vagueness challenge to a rule requiring lawyers to keep client's "reasonably informed about matters in which the lawyer's services are being rendered"); *In re* Disciplinary Proceedings Against Beaver, 510 N.W.2d 129, 132 (Wis. 1994) (rejecting a vagueness challenge to a rule against "offensive personality").

189 *Revised Resolution 109 & Report*, *supra* note 153, at 9 (citing Model Rules of Prof'l Conduct r. 5.5 cmt. 2 (Am. Bar Ass'n 2016).

190 *Id.* (citing Model Rules of Prof'l Conduct r. 8.4 cmt. 4).

191 *Id.* at 10.

192 *Id.*

193 *Revised Resolution 109 & Report*, *supra* note 153, at 7.

194 *Id.*

195 *Id.*

196 *Id.*

197 *Id.* at 8.

198 *Id.*

199 *Id.*

200 *Id.*

201 *Id.*

202 *Id.*

203 *Id.*

204 *Executive Summary*, *supra* note 180, at 20.

205 *Id.* at 21.

206 *Id.* at 21-22.

207 *Revised Resolution 109 & Report, supra* note 153, at 8.

208 *Id.* at 11.

209 *Id.*

210 *Id.* (citing Model Rules of Prof'l Conduct Preamble & Scope).

211 *Id.*

212 *Id.*

213 *Id.* at 5 (citing to Cal. Rules of Prof'l Conduct 2-400 (State Bar of Cal. 1994); Colo. Rules of Prof'l Conduct r. 8.4(g) (Colo. Bar Ass'n 2008) (amended 2018); Fla. Rules of Prof'l Conduct r. 4-8.4(d) (Fla. Bar 1994) (amended 2018); Idaho Rules of Prof'l Conduct r. 4.4 (Idaho St. Bar 2007) (amended 2014); Ill. Rules of Prof'l Conduct r. 8.4(j) (Ill. St. Bar Ass'n 2010); Ind. Rules of Prof'l Conduct r. 8.4(g) (Ind. Bar 1987) (amended 2005); Iowa Rules of Prof'l Conduct r. 32:8.4(g) (Iowa Bar 2005) (amended 2012); Md. Attorney's Rules of Prof'l Conduct r. 19-308.4(e) (Md. Bar 2016); Mass. Rules of Prof'l Conduct r. 3.4(i) (Mass. Bar 2015); Mich. Rules of Prof'l Conduct r. 6.5 (St. Bar Mich. 1993) (amended 2018); Minn. Rules of Prof'l Conduct r. 8.4(h) (Minn. Bar 1990) (amended 2015); Mo. Rules of Prof'l Conduct 4-8.4(g) r. (Mo. Bar 1986) (amended 2012); Neb. Rules of Prof'l Conduct r. 3-508.4(d) (Neb. 2008) (amended 2016); N.J. Rules of Prof'l Conduct r. 8.4(g) (N.J. 1984) (amended 2004); N.M. Rules of Prof'l Conduct r. 16-300 (N.M. 1994) (amended 2008); N.Y. Rules of Prof'l Conduct r. 8.4 (N.Y. St. Bar Ass'n 2009) (amended 2017); N.D. Rules of Prof'l Conduct r. 8.4(f) (N.D. St. Bar Ass'n 2000) (amended 2006); Ohio Rules of Prof'l Conduct r. 8.4(g) (Ohio St. Bar Ass'n 2007) (amended 2017); Or. Rules of Prof'l Conduct r. 8.4(a)(7) (Or. St. Bar Ass'n 2005) (amended 2018); RI. Rules of Prof'l Conduct r. 8.4(d) (RI. Bar Ass'n 2007) (amended 2017); Tex. Disciplinary Rules of Prof'l Conduct r. 5.08 (Tex. Bar Ass'n 1994) (amended 2018); Vt. Rules of Prof'l Conduct r. 8.4(g) (Vt. Bar Ass'n 1999) (amended 2009); Wash. Rules of Prof'l Conduct r. 8.4(g) (Wash. St. Bar Ass'n 1985) (amended 2018); Wis. Rules of Prof'l Conduct r. 8.4(i) (St. Bar of Wis. 1987) (amended 2017); D.C. Rules of Prof'l Conduct r. 9.1 (D.C. Bar 2007).

214 *Id.* at 6 (The states that do not address this issue in their rules include Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania, and Virginia.).

215 *Jurisdictional Rules Comparison Charts*, Am. Bar Ass'n, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html (last visited Sept. 4, 2018). Note that California has a page that shows how it has amended the rules, as well as how it proposes to amend the rules, for those that it has not already done so. *Cross Reference Chart Rules of Professional Conduct*, State Bar of Cal. (June 11, 2018), http://www.calbar.ca.gov/Portals/0/documents/rules/Cross-Reference-Chart-Rules-of-Professional-Conduct.pdf.

216 *ABA National Lawyer Population Survey*, Am. Bar Ass'n (Dec. 31, 2016), https://www.americanbar.org/content/dam/aba/administrative/market_research/National%20Lawyer%C20Population%C20by%C20State%202017.authcheckdam.pdf; *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2017*, U.S. Census Bureau: Population Div. (Dec. 2017), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2017_PEPANNRES&src=pt.

217 *ABA Provision Makes Harassment and Discrimination 'Professional Misconduct'*, Fla. Bar News (Oct. 1, 2016), https://www.floridabar.org/news/tfb-news/?durl=%2FDIVCOM%C2FJN%C2Fjnnews01.nsf%C2FArticles%2FC9E285859CC097668525802F00544D9C.

218 Fla. Rules of Prof'l Conduct r. 4-8.4(d).

219 Fla. Rules of Prof'l Conduct r. 4-8.4.

220 Tex. Disciplinary Rules of Prof'l Conduct r. 5.08.

221 Letter from Ken Paxton, Att'y Gen., St. of Tex., to Sen. Charles Perry, Chair, Committee on Agriculture, Water & Rural Affairs (Dec. 20, 2016), https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf

222 *Id.*

223 *Id.*

224 *Id.*

225 Liaquat Ali Khan, *Disciplining Lawyers for Harassment and Discrimination*, Huff. Post (July 12, 2017), https://www.huffingtonpost.com/entry/disciplining-lawyers-for-harassment-and-discrimination_us_5962c774e4b0cf3c8e8d59d7.

226 *Revised Resolution 109 & Report*, *supra* note 153, at 9 (citing to Fla. Rules of Prof'l Conduct r. 4-8.4 (Fla. Bar 1994) (amended 2018) (addressing conduct "in connection with the practice of law"); Ind. Rules of Prof'l Conduct r. 8.4(g) (Ind. Bar 1987) (amended 2005) (addressing conduct a lawyer undertakes in the lawyer's "professional capacity"); Iowa Rules of Prof'l Conduct r. 32:8.4(g) (Iowa Bar 2005) (amended 2012) (addressing conduct "in the practice of law"); Md. Attorney's Rules of Prof'l Conduct r. 19-308.4(e) (Md. Bar 2016) (discussing "when acting in a professional capacity"); Minn. Rules of Prof'l Conduct r. 8.4(h) (Minn. Bar 1990) (amended 2015) (addressing conduct "in connection with a lawyer's professional activities"); N.J. Rules of Prof'l Conduct r. 8.4(g) (N.J. 1984) (amended 2004) (addressing when a lawyer's conduct is performed "in a professional capacity"); N.Y. Rules of Prof'l Conduct r. 8.4 (N.Y. St. Bar Ass'n 2009) (amended 2017) (covering conduct "in the practice of law"); Ohio Rules of Prof'l Conduct r. 8.4(g) (Ohio St. Bar Ass'n 2007) (amended 2017) (addressing when lawyer "engage[s], in a professional capacity, in conduct"); Wash. Rules of Prof'l Conduct r. 8.4(g) (Wash. St. Bar Ass'n 1985) (amended 2018) (covering "connection with the lawyer's professional activities"); and Wis. Rules of Prof'l Conduct r. 8.4(i) (St. Bar of Wis. 1987) (amended 2017) (covering conduct "in connection with the lawyer's professional activities.").

227 N.Y. Rules of Prof'l Conduct r. 8.4(g)-(h).

228 N.Y. Rules of Prof'l Conduct r. 8.4 cmt. [5A].

229 Cal. Rules of Prof'l Conduct r. 8.4.1 (State Bar of Cal. 1994) (amended 2018) (footnotes omitted).

230 Nicole Israel, *Training Students to be Aware of Implicit Bias*, Before Bar (Nov. 1, 2014), https://abaforlawstudents.com/2014/11/01/fourtheenth-circuit-cindy-dinh-training-students-aware-implicit-bias/.

231 *Implicit Bias Training Workshop with Dr. Benjamin Reese*, Duke L. Events (Jan. 25, 2018), https://law.duke.edu/events/implicit-bias-training-workshop-dr-benjamin-reese/.

232 *Id.*

233 Peery, *supra* note 125, at 9.

234 *Id.* at 9-10. The Survey went on to note that "[m]ost (91 percent) firms reported that they had mission statements specifically for their Women's Initiatives, up from 75 percent in the 2012 NAWL WI Survey Report. Further, 87 percent reported that their Women's Initiative is part of the strategic plan of the firm, up from 47 percent in 2012. In addition to Women's Initiatives being incorporated into the strategic vision of the law firm, essentially all firms also reported that they had specific objectives for their Initiatives. Finally, 100 percent of firms reported that their Women's Initiative is part of the firm's diversity plan, up from 85 percent in 2012." Additionally,

"[i]n terms of resources, 87.5 percent of firms reported that they had specific budgets for their Women's Initiatives, and a few firms indicated that their Women's Initiative budgets fall under the umbrella of their broader diversity budgets." *Id.* at 10.

235 *Id.*

236 *Id.*

237 *Id.* (emphasis added).

238 *Id.*

239 *Id.*

240 *Id.* at 6.

241 *Id.* at 11.

242 *Id.*

243 *Id.*

244 *Id.*

245 *Continuing Legal Education: FAQs for Newly Admitted Lawyers*, N.Y. Courts, https://www.nycourts.gov/attorneys/cle/newattorney_faqs.shtml#s1_q3 (last visited Sept. 3, 2018). Newly admitted attorneys (those in their first two years of practice) in New York have different requirements than experienced attorneys and must complete at least 16 transitional CLE credit hours in *each* of the first two years of admission to the Bar as follows: 3 credits in Ethics and Professionalism, 6 credits in Skills, and 7 credits in Law Practice Management and/or Areas of Professional Practice. *Id.*

246 *CLE Program Rules*, N.Y. St. CLE Board 1-2 (Jan. 1, 2018), https://www.nycourts.gov/attorneys/cle/programrules.pdf. New York has Categories of CLE Credit as Defined in the Program Rules 22 NYCRR 1500.2(c)-(g), which states that "Ethics and Professionalism may include, among other things, the following: the norms relating to lawyers' professional obligations to clients (including the obligation to provide legal assistance to those in need, confidentiality, competence, conflicts of interest, the allocation of decision making, and zealous advocacy and its limits); the norms relating to lawyers' professional relations with prospective clients, courts and other legal institutions, and third parties (including the lawyers' fiduciary, accounting and record-keeping obligations when entrusted with law client and escrow monies, as well as the norms relating to civility); the sources of lawyers' professional obligations (including disciplinary rules, judicial decisions, and relevant constitutional and statutory provisions); recognition and resolution of ethical dilemmas; the mechanisms for enforcing professional norms; substance abuse control; and professional values (including professional development, improving the profession, and the promotion of fairness, justice and morality)."

247 *Id.* at 3.

248 *Id.*

249 *Rights and Responsibilities of Members Minimum Continuing Legal Education*, St. Bar Cal. 4-5 (Jul. 1, 2014), https://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title2_Div4-MCLE_pending.pdf (footnotes omitted).

250 *CLE and Basic Skills Course Requirements*, Fla. Bar, https://www.floridabar.org/member/cle/bscr-req/ (last visited Sept. 3, 2018). Newly admitted attorneys also have a Basic Skills Course requirement. *See Frequently Asked Questions About Basic Skills Requirements*, Fla. Bar, https://www.floridabar.org/member/cle/bscr-faq/ (last visited Sept. 3, 2018) ("Practicing with Professionalism must be completed no sooner than 12 months prior to or no later than 12 months following admission to The Florida Bar. The 21 hours of basic substantive CLE programs sponsored by the Young Lawyers Division of The Florida Bar must be completed by the end of the members' initial continuing legal education requirement reporting cycle.").

251 *Definition of MCLE Credit*, St. Bar Tex., https://www.texasbar.com/AM/Template.cfm?Section=Definition_of_MCLE_Credit&Template=/CM/HTMLDisplay.cfm&ContentID=29187 (last visited Feb. 27, 2018).

252 *Texas Minimum Continuing Legal Education Rules*, St. Bar Tex. (June 13, 2017), https://www.texasbar.com/AM/Template.cfm?Section=MCLE_Rules1&Template=/CM/ContentDisplay.cfm&ContentID=31722.

253 *CLE and Basic Skills Course Requirements, supra* note 250.

254 Victor Li, *Florida Supreme Court Approves Mandatory Tech CLE Classes for Lawyers*, ABA J. (Sept. 30, 2016), http://www.abajournal.com/news/article/florida_supreme_court_approves_mandatory_tech_cles_for_lawyers.

255 *Implicit Bias for Lawyers MCLE Workshop*, Stan. L. Sch., https://law.stanford.edu/event/implicit-bias-for-lawyers-mcle-workshop/ (last visited Sept. 3, 2018).

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Feature

Diversity and Inclusion
Kristen L. Palacio[a1]

WHAT DOES GENDER BIAS LOOK LIKE IN REAL LIFE?

Gender bias is the prejudice displayed toward one gender over the other.[1] Often this bias is implicit in our nature-- molded by our culture, upbringing, and personal experiences.[2] A simple example of this bias is when a person refers to an individual by their occupation, such as "doctor" or "engineer," and it is assumed that individual is male. Males, however, are not immune from gender bias. For example, teachers, especially those who teach younger-aged children, are often assumed to be women.[3] This makes it challenging for men to enter the field of early childhood learning.[4] These notions-- however antiquated--are difficult to dispel and can carry over into the workplace.

In the practice of law, women lawyers may face certain hurdles that men may not encounter. Often, a woman lawyer must be mindful of how her demeanor will be perceived by judges, juries, opposing counsel, and even her own clients. The same behavior when exhibited by a male may be construed differently than when exhibited by a female. For example, if a male attorney appears outwardly frustrated or angry in the courtroom, he may be viewed as an assertive advocate for his client. When a female attorney displays the same emotions, she may be viewed as temperamental or irrational. At the same time, the woman lawyer must be careful not to be perceived as "too soft" in front of her client and opposing counsel. These perceptions can be the result of implicit bias.

Gender bias can affect women lawyers at every level of the legal profession. Women lawyers may have to field comments from male clients and colleagues who are concerned that a female lawyer cannot go "toe-to-toe" with a male opponent. Women lawyers often find themselves reminded of their male opponents' experience, regardless of their own experience. It is not uncommon to hear comments that men can more effectively resolve disputes with male opposing counsel and get their client a better deal than their female team members because men speak the same "language." And we've all heard the tales of women lawyers being mistaken for court reporters, assistants, and paralegals--or experienced it firsthand. The Florida Bar's 2016 Survey on Gender Equality in the Legal Profession confirms these anecdotal experiences.[5] The survey found:

• 29% of female respondents and less than 1% of male respondents report personally experiencing being addressed by names like "honey" or "sweetie" by male lawyers.

• 27% of female respondents and less than 1% of male respondents report personally experiencing female lawyers being accorded less respect than male lawyers.

• 18% of female respondents and 5% of male respondents report personally experiencing being treated differently by opposing counsel in court or related proceedings than other counsel of a different gender.

• 17% of female respondents and 4% of male respondents report personally experiencing being asked to do lower-level tasks not typically requested of other attorneys of a different gender.

• 14% of female respondents and 4% of male respondents report personally experiencing their work being attributed to or assumed to be that of another lawyer of the opposite gender.[6]

Women in the legal field who choose to have children grapple with an additional set of gender biases: how much time to take off; will time off affect their partnership track; will their cases be reassigned? The issue of trial continuances based on maternity leave is still heavily debated, drawing criticism from women and men alike.[7]

For example, Christen Luikart, a Jacksonville attorney requested her trial be continued because of her pregnancy. ***13** Her male opponent strongly opposed the requested continuance.[8] In doing so, he compared Luikart's pregnancy to an illness. Ultimately, Luikart's request was granted, but Luikart's story is not uncommon,[9] and not all women will have the same outcome.

Florida lawyers and the Florida Supreme Court are considering a new Rule of Judicial Administration regulating parental-leave continuances.[10] The rule would require judges to grant a motion for a 90-day continuance based on parental leave of the lead attorney if the motion is timely filed and if there is no substantial prejudice to the opposing party.[11] If a party opposes the motion on the basis of substantial prejudice, the attorney seeking the continuance has the burden of demonstrating the lack of substantial prejudice. The proposed rule was launched because women lawyers found it increasingly difficult to obtain continuances of trial in their cases, forcing them to hand off their cases to other attorneys because of their pregnancies.[12]

Gender bias seems to make headlines on a weekly basis. For example, Judge Hughes, a male federal judge in Houston drew national attention after making demeaning and inappropriate comments beneath the dignity of the profession.[13] The incident occurred when a prosecutor turned over new documents after the deadline set by Judge Hughes. The judge, after expressing his apparent displeasure, was quoted as telling the prosecutor, "[i]t was a lot simpler when you guys wore dark suits, white shirts and navy ties," and "[w]e didn't let girls do it in the old days." While the appellate court ordered Judge Hughes to be replaced with another judge, Judge Hughes later explained that his comments were directed at a woman in his courtroom who was "inappropriately dressed." Whether Judge Hughes' comments were ill-timed or impulsively made, it highlights the core issue--gender bias is a real issue that impacts lawyers on a daily basis, especially women lawyers. Women are often still not regarded as having the same competencies as their male contemporaries in a still heavily maledominated environment.[14]

While the legal system has made significant strides in addressing gender bias, it is still an issue affecting both new and experienced women lawyers, in and out of the courtroom. As we continue to bring awareness, identify the biases, and learn to counteract them, women lawyers should not feel compelled to mimic their male counterparts or act differently than they normally would. Women lawyers should be encouraged to rise above the biases, implicit and actual, by honing their individual styles.

Footnotes

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HOW TO INTERRUPT IMPLICIT BIAS IN THE LEGAL WORKPLACE – PART I

December 14, 2018

In 2014, Baker Donelson implemented a Firm-wide training program addressing "implicit bias" in the workplace. Implicit bias refers to the tendency to engage in stereotype-confirming thoughts, which affect our understanding, actions, and decisions in an unconscious manner.

In light of statistical evidence establishing women have not significantly advanced in the legal profession over the past several decades, the American Bar Association's Commission on Women in the Profession and the Minority Corporate Counsel Association worked in partnership with the University of California, Hastings College of Law to conduct research and further understand law firm and in-house lawyers' experiences of workplace bias.[1] The results of the study are staggering, confirming many of the traditional diversity tools organizations have relied on throughout the years have been ineffective in addressing bias.

This article is Part 1 of a two-article series, and will discuss the four main patterns of racial and gender bias in the legal profession as identified in the study. Part 2 will identify two cutting-edge toolkits employers can implement to interrupt racial and gender biases in their own workplaces. The Commission and MCCA tout these toolkits as the "next generation of diversity tools." One toolkit is specific to law firms, whereas the other is tailored for in-house legal departments.

Studies show there are four main patterns of racial and gender bias in the legal profession: (1) the “prove-it-again” bias, (2) the "tightrope" bias, (3) the "maternal wall" bias, and (4) the "tug-of-war" bias. "Prove-it-again" describes the need for women and people of color to work harder to prove themselves. The "tightrope" bias illustrates the narrow range of behavior expected of and deemed appropriate for women and people of color. Notably, both of these groups are reportedly more likely than white men to be treated with disrespect. This finding highlights the fact that these groups are perceived to be subject to a tightrope, as they are expected to behave according to preconceived, limited terms.

"Maternal wall" describes the well-documented bias against mothers. Lastly, "tug-of-war" represents the conflict between members of disadvantaged groups that may result from bias in the environment.

Keeping these patterns in mind, the survey was launched in 2016 to examine how bias affects workplace experiences in the legal profession. The researchers compared the reported experiences of women attorneys of color, white women attorneys, male attorneys of color, and white male attorneys. Respondents were also asked whether they experienced the patterns of gender and racial bias that were documented in experimental social psychology studies over the past several decades. Respondents also were asked whether they experienced implicit bias in basic workplace processes, such as hiring, assignments, business development, performance evaluations, promotions, compensation, and support. Of the individuals who received surveys, 2,827 responded, and 525 of the respondents included comments.

The research report evidences the overall need for law firms and in-house departments to implement calculated measures to disturb workplace bias. For example, in relation to the "prove-it-again" bias, women of color, white women, and men of color reported that they have to go "above and beyond" to get the same recognition and respect as their colleagues. Women of color reported experiencing the "prove-it-again" bias at a higher level than any other group, reporting this experience 35 percentage points higher than white men. White women and men of color also reported high levels of the "prove-it-again" bias at a

rate 25 percentage points higher than white men. Women of color reported being held to higher standards than their colleagues at a level 32 percentage points higher than white men. The research report also showed that men of color and women of all races receive clear messages that they do not fit people's image of a lawyer. Women of color reported they had been mistaken for administrative staff, court personnel, or janitorial staff at a level 50 percentage points higher than white men. This was the largest reported difference in the entire study. White women reported this bias at a level 44 percentage points higher than white men. Lastly, men of color reported the "prove-it-again" bias at a level 23 percentage points higher than white men.

Concerning the "tightrope" bias, women of all races reported pressure to behave in feminine ways, and they reported receiving backlash for exhibiting masculine behaviors. Women of all races reported higher loads of non-career-enhancing "office housework" than men. For example, white women reported doing more administrative tasks (such as taking notes) at a level 21 percentage points higher than white men. Women of color reported doing more of this type of "office housework" at a level 18 percentage points higher than white men.

Research also showed there is a significant bias against mothers reported – and against fathers who take parental leave. Women of all races reported they were treated worse after they had children. They were passed over for promotions, given low-quality assignments, demoted or paid less, and they were unfairly disadvantaged for working part-time or with a flexible schedule. Women also observed a double standard between male and female parents. White women reported their commitment or competence was questioned after they had kids at a level 36 percentage points higher than white men. Women of color reported this at a level 29 percentage points higher than white men. About half of people of color (47 percent of men of color and 50 percent of women of color) and 57 percent of white women agreed that taking family leave would have a negative impact on their careers. A bit surprisingly, 42 percent of white men agreed, indicating the flexibility stigma surrounding leave affects all groups, including majority men groups.

Most of the biggest findings of the survey had to do with bias existing in the basic business systems of attorneys' workplaces. Women and people of color reported higher levels of bias than white men regarding equal opportunities in getting hired, receiving fair performance evaluations, being mentored, receiving high-quality assignments, accessing networking opportunities, getting paid fairly, and getting promoted. In other words, gender and racial bias was reported in all seven basic workplace processes. In almost every workplace process, women of color reported the highest levels of bias. For example, women of color reported they had equal access to high-quality assignments at a level 28 percentage points lower than white men. Similarly, women of color also reported they had fair opportunities for promotion at a level 23 percentage points lower than white men. As a trend throughout the report, women of color reported the highest levels of bias overall.

Turning to the research study's findings related to compensation, large amounts of bias were reported by both white women and women of color, and these were some of the widest gaps in experiences described in the report. The gender pay gap in law has received significant media attention, but much less attention has been paid to bias in compensation systems. Similarly, the racial element of the gender gap is rarely discussed and demands much closer attention. Women of color agreed their pay is comparable to their colleagues of similar experience and seniority at a level 31 percentage points lower than white men. White women agreed at a level 24 percentage points lower than white men. In the same vein, when respondents were asked if they were paid less than their colleagues of similar experience and skill level, women of color agreed they were paid less at a level 31 percentage points higher than white men. White women agreed they were paid less at a level 24 percentage points higher than white men.

Since so much attention is placed on the partner pay gap, in-house is thought to be a more equitable environment for women in terms of pay. However, the report's data suggests this may not be the case. Surprisingly, in-house white women reported roughly the same level of compensation bias as their law firm counterparts. Looking at the differences between law firm and in-house experiences generally,

women of all races and men of color reported lower levels of bias in-house than in law firms. Conversely, white men reported lower levels of bias in law firms than in-house.

The Commission and MCCA's research report also briefly addressed sexual harassment. Findings showed about 25 percent of women, only seven percent of white men, and 11 percent of men of color reported they encountered unwelcome sexual harassment at work. This included unwanted sexual comments, physical contact, and/or romantic advances. Interestingly, sexist comments, stories, and jokes appear to be widespread in the legal profession, with more than 70 percent of all groups reportedly having encountered these. Finally, about one in eight white women, and one in ten women of color reported having lost career opportunities because they rejected sexual advances at work.

Despite the overwhelming evidence that implicit bias is commonplace in the legal profession, the great news is that it can be interrupted. Stereotype activation is automatic, so unfortunately we cannot stop our brains from making assumptions. However, stereotype application can be controlled, meaning we can control whether we act on our assumptions. The report distills its research into Bias Interrupter Toolkits that provide easily implementable, measurable tweaks to existing workplace systems in order to interrupt racial and gender bias in law firm and in-house departments. Ultimately, these bias interrupters could not just level the playing field for women and attorneys of color; they can also help individuals with disabilities, professionals from nonprofessional families, and introverted men in the legal workplace.

The benefits of interrupting bias are abundant, as incremental steps can improve law firm and in-house diversity in ways that yield well-documented business benefits. Research shows diverse workgroups perform better and are more committed, innovative, and loyal. Gender-diverse workgroups have higher collective intelligence, which improves the performance of both the group and of the individuals in the group, leading to better financial performance results. Racially diverse workgroups consider a broader range of alternatives, make better decisions, and are better at solving problems. Lastly, if bias goes unchecked, it affects a wide variety of groups, including modest or introverted men, members of the LGBTQ community, individuals with disabilities, professionals from nonprofessional backgrounds, women, and people of color.

Part 2 of this series will identify the toolkits that can interrupt bias.

[1] https://www.americanbar.org/content/dam/aba/administrative/women/Updated%20Bias%20Interrupters.authcheckdam.pdf

INTERRUPTING BIAS IN THE LEGAL WORKPLACE – PART 2

January 14, 2020

By Tiye Foley, former Baker Donelson Associate[1]

This article is Part 2 of a two-article series. Part 1 discussed four main patterns of racial and gender bias in the legal profession, as identified in a report developed by the American Bar Association's Commission on Women in the Profession, the Minority Corporate Counsel Association, and the University of California, Hastings College of Law.[2] Part 2 identifies and demonstrates two cutting-edge toolkits employers can implement to interrupt racial and gender biases in their own workplaces. More specifically, we will explore easily implementable, measurable tweaks to existing workplace systems that can interrupt racial and gender bias in law firms and in-house legal departments.

The report outlines a three-step approach to successfully interrupt bias in hiring, assignments, performance evaluations, compensation, and sponsorship. For demonstration purposes, we will discuss the approaches used to interrupt bias in law-firm hiring and in performance evaluations for in-house legal departments.

Both approaches include three basic steps: (1) using metrics, (2) implementing bias interrupters, and (3) repeating steps one and two as needed. Organizations routinely use metrics to assess progress toward any strategic goal. Metrics can help an organization pinpoint where bias exists and assess the effectiveness of ongoing measures. For each metric, employers should examine whether patterned differences exist between majority men, majority women, men of color, and women of color, including any other underrepresented group that the organization tracks, such as military veterans or members of the LGBTQ community. All bias interrupters should apply to both written materials and meetings, where relevant. Because every organization is different, not all interrupters will be relevant; that said, consider the following interrupters more of a menu.

Interrupting Bias in Law-Firm Hiring

To demonstrate potential biases in hiring and the challenges to interrupting these biases, the report noted the following case study: when comparing identical resumes, "Jamal" needed eight more years of experience to be considered as qualified as "Greg;" mothers were 79 percent less likely to be hired than otherwise identical candidates without children; and "Jennifer" was offered $4,000 less in starting salary than "John."

To interrupt these biases, the Law Firm Toolkit directs organizations to first use (in part) the following metrics:

track the candidate pool through the hiring process from initial contact, to resume review, to interviewers, to hiring;

analyze where underrepresented groups are falling out of the hiring process;

track whether hiring qualifications are waived more often for some groups;

track interviewers' reviews and/or recommendations to ensure they are not consistently rating majority candidates higher than others; and

track metrics by individual supervising attorney, department and/or office, and the firm as a whole.

In addition, organizations should implement bias interrupters to empower those involved in the hiring process to spot and interrupt bias. This can be achieved by appointing bias interrupters (HR professionals or team members) and training them on how to spot bias. More information about this training is available at BiasInterrupters.org. The appointed bias interrupters should be involved at every step of the hiring process. After appointing and empowering bias interrupters, organizations should assemble a diverse pool of candidates by:

- limiting referral hiring;
- tapping diverse networks;
- considering candidates from multitier schools;
- getting the word out to diverse candidates;
- changing the wording of job postings (using masculine-coded words like "leader" and "competitive" tends to reduce the number of women who apply); and
- insisting on a diverse pool if search firms are used in the hiring process.

Once a diverse pool is assembled, organizations should implement bias interrupters in the resume review process. BiasInterrupters.org offers a resource – "Identifying Bias in Hiring Worksheet" – that identifies common forms of bias that can affect the hiring process. Organizations should focus on qualifications that are important when making hiring decisions and require accountability. When qualifications are waived for a specific candidate, a record should be maintained that explains why those qualifications are no longer important and identifies the candidates who received the waiver. Resumes must be graded on the same scale, for example, the report suggests employer remove extracurricular activities from resumes, as they can artificially disadvantage class migrants and increase class-based bias. Resume reviewers should avoid inferring family obligations (i.e., train people not to make inferences about whether someone is committed to the job due to parental status and not to count gaps in a resume as an automatic negative). Employers should also use "blind auditions." For example, if women are dropping out of the pool at the resume review stage, consider removing demographic information from resumes.

Employers are further instructed to interrupt bias in the interview process through structured interviews wherein interviewers ask the same questions to all candidates, and only ask those questions that are directly relevant to the position. Employers should ask performance-based questions, which are a strong predictor of a candidate's potential for success. Organizations should also consider behavioral interviewing by asking questions that reveal how candidates have dealt with prior work experiences. Employers are encouraged to engage in work-sample screening by requiring candidates to submit examples of their prior work. Developing a consistent rating scale will help decrease bias in the interview process. Lastly, if "culture fit" is a criterion for hiring, employers should provide a specific work-relevant definition.

Once steps one (using metrics) and two (implementing bias interrupters) are accomplished, employers should repeat these steps as needed. For example, organizations should return to their key metrics and assess whether there are any noticeable changes. If employers do not observe a change, they should implement stronger bias interrupters, or consider if they are targeting the wrong stage in the process. This third step should be applied in an iterative manner until metrics improve.

As previously noted, the report not only provides a three-step approach to interrupting bias in law-firm hiring; it also provides a detailed approach as to assignments, performance evaluations, compensation, and sponsorship. For a comprehensive, step-by-step outline on these topics, please refer to the Commission and MCCA's full report.

Interrupting Bias in Performance Evaluations for In-House Legal Departments

Next, we will explore the In-House Toolkit and discuss how to interrupt bias in performance evaluations in legal departments. To provide context for this discussion, the report cites the following case study:

Law firm partners were asked to evaluate a memo by a third-year associate. Half the partners were told the associate was black; the other half were told the identical memo was written by a white associate. The partners found 41% more errors in the memo they believed was written by a black associate as compared with a white associate. Overall rankings also differed by race. Partners graded the white author as having "potential" and being "generally good," whereas they graded the black author as "average at best."

Bias in the evaluation process spans across industries and is not limited to law firms. The report notes an informal study in the technology industry that revealed 66 percent of women's performance reviews included negative personality criticism. Conversely, such criticism was contained in only one percent of men's reviews.

To tackle bias in performance evaluations, in-house legal departments should first use the following metrics:

track whether performance evaluations show consistent disparities by demographic group;

analyze whether employees' ratings fall after they have children, after they take parental leave, or after they adopt flexible work arrangements;

track whether the same performance ratings result in different promotion or compensation rates for different groups; and

keep metrics by individual supervisor, department, and country, if relevant.

For each metric, organizations should examine if patterned differences exist between majority men, majority women, men of color, women of color, and any other underrepresented group the company tracks, such as veterans, individuals with disabilities, and people who identify as LGBTQ.

Organizations should next implement bias interrupters to empower those involved in the evaluation process to spot and interrupt bias. Organizations should appoint HR professionals or department team members as bias interrupters and provide them with special training to spot bias, involving them at every step of the evaluation process.[3] Once companies designate and empower bias interrupters, organizations should tweak their performance evaluation forms as needed. The report suggests a variety of tweaks, including the following:

- Evaluation forms should begin with clear and specific performance criteria directly related to job requirements (e.g., instead of "He writes well," try "He writes clear memos to clients that accurately portray the legal situations at hand.")
- Companies should instruct reviewers to justify their ratings and provide supporting evidence, ultimately holding reviewers accountable. Bare ratings lacking specifics facilitate bias and do not provide constructive advice to the employees.
- Ensure any evidence used to support a rating pertains to the current evaluation period (e.g., mistakes made two years ago are not acceptable evidence of a poor rating today).
- Separate discussions about potential and performance. Reviewers tend to judge majority men on potential, whereas others are typically judged on performance.
- Separate personality issues from skill sets. Reviewers tend to accept a narrower range of behavior from women and people of color than from majority men.

Once bias interrupters are appointed and empowered and an organization's performance evaluation form is tweaked, the In-House Toolkit recommends that companies tweak the performance evaluation process itself. Suggested tweaks include helping employees effectively advocate for themselves ("Writing an

Effective Self-Evaluation" is available at BiasInterrupters.org); setting up more formal systems for sharing successes within your in-house department (rather than including self-promotion in the evaluation process), such as monthly emails highlighting employees' accomplishments; providing a bounceback[4] to ensure individual supervisors' reviews do not show bias toward or against a particular group (consider asking HR to perform the necessary analysis); ensuring appointed bias interrupters play an active role to spot and correct instances of bias (such as in rankings calibration meetings with management); and maintaining formal performance appraisal systems, rather than using informal, on-the-fly systems that have a tendency to reproduce patterns of bias.

Once organizations perform steps one (using metrics) and two (implementing bias interrupters), the third step involves repeating steps one and two as needed using an iterative process until metrics improve.

A key takeaway from the report is the need for both law firms and in-house legal departments to implement a deliberate, calculated, and disciplined approach to overcoming racial and gender bias in the workplace. Traditional approaches simply are not achieving quantifiable results, and this new generation of bias-interrupters provides a promising avenue towards success. Firms and in-house departments are encouraged to remain committed to knocking down barriers that perpetuate workplace biases, and we are proud to explore the Commission and MCCA's Research Report so that the legal profession continues marching towards workplace equality.

[1] Ms. Foley is currently an Attorney at Exxon Mobil Corporation.

[2] https://www.mcca.com/wp-content/uploads/2018/09/You-Cant-Change-What-You-Cant-See-Executive-Summary.pdf

[3] As previously noted, employers can find more information about training their appointed bias interrupters at BiasInterrupters.org.

[4] A "bounceback" is when someone talks through a supervisor's reviews with him or her because the supervisor's performance evaluations show persistent bias.

Business Of Law (Https://Businesslawtoday.Org/Practice-Area/Business-Of-Law/)

The Evolution of Mentorship in Legal Professional Development

13 Min Read

By: Rafael X. Zahralddin-Aravena (/author/rafaelxzahralddinaravena/)

| March 19, 2020

IN BRIEF

- When it comes to training of young lawyers, internal programs have had poor to mixed results.
- More than mentorship programs, sponsorship has become especially popular in law firms.
- How can your firm achieve the best results for young lawyers through sponsorship?

Lawyers have different professional development obligations at each stage of their career.[1] Despite that evolutionary arc, there is one constant: the best lawyers are engaged in life-long learning. Many firms have formalized the elements of the traditional training that young lawyers historically, and often organically, received from partners and other more senior lawyers within the firm. Whether by such internal training methods or going outside the firm to hear from special consultants such as law professors or industry experts, or to participate in bar and trade associations, firms develop their lawyers in a variety of ways. In addition, seasoned lawyers equally benefit from helping to train other lawyers, whether inside or outside their firm.

One of the more prevalent law firm initiatives related to professional development for younger lawyers has been assigning mentors and encouraging participation in organizations like the American Bar Association to seek outside mentoring within its ranks. Research from the Center for Talent Innovation (CTI), a well-known think tank with a research focus in this area, shows that the vast majority of women (85 percent) and multicultural professionals (81 percent) need "navigational help" inside organizations.[2] Most law firms have some sort of internal mentoring program, and many local and state bar associations also have long-standing programs, several of which are at least in part able to trace their origins to an attempt to develop or retain women and lawyers of color.[3] Despite the availability and proliferation of mentorship programs, mentorship alone has been ineffective in helping to maximize the talent hired by law firms, and the investment in young lawyers, especially women and lawyers of color, continues to dissipate.[4]

The big push for mentorship programs is not only among law firms, but also within trade and professional associations, including bar and affinity associations, and in programs that have been created to assist in creating pipelines for potential law students. Mentorship can be defined as either one-on-one relationships between an experienced lawyer and another lawyer, law student, or potential law student, or it can be executed in a group setting. Individuals meet in person, via emails, or on calls, and the meetings can be on a regular schedule or on an ad hoc basis. Group mentorship programs can be especially helpful and can take the form of skills training in networking, relationship development, interviewing, professionalism, evaluations, and how to take advantage of opportunities to develop an industry or practice expertise.

Mentorship programs, especially in trade organizations, bar associations, and with young students, have been especially effective. Especially in communities of color and of women, a lawyer taking the time to visit or work with potential future lawyers is extremely impactful. When one of those lawyers or even a group of lawyers are lawyers of color or are women, it is especially important because their mere presence demonstrates to female students or students of color that they themselves can be a lawyer or a judge. These anecdotal remarks are backed up by teachers and students who confirm the effect on them and their classmates of these mentoring programs.[5] Similar success can be seen in the efforts by bar associations and trade groups to mentor young professionals. Both of these types of success stories have one thing in common: external mentoring programs. By comparison, internal programs have had poor to mixed results.

SHORTCOMINGS IN MENTORING PROGRAMS

Despite the success of mentorship for students of all ages, the problem with mentorship programs within law firms has often been the execution of the mentor's duties. Oftentimes the mentor will report on progress to firm administration, and mentors are not always advocating for their mentees. Indeed, some mentorship programs are seen with suspicion by associates, either as part of the firm's apathetic bureaucracy, or part of the firm's self-interested management.[6] A new concept has developed out of this discord and mistrust in the value of a *sponsor,* as opposed to a mentor, in the context of advancement within an organization and the role mentorship can play in that context.[7][8] On the contrary, mentors play a continuing and important role in professional development and, for example, help map out the unwritten rules and practices in an organization and pave the way for a sponsor.[9]

SPONSORSHIP AS THE CURE TO FAILED OR FALTERING MENTORSHIP PROGRAMS

Sponsorship has become especially popular in law firms. Many law firms have been criticized for not retaining lawyers of color and women. In the post-mortem analysis of "why," it was found that key advantages related to professional development have not historically been provided to lawyers of color or women. For example, partners have provided the best assignments and, thus, one of the best professional development opportunities, to those they have chosen to informally mentor, which oftentimes were lawyers of the same peer groups, race, or gender as the partner. Institutionalized mentorship programs that work in tandem with a dedicated commitment to sponsorship

by firm management could be the cure to the fatigue that many firm mentorship programs are currently experiencing.

Maryann Baumgarten, the head of Tech Diversity Business Partners at Facebook, has written a wonderful comparison of the key elements of being a mentor as opposed to a sponsor that illustrates where sponsorship can both add to the efficacy of existing mentorship programs, as well as become the next step in the evolution of such programs.[10] A mentor is anyone with experience who can support a mentee on how to build skills, professional demeanor, and self confidence in the workplace, whereas a sponsor is a senior member of management invested in the protégé's success. Mentoring tends to be more general, whereas sponsorship is tailored to the protégé and involves using the influence and the networks of the sponsor to provide access to key assignments, people, and responsibility. Mentors help a mentee develop a career vision; sponsors drive that vision. Mentors will give suggestions on how to create a network; sponsors will open up their network to the protégé. Mentors will provide advice on visibility by encouraging the mentee to seek out key projects and people; sponsors will use their own platforms and mediums to provide direct exposure to the protégé.

SPONSORSHIP IS THE GIFT THAT KEEPS ON GIVING

Many firms will ask, "What is in it for me?" Sponsorship is an active and engaged relationship; the protégé has just as many responsibilities and commitments to the relationship as the sponsor. The protégé must perform well, demonstrate loyalty to the firm and sponsor, and actively look to enhance the team brand.[11] CTI has researched the issue of job

satisfaction for sponsors and finds that a sponsor with protégés has far greater job satisfaction (11 percent) than those who have not worked to develop new talent.[12] In terms of retention objectives, sponsors of color have reported 30 percent more job and career satisfaction than those who do not have the same following of protégés.[13] In many ways, you can see this in the legal profession directly and poignantly in the legions of law clerks that have worked with our judiciary. It is a well-known and chronicled aspect of clerking that there is a bond between the judges and their clerks that survives deep into their respective careers.[14] Even closer to the bottom line, an important update to CTI's research published in 2019 reported that 66 percent of sponsors were confident with their ability to deliver on difficult projects with their teams, and only 53 percent of nonsponsors had the same confidence.[15]

"My crown is in my heart, not on my head; Not decked with diamonds and Indian stones, Nor to be seen. My crown is called content: A crown it is that seldom kings enjoy."[16]

The weakness of a sponsorship program is that it requires leadership from the sponsor. The most important aspect of that leadership is to advocate for the promotion of the protégé. CTI's latest research shows that of the one in four employees that identify themselves as sponsors, only 27 percent are advocating for their protégés, and to the point of this article, 71 percent of the sponsors have protégés who are the same race or gender as they are.[17] Probably just as applicable as the quote above from *Henry VI* could be the quote from *Romeo and Juliet*: "What's in a name? That which we call a rose by any other name would smell as sweet."[18] Leadership has often been defined as the art of motivating a group of people to act toward achieving a common goal. Kevin Kruse in a 2013

Forbes article dismisses the notion that leadership is defined by seniority or hierarchy, titles, extroverted charisma, or being part of management.[19] He takes a mild shot at Peter Drucker, who has been quoted as saying, "The only definition of a leader is someone who has followers," dismissing it as "too simple."[20] He then castigates and rejects the definitions of leadership put forth by no less than Warren Bennis (leadership is translating vision into reality), Bill Gates (leaders will be those who empower others), and John Maxwell (leadership is influence—nothing more, nothing less).[21] Instead, Kruse's definition of leadership is "a process of social influence, which maximizes the efforts of others, towards the achievement of a goal."[22] He emphasizes that leadership comes from social influence, not authority; requires others; does not rely on charisma or another personal trait (as leaders can come in all varieties); and focuses on a goal—and is not influence for the sake of influence—and does so by making the most of others' talents.[23] Kruse's definition punctuates and sums up one of the most effective executions of professional development programs: the marriage of mentoring and sponsorship, which managers in law and business should take to heart based on their collective experience in making the most of the talented professionals that they hire, train, and hope to retain.

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[1] Director and practice chair, Elliott Greenleaf, P.C. Thank you to Courtney Snyder, business development director for Elliott Greenleaf, P.C.'s Delaware office, and Sarah Denis, Esq., for their assistance in the editing of this article.

[2] Sylvia Ann Hewlett, Melinda Marshall & Laura Sherbin *with* Barbara Adachi, *Sponsor Effect 2.0: Road Maps for Sponsors and Protégés*

(https://www.talentinnovation.org/publication.cfm?publication=1330), Center for Talent Innovation (last accessed Feb. 25, 2020).

[3] The National Legal Mentoring Consortium lists a wide range of programs, including law firm, law school, ethics-based, local bar, and state-based. National Legal Mentoring Consortium, Mentoring Programs - Law Firms (http://www.legalmentoring.org/mentoringprograms.php?id=30) (Feb. 20, 2020). Organizations like the American Bar Association have extensive mentorship programs among the wealth of available professional development opportunities, including the Business Law Section Fellows Program and Business Law Section Diversity Clerkship Program.

[4] Endemic issues with lack of retention of women and minorities are not exclusive to the legal profession and have been the subject of many studies and articles about management in this area. *See* Joan C. Williams & Marina Multhaup, *For Women and Minorities to Get Ahead, Managers Must Assign Work Fairly*, Harvard Bus. Rev. (last accessed Feb. 25, 2020). An excellent overview of why diversity is important to the bottom line of law firms is Sheryl L. Axelrod's *Banking on Diversity: Diversity and Inclusion as Profit Drivers—The Business Case for Diversity* (https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2014/diversity-inclusion-profit-drivers/), americanbar.org (last accessed Feb. 25, 2020).

[5] The Leadership Council on Legal Diversity, which consists of more than 320 corporate chief legal officers and law firm managing partners, runs a leadership development program known as the LCLD Fellows, which debuted in 2011. The program works by identifying high-potential attorneys from diverse backgrounds with the objective of the Fellows

becoming leadership within their organizations. The author was fortunate enough to serve on the fellows Alumni Council as the community outreach co-chair. He has first-hand knowledge of the profound impact of mentorship programs on communities of color and on women, especially in a group session with young students who are first-generation citizens, potential first-generation college students, and potential first-generation law students.

[6] *See, e.g.*, Malaika Costello-Dougherty, *We're Outta Here* (https://dailyjournal.com/articles/256818-we-re-outta-here), Daily J. (last accessed Feb. 25, 2020).

[7] *See, e.g.,* Hewitt, S.A., *Forget a Mentor, Find a Sponsor: The New Way to Fast-Track Your Career*, Harvard Bus. Rev. Press, Sept. 2013.

[8] Sylvia Ann Hewitt, CEO of the Center for Talent and Innovation, a think tank based in New York, also chairs the Task Force for Talent Innovation, which is comprised of 75 global companies that focus on maximizing talent in corporations.

[9] Dan Schawbel, *Sylvia Ann Hewlett: Find a Sponsor Instead of a Mentor* (https://www.forbes.com/sites/danschawbel/2013/09/10/sylvia-ann-hewlett-find-a-sponsor-instead-of-a-mentor/#7ef454181760), Forbes (last accessed Feb. 25, 2020).

[10] Stanford University, The Key Role of Sponsorship (https://inclusion.slac.stanford.edu/sites/inclusion.slac.stanford.edu/files/The_Key_Role_of_a_Sponsors Feb. 25, 2020; *see also* Katherine Hansen, *From Mentor to Sponsor: Enlisting Others to Help Boost Your Life Sciences Career* (https://www.biospace.com/article/from-mentor-to-

sponsor-enlisting-others-to-help-boost-your-life-science-career/), biospace.com (last accessed Feb. 25, 2020).

[11] Schawbel, *supra* note 9.

[12] Schawbel, *supra* note 9.

[13] Schawbel, *supra* note 9.

[14] *See, e.g.*, Andrew Cohen, *Real Mentorship: Do Judges and Law Clerks Still Do This* (https://www.theatlantic.com/national/archive/2011/05/real-mentorship-do-judges-and-law-clerks-still-do-this/238892/) (last accessed Feb. 25, 2020) ("Even lawyers and law students who have heard about Judge Hand probably don't know that in addition to his stewardship of the 2nd Circuit for decades he also sort of invented the modern-day practice of federal judicial clerkships, which are nearly 100 years later still the gold standard in legal apprenticeship. . . . Most of [Judge] Hand's clerks, fresh out of law school, were startled to find this experienced jurist; a near mythic figure, a household word to every law school graduate, the master judge of his generation, asking for help and insisting on candid criticism and continuous oral participation in the decision process. Was it really conceivable, they would wonder, that [Judge] Hand was seriously interested in their views when they were just months away from the classroom? . . . As the clerks got to know [Judge] Hand better, most realized that he was entirely serious about his constant prodding to elicit critical analysis, and that this unique way of working with his clerks was part and parcel of his distinctiveness as a judge."); *see also* NALP, Clerkship Study Alumni Law Clerk Survey (https://www.nalp.org/clrkfind4?print=Y#experience) (last accessed Feb. 25, 2020) ("As expected, the relationships in their own judge's chambers—their

judge (87%), the other law clerks (71%) and the administrative staff (67%)—proved to be the most significantly enhanced. In addition, they developed relationships with other chambers, most reporting that their relationships with other judges, law clerks, and court personnel were also moderately or significantly enhanced."); Chambers Associate, *Clerkships* (https://www.chambers-associate.com/where-to-start/clerkships), chambers-associate.com (last accessed Feb. 25, 2020) ("Clerks also build up a valuable network among members of the Bar, other clerks and judges. This comes in handy when practicing in the same state or district as the judge."); Laura B. Bartell, *A Splendid Relationship - Judge and Law Clerk* (https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=5386&context=lalrev), 52 La. L. Rev. 6 (July 1992) (last accessed Feb. 25, 2020) ("The partnership between a federal judge and the judge's clerk can be a splendid and mutually rewarding relationship."); Grace Renshaw, *The Best Legal Job You'll Ever Have* (https://law.vanderbilt.edu/alumni/lawyer-vol40num2/clerkships.html), 40 Vanderbilt Law. 2 (last accessed Feb 25, 2020) ("She also gained two permanent advantages from her year as a clerk: a lifetime mentor and membership in a close-knit "family" of other former clerks. 'Judge Collier is an amazing mentor to his law clerks,' Johnson said. 'He spent a lot of time talking with us and really seemed to enjoy the teaching aspect. He's very patient and has a great understanding of the role that a clerkship plays in cultivating a young attorney's career.'").

[15] Center for Talent Innovation, Sponsor Dividend (https://www.talentinnovation.org/publication.cfm?publication=1640) (last accessed Feb. 25, 2020). This survey was conducted by NORC at the University of Chicago under the auspices of the Center for Talent

Innovation (CTI), a nonprofit research organization. NORC was responsible for the data collection, whereas the CTI conducted the analysis.

[16] William Shakespeare, Henry the VI, Pt. III, Act III, Scene I.

[17] Center for Talent Innovation, *supra* note 15.

[18] William Shakespeare, Romeo and Juliet, Act II, Scene II.

[19] Kevin Kruse, *What is Leadership?* (https://www.forbes.com/sites/kevinkruse/2013/04/09/what-is-leadership/#4f2cec2e5b90), Forbes (last accessed at Feb. 25, 2020).

[20] *Id.* To be fair, Kruse states in full that: "Drucker is of course a brilliant thinker of modern business but his definition of leader is too simple."

[21] *Id.*

[22] *Id.*

[23] *Id.*

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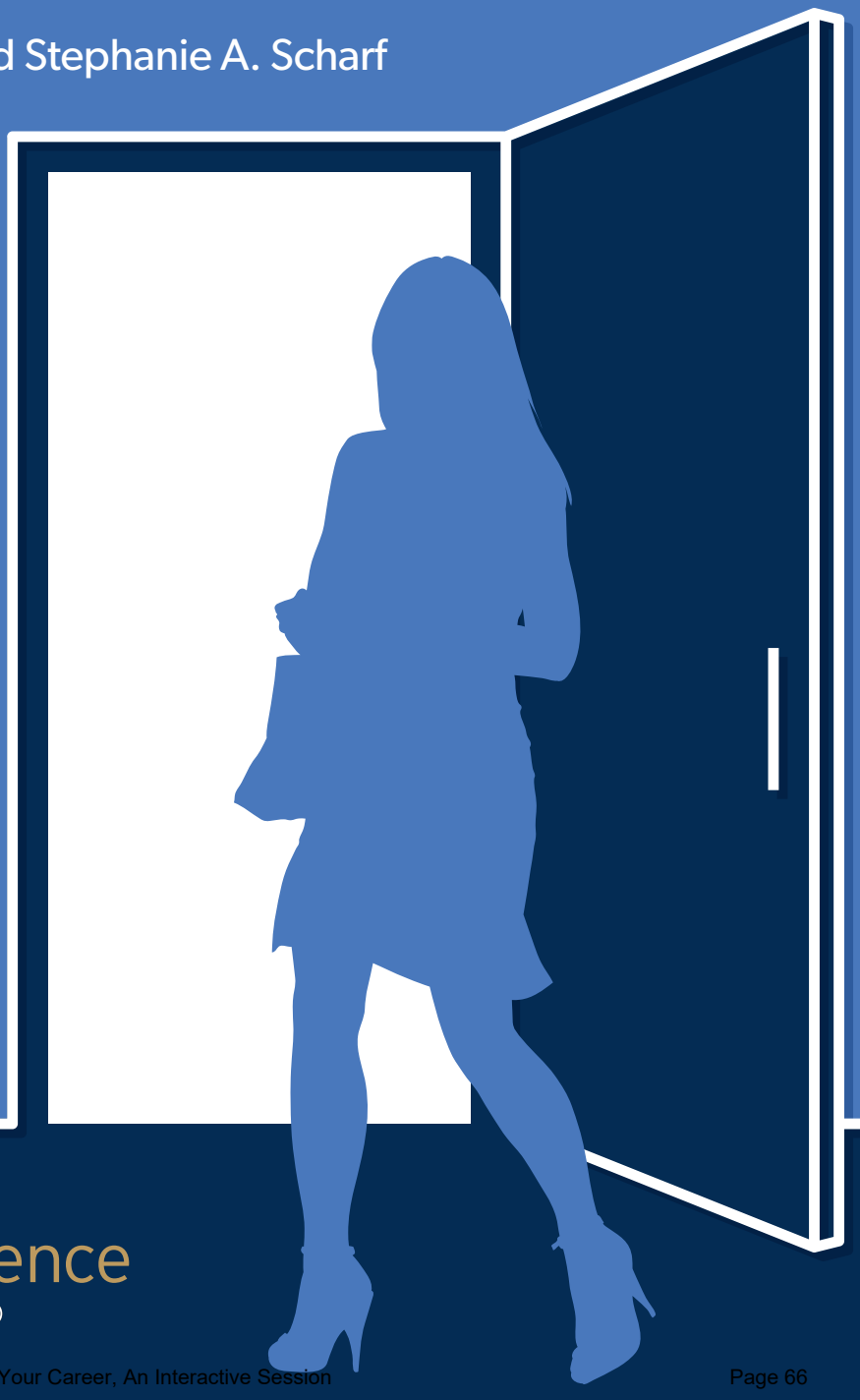

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THE FACTS, FIGURES, AND FUTURE OF EXPERIENCED WOMEN LAWYERS IN PRIVATE PRACTICE

BY ROBERTA D. LIEBENBERG AND STEPHANIE A. SCHARF

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A Note from the Authors

In 2017, then-ABA President Hilarie Bass launched a Presidential Initiative on Achieving Long-Term Careers for Women in Law, and we were honored to be appointed as its Co-Chairs. This groundbreaking initiative was begun because of the troubling fact that far too many experienced women lawyers are leaving the legal profession when they are in the prime of their careers and should be enjoying the most success. To examine and help solve that problem, the initiative sponsored a number of innovative research studies, including this one, which focuses on the nation's largest firms and was conducted in cooperation with ALM Intelligence.

BigLaw is no stranger to the loss of experienced women attorneys. While entering associate classes have been comprised of approximately 45% women for several decades, in the typical large firm, women constitute only 30% of non-equity partners and 20% of equity partners. Women lawyers face many other challenging hurdles as they seek to advance into senior roles: the number of lawyers named as new equity partners at big firms has declined by nearly 30% over the past several years, and firms are increasingly relying on the hiring of lateral partners, over 70% of whom are men.

The departure of senior women lawyers is unfortunate not only for women who sought to carve out long-term careers in private practice, it is also a growing problem for law firms and their clients. Law firms devote substantial time and resources to the hiring and training of their women lawyers, and that investment is lost when senior women leave. A firm's relationship with the clients of departing women necessarily suffers, and the clients lose valuable and trusted legal advisors who know their business and legal needs. The attrition of experienced women lawyers leaves law firms without a critical mass of senior women who can participate in key leadership roles; creates a dearth of senior women to serve as first chairs at trial and leads on deals, which clients are increasingly insisting upon in their outside firms; deprives firms of much-needed gender diversity at senior levels; and deprives younger women lawyers of role models and sponsors.

The critical question, of course, is why? What is it about the experiences of women in BigLaw that result in such different outcomes for women than men, and why do even senior women lawyers have so many more obstacles to overcome? These core questions drove this first-of-its-kind study and provided eye-opening data on the everyday work experiences of senior women and men in large firms through the perspective of more than 1,200 big firm lawyers who have been in practice for at least 15 years. The research was multidimensional. We measured various aspects of big firm practice and opportunities for success from the viewpoint of senior women, senior men, and managing partners.

Our work was guided by three related issues:

1. What are the everyday experiences that contribute to the success of women and men in big firm practice?
2. Why do experienced women stay in large firms and why do they leave?
3. What are law firms doing to advance women into the top echelons of leadership, what actually works, and where is innovation needed?

The results offer a great deal of new information that can be used by firms to understand and reframe the effects of their policies, practices, cultures, and unwritten rules, all of which affect who succeeds and who does not. As examples, the data show that women in large firms have far less access to the building blocks for success than men. Experienced women lawyers report that, *on account of their gender*, they are significantly more likely than their male counterparts to be overlooked for advancement; denied a salary increase or bonus; denied equal access to business development opportunities; become subjected to implicit biases, double standards, and sexual harassment; be perceived as less committed to their careers; and more. Another striking finding is the sharp disparity in how senior women perceive their firm's commitment to advancing women, compared to the perceptions of managing partners and senior male attorneys. We found markedly different perspectives by gender on such factors as perceptions of whether firm leaders are active advocates of gender diversity (91% men v. 62% women agree), whether respondents' firms are succeeding in advancing women into equity partnership (78% men v. 48% women agree), whether firms actively promote women into leadership roles (84% men v. 55% women agree), and whether firms work to retain experienced women lawyers (74% men v. 47% women agree). This "men are from Mars, women are from Venus" dichotomy underscores the importance of implementing—not just talking about—real changes to the structure and culture of law firms.

Driven by the empirical results described in this report, we have formulated suggested best practices and strategies that law firms can adopt to retain and advance their senior women lawyers. We are hopeful that, over time, if these recommendations are followed, the vast majority of firms will eventually achieve gender parity in firm leadership, equity partnerships, and compensation, and ameliorate the disproportionately high rate of attrition of senior women from law firms.

We are way past the point where mere lip service to the goal of gender equality in the profession will suffice. All of us must act with a sense of urgency to take the long-overdue steps necessary to level the playing field for senior women lawyers, which is necessary for law firms to succeed in a market that is increasingly demanding not only a professed commitment to diversity and inclusion, but actual proof of success in achieving that objective.

Stephanie A. Scharf

Roberta D. Liebenberg

Foreword

As President of the American Bar Association during the 2017–2018 bar year, I had the opportunity to choose issues of concern across the justice system on which I would shine the light and focus the attention of the juggernaut of the ABA and its thousands of members. Along with the critical issues of wellness, the immigration crisis, and declining bar passage rates, none was of higher priority to me than examining and better understanding why women continue to experience such different professional experiences as practicing lawyers than their male colleagues. As a woman practicing in "big law" for more than 35 years, I certainly had my own assumptions as to why women remain frustrated due to their failure to reach the level of success in the profession of comparably, and even less, talented men. But we also knew that any hope of moving past our personal frustration at the glacial speed of movement toward gender parity in our profession would require that we collect data regarding the specific challenges that continue to impede women from achieving the success that they deserve.

With the able leadership of past and current Chairs of the ABA Commission on Women in the Profession, Roberta Liebenberg and Stephanie Scharf, a four-prong research initiative was developed to look at this issue from every possible direction. This report, the first of the four to be published, focuses on the perspective of women in practice for more than 15 years in this country's 350 largest firms. Better understanding the disconnect between their perceptions of what their firms have done well to close this gap, as compared to the perception of their Managing Partners as to what they think is working effectively, is a true eye opener as to just how much work remains to be done. The positive part of the story is that research such as that undertaken by the ABA and ALM Intelligence has the potential to really move the needle on making the professional experiences of men and women in our profession more comparable. The information gives us the roadmap we need to help address and eliminate those barriers that continue to prevent women from reaching their full potential as lawyers.

Identifying this issue obviously touched a nerve, as firms and corporate law departments generously contributed to our effort as soon as we articulated our plans for this research. Managing Partners across the country have reached out to describe their surprise that their well-intentioned efforts over the last 20 years, whether through the creation of Women's Initiatives and Diversity Committees, implicit bias training, or focusing on diverse pipelines of incoming attorneys, had not done more to even the playing field for women attorneys in their firms. The increasing insistence of clients on greater diversity in the leadership of their legal teams has only added to the recognition that firms need assistance in figuring out how to ensure that their firms provide women attorneys the same opportunity for success as that provided to their male attorneys. Working toward gender parity in the profession is no longer just a moral imperative; any law firm that hopes to compete, let alone succeed and excel, cannot move forward if it is leaving 50% of its talent at the door.

The critical information revealed in this study will hopefully be looked back on as the beginning of the end for women facing unequal challenges in the practice of law. Our profession deserves nothing less.

Hilarie Bass
Past President
American Bar Association

Foreword

Upon joining ALM in the summer of 2017, I (Patrick Fuller) was immediately asked to review survey questions for a joint study that ALM Intelligence was conducting with the American Bar Association on women in law. Specifically, then-ABA President Hilarie Bass launched a Presidential Initiative focused on Achieving Long-Term Careers for Women in Law. The numbers have been stunning in their disparity for years, as more than 50% of law school graduates are now women, and nearly 45% of Am Law 200 associate classes are female, and yet women somehow represent less than 25% of all Am Law 200 equity partners. Why the massive gap? And why have women been fleeing law firms and the legal profession in droves? This is what we set out to understand.

I gave my first speech on diversity in 2002 for the Minority Corporate Counsel Association. In the years that followed, I spoke often on both the need for a diverse and inclusive legal profession, as well as on the disappointing analytics that belied a seemingly indifferent profession. As the only son of a single mother, I witnessed first-hand the struggles that women faced in professional environments, from behavioral double-standards to the lack of advancement and recognition for achievements. My naivety was never greater than when I believed the legal profession would somehow be different, that the sheer nature of the profession, which blended both emotional and intellectual intelligence, would rise above the societal norms.

What I discovered is that the legal profession is very attractive to women, but that the attraction does not translate to retention, and this represents a far greater issue than most believe. Many professions struggle with attracting qualified professionals, only to find that once the professionals immerse themselves into a career, they commit to the advancement and evolution of their chosen profession. The legal profession, and specifically "big law", is at the other end of that spectrum. This begs many questions, but channeling our inner Simon Sinek, we first need to start with why. Why is the experience so different for women compared to men that women leave the profession? As men, what can we do to ensure that we help reverse the course to ensure that our daughters and granddaughters do not face the same challenges that our current colleagues and their predecessors faced?

We were very fortunate to partner with the ABA, and specifically Hilarie Bass, Stephanie Scharf, and Roberta "Bobbi" Liebenberg to embark on the quest for answers in an effort to develop solutions for a problem that has continued to expand in recent years.

- What are the everyday experiences that contribute to success for both men and women?
    - Understanding this is the first key question, as the divergent experiences for men and women begin nearly immediately.
- Why do experienced women lawyers stay in large law firms, and why do they leave?
- What are law firms doing to advance women into the power structure and key leadership echelons of firms?
- What actually works, and where is more innovation and commitment needed?

Over 1,200 senior attorneys and leaders responded to our questionnaire, with the responses revealing a number of insights which are captured in both the attached report and in the survey data available through ALM Intelligence's Legal Compass. In the period between the conducting of the research and the publishing of this study, the legal profession has experienced some important steps forward, with the adoption of the Mansfield Rule by many firms playing a key role.

This is a multifaceted problem that has been increasing in complexity for decades, and like similar challenges, there is not an easy or convenient answer. Rather, there are uncomfortable truths that we must address in order to move forward, which this study and report help bring to light.

Our goal in this report is to provide a factual, research-backed basis for action, and to facilitate change. The solution will happen through our collective actions, the policies we implement, and most importantly, our own personal attitudes, behavior, and commitment to change.

Patrick Fuller
Vice President
ALM Intelligence

Erika Maurice
Assistant General Counsel
ALM Media

Steve Kovalan, Esq.
Director of Research
ALM Intelligence

Walking Out The Door

THE FACTS, FIGURES, AND FUTURE OF EXPERIENCED WOMEN LAWYERS IN PRIVATE PRACTICE

BY ROBERTA D. LIEBENBERG[1] AND STEPHANIE A. SCHARF[2]

It has been over 40 years since women began entering the legal profession in large numbers. As the number of women lawyers increased, organizations began tracking the progress of women in private practice through regular surveys conducted by The American Lawyer,[3] the National Association of Women Lawyers,[4] Vault/MCCA,[5] and NALP.[6] The results are well known: each year, the surveys continue to show a significant under-representation of women in equity partner ranks and leadership positions. Year after year, women have comprised between 45% and 50% of entering law firm associates but nonetheless in 2018 account for just 20% of law firm equity partners.[7]

Even today, the rate of change is slow. According to the 2018 Vault/MCCA Law Firm Diversity Survey, which analyzed responses from 232 law firms, only 29% of new equity partners were women.[8] While firms continue to increase their partnership ranks through lateral partner hiring, in 2017 only 28% of the lateral partners hired were women.[9] Recent figures show that women constitute less than 25% of management committee members, practice group leaders, and office heads.[10]

At the same time, since 2015, the total number of partner promotions among AmLaw 200 firms has dropped by an astounding 29%.[11] In an effort to bolster their profits per equity partner statistics, many firms continue to reduce the number of equity partners. ALM Intelligence found that, among AmLaw 100 firms, the percentage of partners who are equity partners has steadily declined since 2000 and in 2018 those firms' partnerships were comprised of 56% equity partners and 44% non-equity partners.[12] As firms continue to move the goal posts further away by making equity partnerships ever more elusive, women will face an even more daunting challenge in attaining the highest levels of private practice. *The American Lawyer* has predicted that there will not be gender parity in terms of equity partners until 2181.[13]

Not only do women confront ever-shrinking partnership classes, their quest for equity partnership is rendered even more difficult by the fact that they tend to practice in subject areas which have lower billing rates and generate less attorneys' fees, rather than working in more lucrative "bet the company" commercial litigation, mergers and acquisitions, bankruptcy, and intellectual property law.[14] Women are far less likely than their male counterparts to be chosen as first chairs at trial[15] or as leads on corporate deals.[16] This in turn adversely impacts the ability of women lawyers to develop large books of business. While in the typical large firm, roughly one in three newly inherited client relationships are led by women partners, the process of achieving gender parity is slow: 80% of any given firm's relationship partners for its top 20 clients are men.[17] And men are overwhelmingly the top earners in large firms, with 93% of firms reporting that their most compensated partner is a man and of the 10 top earners in the firm, either one or none is a woman.[18]

It is clear that women lawyers on average do not advance along the same trajectory as men. While there is a perception that the gender gap occurs mostly in the early years before partnership decisions, in reality, the gender gap continues and even widens after partnership, and contributes to the disproportionately high rate of attrition of senior women lawyers. Indeed, women vote with their feet by leaving the practice of law. As a recent NALP report concluded: "The percentage of partners who are women or minorities has increased at least some every year, but the partnership ranks remain overwhelmingly white and male."[19]

Law firms are well aware of this problem and would like to take the necessary steps to close this gap. Studies of gender diversity in other professional settings show significant benefits and, conversely, a lack of diversity has negative effects.[20] The gender gap at senior levels of firms impacts law firm finances, client relationships, the ability to attract and maintain client business, and recruiting and retaining the best lawyers in the profession. Law firms devote substantial resources to hiring and training their lawyers, and the attrition of senior women lawyers causes substantial losses, both tangible and intangible. When senior women lawyers leave firms, the firm's relationship with those lawyers' clients suffer, there is a reduced range of legal talent to offer clients, a narrower base for firms and businesses to develop robust client relationships, a diminished ability to recruit and retain skilled women lawyers at all levels, and, ultimately, serious challenges to the firm's future growth and revenue.

It is evident that current policies and practices will not be enough to close the gender gap. To stem the attrition of senior women lawyers and ensure their critical mass in leadership positions requires an understanding about the everyday experiences of practicing law, and why women are not advancing at the same rate as men into the highest levels of private practice. Every firm has a culture defined by a mix of policies and practices, expectations, unwritten rules, implicit and explicit biases, and workplace demands – which in combination have negative and/or positive consequences for gender parity. Many components of a firm's culture are under the control of firm management and can be modified to achieve diversity goals. While there have been suggested best practices and policies about how to close the gender pay gap in private practice,[21] we believe there has been no systematic survey that looked simultaneously at the multiple factors impacting careers from the viewpoint of managing partners and women and men who have sustained long-term careers in firms.

For all of these reasons, we collaborated with ALM Intelligence to conduct surveys of experienced women and men practicing for 15 or more years in the nation's 500 largest firms, and to also survey a sample of managing partners from those firms. Our focus was on three main issues:

1. What are the everyday experiences that contribute to success for women and men in firm practice?
2. Why do experienced women stay in large firm practice and why do they leave?
3. What are law firms doing to advance women into the top echelons of firms, what actually works, and where is innovation needed?

Data-based answers to these questions not only provide a better understanding of the circumstances that advance or impede women's long-term careers in private practice, but also point to policies and practices that have a realistic chance for closing the gender gap.

Survey Methodology

Working with ALM Intelligence, we designed survey instruments and then surveyed a sample of managing partners and individual men and women who have practiced law for at least 15 years and are currently in private practice at the NLJ 500 law firms.[22]

The data reflected in this report are from the collaborative survey research project between the ABA and ALM Intelligence. The survey incorporated responses from 1,262 individuals, of whom 70% were women and 30% were men.[23] As might be expected, the percentage of women among the respondents declined as the seniority level of the respondents increased, although even in the cohort practicing 40+ years, 35% of respondents were women.[24] The respondents had a good distribution by years in practice, with the largest percentage of respondents practicing from 15 to 20 years (26%) and fewer respondents practicing more than 35 years (23%). Half the respondents (53%) were equity partners, with the remaining respondents about equally divided between non-equity partners and counsel/senior counsel. Respondents were from firms with single tier partnerships, two tier partnerships, and firms with three or more partner tiers. The number of lawyers of color in this sample was low, consistent with numbers in older cohorts.[25] As a result, we did not have enough respondents to do a separate analysis focusing on women lawyers of color.[26] Overall, the individual respondents appear to constitute a representative sample of experienced women and a representative sample of experienced men at the partner or counsel level in the nation's 500 largest firms. While there was substantial variation in non-response rates from question to question, the overall size of the sample allowed meaningful analyses of responses by individual female and male respondents to each question posed. We generally report results based on the number of respondents for a given question.

The fact that the sample includes a robust number of equity partners shows that senior men and women wish to contribute their views and voices for understanding the reasons for the gender gap, and want to be part of the solution. Unfortunately, we received a much lower level of interest from managing partners, only 28 of whom participated in the survey. One possible explanation for this lack of participation is management's recognition that their firms' gender diversity statistics are disappointing. Going forward, if the survey is repeated, we will take additional steps to encourage managing partners to provide their input on this very important issue.

Results And Recommendations

I. WHAT ARE THE EVERYDAY EXPERIENCES THAT CONTRIBUTE TO SUCCESS FOR MEN AND WOMEN IN FIRM PRACTICE?

A. THE CONCEPT OF ACCESS TO SUCCESS

Many lawyers in private practice think of law firms as meritocracies, where the best lawyers reach increasingly greater levels of success. We know, however, that perceptions of who is "best" and opportunities to succeed are not equally distributed.[27] Selection of people for key assignments as well as evaluations of their work are subject to various biases, such as similarity bias, confirmation bias, affinity bias and more.[28] Ironically, organizations that perceive themselves to be meritocracies "tend to have members with more bias than organi-

zations that do not. People who believe the firm is meritocratic tend to perceive themselves as unbiased and fair, which causes them to succumb more easily to unconscious biases."[29]

Our focus here was to measure whether senior women and men are afforded the same opportunities to succeed in private practice. To do so, we asked a series of questions about job satisfaction and experiences at work. With respect to some factors, women and men report highly similar experiences. That is especially true when examining satisfaction with the actual work that is performed and relationships with their colleagues. On the other hand, women report very different everyday experiences along a number of dimensions that we are calling "access to success"—factors that speak to how women generally are perceived and what opportunities they are given to climb up the ladder within their firm.

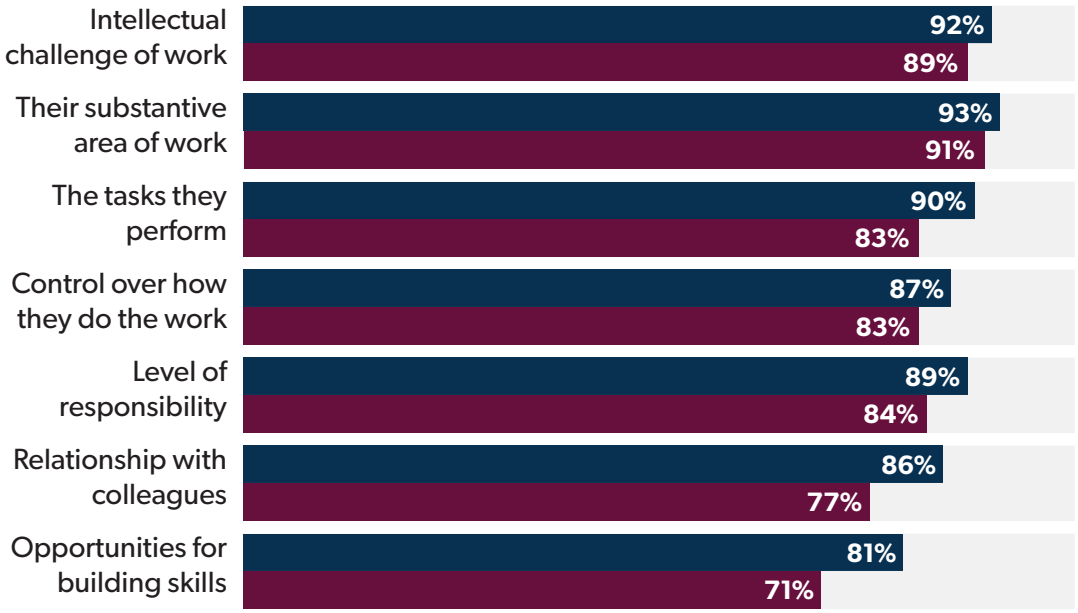
B. SATISFACTION WITH THE JOB

We asked women and men a series of questions about overall job satisfaction, and also about their satisfaction levels with specific components of the job.[30] With respect to our question on "overall level of satisfaction with your job," 87% of men and 72% of women are extremely or somewhat "satisfied" with their job. At the other end of the spectrum, 5% of men and 21% of women are somewhat or extremely "dissatisfied" with their job. The data show a clear gender gap in job dissatisfaction. Through other questions, we can zero in on what causes those differences.

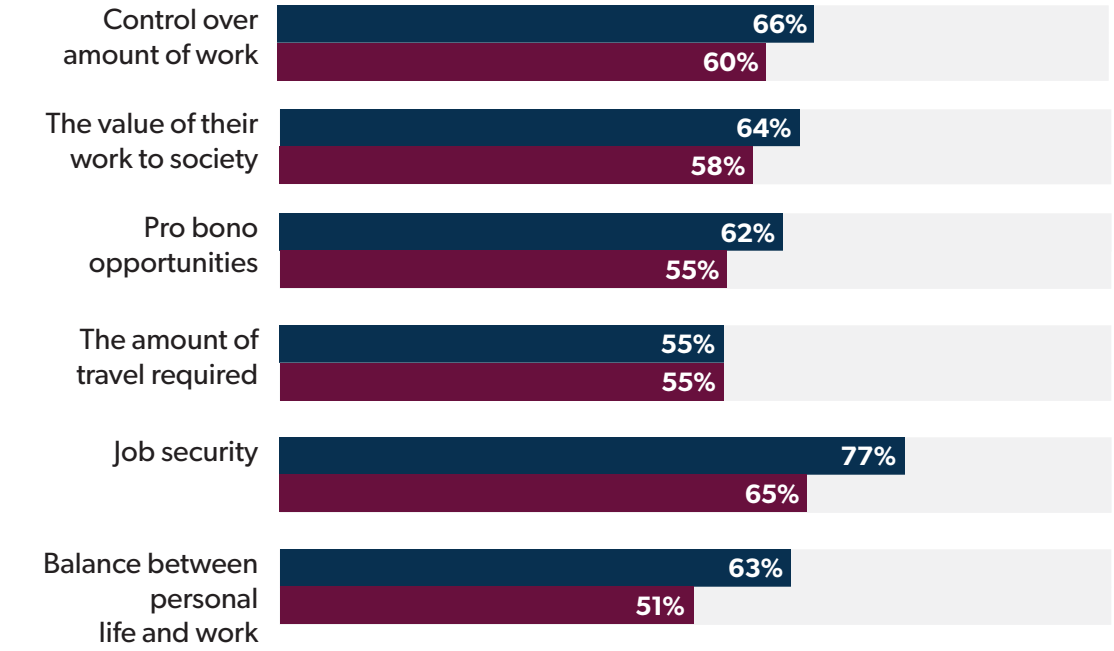
Throughout our report, bar graph results are based on data collected by ALM Intelligence, and are color-coded as follows:

Factors where men and women report similar levels of job satisfaction.

On many specific job components relating to the inherent nature of legal work and the value of that work to themselves and others, women and men report similarly high levels of satisfaction.[31]

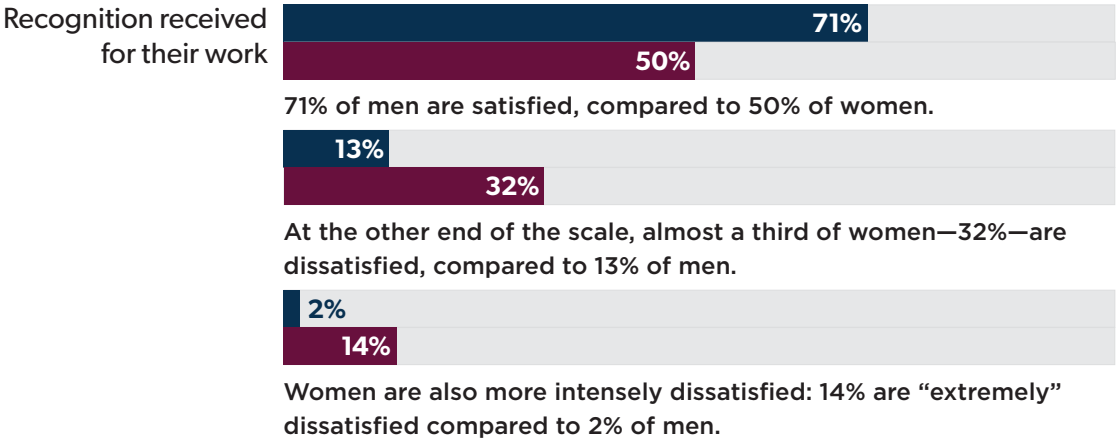


On the factors described below, men and women also reported similar levels of satisfaction (although not at levels as high as for the factors above).[32]



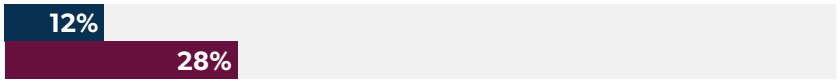
Factors where men and women report dissimilar levels of job satisfaction.

In contrast to those factors about which women and men generally agree, there are certain factors with which women are noticeably less satisfied than men – with sometimes a pronounced 20% or greater gap in levels of satisfaction[33] or dissatisfaction[34]. These differences[35] occur with respect to factors over which firm management can exercise substantial control:



Actual compensation

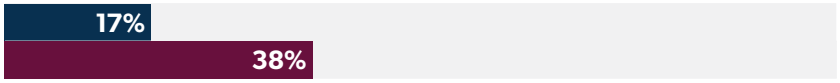
75% of men and 61% of women are extremely or somewhat satisfied.



At the other end of the scale, 12% of men and 28% of women are "extremely" or "somewhat" dissatisfied with their compensation.

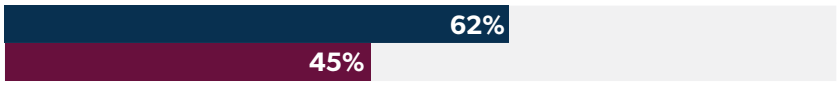
The methods by which compensation is determined (including salary, benefits, and bonus)

69% of men compared to 46% of women are extremely or somewhat satisfied.

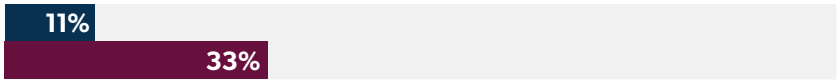


At the other end of the scale, 17% of men are dissatisfied and 38% of women are dissatisfied.

Opportunities for advancement



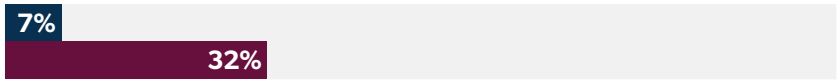
62% of men and 45% of women are satisfied.



At the other end of the scale, 11% of men and 33% of women are dissatisfied.

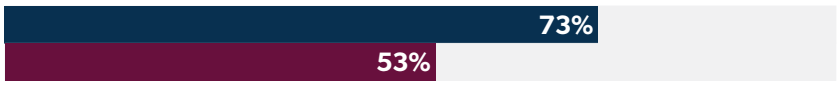
Workplace gender diversity

Considerably more men (67%) are satisfied than women (43%)



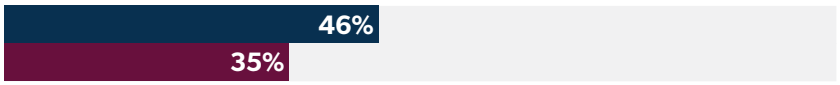
At the other end of the scale, substantially more women expressed higher levels of dissatisfaction (32%) than men (7%).

Leadership of their firm



Substantially more men are satisfied (73%) than women (53%).

Firm's performance evaluation process



Responses showed a wide range across the satisfaction/ dissatisfaction spectrum for both men and women. However, more men are satisfied (46%) than women (35%).

One implication of these results is that firms need to do a much better job to make sure that policies are clear, well known, and applied equitably to men and women when it comes to rewarding and advancing lawyers, including experienced women lawyers. A prime example concerns the methods by which compensation is determined. Too many firms have their compensation systems shrouded in mystery, where unwritten rules and relationships determine equity shares, origination credit, salary, and bonuses. These unwritten rules help maintain the *status quo*, which directly impacts the ability of women (and lawyers of color) to break through into the top levels of compensation.[36] Moreover, the lack of a critical mass of women on many firm compensation committees, coupled with a lack of women sponsors in the compensation process, contribute to the continuing and significant gender pay gap for women partners.[37] In the same vein, many firms continue to lack a "team" approach to compensation decisions, which would ensure that credit is shared among all the partners who are playing a significant role on a client matter. Thus, when it comes to compensation decisions, many experienced women lawyers believe that the compensation system is "rigged" against them.

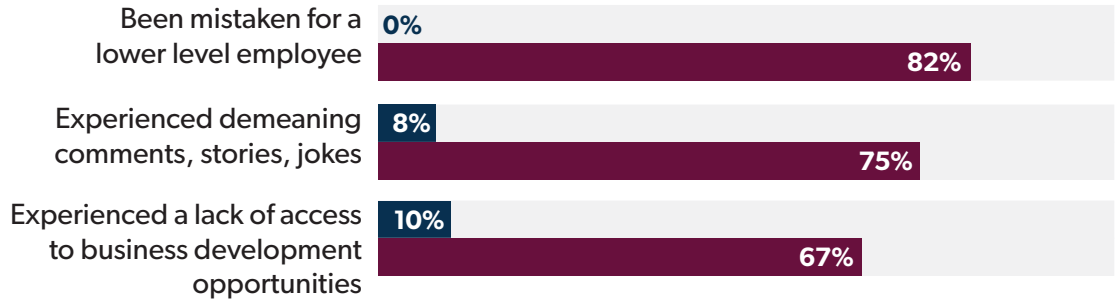
The same problems – a lack of communication and clarity – frequently exist when it comes to opportunities for advancement, recognition in the firm, and leadership positions. We note that lower levels of satisfaction among women on these factors reflect similar responses on questions about access to success, where women experienced less access to business development opportunities, advancement, salary increases or bonuses, and recognition than men.

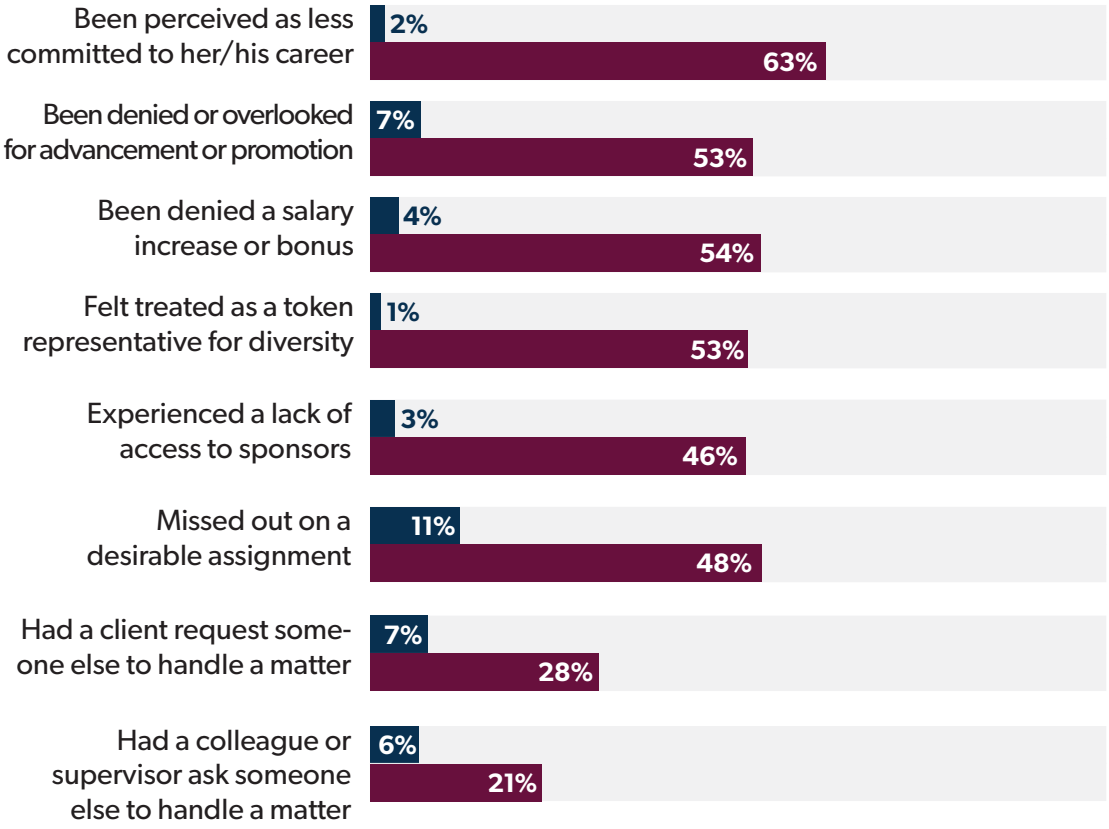
Finally, satisfaction with the actions taken by a firm depends in part on whether someone feels that he or she has been equitably treated. In the area of compensation, for example, people tend to evaluate their actual level of compensation against what they view to be an equitable level of compensation.[38] Systems that lack transparency exacerbate a sense of unfairness and dissatisfaction. According to Major, Lindsey & Africa's 2018 Partner Compensation Survey, partners in open compensation systems report higher average compensation, higher average origination and are more likely to classify themselves as very satisfied than partners in partially open or closed systems.[39] In contrast, 69% of partners in closed compensation systems said they would like to see aspects of their compensation changed.[40]

In short, ignoring policies and practices that lower the satisfaction levels of experienced women lawyers invites a number of adverse consequences, which even over a short period of time can have a negative impact on the firm as a whole.

C. THE EVERYDAY BUILDING BLOCKS FOR SUCCESS

Senior women attorneys are far more likely than men to report negative work experiences that resulted simply because they are women. Women also have less access to the opportunities needed to reach various levels of firm leadership. Thus, senior women are significantly more likely than men to report that, *on account of their gender,* they have:[41]





These gender differences are both striking and alarming. It is clear that too many firms have not addressed the two key impediments faced by their women lawyers: (a) unequal access to the experiences that are building blocks for success, and (b) negative gender stereotypes and implicit biases. Women report being *four to eight times more likely* to be overlooked for advancement, denied a salary increase or bonus, treated as a token representative for diversity, lacking access to business development opportunities, perceived as less committed to her career, and lacking access to sponsors. Each one of these factors is, in and of itself, critical for advancement. The combination of such significant disparities on so many core factors does much to explain why women are not advancing at the same rate as men – and underscores the importance of implementing effective policies and practices that can ameliorate these negative everyday experiences.

D. SEXUAL HARASSMENT

While there are numerous striking differences between the everyday experiences of senior women and men in law firms, one set of responses stands out above all the rest: the much greater extent to which women experience sexual harassment. In our sample of over 1200 experienced lawyers:

- 50% of women versus 6% of men had received unwanted sexual conduct at work. In essence, one of every two women said they had experienced sexual harassment.
- 16% of women versus 1% of men have lost work opportunities as a result of rebuffing sexual advances.
- At the same time, more than a quarter of all women (28%) avoided reporting sexual harassment due to fear of retaliation while 1% of men reported the same avoidance behavior.[42]

These distressing results show that the problem of sexual harassment in law firms is far from solved. Sexual harassment is not confined to "certain" firms, but instead is widespread throughout the profession.[43] The inappropriate personal comments made to respondents clearly illustrate the severity of this significant problem.

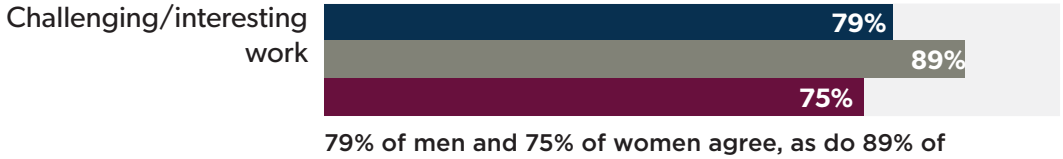
Few law firms, if any, are focused on sexual harassment as a core reason why women leave the practice or become disengaged from firm culture. Yet, the data here and in other recent studies overwhelmingly suggest that law firms need to take a fresh look at their policies and practices. The American Bar Association has analyzed and approved policies for how law firms, among other legal employers, can minimize sexual harassment.[44] Certainly, a key component is for firm leadership and management to implement sensible and enforceable policies that incentivize women to report sexual harassment, protect them from retaliation, and punish those who engage in such conduct. Law firms must send a strong message that sexual harassment simply will not be tolerated.[45]

In sum, our data show that gender bias takes place in many different ways. The cumulative result is what we term "death by a thousand cuts." While women in private practice may talk with each other about such experiences, they are less often discussed by law firm leadership or with male partners. Until these kinds of experiences are brought into the open and addressed, they will continue to be impediments to advancing women – impediments, we add, that have nothing to do with the qualifications, talent, or ambition of individual women lawyers, but instead are created by implicit biases, gender stereotypes and sexual harassment, all of which remain pervasive in too many law firms.

II. WHY DO EXPERIENCED WOMEN LAWYERS STAY AT THEIR FIRM OR LEAVE?

We asked experienced men and women, and managing partners, about which factors influence why experienced female lawyers stay with or leave their firms.[46] By framing questions about the respondent's particular firm, the responses are more likely to reflect first-hand knowledge about why women stay or leave, rather than more abstract information about firms in general.

There was a good deal of consensus among men, women, and managing partners about the reasons why experienced women lawyers *stay* in their firms:

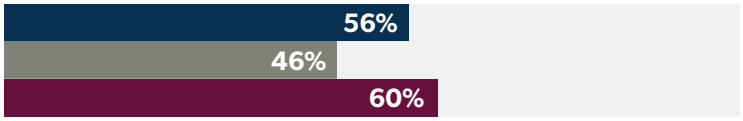


79% of men and 75% of women agree, as do 89% of managing partners.

82% of men and 75% of women agree as do 86% of managing partners.

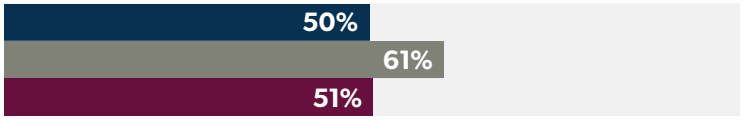
Men and women along with managing partners also generally agree on the following reasons why experienced women lawyers *leave* their firms:

Caretaking commitments



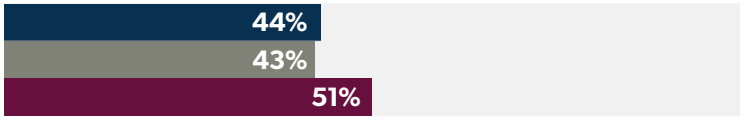
60% of women, 56% of men, and 46% of managing partners agree.

Women no longer wish to practice law



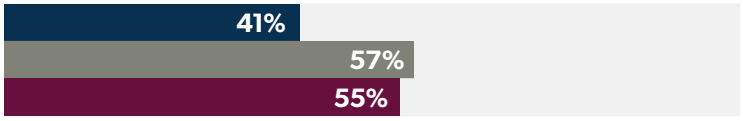
51% of women, 50% of men and 61% of managing partners agree.[47]

The number of billable hours



51% of women, 44% of men, and 43% of managing partners agree.

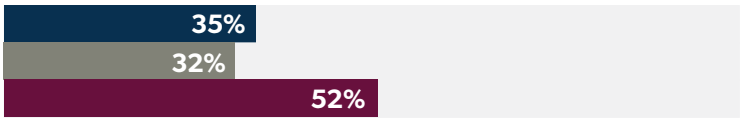
The level of stress at work



41% of men, 55% of women and 57% of managing partners agree.

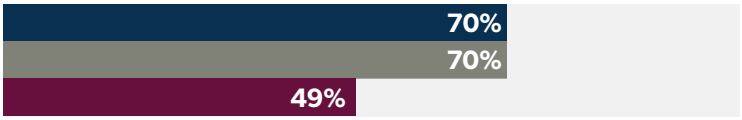
Women, however, have significantly different views about the impact of these three factors on women leaving or staying:[48]

Emphasis on marketing



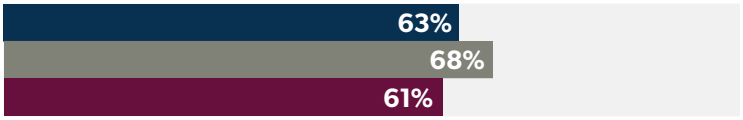
While 52% of women said this was an important reason influencing women's decision to leave their firms, only 35% of men and 32% of managing partners thought so.

Opportunity for advancement



While 70% of men and 70% of managing partners believe this is an important reason why experienced women stay, far fewer women agree. 49% of women view the opportunity for advancement as an important reason for staying at the firm but a substantial number of women—32%—also view the opportunity for advancement in their firm as an important reason for leaving the firm.

Financial compensation



A similar dynamic exists for financial compensation. 61% of women and 63% of men view this factor as an important reason for women staying in their firm. Managing partners are in accord with these results: 68% of them think that financial compensation is an important reason for women staying. At the other end of the spectrum, however, almost one quarter of women (24%) report that compensation influences why experienced female lawyers leave the firm, although a small minority of men (11%) view compensation as an important influence on experienced women lawyers' decisions to leave.

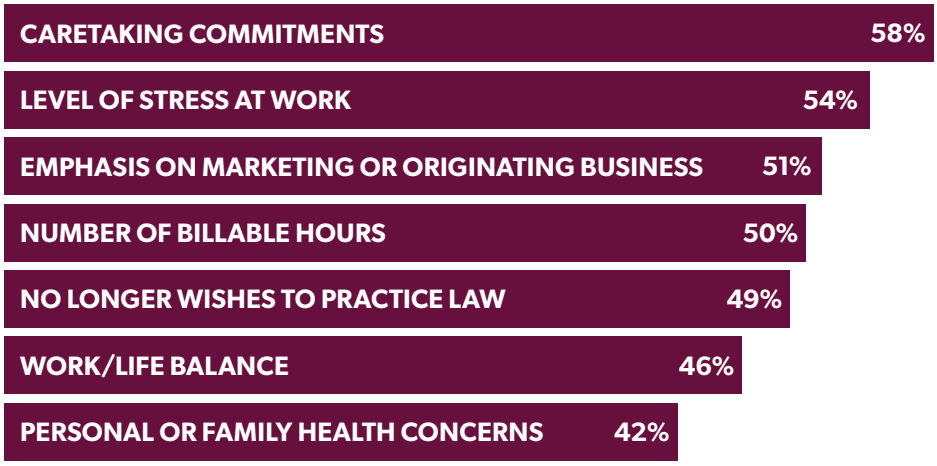
A few other factors that we measured are largely a neutral to somewhat important reason for women leaving their firm: personal or family health; job opportunities for a partner or spouse; and performance reviews.

These results, of course, have certain limitations. Our respondents are women and men who are still practicing in firms and offering opinions from their perspective about why experienced women stay or go. We believe, however, that the women we sampled are much more likely to be aware of reasons why women stay or leave their firms, based on informal networks with women in the firm and those who have left.

A summary of the data on reasons why women leave, according to experienced women lawyers, is presented here:

	% OF WOMEN WHO SAY IT'S A VERY IMPORTANT REASON FOR LEAVING	% OF WOMEN WHO SAY IT'S A SOMEWHAT IMPORTANT REASON FOR LEAVING	COMBINED % OF WOMEN WHO SAY IT'S A VERY OR SOMEWHAT IMPORTANT REASON FOR LEAVING[49]
FINANCIAL COMPENSATION	7%	17%	24%
WORK/LIFE BALANCE	19%	27%	46%
CHALLENGING/INTERESTING WORK	2%	7%	9%
ADVANCEMENT OPPORTUNITY	12%	20%	32%
RELATIONSHIPS WITH COLLEAGUES	3%	6 %	9%
LEVEL OF STRESS AT WORK	17%	37%	54%
NUMBER OF BILLABLE HOURS	15%	34%	50%
EMPHASIS ON MARKETING OR ORIGINATING BUSINESS	13%	38%	51%
CARETAKING COMMITMENTS	16%	42%	58%
PERSONAL OR FAMILY HEALTH CONCERNS	9%	33%	42%
JOB OPPORTUNITIES FOR SPOUSE/PARTNER	4%	27%	30%
PERFORMANCE REVIEWS	2%	14%	16%
NO LONGER WISHES TO PRACTICE LAW	18%	31%	49%
SEXUAL HARASSMENT OR RETALIATION	9%	15%	24%
OTHER	2%	3%	5%

In trying to distill the data, we have ranked the top reasons that experienced women cite as an "important" influence on women leaving their firm, listing any reason mentioned by at least 40% of respondents:



These top reasons why experienced women leave private practice boil down to the stress and time needed to "do it all," especially around non-substantive responsibilities at the office that do not reflect the quality of an individual's legal work. Pressures to bill a large number of hours, and then spend more time to originate business, and then meet caretaking commitments lead to increased stress and an inability to strike an acceptable work/life balance.

The responses we collected on caretaking commitments drive home the point. Experienced women lawyers are, indeed, much more likely than experienced men to be solely responsible for multiple dimensions of child care. The gender differences are striking:[50]

ACTIVITY	PERCENTAGE OF WOMEN WHO SAY THIS IS THEIR FULL RESPONSIBILITY	PERCENTAGE OF MEN WHO SAY THIS IS THEIR FULL RESPONSIBILITY
ARRANGING CHILDCARE	54%	1%
LEAVING WORK FOR CHILDCARE	32%	4%
CHILDREN'S EXTRACURRICULARS	20%	4%
EVENING CHILDCARE	17%	4%
DAYTIME CHILDCARE	10%	1%

As the data make clear, experienced women lawyers bear a disproportionate brunt of responsibility for arranging for care, leaving work when needed by the child, children's extracurricular activities, and evening and daytime childcare. Any one of these factors affects the time and effort expected for a successful law practice, and the combination competes all the more for a lawyer's time.

The results beg a bigger policy question: what will law firms do to devise more effective means of enabling all lawyers, including experienced women, to balance those family and household responsibilities with their professional obligations at the firm? As examples, there are a few firms that provide child care on site. The knowledge that it is both easy to obtain child care when needed and the site is literally at the workplace would be of great help to working parents. Another example is the pressure to obtain household services. Some

firms are offering so-called concierge services to perform personal tasks for lawyers and staff, such as arranging to pick up dry cleaning; making on-line purchases, including groceries, and even arranging moving services.[51] Management is recognizing that in order to attract and retain lawyers, firms need to help them deal with their responsibilities outside the office.

Also ripe for review is the impact of part-time, flex-time, and leaves of absence on women lawyers and their firms. We know many women who would wish to practice on a part-time basis or take a leave of absence but are legitimately concerned that firms simply pay lip service to policies for such arrangements, and that the actual result is sidelining a career because of fear of developing a reputation as not being sufficiently committed to work. While almost all law firms have implemented part-time policies to accommodate their lawyers' needs to care for their children, parents, or other family members, the reality is that only 6-7% of law firm attorneys use such policies, and they are mostly women.[52] Few women partners work part-time: only 1.7% of women equity partners and 4.4% of women non-equity partners do so.[53] The reason is obvious: lawyers correctly perceive that "going part-time" may well impede, if not derail, career advancement. The same fear applies to the consequences of participating in a reduced-hours program, maternity/paternity or family leave, and flexible work schedules.[54] And unlike the large majority of senior men, women partners are much less likely to be supported by a stay at home spouse, requiring additional time and effort to handle obligations outside of work.[55] More than one observer of women in law firm practice has suggested that biases in favor of traditional gender roles directly impact the advancement of experienced women lawyers.[56]

Overall, what do the results mean for large law firms with respect to experienced women lawyers? Law firm policies and practices can have a marked influence on changing the direction of these numbers – even for factors that at first blush are outside the usual ambit of law firm concerns. We also emphasize that there is no "one size fits all" set of policies that suits all firms. We urge firms to tap into the creativity of their own lawyers to create solutions that can work within the context of their firm's unique culture and goals. We anticipate that any firm that fails to achieve meaningful gender diversity among its more experienced lawyers will fall behind its peers—the firm simply will not have a large cadre of experienced women lawyers, becoming increasingly out of sync with the range of talent in the legal profession and the demands of the marketplace.

III. WHAT ARE FIRMS DOING TO FOSTER LONG-TERM CAREERS FOR WOMEN IN PRIVATE PRACTICE?

A. FIRM LEADERS CLEARLY RECOGNIZE THE BENEFITS OF GENDER DIVERSITY AT SENIOR LEVELS

Managing partners appear to be well aware that attracting experienced women lawyers will allow their firms to remain competitive, because of (1) the benefits to law practice and (2) the market's demand for diversity at senior levels. Thus, our data show:

1. RECOGNITION BY MANAGEMENT OF BENEFITS FOR QUALITY OF THE FIRM

- 82% of managing partners cited "achieving better decision-making by improving diversity at senior levels."
- 79% of managing partners cited "widening their talent pool at senior levels."
- 79% of managing partners cited mitigating the costs of female lawyer attrition or turnover.

2. RECOGNITION BY MANAGEMENT OF BENEFITS FOR MARKET RESPONSIVENESS

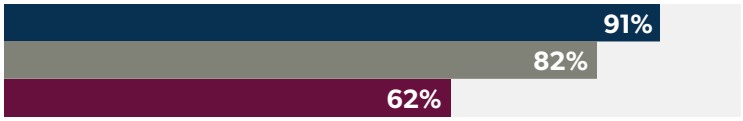
- 86% of managing partners cited improving the firm's reputation and image.
- 86% of managing partners cited being more responsive to the market.
- 79% of managing partners cited being more responsive to the requests of clients.

But beyond awareness that experienced women are critical to a firm's long-term success and clients' demand for experienced women lawyers, which policies are in place and which ones are actually impacting the advancement of women?

B. FIRM LEADERS AND MALE PARTNERS BELIEVE THEIR FIRMS DO WELL IN ADVANCING EXPERIENCED WOMEN – BUT EXPERIENCED WOMEN DO NOT SHARE THAT VIEW

We asked managing partners and individual men and women lawyers a series of questions about their firm's efforts to retain and advance experienced women lawyers and their success in doing so. Overall, a large percentage of managing partners and senior men agree that their firms have been active in making gender diversity a priority and have been successful in advancing experienced women lawyers.[57] However, experienced women lawyers have significantly less positive opinions, as shown by responses to five questions we asked about law firm advocacy and success in advancing gender diversity:

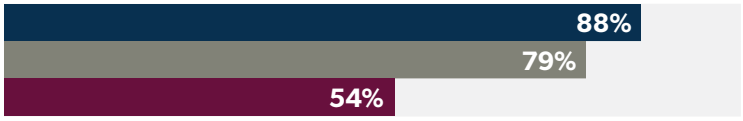
Are firm leaders "active advocates of gender diversity?"



82% of managing partners agree that their firms are "active advocates of gender diversity" for experienced women lawyers. A very high 91% of the experienced men agree with that statement, with over two thirds of men (69%) "strongly" agreeing.

Experienced women have a markedly less positive view: 62% of women agree, with only 27% "strongly" agreeing that firms are active advocates of gender diversity. At the other end of the scale, a substantial number of women—25%—*disagree* that their firms are active advocates for gender diversity.

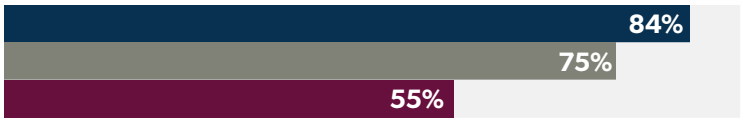
Is gender diversity widely acknowledged as a firm priority?



79% of managing partners believe "gender diversity for experienced women lawyers is widely acknowledged in my firm as a priority." 88% of experienced men agree with that statement.

Women have a less positive view: 54% of experienced women agree that gender diversity is a firm priority, and 27% of experienced women *disagree* that gender diversity is a firm priority.

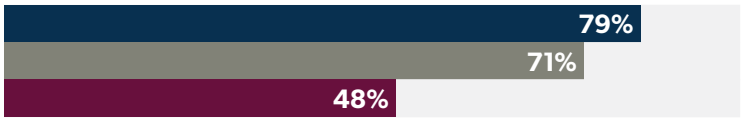
Has the firm succeeded in promoting women into leadership?



75% of managing partners believe that their firm "has been successful at promoting experienced female lawyers into leadership positions in the firm." Individual senior men agree at an even higher level (84%).

A much lower percentage of experienced women (55%) agree that their firm has been successful and a substantial number (30%) *disagree* that their firm has been successful in promoting women into leadership.

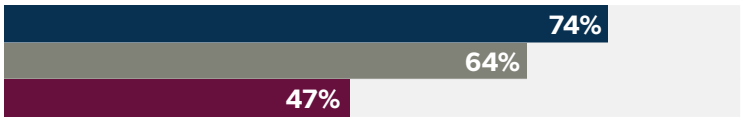
Has the firm succeeded in promoting women into equity partnership?



71% of managing partners believe that their firm "has been successful at advancing/promoting female attorneys into equity partnership." A similar level of agreement exists among experienced male lawyers (79%).

Substantially fewer experienced women—48%—agree that their firm has been successful at advancing women into equity partnership, and 35% *disagree* with that statement.

Has the firm successfully retained experienced women?



64% of managing partners believe that their firm "has been successful at retaining experienced women lawyers." A much greater percentage of experienced men—74%—agree with that statement.

A lower percentage of women—47%—agree that their firm has successfully retained women lawyers, and 38% *disagree* that their firm has been successful.

Clearly, managing partners and senior men have far more positive views than their women colleagues about their firm's "success" in retaining and advancing experienced women lawyers, acknowledging gender diversity as a priority, and promoting experienced women into the highest levels of the partnership and firm leadership. What explains the differences? It may be that managing partners and senior men are unaware of the actual statistics showing a relative lack of advancement for experienced women lawyers and their high rate of attrition. Alternatively, men may have different expectations than women for assessing the firm's "success" in advancing and retaining senior women lawyers. Whatever the reason, there is a definite "men are from Mars, women are from Venus" dichotomy regarding their respective perceptions of their firms' commitment and success in advancing women into senior roles.[58]

The data lead us to conclude that firms need to look anew, from broader perspectives, at setting targets and implementing policies and practices that actually achieve meaningful progress and results. The pronounced gender perception gap demonstrates that law firm efforts and initiatives are not accomplishing as much as firm leaders and their male colleagues believe, and far more needs to be done.

C. WHAT GENDER ADVANCEMENT POLICIES ARE FIRMS USING, AND HOW ARE THEY WORKING?

Virtually every large firm has goals to increase the number of women lawyers. How any given firm goes about doing so, however, varies widely. Some initiatives are managed by the top level of leadership, while others may be managed by lawyers or staff. Some initiatives are well-funded, while others are funded with less than the cost of a first year associate's compensation. Some initiatives have a strategic plan that sets concrete goals for advancement of women in the firm, while others are less formal. And there are many different types of programs that firms sponsor with the goal of advancing and retaining women lawyers.

We asked managing partners about the use and importance of specific policies for advancing gender diversity. The results are listed below and show that the large majority of managing partners – 90% – report use of these policies: clear, consistent criteria for promotion to equity partner; firm-sponsored client networking for female lawyers and female clients; paid parental leave; work from home policy; mentoring or sponsorship programs for female lawyers; and sexual harassment training. Implicit bias training and training female lawyers in business development are also widely used programs, by at least 80% of firms.

That said, we did not anticipate that all policies would be viewed as equally effective. Indeed, there is a large range of opinion about the effectiveness of these policies for advancing experienced women, based on responses from women lawyers whose firms have implemented the particular policy:[59]

POLICY	PERCENTAGE OF EXPERIENCED WOMEN LAWYERS WHO SAY THE POLICY IS VERY OR SOMEWHAT EFFECTIVE
WORK FROM HOME POLICY	78%
PAID PARENTAL LEAVE	76%
FORMAL PART-TIME POLICY FOR PARTNERS	75%
CLEAR, CONSISTENT CRITERIA FOR PROMOTION TO EQUITY PARTNER	75%
CLIENT SUCCESSION PLANNING POLICY	71%
TRAINING FEMALE LAWYERS/BUSINESS DEVELOPMENT	70%
CLIENT NETWORKING/FEMALE LAWYERS AND CLIENTS	70%
MENTORING/SPONSORING PROGRAMS FOR FEMALE LAWYERS	69%
LEADERSHIP/MANAGEMENT TRAINING	68%
WRITTEN RULES ABOUT CREDIT ALLOCATION	60%
MONITOR GENDER METRICS	60%
IMPLICIT BIAS TRAINING	47%
SEXUAL HARASSMENT TRAINING	42%
FORMAL PROCESS FOR DISPUTE RESOLUTION (E.G., PROMOTION, ORIGINATION)	42%
MANSFIELD RULE	42%
ON-RAMPING PROGRAMS	37%
COMPENSATING DIVERSITY WORK (NOT PRO BONO)	35%
PARTNER COMPENSATION PARTLY TIED TO DIVERSITY EFFORTS	31%

These results show that:

1. Many different policies can be useful for advancing women into senior roles, depending on the circumstances in a particular firm.
2. The policies that at least 75% of women believe are important to advancing senior women are work from home (78%); paid parental leave (76%); clear consistent criteria for promotion to equity partner (75%); and a formal part-time policy for partners (75%). We conclude that when a firm does not implement these policies in a meaningful way, it is undercutting its ability to retain and advance women into senior roles.
3. At least half of the women in our sample also view these policies as important: a client succession planning policy that emphasizes greater inclusion of women lawyers (71%); client networking with female clients (70%); training in business development (70%); mentoring/sponsoring programs (69%); leadership/management training (68%); monitoring gender metrics (60%); and written rules/credit allocation (60%).

The results reinforce our view that, in order to implement effective policies, a firm needs to understand the nature of its culture, how existing policies and practices actually work from the point of view of the lawyers those policies are supposed to benefit, and why policies that are especially effective should be regarded as "best practices" that all firms can consider implementing.

IV. WHAT SHOULD FIRMS BE DOING DIFFERENTLY?

It is undeniable and unfortunate that experienced women lawyers are simply not moving up the ladder to senior levels at the same rate as men. Moreover, experienced women lawyers are leaving their firms at a greater rate than men for reasons that firms are able to address, even if they have not yet done so. What is holding senior women lawyers back is not a lack of drive or commitment, a failure to promote themselves, or an unwillingness to work hard or to make substantial sacrifices. Simply put, women lawyers don't need to "lean in" any more than they have already done. What needs fixing is the structure and culture of law firms, so firms can better address the needs of the many women they recruit and seek to retain.

One key lesson learned from the data here: simply putting policies into place and giving lip service to the goal of diversity appears to have little impact on closing the gap at mid-levels and senior levels of experience. Enacting policies is a basic first step, but it is not enough. And while large firms have developed policies designed to address the gender gap, there is significant variation in the nature of these policies, how well they work in practice, and whether the policies are implemented consistently and equitably over time.

As our data show, women lawyers are much less satisfied than their male colleagues and managing partners with the extent of gender diversity in their firms, the level of commitment that firm leaders have to gender diversity, and what firms are doing to advance women into upper levels of their firms. The satisfaction data should not be a surprise. Women lawyers have substantially less access to the building blocks needed for long-term success in firm practice. Far more than men, and *simply on account of their gender*, women experience demeaning comments, lack access to business development opportunities, have been overlooked for advancement, lack access to sponsors, and suffer other behaviors in firms that diminish their chances for reaching the same level of success as their male colleagues. Women are markedly less satisfied than men with the recognition they receive for their work, their compensation and how it is determined, and the opportunities for

advancement in their own firm. Senior women leave their firms because of the inordinate demands imposed by firm policies – especially onerous billable hours requirements and the emphasis on marketing. While substantial quotas for billable hours drive up profits per equity partner, there is a real cost to pay through the firm's loss of so many experienced women lawyers, diminished diversity at the upper levels of firms, and increasing pressure from clients to fix the problem.

The greatest challenge facing large firms today is whether they will move beyond mere lip service to the goal of greater diversity by taking concrete and specific steps to meet the needs of women lawyers and lawyers of color. Client demands for the breadth of talent that comes with diversity are being heard today, and will increase each year. Firms have both the motivation, resources and, we believe, the creativity to develop programs and policies that truly serve women attorneys throughout the entire cycle of their careers. As very basic next steps, we encourage the leaders of every firm to review the research presented here, and use it to inform changes that are specifically geared to the culture of their firm.

We also suggest that each and every AmLaw 500 firm survey their lawyers on an anonymous basis with the types of questions that we administered, in order to fully understand whether there are any gender-based differences in their lawyers' work day experiences and their satisfaction or dissatisfaction with the firm's culture, policies and practices. We encourage guided in-firm conversations so firm leaders can decide how to use that information effectively to make necessary changes and reforms for eliminating any gender gap in access to success and create a workplace environment more conducive to the retention and advancement of experienced women lawyers. And we urge male leaders to take ownership of this process and not delegate the internal discussions and process of recommending policies largely to women partners, who often lack the power to ensure that their recommendations are implemented, and to prevent the implicit if not explicit notion that the lack of gender diversity is only a "women's problem."

We do not believe there is a silver bullet that will create meaningful gender diversity in all firms. We do believe, however – based on this new research and other well-regarded studies – that certain practices implemented over a four to five year period will achieve noticeable positive changes for a firm's retention of experienced women lawyers, the number of women advancing to leadership positions, parity in compensation, the firm's enhanced capabilities at its senior levels, and the firm's ability to take a leading position in a marketplace that demands diversity. With these goals in mind, our recommended best practices are:

1. **Develop a strategy, set targets, and establish a timeline for what the firm wants to achieve.** A strategy is best developed in collaboration with members of the firm and with an outside specialist. It is difficult for any firm to take an objective look at its own culture, articulate its needs, and reach consensus about action items without an independent analysis to provide additional perspective based on other firms' policies and experiences, and advise about possible solutions.

2. **Take a hard look at the data. Use gender metrics and gender statistics to measure and track the status of key factors over time.** As discussed above, 60% of the women respondents agreed that monitoring gender metrics is important to the advancement and retention of experienced women lawyers. A firm can focus on various key metrics, such as attrition, promotion, work assignments, compensation, bonuses, credit allocation and client succession, according to its specific goals. As examples, a firm may choose to look at gender statistics by overall firm; focus on major clients; practice area or office; posi-

tion; departure data; or other parameters. Take some "soft measures," including at least some of the perception and satisfaction data we describe above. When an experienced women lawyer leaves, conduct an exit interview and collate the findings over time.

3. **Affirm leadership's commitment to take specific actions for gender diversity.** Not only should firm leaders convey the message that they are committed to increasing gender equity, they also need to take actions demonstrating that this commitment is integral to the firm's mission. For example, firm leaders should be assigned an initiative or area of improvement for which they are personally responsible. Thereafter, leadership must be held accountable if measurable progress is not made.

4. **Own the business case for diversity.** Firm leadership has to truly understand the business value of making retention and advancement of experienced women attorneys a core firm priority. Research makes clear that the presence of women in leadership roles has a positive impact on both innovation and diversity. Corporations are increasingly demanding diverse teams to handle their matters, and are making clear that a decision to retain a firm or to discontinue relationships with firms will be based, in part, on the firm's demonstrated commitment to diversity. Clients correctly recognize that promoting greater diversity in the law firms they hire will lead to better decision-making, work product, and results. For example, corporations are increasingly requesting that senior women litigators serve as first chairs on their trials, based on research that female partners are more likely than male partners to get courtroom wins.

5. **Take steps to ensure that there is a critical mass of women partners on key firm committees.** This is vitally important with respect to committees that make decisions concerning the advancement of lawyers to partner and equity partner; the lateral partner hiring committee; the compensation committee; the firm Executive Committee; and appointments of office managing partners, practice group leaders, and other leadership roles. Firms should consider adopting the Mansfield Rule, which sets an aspirational goal of having at least 30% women lawyers and attorneys of color on key firm committees.

6. **Assess the impact of firm policies and practices on women lawyers.** In particular, evaluate practices relating to compensation, credit allocation, client succession, business development opportunities and internal referrals. Transparency and equal treatment for men and women with respect to these policies are vitally important. In large firms, written policies are far preferable to ad hoc decision making which, because of implicit biases and favoritism, generally disadvantage women and create considerable dissatisfaction. In addition, firms should consider the adoption of a formal process of dispute resolution to resolve disagreements concerning origination credit, client succession, and compensation.

7. **Continue to implement implicit bias and sexual harassment training for all partners.** Such training is an important baseline activity, to ensure that from the day women join the firm, they are treated equitably and with the respect that they deserve. Demeaning communications, unwanted sexual advances, gender bias, and double standards take a significant toll on women at all levels, contribute to dissatisfaction with a firm, and ultimately can influence the decision to leave.

8. **Increase lateral hiring of women partners.** Legal recruiters play an important role in law firm hiring of lateral partners. Given the fact that at many firms more partners are hired laterally than are promoted internally[60], it is critical that law firms instruct the recruiters they retain to focus on identifying potential women lateral candidates, including searching for qualified candidates out of existing networks. We recommend a special focus on practice areas where women are generally under-represented, such as antitrust, private equity, intellectual property, and mergers and acquisitions. Firms can set targets for the number of women who are presented by recruiters as lateral hire candidates, as well as the overall percentage of lateral hires that the firm makes.

9. **Provide resources to relieve pressures from family obligations that women more often face than their male colleagues.** Incentivize partners to avail themselves of part-time and flex-time policies. This can be done by removing the stigma and ensuring that lawyers are not impeded in their career advancement on account of using such policies. Promoting those who have used such policies to partner status is one meaningful way to remove the stigma that prevents so many lawyers, male and female, from using such policies. In addition, provide assistance and support to lawyers with family obligations, such as childcare programs, concierge services and other measures to make work-life balance more achievable.

Ultimately, achieving gender diversity is a matter of how much talent do law firms want to attract and retain, and what are firms willing to do to advance a range of diverse attorneys in their firms. With input from genuinely diverse perspectives, firms can frame policies and procedures that fit their desired culture and also meet the goal of providing men and women equal access to successful long term careers in the law. Only the full strength and voice of a firm's leaders can give teeth to a firm's efforts to ensure the advancement and retention of experienced women lawyers and position the firm as a leader in the marketplace.

Endnotes

[1] Co-chair, American Bar Association Presidential Initiative on Long-term Careers for Women in the Law; Senior Partner, Fine, Kaplan & Black, R.P.C.; Former Chair, ABA Commission on Women in the Profession.

[2] Co-chair, American Bar Association Presidential Initiative on Long-term Careers for Women in the Law; Founding Partner, Scharf Banks Marmor LLC; Chair, ABA Commission on Women in the Profession.

[3] *E.g.*, https://www.law.com/2018/09/24/data-snapshot-is-big-law-making-progress-on-gender-diversity.

[4] The NAWL Annual Survey of Women in Law Firms was designed, implemented and reported by Stephanie Scharf from 2006 through 2014, with collaboration at various times with Roberta Liebenberg, Barbara Flom, and Christine Amalfe. The Survey is now overseen by Destiny Peery, Northwestern Pritzker School of Law. For the NAWL series of reports, see https://www.nawl.org/p/cm/ld/fid=82.

[5] *See* 2018 Vault/MCCA Law Firm Diversity Survey, https://www.mcca.com/resources/surveys/2018-vault-mcca-law-firm-diversity-survey/.

[6] "Women and Minorities at Law Firms: What Has Changed and What Has Not in the Past 25 Years?" February 2018, https://www.nalp.org/0218research.

[7] *See NALP Bulletin*, April 2019 (women comprised 19.6% of equity partners in 2018, and a much higher percentage of women are non-equity partners (30.5%)), https://www.nalp.org/0419research. *See also* 2018 NAWL Annual Survey on Retention and Promotion of Women in Law Firms ("NAWL Survey"), covering the nation's 200 largest firms. "The likelihood that women will become equity partners remains on a sluggish upward trajectory over the last 12 years, with the data reflecting an increase from 15 percent in 2006 to 20 percent in 2018." https://www.nawl.org/p/cm/ld/fid=1163, at 7.

[8] 2018 Vault/MCCA Law Firm Diversity Survey at 6.

[9] *Id.*

[10] 2018 Vault/MCCA Law Firm Diversity Survey at 6 shows that women constitute 24% of management committee members; 24% of practice group leaders; and 21% of office heads.

[11] Vivia Chen, "Partnership Classes Are Shrinking, Hampering Advancement and Diversity." (Feb. 5, 2019).

[12] https://www.raw.com/2019/05/06/data-snapshot-the-path-to-big-law-equity-partnership-is-narrowing.

[13] The "Special Report: Big Law is Failing Women," *The American Lawyer*, May 28, 2015.

[14] *See, e.g.*, ALM Intelligence, "Where Do We Go from Here? Big Law's Struggle with Recruiting and Retaining Female Talent," April 2017. https://www.law.com/sites/ali/2017/04/17/where-do-we-go-from-here-big-laws-struggle-with-recruiting-and-retaining-female-talent.

[15] Stephanie Scharf and Roberta Liebenberg, "First Chairs at Trial: More Women Need Seats at the Table," ABA Commission on Women in the Profession (2015).

[16] *Id.* note 13.

[17] 2018 NAWL Annual Survey at 7, 12.

[18] 2018 NAWL Annual Survey at 7.

[19] "Women and Minorities at Law Firms: What Has Changed and What Has Not in the Past 25 Years?" February 2018, https://www.nalp.org/0218research.

[20] *See, e.g.*, "Why Diversity Matters," McKinsey & Company (2015); Marcus Noland, Tyler Moran, and Barbara Kotschwar, "Is Gender Diversity Profitable? Evidence From a Global Survey," The Peterson Institute for International Economics (February 2016).

[21] *E.g.*, "Closing the Gap: A Road Map for Achieving Gender Pay Equity in Law Firm Partner Compensation" (ABA Task Force on Gender Equity, August 2013); "Power of the Purse: How General Counsel Can Impact Pay Equity for Women Lawyers" (ABA Task Force on Gender Equity, August 2013); "What You Need to Know About Negotiating Compensation" (ABA Task Force on Gender Equity, August 2013).

[22] https://www.law.com/americanlawyer/almID/1202791138736/.

[23] A total of 1,325 total responses were initially collected. Sixty-three responses were excluded from our analyses because the respondent reported being an associate or staff attorney and was not on a track to advance into higher levels of the partnership; or because the respondent did not identify their gender.

[24] The distribution in our sample of gender by years out of law school is: 15-20 years: 81.5% women; 21-25 years: 81% women; 26-30 years: 73.7%

women; 31-35 years: 66.3% women; 36-40 years: 59.4% women; 40+ years: 35% women.

[25] *See, e.g.*, Aviva Cuyler, "Diversity in the Practice of Law: How Far Have We Come?" American Bar Association, 2012. https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2012/september_october/diversity_practice law_how_far_have_we_come/

[26] The ABA Initiative on Long-Term Careers and the ABA Commission on Women in the Profession have sponsored an independent national study on Achieving Long-Term Careers for Women Attorneys of Color, the results of which will be published by Fall 2019.

[27] *See, e.g.*, https://hbr.org/2017/04/how-gender-bias-corrupts-performance-reviews-and-what-to-do-about-it.

[28] *See, e.g.*, https://hbr.org/2018/06/3-biases-that-hijack-performance-reviews-and-how-to-address-them; https://www.hcamag.com/au/news/general/the-danger-of-unconscious-bias-in-hr-decisions-and-how-to-overcome-it/151339.

[29] Renwei Chung, "Unconscious Bias Remains Silent But Deadly for Legal Diversity," Above The Law, Mar. 10, 2017, http://abovethelaw.com/2017/03/unconscious-bias-remains-silent-but-deadly-for-legal-diversity/.

[30] The questions about job satisfaction mirror the job satisfaction questions used in "After the JD: Third Results from a National Study of Legal Careers," at 50-51. Published by the American Bar Foundation and NALP Foundation for Law Career Research and Education (2014). The satisfaction questions had five response categories: extremely satisfied, somewhat satisfied, neutral, somewhat dissatisfied, and extremely dissatisfied. In this analysis, we typically grouped "extremely" and "somewhat satisfied" responses unless there is an unusual gender distribution. Similarly, we typically grouped the "somewhat' and "extremely" dissatisfied responses.

[31] Responding "extremely" or "somewhat satisfied" to each factor.

[32] Responding "extremely" or "somewhat satisfied" to each factor.

[33] Responding "extremely" or "somewhat satisfied" to each factor.

[34] Responding "somewhat" or "extremely dissatisfied" to each factor.

[35] Each of these questions show significant differences in response distribution by gender at the .001 level using a Chi-square test, with the exception that item 7 is significantly different at the .005 level.

As above, these percentages are for women and men reporting that they are "extremely satisfied" or "somewhat satisfied" with the aspect of their work.

[36] The most recent study of partner compensation by Major Lindsey & Africa found that, on average, male partners earn $959,000 compared to $627,000 for female partners, a 53% difference. "New Survey Finds Even Bigger Gender Gap in Big Law Partner Pay," *The American Lawyer*, Dec. 6, 2018. Moreover, one of the key factors in the long-standing pay gap between male and female equity partners is that male partners receive on average over $1 million more in origination credit than female partners. *Id.* at 24, 27. For example, in the Major Lindsey & Africa 2018 Partner Compensation Survey, the gain for male partners in origination credit was 8% in 2016; while female partners' origination credit declined 8%. *Id.* at 13.

[37] The Report of the Eighth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms (February 2014) showed that having two or more women on a compensation committee has a significant impact in ameliorating the gender pay gap. *Id.* at 5, 12-13. https://www.nawl.org/p/cm/ld/fid=82#surveys.

[38] Y. Yao, E. Locke and M. Jamal, *On A Combined Theory of Pay Level Satisfaction*, Journal of Organizational Behavior, Nov. 3, 2017. https://doi.org/10.1002/job.2243

[39] Major Lindsey & Africa, "2018 Partner Compensation Survey," at 17, 22, 33.

[40] *Id.* at 12.

[41] Logistic regression indicates that for each of these questions women are significantly more likely than men to experience these events (all p values are < 0.001).

[42] Logistic regression indicates that for each of these questions women are significantly more likely than men to experience these events (all p values are < 0.001).

[43] The results of other surveys examining unwanted sexual conduct in law firms are consistent with the results here. *See*, Lauren Rikleen, "Survey of Workplace Conduct and Behaviors in Law Firms," The Women's Bar Association of Massachusetts, www.womensbar.org. *See also Chang and Chopra*, "Where Are All the Women Lawyers?" FORUM, Sept./Oct. 2015 at pp. 15-20 (reporting that 2005

survey of California lawyers found that 50% of women respondents reported sexual harassment). https://www.360advocacy.com/wp-content/uploads/2015/10/ChangChopraArticle-1-.pdf; Results of the 2015 YLD Survey on Women in the Legal Profession, The Florida Bar, at 9 (17% of the respondents stated they had experienced harassment). https://www.floridabar.org/wp-content/uploads/2017/04/results-of-2015-survey.pdf; Report of the Florida Bar Special Committee on Gender Bias, May 26, 2017 at 1 (one out of every seven female lawyer respondents stated they had experienced harassment or bullying due to their gender within last three years, and only 23% of those who reported the incident to a supervisor stated that the complaint was resolved satisfactorily); https://www.floridabar.org/wp-content/uploads/2017/06/Special-Committee-on-Gender-Bias-Report-2017.pdf; *Women Lawyers of Utah, The Utah Report: The Initiative of the Advancement and Retention of Women in Law Firms* (Oct. 2010), http://ms-jd-org/files/wlu_report_final.pdf ("37% of women in firms responded that they experienced verbal or physical behavior that created an unpleasant or offensive work environment.[, and] 27% of the 37% indicated that the situation became serious enough that they felt they were being harassed (approximately 10% of women in firms). The vast majority (86%) of those reporting harassment identified sex as the basis for the harassment."); ABA Commission on Women in the Profession, *The Unfinished Agenda: Women and the Legal Profession* 18-19 (2001) (citing survey results indicating that one-half of two-thirds of women lawyers experienced or observed sexual harassment).

[44] *See* ABA Resolution 302 (February 2018) and ABA Resolution 300 (August 2018) and accompanying Reports. The ABA Commission on Women's publication "Zero Tolerance" provides concrete best practices and solutions to combat sexual harassment in the workplace.

[45] *See, e.g.*, "A Post-#MeToo Standard Emerges in Law Firms as Orrick, Mayer Brown Oust Partners," *The Recorder*, March 29, 2019.

[46] Respondents had to choose one of five response categories about a given factor: very important reason for staying; somewhat important reason for staying, neutral, somewhat important reason for leaving, very important reason for leaving. To keep the questionnaires a manageable length, we did not collect individual responses about why men leave.

[47] We note from other research that both men and women leave the legal profession for work in other sectors in increasing numbers over time. "After the JD III: Third Results from a National Study of Legal Careers," American Bar Foundation and NALP Foundation for Law Career Research and Education (2014).

[48] Each of these questions show significant differences in response distributions between men and women at the .001 level using a Chi-square test. The number of managing partners was not large enough to compare their response distributions.

[49] Rounded to the nearest whole percentage for listing in this chart. Adding unrounded percentages from columns 1 and 2 accounts for any difference between the total percentage listed in column 3 versus adding the rounded percentages in columns 1 and 2 for "very important" and "somewhat important."

[50] Logistic regressions with gender predicting likelihood of sole responsibility in these domains were all significant with $p < 0.001$.

[51] "At Kirkland, Concierge Service Aims to Ease Personal Distractions for Lawyers," https://www.law.com/americanlawyer/2018/11/13/at-kirkland-concierge-service-aims-to-ease-personal-distractions-for-lawyers/

[52] 2018 Vault/MCCA Law Firm Diversity Survey at 17. This reality is reflected by the fact that according to the Vault survey, less than 1% of male associates and less than 4% of female associates work part-time schedules.

[53] *Id*.

[54] *See* M. Brodherson, L. McGee and M. Pires dos Reis, "Women in law firms," McKinsey & Company (2017) at 9. https://www.mckinsey.com/featured-insights/gender-equality/women-in-law-firms.

[55] According to a 2013 NALP Survey, 87% of law firm partners are supported by a stay-at-home spouse. Oct. 21, 2013 National Law Journal, "*Diapers, Laundry and a Legal Practice*." By way of contrast, the PAR/MCCA/ABA Commission Report in 2010 found that only 13% of female partners had a spouse at home full-time, while just 10% had a spouse home part-time.

[56] Lauren Rikleen, "Are Women Held Back By Colleagues' Wives?" *Harvard Business Review*, https://hbr.org/2012/05/are-working-women-held-back-by.

See also Anna Dorn, "Big Law Is Still an Old Boys' Club," May 8, 2018. https://medium.com/s/all-rise/big-law-remains-an-old-boys-club-b8fd85647305.

[57] A respondent was coded as "agreeing" with the statement if he/she "strongly" or "somewhat" agreed.

[58] Unfortunately, the stark differences in opinion between experienced male and female lawyers concerning their firms' efforts to create a level playing field for women also exist among millennial lawyers, which further underscore the need for fundamental change. A new survey of over 1,200 millennial attorneys found that 45% of the women strongly agreed that law firm culture is inherently sexist, compared to just 14% of men. Over 56% of the millennial women strongly agreed that there is a gender pay gap, compared to just 18% of men. Also, while 63% of the women strongly agreed that a diverse and inclusive workforce should be a priority for law firms, only 37% of the millennial male attorneys strongly agreed. See Major Lindsey & Africa, "2019 Millennial Attorney Survey: New Expectations, Evolving Beliefs and Shifting Career Goals" (April 2019). https://www.mlaglobal.com/en/knowledge-library/research/2019-millennial-attorney-survey-new-expectations-evolving-beliefs-and-shifting-career-goals.

[59] Each respondent was asked to rate a policy only if her firm had already implemented the policy.

[60] *See* "2019 Client Advisory" by Hildebrandt Consulting and Citibank at 11 (reporting that in 2017, more partners were hired laterally than promoted internally). *See also* "Should Law Firms Be Clamoring For Diversity in Recruiters?", Law 360, Oct. 4, 2019.

The data contained in this report are from a collaborative research project by the American Bar Association and ALM Intelligence. An initial report of research results was presented in August 2018 at the American Bar Association Annual Meeting and may be found at https://www.americanbar.org/news/abanews/aba-news-archives/2018/08/annual_meeting_20183/.

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The Initiative has implemented four research projects, which as of October 2019, have been completed and are in various stages of publication:

1. This joint ABA/ALMI survey of law firm managing partners and practicing attorneys;
2. A representative survey of law school alumni in order to generate systematic data about the course of long-term careers for women and men in the legal profession, and the professional, social and personal factors that enhance or impede legal careers;
3. A national study based on focus group data to understand factors that affect long-term careers for women lawyers;
4. A national study focusing specifically on women lawyers of color using focus group and individual data.

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