

The Feerick Center for Social Justice and
the Stein Center for Law and Ethics
present



Women's Leadership Institute

January 25, 2019 | 9 a.m. – 5:30 p.m. | Skadden Conference Center

Course Materials



FORDHAM UNIVERSITY
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Women's Leadership Institute
January 25, 2019
Speaker Bios

Helene R. Banks

Partner

Cahill Gordon & Reindel LLP

Helene Banks is a member of Cahill Gordon & Reindel LLP's corporate practice group. Helene advises publicly-held and private companies in significant corporate and securities matters, with particular emphasis on mergers and acquisitions. She has represented sellers, acquirers, targets, financial institutions, shareholders and investors in M&A transactions, spin-offs, joint ventures, private and public equity and debt offerings, and tender offers. Her work ranges from managing complex international transactions for large public companies to guiding owners through investments in their privately held businesses. Her breadth of experience gives her a unique ability to spot and solve issues and understand all aspects of complicated transactions. Helene is recognized as a leading M&A lawyer by *The Legal 500* and is recognized for both M&A and Capital Markets Debt & Equity by *IFLR1000 2019*.

Helene was the first female partner elected in Cahill's corporate practice group. She is the Chair of the Firm's Women's Initiatives Committee and mentors many of the female corporate associates of the firm. Helene serves on the boards of the New York Women's Foundation and the Baruch College Fund. She served on the development committee of the YMCA of New York City and the Grants Advisory Committee of the New York Women's Foundation. She also served on the Board of Trustees of the Tada! Youth Theater for six years and was the Board Chair at the Brooklyn Heights Montessori School for five years, and is a Trustee Emeritus. She received her JD from Fordham University School of Law

Honorable Judge Claire Chadirjian Cecchi

U.S. District Judge

District of New Jersey

Claire C. Cecchi serves as a United States District Judge for the District of New Jersey in Newark, New Jersey. She joined the Court as a United States Magistrate Judge in 2006, a position she held until her appointment in 2011. She has a substantial caseload of civil and criminal matters and is a designated judge in the patent pilot program, handling numerous high-profile patent cases. She is also actively managing a sizable multi-district litigation involving personal-injury claims arising from the use of proton-pump inhibitors.

Judge Cecchi is from Whitestone, Queens, New York and graduated from The Bronx High School of Science in 1982. She received her Bachelor's Degree *cum laude* in 1986 from Barnard College, Columbia University, where she studied political science and history. She received her *Juris Doctor* in 1989 from Fordham University School of Law, where she was a recipient of the Gulbenkian Merit Scholarship.

Following her graduation from law school, Judge Cecchi served as an Assistant Corporation Counsel in the Office of the Corporation Counsel, City of New York. Thereafter, she was an Associate at Robinson, St. John & Wayne from 1992 to 1996 and its successor firm, Robinson, Lapidus & Livelli in 1996. Subsequently, at the firm of Carpenter, Bennett & Morrissey she was an Associate from 1997 to 2001 and a Partner from 2001 to 2004. The firm later merged and became known as McElroy, Deutsch, Mulvaney & Carpenter, where she was also a Partner. She specialized in complex litigation in federal and state courts of New Jersey and other jurisdictions.

The New Jersey Law Journal named Judge Cecchi one of New Jersey's "40 Under 40" in 2002. Among her other honors, she received the Fordham Law Alumni Association's Distinguished Alumnus Award in 2016. She is a Fellow of the American Bar Foundation, a Member of the Historical Society of the United States District Court for the District of New Jersey, and a Master of the William J. Brennan, Jr./Arthur T. Vanderbilt American Inn of Court. Judge Cecchi is actively involved in community outreach. She is a frequent speaker at continuing legal education programs, and was previously the director and moderator of the United States District Court for the District of New Jersey Summer Intern/Law Clerk Education Program.

Her efforts to interest younger people in the law include hosting the United States District Court for the District of New Jersey Take Your Child to Work Day, and sponsoring an annual mock trial for Essex Fells School sixth-graders.

Christa D'Alimonte

General Counsel

Viacom

Christa A. D'Alimonte is Executive Vice President, General Counsel and Secretary, overseeing Viacom's global legal functions, as well as the company's Human Resources organization and its Security, Facilities and Real Estate teams.

D'Alimonte joined Viacom as Senior Vice President, Deputy General Counsel and Assistant Secretary in 2012 from Shearman & Sterling LLP, where she was Deputy Practice Group Leader of the Firm's Global Mergers & Acquisitions group. In her practice at Shearman & Sterling, D'Alimonte represented a broad range of domestic and multinational clients – including Viacom - on public and private mergers, acquisitions and dispositions, as well as corporate governance matters. D'Alimonte joined Shearman & Sterling in 1993, and became a partner in January 2001.

D'Alimonte graduated from Georgetown University Law Center, where she was the Editor-in-Chief of the *American Criminal Law Review*, and received her A.B. in Politics and a Certificate of Proficiency in Latin American Studies from Princeton University. She has been recognized as a leading lawyer by *Chambers USA* and *Legal 500* and as a "Top Female Dealmaker" by *Law360*. D'Alimonte is a member of the board of directors of Asphalt Green, a nonprofit organization dedicated to assisting individuals of all ages and backgrounds achieve health through a lifetime of sports and fitness, a past member of the Princeton University Politics Department Advisory Council and a past participant in the Partnership for New York City's David Rockefeller Fellows Program.

Paula Davis-Laack

Founder and CEO

Stress & Resilience Institute

Paula Davis-Laack, JD, MAPP, is a former practicing lawyer, speaker, consultant, media contributor, and a stress and resilience expert who has designed and taught resilience workshops to thousands of professionals around the world.

Paula left her law practice after seven years and earned a master's degree in applied positive psychology from the University of Pennsylvania. As part of her post-graduate training, Paula

was selected to be part of the University of Pennsylvania faculty teaching and training resilience skills to soldiers as part of the Army's Comprehensive Soldier and Family Fitness program. The Penn team trained resilience skills to more than 30,000 soldiers and their family members.

Her articles on stress, burnout prevention, resilience, and thriving at work are prominently featured on her blogs in *The Huffington Post*, *Forbes*, *Fast Company* and *Psychology Today*. She is the author of several e-books, with her latest called *From Army Strong to Lawyer Strong®: What the Legal Profession Can Learn from The Army's Experience Cultivating a Culture of Resilience*.

She is a contributing author to several books, including, *Character Strengths Matter: How to Live a Full Life* (2015), a chapter about resilience in *The Best Lawyer You Can Be* (2018), and a chapter about her burnout prevention and resilience work with the Medical College of Wisconsin in the forthcoming *Appreciative and Relationship Practices in Healthcare*.

Her expertise has been featured in and on *O, The Oprah Magazine*, *Redbook*, *Men's Health*, Time.com, Today.com, The Steve Harvey TV show, Huffington Post Live and a variety of media outlets. She has also been featured in and on the Lawyerist, Law360.com, various ABA webinars and publications, and the *Women's Law Journal*. Paula was recently named a Trusted Advisor to the Professional Development Consortium.

She is the Founder and CEO of the Stress & Resilience Institute, a training and consulting firm that partners with law firms and organizations to help them develop high-performing professionals, leaders, and teams using the science of resilience and well-being (www.pauladavislaack.com). You can reach Paula at paula@pauladavislaack.com.

Brittany Dryer

Associate

Latham & Watkins LLP

Brittany K. Dryer is an associate in the New York office of Latham & Watkins and a member of the firm's Litigation & Trial Department. Ms. Dryer previously clerked for Judge Claire C. Cecchi of the US District Court for the District of New Jersey. She received her JD from Fordham University School of Law, where she graduated *magna cum laude* and was the executive digital editor for the *Fordham Law Review* and an associate editor for the Moot Court Board. Ms. Dryer received her bachelor's degree in political science from Emory University.

Brenne Grossman

Principal Trainer

SpeechSkills

Based in New York, Brenne delivers the firm's signature workshops to some of the East Coast's most innovative companies. As a Principal Trainer for SpeechSkills, Brenne has provided training to companies and non-profits across the U.S., including: C1 Consulting, Indeed, Palantir, Pfizer, PopSugar and LWT (Leading Women in Technology).

A graduate of the NYU Tisch School of the Arts with a BFA in Drama, Brenne has significant experience as a professional actor, including a recent year-long Broadway National Tour. Brenne has also worked in the world of casting, collaborating with creative teams to match unique voices and personalities with the needs of various productions. Through her roles both onstage and behind the scenes, Brenne has come to learn and appreciate the necessary skills for taming adrenaline and projecting confidence in high-stakes situations.

In addition to leading workshops, Brenne is a part of our development team, working alongside founder Cara Hale Alter to design new curriculum and cultivate new business opportunities.

Brenne's other passions include food, travel, and kickboxing.

Kim Koopersmith

Chairperson

Akin Gump Strauss Hauer & Feld LLP

Kim Koopersmith, chairperson of Akin Gump Strauss Hauer & Feld LLP, guides the firm's strategic direction, heads the firm's management committee and ensures the firm's continued commitment to client service, diversity, pro bono work and attorney excellence. She has played a key role in enhancing the firm's overall performance, earning recognition for her innovative and transformative approach to law firm leadership.

Prior to her role in management, Ms. Koopersmith was a partner in the firm's litigation practice, handling complex commercial litigation and serving as relationship partner to several of the firm's largest clients.

Throughout her career, Ms. Koopersmith pioneered many of Akin Gump's efforts to enhance diversity and attract and retain the best talent, including driving the firm's participation in scholarship and pipeline efforts. She is also an active participant in legal industry efforts to address diversity.

Ms. Koopersmith has received much recognition for her work at Akin Gump. She received the 2018 Flex Leader Award from the Diversity & Flexibility Alliance for moving the firm toward a more inclusive workplace. In 2015, she was named to *The Lawyer's* "Hot 100" list of the most noteworthy legal performers for her role in Akin Gump's historic hire of Bingham McCutchen's London office. She was named an "agent of change" by *Women of Influence* magazine in 2014 for promoting a diverse workplace and flexible schedules. In 2011, she was the recipient of *Inside Counsel's* Pathmaker Award, presented annually to a law firm leader whose "courage, unyielding vision, integrity, conviction and authenticity [have] carved a groundbreaking path and laid a new foundation to accelerate the economic empowerment of attorneys of color or women." Additionally, *Law360* selected her as one of its "2012 Most Innovative Managing Partners," citing "almost two decades creating and expanding advancement opportunities for women and minorities both inside and outside of the firm, making her among the most innovative leaders at U.S. firms."

Ms. Koopersmith is involved in numerous community activities, including serving on the board of the NAACP Legal Defense and Educational Fund, co-chairing the Pro Bono Institute Law Firm Committee and sitting on the board of Her Justice. She has also chaired the board of Equal Justice Works.

Jiyeon Lee-Lim

Partner

Latham & Watkins LLP

Jiyeon Lee-Lim is a partner in the New York office of Latham & Watkins and is a Global Department Chair of the firm's Tax Department. Her major practice area includes international and corporate tax, with a particular emphasis on financial products, capital markets transactions, securitization transactions and cross-border tax planning. Ms. Lee-Lim has

previously served as the head of the firm's International Tax Group, and is ranked by Chambers Global as a notable practitioner. She was recently named as the Notable Women in Law by Crain's New York Business (2019).

Ms. Lee-Lim has been on the Executive Committee of Tax Section of the New York State Bar Association (NYSBA) and previously served as a co-chair of the Committee on Securitizations and Structured Finance. She is also a member of Tax Forum. Ms. Lee-Lim is a frequent speaker at a number of conferences.

Ms. Lee-Lim received S.J.D from Harvard Law School (1988), LL.M from Harvard Law School (1984) and LL.B. from Seoul National University (1983, President's Prize).

Maria L. Marcus

Joseph M. McLaughlin Professor of Law Emerita

Maria L. Marcus is the Joseph M. McLaughlin Professor of Law Emerita and the Fordham Law School Moor Court Board Moderator. She received her B.A. from Oberlin College and her J.D. from Yale Law School. She was Associate Counsel for the NAACP from 1961 to 1967, Assistant Attorney General of New York State from 1967 to 1978, Chief of the Litigation Bureau for the Attorney General of New York State from 1976 to 1978, and Vice President of the Association of the Bar of the City of New York from 1995 to 1996. Her achievements of note include the Dean's Medal of Recognition from Fordham Law School in 2011, Teacher of the Year from Fordham Law Students in 2001, the New York Women's Bar Association President's Special Award in 1999, and the Fordham Urban Law Journal's Lefkowitz Award in 2016.

Khadijah Sharif-Drinkard

Senior Vice President, Business and Legal Affairs Viacom Media Networks

Khadijah Sharif-Drinkard serves as Senior Vice President, Business and Legal Affairs, Viacom Media Networks, where she oversees unscripted programming, music programming, tent poles, specials and news across BET Networks. She is a strong business partner with broad expertise and over 20 years of practicing law in the media and entertainment field. Khadijah structures and negotiates a wide variety of transactions in connection with the development, production, acquisition and distribution of content across platforms. Her experience as a skilled business executive and deal maker was paramount in her closing deals for a number of high profile projects, including, the Bobby Brown Story, the New Edition mini-series (the highest rated show ever on BET), and in bringing the Black Girls Rock! franchise to BET. Prior to working at BET Networks, Khadijah served as Vice President, Senior Counsel at Nickelodeon where she helped to launch such hits as Dora the Explorer, Diego and The Backyardigans.

Khadijah serves as President of the Board of Directors for the Black Entertainment & Sports Lawyers Association (BESLA) and as Vice President of the Board for Columbia College Women (CCW). She received the Luminary Award for her business acumen and her commitment to diversity and inclusion from the National Association of Multi-Ethnicity in Communications (NAMIC) and the inaugural Corporate Counsel of the Year Award from the Muslim Bar Association of New York (MuBANY) in 2018. Khadijah earned her Bachelor of Arts degree from Columbia University and her Juris Doctor from Fordham University School of Law. She lives in New Jersey with her husband and two daughters.

Aviva O. Will

Senior Managing Director

Burford Capital

In her role at Burford, Ms. Will has overseen the continuing innovation of its offerings to law firms and corporations, and has built the industry's most respected litigation finance team and process. She has managed a broad range of litigation matters valued in the billions of dollars during her career, with a particular specialty in antitrust and complex business litigation.

Prior to joining Burford in 2010, Ms. Will was a senior litigation manager and Assistant General Counsel at Time Warner Inc., where she managed a portfolio of significant antitrust, IP, and complex commercial litigation. She was also the company's chief antitrust and regulatory counsel, advising senior management on antitrust risk and overseeing all government antitrust investigations and merger clearances worldwide; she served as the Assistant Secretary for the company, managing corporate compliance and governance for the company and Board. Prior to joining Time Warner, Ms. Will was a senior litigator at Cravath, Swaine & Moore.

Ms. Will graduated from Columbia College with a degree in economics and philosophy, and cum laude from Fordham University School of Law, where she was the Writing & Research Editor of the Fordham Law Review and a member of the Order of the Coif. She was a law clerk to the Honorable Stewart G. Pollock on the New Jersey Supreme Court.



IF NOT NOW, WHEN?

**Achieving Equality for Women Attorneys in
the Courtroom and in ADR**

Report of the New York State Bar Association

**Prepared by the Commercial and Federal Litigation Section's
Task Force on Women's Initiatives: Hon. Shira A. Scheindlin
(ret.); Carrie H. Cohen; Tracee E. Davis; Bernice K. Leber;
Sharon M. Porcellio; Lesley F. Rosenthal; Lauren J. Wachtler**

**Approved by the House
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**IF NOT NOW, WHEN? ACHIEVING EQUALITY FOR WOMEN ATTORNEYS
IN THE COURTROOM AND IN ADR
REPORT OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION
2017 WOMEN’S INITIATIVE STUDY**

I. Introduction

During the last two decades, much has been written and discussed about whether women attorneys appear in court with the frequency expected given their numbers in the legal profession. The Commercial and Federal Litigation Section of the New York State Bar Association is a preeminent bar group focused on complex commercial state and federal litigation. The Section counts among its former chairs a substantial number of prominent women litigators from both upstate and downstate, including a former United States District Judge who previously served as a federal prosecutor and an attorney in private practice, a former President of the New York State Bar Association who is recognized as one of New York’s top female commercial litigators and also serves as a mediator and arbitrator of commercial disputes, a former federal and state prosecutor who now is a partner in a large global law firm, an in-house counsel at a large non-profit corporation, and senior partners in large and mid-size private law firms located both upstate and downstate. With the full support and commitment of the Section’s leadership, these female alumnae Section chairs met and formed an ad hoc task force devoted to the issue of women litigators in the courtroom. The task force also examined the related issue of the apparent dearth of women who serve as arbitrators and mediators in complex commercial and international arbitrations and mediations (collectively referred to herein as Alternative Dispute Resolution (“ADR”)).

As an initial matter, the task force sought to ascertain whether there was, in fact, a disparity in the number of female attorneys versus male attorneys who appear in speaking roles in federal and state courts throughout New York. Toward that end, the task force devised and distributed a survey to state and federal judges throughout the State and then compiled the survey results. As fully discussed below, based on the survey results, the task force found continued disparity and gender imbalance in the courtroom. This report first details recent studies and research on the issue of gender disparity in the legal profession, then discusses how the court survey was conducted, including methodology and findings, and concludes with recommendations for addressing the disparity and ensuring that women attorneys obtain their rightful equal place in the courtroom. This report further details the task force’s findings with respect to the gender gap in the ADR context.

II. Literature Review: Women in Litigation; Women in ADR

There is no shortage of literature discussing the gender gap in the courtroom, which sadly continues to persist at all levels—from law firm associates, to equity partnerships at law firms, to lead counsel at trial. To orient the discussion, the task force sets forth below a brief summary of some of the relevant articles it reviewed.

A. Women in Litigation: Nationwide

ABA Commission on Women in the Profession

The ABA Commission on Women in the Profession (the “ABA Commission”) was founded in 1987 “to assess the status of women in the legal profession and to identify barriers to their achievement.”¹ The following year, with Hillary Rodham Clinton serving as its inaugural chair, the ABA Commission published a groundbreaking report documenting the lack of adequate advancement opportunities for women lawyers.² Thirty years later, the ABA Commission is perhaps the nation’s preeminent body for researching and addressing issues faced by women lawyers.³

In 2015, the ABA Commission published *First Chairs at Trial: More Women Need Seats at the Table* (the “ABA Report”), “a first-of-its-kind empirical study of the participation of women and men as lead counsel and trial attorneys in civil and criminal litigation.”⁴ The study was based on a random sample of 600 civil and criminal cases filed in the United States District Court for the Northern District of Illinois in 2013—a sample that offered a limited but important snapshot into the composition of trial courtrooms at that time.⁵ As summarized by its authors, Stephanie A. Scharf and Roberta D. Liebenberg, the ABA Report showed at a high level the following:

[W]omen are consistently underrepresented in lead counsel positions and in the role of trial attorney In civil cases, [for example], men are three times more likely than women to appear as lead counsel That substantial gender gap is a marked departure from what we expected based on the distribution of

¹ Stephanie A. Scharf & Roberta D. Liebenberg, ABA Commission on Women in the Profession, *First Chairs at Trial: More Women Need Seats at the Table—A Research Report on the Participation of Women Lawyers as Lead Counsel and Trial Counsel in Litigation* at 25 (2015).

² *See id.*

³ *See id.*

⁴ *Id.* At 4.

⁵ *See id.*

men and women appearing generally in the federal cases we examined (a roughly 2 to 1 ratio) and the distribution of men and women in the legal profession generally (again, a roughly 2 to 1 ratio).⁶

The ABA Report also provided more granular statistics about the sample population, including that out of the 558 civil cases surveyed, 68% of all lawyers and 76% of the lead counsel were male.⁷ The disparity was even more exaggerated in the class action context, in which 87% of lead class counsel were men.⁸ The 50 criminal cases studied fared no better: among all attorneys appearing, 67% were men and just 33% were women.⁹

Contextualizing these statistics, the ABA Report also outlined factors that might help to explain the gender disparities evidenced by the data. In particular, the ABA Report posited that:

The underrepresentation of women among lead lawyers may. . . stem from certain client preferences, as some clients prefer a male lawyer to represent them in court. . . . In addition, women may too often be relegated by their law firms to second-chair positions, even though they have the talent and experience to serve as first chairs. The denial of these significant opportunities adversely affects the ability of women to advance at their firms. All of these issues apply with even greater force to women trial attorneys of color, who face the double bind of gender and race.

Id. at 15 (footnote omitted). The ABA Report concluded by offering some “best practices” for law schools, law firms, clients, judges, and women lawyers, many of which focus on cultivating opportunities for women to gain substantive trial experience.¹⁰

Other research corroborates the extent to which gender disparities continue to persist within the legal profession, particularly within law firm culture. This research shows that the presence of women in the legal profession—now in substantial numbers—has not translated into equal opportunities for women lawyers at all levels. For example, a recent law firm survey, conducted by the New York City Bar Association, found that just 35% of all lawyers at surveyed firms in 2015 were women—“despite [the fact that

⁶ *Id.*

⁷ *See id.* at 8-10.

⁸ *See id.* at 12.

⁹ *See id.* at 12-13.

¹⁰ *Id. See also id.* at 14-17.

women have] represent[ed] almost half of graduating law school classes for nearly two decades.”¹¹ That same survey found a disparity in lawyer attrition rates based on gender and ethnicity, with 18.4% of women and 20.8% of minorities leaving the surveyed firms in 2015 compared to just 12.9% of white men.¹² Serious disparities also have been identified at the most senior levels of the law firm structure. Indeed, a 2015 survey by the National Association of Women Lawyers found that women held only 18% of all equity partner positions—just 2% higher than they did approximately a decade earlier.¹³ Based on one study by legal recruiting firm, Major, Lindsey & Africa, it is estimated that the compensation of male partners is, on average, 44% higher than that of female partners.¹⁴

In April 2017, ALM Intelligence focused on Big Law and asked, “Where Do We Go From Here?: Big Law’s Struggle With Recruiting and Retaining Female Talent.”¹⁵ The author found that certain niche practices such as education, family law, health care, immigration, and labor and employment had the greatest proportion of women; other areas such as banking, corporate, and litigation had the lowest number of female attorneys.¹⁶

Promisingly, however, there also have been significant calls to action—across the bar and bench—to increase advancement opportunities for women lawyers. In interviews conducted after the ABA Report was published, top female trial attorneys cited factors such as competing familial demands, law firm culture (including a desire to have “tried and true” lawyers serve as lead counsel), and too few training opportunities for young lawyers as reasons why so few women were present at the highest ranks of the profession.¹⁷ Those interviewed suggested ways in which law firms can foster the development of women lawyers at firms, including by affording female associates more

¹¹ Liane Jackson, *How can barriers to advancement be removed for women at large law firms?*, ABA Journal (Jan. 1, 2017), http://www.abajournal.com/magazine/article/visible_difference_women_law.

¹² *See id.*

¹³ Andrew Strickler, *Female Attorneys Should Grab High-Profile Work: Bar Panel*, Law360 (Jan. 27, 2016), <https://www.law360.com/articles/750952/female-attorneys-should-grab-high-profile-work-bar-panel>.

¹⁴ *See id.*

¹⁵ Daniella Isaacson, ALM Intelligence, *Where Do We Go From Here?: Big Law’s Struggle With Recruiting and Retaining Female Talent* (Apr. 2017).

¹⁶ Meghan Tribe, *Study Shows Gender Diversity Varies Widely Across Practice Areas*, The Am Law Daily (Apr. 17, 2017) <http://www.americanlawyer.com/id=1202783889472/Study-Shows-Gender-Diversity-Varies-Widely-Across-Practice-Areas> (citing Daniella Isaacson, ALM Intelligence, *Where Do We Go From Here?: Big Law’s Struggle With Recruiting and Retaining Female Talent* (Apr. 2017)).

¹⁷ Mary Ellen Egan, *Too Few Women in Court*, The American Lawyer (Apr. 25, 2016), <http://www.americanlawyer.com/id=1202755433078/Too-Few-Women-in-Court>.

courtroom opportunities and moving away from using business generation as the basis for determining who is selected to try a case.¹⁸ Among those interviewed was Ms. Liebenberg, one of the co-authors of the ABA Report. She stressed that clients can play an important role by using their economic clout to insist that women play a significant role in their trial teams.¹⁹

In another follow-up to the ABA Report, Law360 published an article focusing on the ABA Report's recommendation that judges help to close the gender gap by encouraging law firms to give young lawyers (including female and minority associates) visible roles in the courtroom and at trial.²⁰ The article highlighted the practice of some judges around the country in doing this, such as Judge Barbara Lynn of the Northern District of Texas. As explained in the article, Judge Lynn employs a "standard order"—adapted from one used by Judge William Alsup of the Northern District of California—that encouraged parties to offer courtroom opportunities to less experienced members of their teams.²¹ One such order provides: "In those instances where the court is inclined to rule on the papers, a representation that the argument would be handled by a young lawyer will weigh in favor of holding a hearing."²² As explained in the article, Judge Lynn said that, while her order does not mention gender, younger lawyers in her courtroom tend to include more women.

Indeed, a recent survey revealed that nineteen federal judges have issued standing orders that encourage law firms to provide junior attorneys with opportunities to gain courtroom experience.²³ Here are some examples of such orders:

- Judge Indira Talwani (D. Mass): "Recognizing the importance of the development of future generations of practitioners through courtroom opportunities, the undersigned judge, as a matter of policy, strongly encourages the participation of relatively inexperienced attorneys in all courtroom proceedings including but not limited to initial scheduling conferences, status conferences, hearings on discovery motions, and examination of witnesses at

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ Andrew Strickler, *Judges Key to Closing Trial Counsel Gender Gap*, Law360 (July 20, 2015) <https://www.law360.com/articles/680493/judges-key-to-closing-trial-counsel-gender-gap>.

²¹ *Id.*

²² *Id.*

²³ Michael Rader, *Rising to the Challenge: Junior Attorneys in the Courtroom*, 257 N.Y.L.J. 4 (Apr. 28, 2017).

trial.”

- Judge William Alsup (N.D. Cal.): “The Court strongly encourages lead counsel to permit young lawyers to examine witnesses at trial and to have an important role. It is the way one generation will teach the next to try cases and to maintain our district’s reputation for excellence in trial practice.”

- Magistrate Judge Christopher Burke (D. Del.) “indicates that the court will make extra effort to grant argument—and will strongly consider allotting additional time for oral argument—when junior lawyers argue.”

- Judge Allison Burroughs (D. Mass) offers law firm associates the chance to argue a motion after the lead attorneys have argued the identical motion.²⁴

As explained in the article cited below, there are benefits to both the lawyer and the client in having junior attorneys play a more significant role in the litigation:

When it comes to examining a witness at trial, junior lawyers frequently have a distinct advantage over their more senior colleagues. It is very often the junior lawyer who spent significant time with the witness during the discovery process In the case of an expert witness, the junior lawyer probably played a key role in drafting the expert report. In the case of a fact witness, the junior lawyer probably worked with the witness to prepare a detailed outline of the direct examination. . . . [C]lients should appreciate that the individual best positioned to present a witness’s direct testimony at trial may be the junior attorney who worked with that witness The investment of time required to prepare a junior attorney to examine a witness or conduct an important argument can be substantial, but this type of hands-on mentoring is one of the most rewarding aspects of legal practice.²⁵

At the same time, practitioners also have urged junior female attorneys to seek out advancement opportunities for themselves—a sentiment that was shared by panelists at a conference hosted by the New York State Bar Association in January 2016. Panel members—who spoke from a variety of experiences, ranging from that of a federal District Court Judge to a former Assistant U.S. Attorney to private practice—“uniformly called for rising female attorneys to seek out client matters, pro bono cases, bar roles, and other responsibilities that would give them experience as well as profile beyond their

²⁴ *Id.*

²⁵ *Id.*

home office.”²⁶

ABA Presidential Task Force on Gender Equity

In 2012, American Bar Association President Laurel G. Bellows appointed a blue-ribbon Task Force on Gender Equity (“Task Force”) to recommend solutions for eliminating gender bias in the legal profession.²⁷ In 2013, the Task Force in conjunction with the ABA Commission published a report that discussed, among other things, specific steps clients can take to ensure that law firms they hire provide, promote, and achieve diverse and inclusive workplaces.²⁸ Working together, the Task Force concluded, “general counsel and law firms can help reduce and ultimately eliminate the compensation gap that women continue to experience in the legal profession.”²⁹

The Task Force recommended several “best practices” that in-house counsel can undertake to promote the success of women in the legal profession. As a “baseline effort,” corporations that hire outside counsel, including litigators, should inform their law firms that the corporation is interested in seeing female partners serving as “lead lawyers, receiving appropriate origination credit, and being in line for succession to handle their representation on behalf of the firm.”³⁰ Corporate clients can also expand their list of “go-to” lawyers by obtaining referrals to women lawyers from local bar associations; contacting women lawyers in trial court opinions issued in areas of expertise needed; and inviting diverse lawyers to present CLE programs.³¹ This allows the corporate clients to use their “purchasing power” to ensure that their hired firms are creating diverse legal teams.³²

The Task Force also reported that clients can utilize requests for proposal and pitch

²⁶ Andrew Strickler, *Female Attorneys Should Grab High-Profile Work: Bar Panel*, Law360 (Jan. 27, 2016) <https://www.law360.com/articles/750952/female-attorneys-should-grab-high-profile-work-bar-panel> (emphasis added).

²⁷ *ABA Presidential Task Force on Gender Equity and the Commission on Women in the Profession, Power of the Purse: How General Counsel Can Impact Pay Equity for Women Lawyers* (2013).

²⁸ *Publications from the ABA Presidential Task Force on Gender Equity*, AMERICAN BAR ASSOCIATION (2012), https://www.americanbar.org/groups/women/gender_equity_task_force/task_force_publications.html.

²⁹ *Id.*

³⁰ *Id.* at 6. For an in-depth discussion of recommendations for steps clients can take to combat the gender disparity in courtrooms, see *infra* Part F.

³¹ *Id.* at 9.

³² *Id.* at 8.

meetings to convey their diversity policies to outside firms and “specify metrics by which they can better evaluate a firm’s commitment to women lawyers.”³³ When in-house counsel ask their outside firms to provide data, they demonstrate to the firms their consciousness of metrics, and the data allows them to benchmark the information against other firms.³⁴

Perhaps the most impactful practice corporate clients can undertake is a “deepened level of inquiry,” which involves investigating how work is credited within law firms.³⁵ For example, a general counsel may tell a firm that she wants “the woman lawyer on whom she continually relied to be the relationship partner and to receive fee credit for the client’s matters” even if that means “transferring that role from a senior partner” that might cause “tension in the firm.”³⁶

Finally, clients can “lead by example, both formally and informally” by partnering with law firms committed to bringing about pay equity.³⁷ The Task force professed that by doing so, corporate clients have the power to shatter the “last vestiges of the glass ceiling in the legal profession.”³⁸

Call for Diversity by Corporate Counsel

The ABA was not the first and only organization to recognize the growing importance of gender equity in the legal profession. In 1999, Charles R. Morgan, then Chief Legal Officer for BellSouth Corporation, developed a pledge titled Diversity in the Workplace: A Statement of Principle (“Statement of Principle”) as a reaction to the lack of diversity at law firms providing legal services to Fortune 500 companies.³⁹ Mr. Morgan intended the Statement of Principle to function as a mandate requiring law firms to make immediate and sustained improvements in diversity initiatives.⁴⁰ More than four hundred Chief Legal Officers of major corporations signed the Statement of Principle,⁴¹

³³ *Id.* at 10.

³⁴ *See id.* at 11.

³⁵ *See id.* at 13.

³⁶ *Id.* at 10.

³⁷ *Id.* at 15.

³⁸ *Id.*

³⁹ Donald O. Johnson, *The Business Case for Diversity at the CPCU Society* at 5 (2007), <https://www.cpcusociety.org/sites/dev.aicpcu.org/files/imported/BusinessDiversity.pdf>.

⁴⁰ Rick Palmore, *A Call to Action: Diversity in the Legal Profession*, 8 ENGAGE 21, 21 (2004).

⁴¹ Donald O. Johnson, *The Business Case for Diversity at the CPCU Society* at 5 (2007),

which served as evidence of commitment by signatory corporations to a diverse legal profession.⁴²

By 2004, however, Rick Palmore, a “nationally recognized advocate for diversity in the legal industry,”⁴³ then serving as an executive and counsel at Sara Lee Corporation, observed that efforts for law firm diversity had reached a “disappointing plateau.”⁴⁴ Mr. Palmore authored *A Call to Action: Diversity in the Legal Profession*, (“Call to Action”), which built upon the Statement of Principle.⁴⁵ The Call to Action focused on three major elements: (1) the general principle of having a principal’s interest in diversity; (2) diversity performance by law firms, especially in hiring and retention; and (3) commitment to no longer hiring law firms that do not promote diversity initiatives.⁴⁶

Mr. Palmore pledged to “make decisions regarding which law firms represent our companies based in significant part on the diversity performance of the firms.” To that end, he called upon corporate legal departments and law firms to increase the numbers of women and minority attorneys hired and retained.⁴⁷ Mr. Palmore stated that he intended to terminate relationships with firms whose performances “consistently evidence[] a lack of meaningful interest in being diverse.”⁴⁸ By December 4, 2004, the Call to Action received signatory responses from seventy-two companies, including corporate giants such as American Airlines, UPS, and Wal-Mart.⁴⁹ Both the Statement of Principle and *A Call to Action* reflect the belief of many leading corporations that diversity is important and has the potential to profoundly impact business performance.⁵⁰

<https://www.cpcusociety.org/sites/dev.aicpcu.org/files/imported/BusinessDiversity.pdf>.

⁴² Rick Palmore, *A Call to Action: Diversity in the Legal Profession*, 8 ENGAGE 21, 21 (2004).

⁴³ Rick Palmore, Senior Counsel, Dentons US LLP; LCLD Founding Chair Emeritus http://www.lclldnet.org/media/mce_filebrowser/2017/02/22/Palmore.Rick-Fellows-branded-bio.2.13.17.pdf (last visited May 30, 2017).

⁴⁴ Rick Palmore, *A Call to Action: Diversity in the Legal Profession*, 8 ENGAGE 21, 21 (2004).

⁴⁵ Melanie Lasoff Levs, *Call to Action: Sara Lee's General Counsel: Making Diversity a Priority*, DIVERSITY & THE BAR (Jan./Feb. 2005), <http://archive.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=803>.

⁴⁶ *See id.*

⁴⁷ *Id.*

⁴⁸ Rick Palmore, *A Call to Action: Diversity in the Legal Profession*, 8 ENGAGE 21, 21 (2004).

⁴⁹ Melanie Lasoff Levs, *Call to Action: Sara Lee's General Counsel: Making Diversity a Priority*, DIVERSITY & THE BAR (Jan./Feb. 2005), <http://archive.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=803>.

⁵⁰ Donald O. Johnson, *The Business Case for Diversity at the CPCU Society* at 7 (2007),

B. Women in ADR

Turning to the ADR context, the governing principle should be that panels of “[n]eutrals should reflect the diverse communities of attorneys and parties whom they serve.”⁵¹ This statement strikes us as the best way to begin our survey of the literature concerning the status of women in the world of ADR.

It should come as no surprise that much has been written about the lack of diversity among ADR neutrals, especially those selected for high-value cases. As a 2017 article examining gender differences in dispute resolution practice put it, “the more high-stakes the case, the lower the odds that a woman would be involved.”⁵² Data from a 2014 ABA Dispute Resolution Section survey indicated that for cases with between one and ten million dollars at issue, 82% of neutrals and 89% of arbitrators were men.⁵³ Another survey estimated that women arbitrators were involved in just 4% of cases involving one billion dollars or more.⁵⁴

One part of the problem may be that relatively few women and minorities are present within the field. For example, one ADR provider estimated that in 2016 only 25% of its neutrals were women, 7% were minorities, and 95% were over fifty.⁵⁵ Similarly, in 2016, the International Centre for Settlement of Investment Disputes (an arm of the World Bank) reported that only 12% of those selected as arbitrators in ICSID cases were women.⁵⁶ Similarly, the International Institute for Conflict Prevention and Resolution (CPR)

<https://www.cpcusociety.org/sites/dev.aicpcu.org/files/imported/BusinessDiversity.pdf>.

⁵¹ Theodore K. Cheng, *A Celebration of Diversity in Alternative Dispute Resolution*, Diversity and the Bar Spring 2017 MCCA.com at 14.

⁵² Noah Hanft, *Making Diversity Happen in ADR: No More Lip Service*, 257 N.Y.L.J. S6 (Mar. 20, 2017).

⁵³ See *id.* (citing *Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey* (Jan. 2014)).

⁵⁴ See Christine Simmons, *Where Are the Women and Minorities in Global Dispute Resolution?*, The American Lawyer (Oct. 10, 2016) <http://www.americanlawyer.com/id=1202769481566/Where-Are-the-Women-and-Minorities-in-Global-Dispute-Resolution?mcode=0&curindex=0&curpage=ALL>.

⁵⁵ See Noah Hanft, *Making Diversity Happen in ADR: No More Lip Service*, 257 N.Y.L.J. S6 (Mar. 20, 2017) (citing Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, <http://www.law.com/sites/almstaff/2016/10/05/adr-business-wakes-up-to-glaring-deficit-of-diversity/> (Oct. 5, 2016)).

⁵⁶ See Christine Simmons, *Where Are the Women and Minorities in Global Dispute Resolution?*, The American Lawyer (Oct. 10, 2016) <http://www.americanlawyer.com/id=1202769481566/Where-Are-the-Women-and-Minorities-in-Global-Dispute-Resolution?mcode=0&curindex=0&curpage=ALL>.

reported that of more than 550 neutrals who serve on its worldwide panels, about 15% are women and 14% are minorities.⁵⁷

One of the concerns raised by this lack of diversity among neutrals is that it diminishes the legitimacy of the process.⁵⁸ But as one recent article in the New York Law Journal suggests, it may be even harder to take steps to improve diversity within ADR than it is to do so in law firms given the incentives of key stakeholders in the ADR context.⁵⁹ In particular, the article argues that law firms may be more inclined to recommend familiar, well-established (likely male) neutrals with the intent of trying to achieve a favorable outcome, and their clients may be more willing to accept their lawyers' recommendations for that same reason.⁶⁰

Comparing ADR statistics with those of the judiciary is revealing. Approximately 33% of federal judges are women and 20% are minorities—which is far ahead of the numbers in the world of ADR.⁶¹ Despite ADR's "quasi-public" nature, it remains a private and confidential enterprise for which gender and racial statistics for ADR providers are not fully available.⁶² Nonetheless, the information that is available reveals a stark underrepresentation of women and minority arbitrators and mediators.⁶³ In short, the overwhelming percentage of neutrals are white men and the lowest represented group is minority women. It is no wonder that one attorney reported that, in her twenty-three years of practice, she had just three cases with non-white male neutrals.⁶⁴

⁵⁷ Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law.com (Oct. 5, 2016).

⁵⁸ See Christine Simmons, *Where Are the Women and Minorities in Global Dispute Resolution?*, The American Lawyer (Oct. 10, 2016) <http://www.americanlawyer.com/id=1202769481566/Where-Are-the-Women-and-Minorities-in-Global-Dispute-Resolution?mcode=0&curindex=0&curpage=ALL>.

⁵⁹ See Noah Hanft, *Making Diversity Happen in ADR: No More Lip Service*, 257 N.Y.L.J. S6 (Mar. 20, 2017) (citing Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, <http://www.law.com/sites/almstaff/2016/10/05/adr-business-wakes-up-to-glaring-deficit-of-diversity/> (Oct. 5, 2016)).

⁶⁰ See *id.*

⁶¹ Laura A. Kaster, et al., *The Lack of Diversity in ADR—and the Current Beneath*, American Inns of Court (Mar./Apr. 2017) at 14.

⁶² Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law.com (Oct. 5, 2016); see also Laura A. Kaster, *Choose Diverse Neutral to Resolve Disputes—A Diverse Panel Will Improve Decision Making* ("Because alternative dispute resolution is a privatization of otherwise public court systems, it is . . . valid to compare the public judiciary to private neutrals in commercial arbitration.").

⁶³ ABA Presidential Task Force on Gender Equity and the Commission on Women in the Profession, *Power of the Purse: How General Counsel Can Impact Pay Equity for Women Lawyers* (2013).

⁶⁴ Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law.com (Oct. 5, 2016).

The homogeneity within the ADR field is even worse at the case-specific level. A 2014 survey published by the American Bar Association indicated a clear disparity in the types of cases for which women neutrals were selected: whereas 57% of neutrals in family, elder, and probate cases were women, this figure was just 37% for labor and employment actions, 18% for corporate and commercial cases, and 7% for intellectual property cases.⁶⁵

Some have theorized that the reason for the lack of diversity within ADR—both in the neutrals available for selection and the types of cases for which diverse neutrals are selected—is a “chronological lag”: most neutrals who are actually selected are retired judges or lawyers with long careers behind them, who comprise a pool of predominantly white males.⁶⁶ But, women have been attending law school at equal rates as men for more than ten years and there is no dearth of qualified female practitioners.⁶⁷ Accordingly, other important but difficult to overcome factors may include implicit bias by lawyers or their related fear of engaging neutrals who may not share their same background (and therefore, who they believe may arrive at an unfavorable decision).⁶⁸ This cannot be an excuse: “the privatization of dispute resolution through ADR . . . cannot alter the legitimacy of requiring that society’s dispute resolution professionals, who perform a quasi-public function, reflect the population at large.”⁶⁹

This disparity continues to exist despite the well-documented benefits for all stakeholders of diversity in decision-making processes. Indeed, studies indicate that “when arbitration involves a panel of three, the parties are likely to have harder working panelists and a more focused judgment from the neutrals if the panel is diverse.”⁷⁰ This is because “when members of a group notice that they are socially different from one another, . . . they assume they will need to work harder to come to a consensus. . . . [T]he hard work can lead to better outcomes.”⁷¹ In order to move the needle on diversity in the ADR field, especially with respect to lawyers’ selection of neutrals which is arguably the

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ David H. Burt, *et al.*, *Why Bringing Diversity to ADR Is a Necessity*, ACC Docket at 44 (Oct. 2013).

⁶⁸ *Id.*; see also Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law.com (Oct. 5, 2016).

⁶⁹ Laura A. Kaster, *Why and How Corporations Must Act Now to Improve ADR Diversity*, Corporate Disputes (Jan.-Mar. 2015).

⁷⁰ Laura A. Kaster, *Choose Diverse Neutral to Resolve Disputes—A Diverse Panel Will Improve Decision Making*.

⁷¹ *Id.*

largest driver of the composition of ADR panels, “[w]hat may be missing is the firm belief that diversity matters not just for basic fairness and social equity but also for better judgment.”⁷²

In a recent article, Theodore Cheng, an ADR specialist, described what he sees as the failure of the legal community to accept the fact that diversity in the selection of neutrals is both necessary and beneficial. He begins by noting that “the decision-making process is generally improved, resulting in normatively better and more correct outcomes, when there exist different points of view.”⁷³ Cheng then notes the gap between the commitment to diversity by companies in their own legal departments versus their commitment to diversity in the ADR process.

The efforts on the part of corporate legal departments to ensure diverse legal teams does not appear to extend to the selection of neutrals – a task routinely delegated to outside counsel. Mr. Cheng’s article explains that outside counsel may be afraid of taking a chance on an unknown quantity for fear that they might be held responsible for an unsatisfactory result. Accordingly, they tend to select known quantities, relying on recommendations from within their firms or from friends, which tends to produce the usual suspects – overwhelmingly lawyers like themselves – i.e., older white males. There is also “a failure to acknowledge and address unconscious, implicit biases that permeate any decision-making process.”⁷⁴ The author concludes that there are many qualified women and minorities available to be selected as neutrals but those doing the selections have somehow failed to recognize that this service – like any other service provided to corporate entities – must consider the need for diversity.

Mr. Cheng also stresses why diversity in ADR is important. His article notes that ADR is the privatization of a public function and it is therefore important that the neutrals be diverse and reflect the communities of attorneys and litigants they serve. Secondly, the author notes (as have many others) that better decisions are made when different points of view are considered. The addition of new perspectives is always a benefit. Some ADR providers are taking steps to document and address the problem. For example, the International Institute for Conflict Prevention and Resolution has developed the following Diversity Commitment which any company can sign: “We ask that our outside law firms and counterparties include qualified diverse neutrals among any list of neutrals or arbitrators they propose. We will do the same with the lists we provide.”⁷⁵ Similarly, the American Arbitration Association has committed to ensuring that 20% of the arbitrators on the lists it provides to the parties are

⁷² *Id.*

⁷³ *Id.* (citing Scott Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies* (Princeton Univ. Press 2017) and James Surowiecki, *The Wisdom of Crowds* (Anchor Books 2004)).

⁷⁴ *Id.* at 19.

⁷⁵ Laura A. Kaster, *Why and How Corporations Must Act Now to Improve ADR Diversity*, Corporate Disputes (Jan.-Mar. 2015).

diverse candidates.⁷⁶ Although such initiatives are promising, the role of the parties is just as important: it is incumbent upon law firms, lawyers, and clients to select diverse neutrals.

III. Survey: Methodology and Findings

The task force's survey began with the creation of two questionnaires both drafted by the task force.⁷⁷ The first questionnaire was directed to federal and state judges sitting throughout New York. This questionnaire was designed to be an observational study that asked judges to record the presence of speaking counsel by gender in all matters in their courtrooms occurring between approximately September 1, 2016 and December 31, 2016. The second questionnaire was directed to various ADR providers asking them to record by gender both the appearance of counsel in each proceeding and the gender of the neutral conducting the proceeding.

The focus of the first survey was to track the participation of women as lead counsel and trial attorneys in civil and criminal litigation. While there have been many anecdotal studies about women attorneys' presence in the courtroom, the task force believes its survey to be the first study based on actual courtroom observations by the bench. The study surveyed proceedings in New York State at each level of court—trial, intermediate, and court of last resort—in both state and federal courts. Approximately 2,800 questionnaires were completed and returned. The cooperation of the judges and courthouse staff was unprecedented and remarkable: New York's Court of Appeals, all four Appellate Divisions, and Commercial Divisions in Supreme Courts in counties from Suffolk to Onondaga to Erie participated. The United States Court of Appeals for the Second Circuit provided assistance compiling publicly available statistics and survey responses were provided by nine Southern District of New York Judges (including the Chief Judge) and Magistrate Judges and District and Magistrate Judges from the Western District of New York.

The results of the survey are striking:⁷⁸

- Female attorneys represented just 25.2% of the attorneys appearing in commercial and criminal cases in courtrooms across New York.
- Female attorneys accounted for 24.9% of lead counsel roles and 27.6% of additional counsel roles.
- The most striking disparity in women's participation appeared in

⁷⁶ Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law.com (Oct. 5, 2016).

⁷⁷ Each questionnaire is attached hereto as [Appendix A](#).

⁷⁸ Survey results in chart format broken down by Court are attached hereto as [Appendix B](#).

complex commercial cases: women's representation as lead counsel shrank from 31.6% in one-party cases to 26.4% in two-party cases to 24.8% in three-to-four-party cases and to 19.5% in cases involving five or more parties. In short, the more complex the case, the less likely that a woman appeared as lead counsel.

The percentage of female attorneys appearing in court was nearly identical at the trial level (24.7%) to at the appellate level (25.2%). The problem is slightly worse downstate (24.8%) than upstate (26.2%).⁷⁹

In New York federal courts, female attorneys made up 24.4% of all attorneys who appeared in court, with 23.1% holding the position of lead counsel. In New York State courts, women made up 26.9% of attorneys appearing in court and 26.8% of attorneys in the position of lead counsel.

One bright spot is public interest law (mainly criminal matters), where female lawyers accounted for 38.2% of lead counsel and 30.9% of attorneys overall. However, in private practice (including both civil and criminal matters), female lawyers only accounted for 19.4% of lead counsel. In sum, the low percentage of women attorneys appearing in a speaking role in courts was found at every level and in every type of court: upstate and downstate, federal and state, trial and appellate, criminal and civil, ex parte applications and multi-party matters. Set forth below is the breakout in all courtrooms—state, federal, regional, and civil/criminal.

A. Women Litigators in New York State Courts

The view from the New York Court of Appeals is particularly interesting. The statistics collected from that Court showed real progress—perhaps as a result of female leadership of that court, now headed by Chief Judge Janet DiFiore and past Chief Judge Judith S. Kaye, as well as the fact that the Court has had a majority of women judges for more than ten years. Of a total of 137 attorneys appearing in that Court, female attorneys made up 39.4%. This percentage held whether the females were lead or second chair counsels. In cases in which at least one party was represented by a public sector office, women attorneys were in the majority at 51.3%. Of the appearances in civil cases, 30% were by female attorneys. The figure in criminal cases was even higher—female attorneys made up 46.8% of all attorneys appearing in those cases.

Similarly, female attorneys in the public sector were well represented in the Appellate Divisions, approaching the 50% mark in the Second Department. The picture

⁷⁹ The task force recognizes that the statistics reported herein may have been affected by which Judges agreed to participate in the survey and other selection bias inherent in any such type of survey. It thus is possible that there is a wider gap between the numbers of women versus men who have speaking roles in courtrooms throughout New York State than the gap demonstrated by the task force's study.

was not as strong in the upstate Appellate Divisions, where, even in cases involving a public entity, women were less well represented (32.6% in the Third Department and 35.3% in the Fourth Department). Women in the private sector in Third Department cases fared worst of all, where they represented 18% of attorneys in the lead and only 12.5% of attorneys in any capacity versus 36.18% of private sector attorneys in the First Department (for civil cases).

Set forth below are some standout figures by county:

- Female public sector attorneys in Erie County represented a whopping 88.9% of all appearances, although the number (n=9) was small.
- Female attorneys in Suffolk County were in the lead position just 13.5% of the time.
- Although the one public sector attorney in Onondaga County during the study period was female, in private sector cases, women represented just 22.2% of all attorneys appearing in state court in that county.

While not studied in every court, the First Department further broke down its statistics for commercial cases and the results are not encouraging. Of the 148 civil cases heard by the First Department during the survey period for which a woman argued or was lead counsel, only 22 of those cases were commercial disputes, which means that women attorneys argued or were lead counsel in only 5.37% of commercial appeals compared to 36.18% for all civil appeals. Such disparity suggests that women are not appearing as lead counsel for commercial cases, which often involve high stakes business-related issues and large dollar amounts.

B. Women Litigators in Federal Courts

Women are not as well represented in the United States Court of Appeals for the Second Circuit as they are in the New York Court of Appeals. Of the 568 attorneys appearing before the Second Circuit during the survey period, 20.6% were female—again, this number held regardless of whether the women were in the lead or in supporting roles. Women made up 35.8% of public sector attorneys but just 13.8% of the private attorneys in that court. Women represented a higher percentage of the attorneys in criminal cases (28.1%) than in civil cases (17.5%).

The Southern District of New York's percentages largely mirrored the sample overall, with women representing 26.1% of the 1627 attorneys appearing in the courtrooms of judges who participated in the survey—24.7% in the role of lead counsel. One anomaly in the Southern District of New York was in the courtroom of the Honorable Deborah A. Batts, where women represented 46.2% of the attorneys and 45.8% of the lead attorneys.

The figures from the Western District of New York fell somewhat below those from the Southern District of New York, again mirroring the slightly lower percentages of female attorneys' participation upstate in state courts as well: 22.9% of the attorneys appearing in the participating Western District of New York cases were women, and 20.8% of the lead attorneys were women.

Overall, women did slightly better in state courts (26.9% of appearances and 25.3% of lead appearances), than in federal courts (24.4% of appearances and 23.1% in the lead).

C. Women Litigators: Criminal & Civil; Private & Public

As has been noted in other areas, female attorneys are better represented among lawyers in criminal cases (30.9%) than in civil cases (23.2%), regardless of trial or appellate court or state or federal court. The difference is explained almost entirely by the difference between female attorneys in the private sector (22.5%) compared to female attorneys in the public sector, particularly with respect to prosecutors and state or federal legal aid offices, which provide services to indigent defendants (totaling 37.0%).

Similarly, women made up 39.6% of the attorneys representing public entities—such as the state or federal government but just 18.5% of lawyers representing private parties in civil litigation.

Overall, female attorneys were almost twice as likely to represent parties in the public sector (38.2% of the attorneys in the sample) than private litigants (19.4%).

Across the full sample, women made up 24.9% of lead counsel and 27.6% of additional counsel.

All these survey findings point to the same conclusion: female attorneys in speaking roles in court account for just about a quarter of counsel who appear in state and federal courts in New York. The lack of women attorneys with speaking roles in court is widespread across different types of cases, varying locations, and at all levels of courts.⁸⁰

⁸⁰ The survey did not include family or housing courts. Accordingly, the percentage of women in speaking roles who appear in those courts may be higher, especially in family court as that area of the law tends to have a greater percentage of women practitioners. See Vivian Chen, *Do Women Really Choose the Pink Ghetto?; Are women opting for those lower-paying practices or is there an invisible hand that steers them there?*, The American Lawyer (Apr. 26, 2017), <http://www.americanlawyer.com/id=1202784558726>.

D. Women in Alternative Dispute Resolution

The view from the world of ADR is slightly more positive for women, although more progress is needed. Two leading ADR providers gathered statistics on the proceedings conducted by their neutrals. In a sample size of 589 cases, women were selected as arbitrators 26.8% of the time and selected as mediators about half the time (50.2%). In a small sample size of two cases, women provided 50% of the neutral analyses but they were not chosen as court referees in either of those two cases.

Data from another major ADR provider revealed that women arbitrators comprised between 15-25% of all appointments for both domestic and foreign arbitrations.

IV. Going Forward: Suggested Solutions

The first step in correcting a problem is to identify it. To do so, as noted by this report and the ALM Intelligence study referenced above in its “Gender Diversity Best Practices Checklist”—the metrics component—firms need data.⁸¹ Regular collection and review of data keeps the “problem” front and center and ideally acts as a reminder of what needs to be done. Suggesting solutions, such as insisting within law firms that women have significant roles on trial teams or empowering female attorneys to seek out advancement opportunities for themselves, is easy to do. Implementing these solutions is more challenging.⁸²

Litigation Context

A. Women’s Initiatives

Many law firms have started Women’s Initiatives designed to provide female attorneys with the tools they need to cultivate and obtain opportunities for themselves and to place themselves in a position within their firms to gain trial and courtroom experience. The success of these initiatives depends on “buy in” not only from all female attorneys, but also from all partners. Data supports the fact that the most successful

⁸¹ Daniella Isaacson, ALM Intelligence, *Where Do We Go From Here?: Big Law’s Struggle With Recruiting and Retaining Female Talent* (Apr. 2017) at 12; see also Meghan Tribe, *Study Shows Gender Diversity Varies Widely Across Practice Areas*, The Am Law Daily (Apr. 17, 2017) <http://www.americanlawyer.com/id=1202783889472/Study-Shows-Gender-Diversity-Varies-Widely-Across-Practice-Areas>.

⁸² A summary of the suggestions contained in the report are attached hereto as [Appendix C](#). Many of the suggestions for law firms contained in this report may be more applicable to large firms than small or mid-size firms but hopefully are sufficiently broad based to provide guidance for all law firms.

Women's Initiative programs depend on the support from all partners and associates.⁸³

One suggestion is that leaders in law firms—whether male or female—take on two different roles. The first is to mentor female attorneys with an emphasis on the mentor discussing various ways in which the female attorney can gain courtroom experience and eventually become a leader in the firm. The second is to provide “hands on” experience to the female attorneys at the firm by assigning them to work with a partner who will not only see that they go to court, but that they also participate in the courtroom proceedings. It is not enough simply to bring an associate to court and have her sit at counsel table while the partner argues the matter. Female associates need opportunities to argue the motion under the supervision of the partner.⁸⁴

Similarly, instead of only preparing an outline for a direct examination of a witness or preparing exhibits to be used during a direct examination, the associate also should conduct the direct examination under the supervision of the partner. While motions and examinations of witnesses at hearings and trials take place in the courtroom, the same technique also can be applied to preparing the case for trial.

Female attorneys should have the opportunity early in their careers to conduct a deposition—not just prepare the outline for a partner. The same is true of defending a deposition. In public sector offices—such as the Corporation Counsel of the City of New York, the Attorney General of the State of New York, District Attorney's Offices and U.S. Attorney's Offices—junior female attorneys have such opportunities early in their careers and on a regular basis. They thus are able to learn hands-on courtroom skills, which they then can take into the private sector after government service.

Firm management, and in particular litigation department heads, also should be educated on how to mentor and guide female attorneys. They should also be encouraged to proactively ensure that women are part of the litigation team and that women on the litigation team are given responsibilities that allow them to appear and speak in court. Formal training and education in courtroom skills should be encouraged and made a part of the law firm initiative. Educational sessions should include mock depositions, oral arguments, and trial skills. These sessions should be available to all junior attorneys, but the firm's Women's Initiative should make a special effort to encourage female attorneys to participate in these sessions.

⁸³ See Victoria Pynchon, *5 Ways to Ensure Your Women's Initiative Succeeds*, <http://www.forbes.com/sites/shenegotiates/2012/05/14/5-ways-to-ensure-your-womens-initiative-succeeds/#20a31614ff92> (May 14, 2012) (citing Lauren Stiller Rikleen, *Ending the Gauntlet, Removing Barriers to Women's Success in the Law* (2006)).

⁸⁴ Understandably, all partners, especially women partners, are under tremendous pressures themselves on any given matter. As a result, delegating substantive work to junior attorneys may not always be feasible.

Data also has shown that female attorneys in the private sector may not be effective in seeking out or obtaining courtroom opportunities for themselves within their firm culture. It is important that more experienced attorneys help female attorneys learn how to put themselves in a position to obtain courtroom opportunities. This can be accomplished, at least in part, in two ways. First, female attorneys from within and outside the firm should be recruited to speak to female attorneys and explain how the female attorney should put herself in a position to obtain opportunities to appear in court. Second, women from the business world should also be invited to speak at Women's Initiative meetings and explain how they have achieved success in their worlds and how they obtained opportunities. These are skills that cross various professions and should not be ignored.

Partners in the firms need to understand that increasing the number of women in leadership roles in their firms is a benefit, not only to the younger women in the firm but to them as well. Education and training of all firm partners is the key to the success of any Women's Initiative.

A firm's Women's Initiative also should provide a forum to address other concerns of the firm's female attorneys. This should not be considered a forum for "carping," but for making and taking concrete and constructive steps to show and assist female attorneys in learning how to do what is needed to obtain opportunities in the courtroom and take a leadership role in the litigation of their cases.

B. Formal Programs Focused on Lead Roles in Court and Discovery

Another suggestion is that law firms establish a formal program through which management or heads of litigation departments seek out junior female associates on a quarterly or semi-annual basis and provide them with the opportunity to participate in a program that enables them to obtain the courtroom and pre-trial experiences outlined above. The establishment of a formal program sends an important signal within a firm that management is committed to providing women with substantive courtroom experience early in their careers.

Firm and department management, of course, would need to monitor the success of such a program to determine whether it is achieving the goals of training women and retaining them at the firm. One possible monitoring mechanism would be to track on a monthly or quarterly basis the gender of those attorneys who have taken or defended a deposition, argued a motion, conducted a hearing or a trial during that period. The resulting numbers then would be helpful to the firm in assessing whether its program was effective. The firm also should consider ways in which the program could be improved and expanded. Management and firm leaders should be encouraged to identify, hire, and retain female attorneys within their firms. Needless to say, promoting women to department heads and firm management is one way to achieve these goals. Women are

now significantly underrepresented in both capacities.⁸⁵

C. Efforts to Provide Other Speaking Opportunities for Women

In addition to law firms assigning female litigators to internal and external speaking opportunities, such as educational programs in the litigation department or speaking at a client continuing legal education program, firms should encourage involvement with bar associations and other civic or industry groups that regularly provide speaking opportunities.⁸⁶ These opportunities allow junior lawyers to practice their public speaking when a client's fate and money are not at risk. Such speaking opportunities also help junior attorneys gain confidence, credentials, and contacts. In addition, bar associations at all levels present the prospect for leadership roles from tasks as basic as running a committee meeting to becoming a section or overall bar association leader. These opportunities can be instrumental to the lawyer's growth, development, and reputation.

D. Sponsorship

In addition to having an internal or external mentor, an ABA publication has noted that, although law firms talk a lot about the importance of mentoring and how to make busy partners better at it, they spend very little time discussing the importance of, and need for, sponsors:

Mentors are counselors who give career advice and provide suggestions on how to navigate certain situations. Sponsors can do everything that mentors do but also have the stature and gravitas to affect whether associates make partner. They wield their influence to further junior lawyers' careers by calling in favors, bring attention to the associates' successes and help them cultivate important relationships with other influential lawyers and clients—all of which are absolutely essential in law firms. **Every sponsor can be a mentor, but not every mentor can be a sponsor.**

Sponsorship is inherent in the legal profession's origins as a craft learned by apprenticeship. For generations, junior lawyers learned the practice of law from senior attorneys who, over time, gave them

⁸⁵ Lauren Stiller Rikleen, *Women Lawyers Continue to Lag Behind Male Colleagues*, Report of the Ninth Annual National Association of Women Lawyers National Survey on Retention and Promotion of Women in Law Firms (2015).

⁸⁶ It is noteworthy that, as of January 1, 2017, women comprise nearly 36% of the New York State Bar Association's membership but comprise only 24% of the Commercial and Federal Litigation Section's membership.

more responsibility and eventually direct access and exposure to clients. These senior lawyers also sponsored their protégés during the partnership election process. Certain aspects of traditional legal practice are no longer feasible today, so firms have created formal training and mentoring programs to fill the void. While these programs may be effective, there is no substitute for learning at the heels of an experienced, influential lawyer. This was true during the apprenticeship days and remains so today.

Because the partnership election process is opaque and potentially highly political, having a sponsor is essential. Viable candidates need someone to vouch for their legal acumen while simultaneously articulating the business case for promotion . . .⁸⁷

As Sylvia Ann Hewlett, founding president of the Center for Talent Innovation (formerly Center for Work-Life Policy), explained in a 2011 Harvard Business Review article “sponsors may advise or steer [their sponsorees] but their chief role is to develop [them] as leader[s]”⁸⁸ and “‘use[] chips on behalf of protégés’ and ‘advocates for promotions.’”⁸⁹ “Sponsors advocate on their protégés’ behalf, connecting them to important players and assignments. In doing so, they make themselves look good. And precisely because sponsors go out on a limb, they expect stellar performance and loyalty.”⁹⁰

Recommendations for successful sponsorship programs include the following activities by a sponsor for his or her sponsoree:

- Expand the sponsoree’s perception of what she can do.
- Connect the sponsoree with the firm’s senior leaders.

⁸⁷ Kenneth O.C. Imo, *Mentors Are Good, Sponsors Are Better*, American Bar Association Law Practice Magazine (Jan./Feb. 2013) (http://www.americanbar.org/publications/law_practice_magazine/2013/january-february/mentors-are-good-sponsors-are-better.html) (emphasis added).

⁸⁸ Sylvia Ann Hewlett, *The Right Way to Find a Career Sponsor*, Harv. Bus. Rev. (Sept. 11, 2013) <https://hbr.org/2013/09/the-right-way-to-find-a-career-sponsor>.

⁸⁹ Kenneth O.C. Imo, *Mentors Are Good, Sponsors Are Better*, American Bar Association Law Practice Magazine (Jan./Feb. 2013), (http://www.americanbar.org/publications/law_practice_magazine/2013/january-february/mentors-are-good-sponsors-are-better.html).

⁹⁰ Sylvia Ann Hewlett, *Mentors are Good. Sponsors Are Better*, N.Y. Times, Apr. 13, 2013, <http://www.nytimes.com/2013/04/14/jobs/sponsors-seen-as-crucial-for-womens-career-advancement.html>.

- Promote the sponsoree's visibility within the firm.
- Connect the sponsoree to career advancement opportunities.
- Advise the sponsoree on how to look and act the part.
- Facilitate external contacts.
- Provide career advice.⁹¹

Of course, given attorneys' and firms' varying sizes and limited time and resources, firms should consider what works best for that firm and that one size does not fit all.

E. Efforts by the Judiciary

Members of the judiciary also must be committed to ensuring that female attorneys have equal opportunities to participate in the courtroom. When a judge notices that a female associate who has prepared the papers and is most familiar with the case is not arguing the motion, that judge should consider addressing questions to the associate. If this type of exchange were to happen repeatedly—i.e., that the judge expects the person who is most familiar with the issue take a lead or, at least, some speaking role—then partners might be encouraged to provide this opportunity to the female associate before the judge does it for them.

All judges, regardless of gender, also should be encouraged to appoint more women as lead counsel in class actions, and as special masters, referees, receivers, or mediators. Some judges have insisted that they will not appoint a firm to a plaintiffs' management committee unless there is at least one woman on the team. Other judges have issued orders, referred to earlier in this report, that if a female, minority, or junior associate is likely to argue a motion, the court may be more likely to grant a request for oral argument of that motion. Many judges are willing to permit two lawyers to argue for one party – perhaps splitting the issues to be argued. In that way, a senior attorney might argue one aspect of the motion, and a more junior attorney another aspect. Judges have suggested that it might be wise to alert the court in advance if two attorneys plan to argue the motion to ensure that this practice is acceptable to the judge. Judges should be encouraged to amend their individual rules to encourage attorneys to take advantage of these courtroom opportunities. All judges should be encouraged to promote and support women in obtaining speaking and leadership roles in the courtroom. All judges and lawyers should consider participating in panels and roundtable discussions to address these issues and both male and female attorneys should be invited and encouraged to attend such events.

⁹¹ Kenneth O.C. Imo, *Mentors Are Good, Sponsors Are Better*, American Bar Association Law Practice Magazine, (Jan./Feb. 2013), (http://www.americanbar.org/publications/law_practice_magazine/2013/january-february/mentors-are-good-sponsors-are-better.html) (emphasis added).

F. Efforts by Clients

Clients also can combat the gender disparity in courtrooms. Insistence on diverse litigation teams is a growing trend across corporate America. Why should corporate clients push for diverse trial teams? Because it is to their advantage to do so. According to Michael Dillon, general counsel for Adobe Systems, Inc., “it makes sense to have a diverse organization that can meet the needs of diverse customers and business partners in several countries” and diversity makes an organization “resilient.”⁹²

A diverse litigation team also can favorably impact the outcome of a trial. A team rich in various life experiences and perspectives may be more likely to produce a comprehensive and balanced assessment of information and strategy.⁹³ A diverse team is also better equipped to collectively pick up verbal and nonverbal cues at trial as well as “read” witnesses, jurors and judges with greater insight and precision.⁹⁴

Additionally, the context surrounding a trial—including the venue, case type, and courtroom environment—can affect how jurors perceive attorneys and ultimately influence the jury’s verdict.⁹⁵ Consciously or not, jurors assess attorney “[p]ersonality, attractiveness, emotionality, and presentation style” when deciding whether they like the attorney, will take him or her seriously, or can relate to his or her persona and arguments.⁹⁶ Because women stereotypically convey different attributes than men, a female attorney actively involved in a trial may win over a juror who was unable to connect with male attorneys on the same litigation team.⁹⁷ Accordingly, a team with diverse voices may be more capable of communicating in terms that resonate with a broader spectrum of courtroom decision-makers.⁹⁸

⁹² David Ruiz, *HP, Legal Depts. Ask Firms for Diversity, Make Efforts In-House*, Corporate Counsel (Apr. 5, 2017) <http://www.corpcounsel.com/id=1202783051167/Legal-Depts-Ask-Firms-for-Diversity-Make-Efforts-InHouse>.

⁹³ Craig C. Martin & David J. Bradford, *Litigation: Why You Want a Diverse Trial Team*, INSIDE COUNSEL, Oct. 14, 2010, <http://www.insidecounsel.com/2010/10/14/litigation-why-you-want-a-diverse-trial-team?slreturn=1495741834>.

⁹⁴ *Id.*

⁹⁵ Ann T. Greeley & Karen L. Hirschman, “*Trial Teams and the Power of Diversity*,” at 3 (2012).

⁹⁶ *Id.* at 5.

⁹⁷ *Id.*

⁹⁸ Craig C. Martin & David J. Bradford, *Litigation: Why You Want a Diverse Trial Team*, Inside Counsel (Oct. 14, 2010) <http://www.insidecounsel.com/2010/10/14/litigation-why-you-want-a-diverse-trial-team?slreturn=1495741834>.

Further, a diverse trial team can increase the power of the team's message. A diverse composition indirectly suggests that the truth of the facts and the principles on which the case is based have been "fairly presented and are universal in their message."⁹⁹ This creates a cohesive account of events and theory of the case, which would be difficult for an opposing party to dismiss as representing only a narrow slice of society.¹⁰⁰

The clear advantages of diverse trial teams are leading corporate clients to take direct and specific measures to ensure that their legal matters are handled by diverse teams of attorneys. General Counsels are beginning to press their outside firms to diversify litigation teams in terms of gender at all levels of seniority.¹⁰¹ Many corporate clients often directly state that they expect their matters will be handled by both men and women.¹⁰²

For example, in 2017, General Counsel for HP, Inc. implemented a policy requiring "at least one diverse firm relationship partner, regularly engaged with HP on billing and staffing issues" or "at least one woman and one racially/ethnically diverse attorney, each performing or managing at least 10% of the billable hours worked on HP matters."¹⁰³ The policy reserves for HP the right to withhold up to ten percent of all amounts invoiced to firms failing to meet these diverse staffing requirements.¹⁰⁴ Oracle Corporation has also implemented an outside retention policy "designed to eliminate law firm excuses for not assigning women and minority attorneys to legal matters."¹⁰⁵ Oracle asks its outside firms to actively promote and recruit women; ensure that the first person with appropriate experience considered for assignment to a case is a woman or a minority; and annually report to Oracle the number and percentage of women and

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Ellen Rosen, *Facebook Pushes Outside Law Firms to Become More Diverse*, New York Times (Apr. 2, 2017) https://www.nytimes.com/2017/04/02/business/dealbook/facebook-pushes-outside-law-firms-to-become-more-diverse.html?_r=1.

¹⁰² Ann T. Greeley & Karen L. Hirschman, "Trial Teams and the Power of Diversity," at 2 (2012).

¹⁰³ Jennifer Williams-Alvarez, *HP, Mandating Diversity, Will Withhold Fees From Some Firm*, Corporate Counsel (Feb. 13, 2017), <http://www.corpcounsel.com/id=1202779113475/HP-Mandating-Diversity-Will-Withhold-Fees-From-Some-Firms>.

¹⁰⁴ *Id.*

¹⁰⁵ *Hiring Women and Minority Attorneys – One General Counsel's Perspective*, <http://corporate.findlaw.com/human-resources/hiring-women-and-minority-attorneys-a-general-counsel-s-perspec.html#sthash.HNE30g5o.dpuf> (last visited June 1, 2017).

minority partners in the firm.¹⁰⁶ Similarly, Facebook, Inc. now requires that women and ethnic minorities account for at least thirty-three percent of law firm teams working on its matters.¹⁰⁷ Under Facebook’s policy, the firms also must show that they “actively identify and create clear and measurable leadership opportunities for women and minorities” when they represent Facebook in legal matters.¹⁰⁸

Corporate clients can follow the examples set by their peers to aid the effort to ensure that female attorneys have equal opportunities to participate in all aspects of litigation, including speaking roles in the courtroom.

G. ADR Context

The first step in addressing any issue is to recognize the issue and start a dialogue.

Accordingly, the dialogue that has begun amongst ADR providers and professionals involved in the ADR process is encouraging. One important step that has been undertaken is the Equal Representation in Arbitration pledge—agreed to by a broad group of ADR stakeholders, including counsel, arbitrators, corporate representatives, academics, and others—to encourage the development and selection of qualified female arbitrators.¹⁰⁹ This pledge outlines simple measures including having a fair representation of women on lists of potential arbitrators and tribunal chairs.¹¹⁰ Other important steps to encourage diverse neutrals have been taken by leading ADR providers, including such diversity commitments as described above.

Another example of a step is the establishment by the ABA’s Dispute Resolution Section of “Women in Dispute Resolution.” This initiative provides networking opportunities for women neutrals to be exposed to decision makers selecting mediators and arbitrators; develops a list of women neutrals and their areas of expertise; provides professional

¹⁰⁶ *Id.*

¹⁰⁷ Ellen Rosen, *Facebook Pushes Outside Law Firms to Become More Diverse*, New York Times (Apr. 2, 2017) https://www.nytimes.com/2017/04/02/business/dealbook/facebook-pushes-outside-law-firms-to-become-more-diverse.html?_r=1.

¹⁰⁸ *Id.* Some corporations have gone further, even firing law firms because they are run by “old white men.” Laura Colby, *Law Firms Risk Losing Corporate Work Unless they Promote Women*, Bloomberg (Dec. 9, 2016), <https://www.bloomberg.com/news/articles/2016-12-09/corporate-america-p pressures-law-firms-to-promote-minorities>.

¹⁰⁹ *See Take the Pledge*, Equal Representation in Arbitration, <http://www.arbitrationpledge.com/pledge> (last visited Mar. 31, 2017).

¹¹⁰ *Id.*

development opportunities for women neutrals; and provides skills education for its members.¹¹¹ Those who select neutrals must make every effort to eliminate unconscious biases that affect such selection. They also must continually remember to recognize the benefit of diversity in the composition of panels neutrals that leads to better and more accurate results. If corporate counsel, together with outside counsel, make the same efforts to diversify the selection of neutrals, as they do when hiring outside counsel, then there may be a real change in the percentage of women selected as neutrals in all types of cases – particularly including complex large commercial disputes.

V. Conclusion

Unfortunately, the gender gap in the courtroom and in ADR has persisted even decades after women have comprised half of all law school graduates. The federal and state courts in New York are not exempt from this phenomenon. There is much more that law firms, corporate counsel, and judges can do to help close the gap. Similarly, the limited number of women serving as neutrals in ADR and appearing as counsel in complex commercial arbitrations is startling. While one size does not fit all, and the solutions will vary within firms and practice areas, the legal profession must take a more proactive role to assure that female attorneys achieve their equal day in court and in ADR.

The active dialogue that continues today is a promising step in the right direction. It is the task force's hope that this dialogue—and the efforts of all stakeholders in the legal process—will help change the quantitative and qualitative role of female lawyers.

¹¹¹ See <http://apps.americanbar.org/dch/committee.cfm?com=DR589300> for more information.

Task Force on Women's Initiatives*

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*The task force especially thanks former Section Chair Mark A. Berman, Ganfer & Shore LLP, for his leadership and unwavering support and dedication to the women's initiative and this report. The task force also thanks Section Executive Committee Member Carla M. Miller, Universal Music Group, for her significant contributions to the task force and David Szanto and Lillian Roberts for their invaluable assistance in analyzing the survey data set forth in this report.

APPENDIX A

JUDICIAL FORM FOR TRACKING COURT APPEARANCES

Identify your court (e.g. SDNY, 1st Dep't; 2d Cir; Commercial Div. N.Y. Co) _____

I. *Type of Case*

- A. Trial Court Criminal____(for federal court) Civil ____
(please specify subject matter e.g. contract, negligence, employment, securities)
B. Appeal Criminal____(for federal court) Civil____

II. *Type of Proceeding*

- A. Arraignment ____ B. Bail Hearing ____ C. Sentencing ____ (for federal court)
D. Initial Conference ____ E. Status/Compliance Conference
F. Oral Argument on Motion____ (please specify type of motion e.g. discovery, motion to dismiss, summary judgment, TRO/preliminary injunction, class certification, in limine)
G. Evidentiary Hearing____H. Trial____ I. Post-Trial ____ J. Appellate Argument ____

III. *Number of Parties (total for all sides)*

- A. Two____ B. Two to Five____ C. More than Five____

IV. *Lead Counsel for Plaintiff(s)* (the lawyer who primarily spoke in court)

Plaintiff No. 1	Plaintiff No. 2	Plaintiff No. 3
Male ____	Male ____	Male ____
Female ____	Female ____	Female ____
Public ____	Public ____	Public ____
Private ____	Private ____	Private ____

V. *Lead Counsel for Defendant(s)* (the lawyer who primarily spoke in court)

Defendant No. 1	Defendant No. 2	Defendant No. 3
Male ____	Male ____	Male ____
Female ____	Female ____	Female ____
Public ____	Public ____	Public ____
Private ____	Private ____	Private ____

VI. *Additional Counsel for Plaintiff(s)* (other lawyers at counsel table who did not speak)

Plaintiff No. 1	Plaintiff No. 2	Plaintiff No. 3
Male ____	Male ____	Male ____
Female ____	Female ____	Female ____
Public ____	Public ____	Public ____
Private ____	Private ____	Private ____

VII. *Additional Counsel for Defendant(s)* (other lawyers at counsel table who did not speak)

Defendant No. 1	Defendant No. 2	Defendant No. 3
Male ____	Male ____	Male ____
Female ____	Female ____	Female ____
Public ____	Public ____	Public ____
Private ____	Private ____	Private ____

ADR FORM FOR TRACKING APPEARANCES IN ADR PROCEEDINGS

- I. Is this an arbitration or mediation? _____ If it is a mediation, is it court ordered? ____
- II. Type of Case (please specify) (e.g., commercial, personal injury, real estate, family law)

- III. If there is one neutral, is that person a female? _____
- IV. If there is a panel, (a) how many are party arbitrators and, if so, how many are females? ____
(b) how many are neutrals and, if so, how many are females? ____
(c) is the Chair a female? _____
- V. Assuming the panel members are neutrals, how was the neutral(s) chosen?
1. From a list provided by a neutral organization? _____
2. By the court? _____
3. Agreed upon by parties? _____
4. Two arbitrators selected the third? _____
- VI. Number of Parties (total for all sides) _____
- VII. Amount at issue (apx.) on affirmative case \$ _____ Counterclaims, if any \$ _____
- VIII. Lead Counsel for Plaintiff(s):
(lawyer who primarily spoke) (other lawyers who did not speak, including local counsel)
Male _____ Male _____
Female _____ Female _____
Government _____ Government _____
Non-Government _____ Non-Government _____
- IX. Lead Counsel for Defendant(s):
(lawyer who primarily spoke) (other lawyers who did not speak, including local counsel)
Male _____ Male _____
Female _____ Female _____
Government _____ Government _____
Non-Government _____ Non-Government _____
- X. Was the Plaintiff a female or, if a corporation, was the GC/CEO/CFO a female? _____
- XI. Was the Defendant a female or, if a corporation, was the GC/CEO/CFO female? _____
- XII. Was this your first or a repeat ADR matter for these parties or their counsel? If repeat, please describe the prior proceeding(s) in which you served and at whose behest and whether the proceeding involved the same or a different area of the law.

APPENDIX B

TABLE 1
SUMMARY OF FINDINGS

Category	# Men	# Women	% Women
Total - Sample-wide	3886	1309	25.2%
Trial level -all	1805	592	24.7%
Appeal level - all	1007	340	25.2%
Upstate Courts - all	1154	409	26.2%
Downstate Courts - all	2103	694	24.8%
Federal Courts - all	1890	611	24.4%
State Courts - all	1725	635	26.9%
All Courts - Parties of 1	561	259	31.6%
Parties of 2	2532	910	26.4%
Parties of 3-4	681	224	24.8%
Parties of 5+	587	142	19.5%
All Courts - Lead Counsel	3430	1 135	24.9%
All Courts - Additional Counsel	456	174	27.6%
All Courts - Private Civil Lawyers	1688	384	18.5%

TABLE 2
DETAIL DATA CITED IN REPORT

Category	# Men	# Women	% Women
Total - Sample-wide	3886	1309	25.2%
New York Court of Appeals	83	54	39.4%
Court of Appeals - Public Attorneys	39	41	51.3%
Court of Appeals - Civil Cases	42	18	30.0%
Court of Appeals - Criminal Cases	41	36	46.8%
New York Appellate Divisions			
First Department - Civil Cases		148	5.37% (commercial cases)
Second Department - Public Attorneys	64	63	49.6%
Third Department - Lead Counsel	200	44	18.0%
Third Department - Public Attorneys	31	15	32.6%
Third Department - Private Attorneys	168	24	12.5%
Fourth Department - Public Attorneys	209	114	35.3%
Erie County	190	70	26.9%
Erie County - Public Attorneys	1	8	88.9%
Suffolk County	176	28	13.7%
Onondaga County	95	35	26.9%
Onondaga County - Private Attorneys	14	4	22.2%
United States Court of Appeals for the Second Circuit	451	117	20.6%
Second Circuit - Public Attorneys	102	57	35.8%
Second Circuit - Private Attorneys	338	54	13.8%
Second Circuit - Civil Cases	331	70	17.5%
Second Circuit - Criminal Cases	120	47	28.1%
Southern District of New York	1203	424	26.1%
SDNY - Lead Counsel	931	306	24.7%
Western District of New York	236	70	22.9%
WDNY - Lead Counsel	221	58	20.8%
Trial level - all	1805	592	24.7%
Appeal level - all	1007	340	25.2%
Upstate Courts - all	1154	409	26.2%
Downstate Courts - all	2103	694	24.8%

Category	# Men	# Women	% Women
Federal Courts -all	1 890	611	24.4%
Lead Counsel	1595	478	23.1%
State Courts - all	1725	635	26.9%
State Courts - Lead Counsel	1672	613	26.8%
State Courts - Civil Cases	2896	874	23.2%
State Courts - Criminal Cases	628	281	30.9%
State Courts - Public Cases	692	428	38.2%
State Courts - Private Cases	2172	524	19.4%
All Courts - Parties of 1	561	259	31.6%
Parties of 2	2532	910	26.4%
Parties of 3-4	681	224	24.8%
Parties of 5+	587	142	19.5%
All Courts - Lead Counsel	3430	1135	24.9%
All Courts - Additional Counsel	456	174	27.6%
All Courts - Private Civil Lawyers	1688	384	18.5%

APPENDIX C

SUMMARY OF RECOMMENDATIONS

1. The Law Firms

- Women's Initiatives
 - Establish and support strong institutionalized Women's Initiatives with emphasis on the following:
 - Convincing partners to provide speaking opportunities in court and at depositions for junior attorneys
 - Training and education on courtroom skills
 - Leadership training
 - Guest speakers
 - Mentorship programs
- Formal Programs to Ensure Lead Roles in Court and Discovery
 - Establish a formal program through which management or heads of litigation departments ensure that junior associates are provided with speaking opportunities in court and at depositions.
 - Track speaking opportunities in court and at depositions on a quarterly basis
- Promote Outside Speaking Opportunities
 - Provide junior attorneys with internal and external speaking opportunities.
- Sponsorship
 - Establish and support an institutionalized Sponsorship Program.

2. The Judiciary

- Ask junior attorneys to address particular issues before the Court.
- Favor granting oral argument when a junior attorney is scheduled to argue the matter.
- Encourage attorneys who primarily authored the briefs to argue the motions or certain parts of the motions in court.
- Appoint qualified women as lead counsel in class actions and as members of steering committees as well as special masters, referees, receivers, and mediators.
- Include as a court rule that more than one attorney can argue a motion.

3. The Client

- Insist on diverse litigation teams.
- Monitor actual work of diverse team members.
- Impose penalties for failure to have diverse teams or teams where diverse members do not perform significant work on the matter.

4. ADR Context

- **Fair representation of women on lists of potential arbitrators and mediators.**
- Corporate counsel should demand diverse neutrals on matters.
- Stress the benefits of having a diverse panel of decisionmakers for arbitrations.
- Instruct outside counsel to consider diversity when selecting neutrals and monitor such selections.

2015

Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel

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DIVERSITY IN THE LEGAL PROFESSION: PERSPECTIVES FROM MANAGING PARTNERS AND GENERAL COUNSEL

Deborah L. Rhode* & Lucy Buford Ricca**

INTRODUCTION

Within the American legal profession, diversity is widely embraced in principle but seldom realized in practice. Women and minorities are grossly underrepresented at the top and overrepresented at the bottom. What accounts for this disparity and what can be done to address it are the subjects of this Article. It provides the first comprehensive portrait of the problem from the vantage of leaders of the nation's largest legal organizations. Through their perspectives, this Article seeks to identify best practices for diversity in law firms and in-house legal departments, as well as the obstacles standing in the way.

Part I begins with an analysis of the challenges confronting the American bar with respect to diversity and the gap between the profession's aspirations and achievements. Part II sets forth the methodology of the survey of law firm leaders and general counsel. Part III explores the survey's findings, and Part IV concludes with a summary of best practices. "We can and should do better"¹ was how one participant in the study described his firm's progress, and that view is the premise of this Article.

I. CHALLENGES²

According to the American Bar Association (ABA), only two professions (the natural sciences and dentistry) have less diversity than law; medicine, accounting, academia, and others do considerably better.³ Women

* Ernest W. McFarland Professor of Law and Director of the Center on the Legal Profession, Stanford University. This Article is part of a larger colloquium entitled *The Challenge of Equity and Inclusion in the Legal Profession: An International and Comparative Perspective* held at Fordham University School of Law. For an overview of the colloquium, see Deborah L. Rhode, *Foreword: Diversity in the Legal Profession: A Comparative Perspective*, 83 FORDHAM L. REV. 2241 (2015).

** Executive Director, Center on the Legal Profession, Stanford University.

1. Telephone Interview with Ahmed Davis, Nat'l Chair of the Diversity Initiative, Fish & Richardson P.C. (May 6, 2014).

2. Analysis in this part draws on DEBORAH L. RHODE, *THE TROUBLE WITH LAWYERS* (forthcoming 2015).

3. ELIZABETH CHAMBLISS, ABA COMM'N ON RACIAL & ETHNIC DIVERSITY IN THE LEGAL PROFESSION, *MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION* 6–7 (2005). For example, minorities account for about 25 percent of doctors and 21 percent of

constitute over one-third of the profession but only about one-fifth of law firm partners, general counsel of Fortune 500 corporations, and law school deans.⁴ Women are less likely to make partner even controlling for other factors, including law school grades and time spent out of the work force or on part-time schedules.⁵ Studies find that men are two to five times more likely to make partner than women.⁶ Even women who never take time away from the labor force and who work long hours have a lower chance of partnership than similarly situated men.⁷ The situation is bleakest at the highest levels. Women constitute only 17 percent of equity partners.⁸ Women are also underrepresented in leadership positions, such as firm chairs and members of management and compensation committees.⁹ Only seven of the nation's one hundred largest firms have a woman as chair or

accountants but only about 12 percent of lawyers. Sara Eckel, *Seed Money*, AM. LAW., Sept. 2008, at 20; *Lawyer Demographics Table*, ABA, http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer_demographics_2013.authcheckdam.pdf (last visited Mar. 25, 2015) (estimate of minority lawyers drawn from 2010 U.S. Census data).

4. See generally ABA COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN LAW (2014), available at http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_july2014.authcheckdam.pdf; *MCCA Survey: Women General Counsel at Fortune 500 Companies Reaches New High*, MINORITY CORP. COUNSEL ASS'N (Aug. 3, 2012), <http://www.mcca.com/index.cfm?fuseaction=Feature.showFeature&FeatureID=350&noheader=1>; *Women in Law in Canada and the U.S.: Quick Take*, CATALYST (Dec. 10, 2014), <http://www.catalyst.org/knowledge/women-law-us>.

5. Theresa M. Beiner, *Not All Lawyers Are Equal: Difficulties That Plague Women and Women of Color*, 58 SYRACUSE L. REV. 317, 328 (2008); Mary C. Noonan et al., *Is the Partnership Gap Closing for Women? Cohort Differences in the Sex Gap in Partnership Chances*, 37 SOC. SCI. RES. 156, 174 (2008).

6. A study of young lawyers by the American Bar Foundation (ABF) found that women attained equity partner status at about half the rate of men. See RONIT DINOVIETZ ET AL., NAT'L ASS'N FOR LAW PLACEMENT FOUND. FOR CAREER RESEARCH & EDUC. & THE ABF, AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 63 (2009), available at <http://law.du.edu/documents/directory/publications/sterling/AJD2.pdf>. A study by the Equal Employment Opportunity Commission (EEOC) found that male lawyers were five times as likely to become partners as their female counterparts. See EEOC, DIVERSITY IN LAW FIRMS 29 (2003), available at <http://www.eeoc.gov/eeoc/statistics/reports/diversitylaw/lawfirms.pdf>.

7. Mary C. Noonan & Mary E. Corcoran, *The Mommy Track and Partnership: Temporary Delay or Dead End?*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 142 (2004); see also Kenneth Day Schmidt, *Men and Women of the Bar, the Impact of Gender on Legal Careers*, 16 MICH. J. GENDER & L. 49, 100–02 (2009) (comparing the respective likelihoods that men and women become partner).

8. NAT'L ASS'N OF WOMEN LAWYERS (NAWL) AND THE NAWL FOUND., REPORT OF THE EIGHTH ANNUAL NAWL NAT'L SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 7 (2014); see also Vivia Chen, *Female Equity Partnership Rate Is Up! (Just Kidding)*, CAREERIST (Feb. 25, 2014), <http://thecareerist.typepad.com/thecareerist/2014/02/nalp-report-2014.html>.

9. Jake Simpson, *Firms Eyeing Gender Equality Should Adopt a Corporate Culture*, LAW360 (Apr. 22, 2014), <http://www.law360.com/articles/530686/firms-eyeing-gender-equality-should-adopt-corporate-culture> (subscription required); see 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, 71 (2008); see also JOAN C. WILLIAMS & VETA T. RICHARDSON, PROJECT FOR ATT'Y RETENTION & MINORITY CORP. COUNSEL ASS'N, NEW MILLENNIUM, SAME GLASS CEILING? THE IMPACT OF LAW FIRM COMPENSATION SYSTEMS ON WOMEN 14 (2010).

managing partner.¹⁰ Gender disparities are similarly apparent in compensation.¹¹ Those differences persist even after controlling for factors such as productivity and differences in equity/non-equity status.¹²

Although blacks, Latinos, Asian Americans, and Native Americans now constitute about one-third of the population and one-fifth of law school graduates, they still only account for fewer than 7 percent of law firm partners.¹³ The situation is particularly bleak for African Americans, who constitute only 3 percent of associates and 1.9 percent of partners.¹⁴ In major law firms, about half of lawyers of color leave within three years.¹⁵ Attrition is highest for women of color; about 75 percent depart by their fifth year and 85 percent before their seventh.¹⁶ Compensation in law firms is lower for lawyers of color, with minority women at the bottom of the financial pecking order.¹⁷

The situation is somewhat better for women in-house. Women hold the top legal job at 21 percent of Fortune 500 companies.¹⁸ That number increased from 17 percent in 2009.¹⁹ Interestingly, women seem to be doing best at the nation's largest companies: four women are general counsel at the seventeen largest companies.²⁰ But only 17 percent of general counsels in the Fortune 501–1000 are female.²¹ Minority representation in the general counsel ranks of the Fortune 500 is 10

10. Kathleen J. Wu, "Bossy" is "Bitch" on Training Wheels, TEX. LAW. (Apr. 29, 2014), <http://www.texaslawyer.com/id=1202653144141/Bossy-Is-Bitch-on-Training-Wheels?slreturn=20150202171343> (subscription required) (referring to Law360 survey).

11. BARBARA M. FLOM, NAWL & NAWL FOUND., REPORT OF THE SEVENTH ANNUAL NAT'L SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 15–16 (2012); Karen Sloan, ABA Issues Toolkit, Aiming to Eliminate Gender Pay Gap, NAT'L L.J. (Mar. 18, 2013), <http://www.nationallawjournal.com/id=1202592488273/ABA-issues-toolkit-aiming-to-eliminate-gender-pay-gap-?slreturn=20150203201645> (subscription required) (noting that women law firm partners earn about \$66,000 less than male partners). Women also have lower billing rates than their male counterparts. See Jennifer Smith, *Female Lawyers Still Battle Gender Bias*, WALL ST. J. (May 4, 2014), available at <http://www.wsj.com/articles/SB10001424052702303948104579537814028747376>.

12. Marina Angel et al., *Statistical Evidence on the Gender Gap in Law Firm Partner Compensation* 2–3 (Temple Univ., Legal Studies Research Paper No. 2010-24, 2010); Ronit Dinovitzer, Nancy Reichman & Joyce Sterling, *Differential Valuation of Women's Work: A New Look at the Gender Gap in Lawyer's Incomes*, 88 SOC. FORCES 819, 835–37 (2009).

13. *Women and Minorities in Law Firms by Race and Ethnicity—An Update*, NALP (Apr. 2013), <http://www.nalp.org/0413research>.

14. Julie Triedman, *The Diversity Crisis: Big Firms' Continuing Failure*, AM. LAW. (May 29, 2014), <http://www.americanlawyer.com/id=1202656372552/The-Diversity-Crisis-Big-Firms-Continuing-Failure?slreturn=20140825135949> (subscription required).

15. NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER 14 n.55 (2010).

16. DEEPALI BAGATI, WOMEN OF COLOR IN U.S. LAW FIRMS 1–2 (2009).

17. ABA COMM'N ON WOMEN IN THE PROFESSION, VISIBLE INVISIBILITY 28 (2006).

18. Sue Reisinger, *Top Women Lawyers in the Fortune 500*, CORP. COUNS. (Mar. 18, 2014), <http://www.corpcounsel.com/id=1202647358761/Top-Women-Lawyers-in-the-Fortune-500?slreturn=20150110161812> (subscription required).

19. *Id.*

20. *Id.*

21. *Id.*

percent.²² Five percent of Fortune 500 general counsel are African American, 2 percent are Asian, and 2 percent are Hispanic.²³

II. METHODOLOGY

Between May and June 2014, a request to participate in this survey was sent to the managing partner or chair of the nation's one hundred largest firms²⁴ and the general counsel of Fortune 100 corporations. Telephone interviews were scheduled with all of those who indicated a willingness to be surveyed. In some instances, the organization's managing partner or general counsel identified someone else in charge of diversity initiatives to be contacted, and interviews were conducted with that person instead of, or in addition to, the managing partner or general counsel. Thirty firms and twenty-three corporations agreed to participate. Thirty spoke on the record; eleven requested anonymity; eleven requested that any quotations be cleared; and one did not indicate any preference. To gain additional perspectives, the authors interviewed members of a national search firm and a consultant on diversity, as well as in-house counsel of some smaller corporations. A list of survey participants appears as Appendix A.

By definition, those who were willing to take the time to participate in the study had a strong commitment to diversity. Moreover, they came from the sectors of the profession with the most resources available to invest in the issue. The findings therefore do not represent a cross section of the profession. Rather, they reflect the experience of those with the greatest willingness and ability to advance diversity in the profession. These participants' insights can help illumine the most effective drivers of change.

III. Findings

A. *Diversity As a Priority*

For the vast majority of survey participants, diversity was a high priority. Although this comes as no surprise, given the self-selected composition of the study, the strength of that commitment was striking.

Among firms, several members spoke of diversity as one of their core values or as part of the firm's identity.²⁵ A number of individuals stressed

22. AMENA ROSS, EXECUTIVE SUMMARY OF 2014 FORTUNE 500 GENERAL COUNSEL DIVERSITY (n.d.), available at http://www.lclldnet.org/media/uploads/resource/Executive_Summary_of_Amena_Ross_Fortune_500_General_Counsel_Diversity.pdf.

23. *Id.*

24. Based on *The American Lawyer's* ranking.

25. For core values, see Telephone Interview with Nicholas Cheffings, Chair, Hogan Lovells (July 2, 2014); Telephone Interview with Robert Giles, Managing Partner, Perkins Coie LLP (July 18, 2014); Telephone Interview with Thomas Milch, Chair, Arnold & Porter LLP (June 25, 2014); accord Telephone Interview with Carter Phillips, Chair of Exec. Comm., Sidley Austin LLP (June 13, 2014) (one of firm's top three or four priorities). For firms' identity, see Telephone Interview with Joseph Andrew, Global Chairman, & Jay Connolly, Global Chief Talent Officer, Dentons (July 30, 2014); Telephone Interview with Maya Hazell, Dir. of Diversity & Inclusion, White & Case LLP (June 24, 2014); Telephone Interview with Larry Sonsini, Chairman, Wilson Sonsini Goodrich & Rosati (July 21, 2014).

that it was not just the “right thing to do,” but also critical to firms’ economic success.²⁶ In elaborating on the business case for diversity, many firm leaders indicated that diversity was central to providing quality service to clients:

- “A diverse team is a more effective team; it has a broader base of experience . . . and the client gets a better product.”²⁷
- “You can’t get the best work without the best talent.”²⁸
- “This is a talent business. You need to cast the net broadly.”²⁹
- “The client base is changing and if we don’t change with it, our bottom line will be impaired as a result.”³⁰
- “We’re in the human capital business. [Diversity is a way to get] the best people and the best decision making.”³¹

Some leaders also spoke of matching the clients and communities they served.³² One noted, “a diverse profile is important to our clients.”³³ Larry Sonsini, Chair of Wilson Sonsini, noted that sixty different languages were spoken in Silicon Valley.³⁴ Diversity, he said, is “inherent in what we do and who we represent. . . . Diversity is not a ‘check the box’ issue in this firm.”³⁵ Joseph Andrew, the Global Chair of Dentons, made a similar point. Because the firm did not have a single nationality, its clients were diverse and the firm needed to follow suit.³⁶

Whether leaders’ views of diversity were fully shared within firm partnerships was, however, less clear. As the chair of one firm’s diversity initiative noted, “It is apparent to me that there are people in the firm who if they had their druthers, there would be less focus on diversity. They keep that view to themselves.”³⁷

Firm leaders communicated their commitment in multiple ways. Many gave periodic updates to leadership and the partnership and included it in their state of the firm speeches and speeches to summer associates.³⁸ One

26. See Telephone Interview with Nicholas Cheffings, *supra* note 25; Telephone Interview with Brad Malt, Chair, Ropes & Gray LLP (May 8, 2014); Telephone Interview with Wally Martinez, Managing Partner, Hunton & Williams LLP (July 22, 2014); Telephone Interview with Thomas Reid, Managing Partner, Davis Polk & Wardwell LLP (July 31, 2014).

27. Telephone Interview with Guy Halgren, Chair of Exec. Comm., Sheppard, Mullin, Richter & Hampton LLP (July 23, 2014).

28. Telephone Interview with Greg Nitzkowski, Global Managing Partner, Paul Hastings LLP (June 3, 2014).

29. Telephone Interview with Wally Martinez, *supra* note 26.

30. Telephone Interview with Thomas Reid, *supra* note 26.

31. Interview by Deborah L. Rhode with participant (July 21, 2014) (on file with author).

32. Telephone Interview with Nicholas Cheffings, *supra* note 25.

33. Telephone Interview with Ahmed Davis, *supra* note 1.

34. Telephone Interview with Larry Sonsini, *supra* note 25.

35. *Id.*

36. Telephone Interview with Joseph Andrew & Jay Connolly, *supra* note 25.

37. Telephone Interview with Ahmed Davis, *supra* note 1.

38. See Telephone Interview with Guy Halgren, *supra* note 27; Telephone Interview with Lee Miller, Global Co-Chairman, DLA Piper (June 23, 2014); Telephone Interview

made sure that every presentation to partners discussed diversity.³⁹ Some included an update or a “come to Jesus” presentation at firm retreats.⁴⁰ Many had a formal statement on their website and some put diversity information in their newsletters or annual reports.⁴¹ Diversity often figured in a firm’s strategic plan.⁴² One chair mentioned it in every major speech in an effort to keep it at the “forefront of peoples’ attention.”⁴³ One had a partners’ meeting focused on the topic; another had a conclave on the issue for firm leadership, practice group leaders, office managing partners and other key people; and a third held diversity retreats annually.⁴⁴ Some emphasized it in required training for firm leadership or new partners.⁴⁵

General counsel also stressed the importance of diversity, although some were slightly more reluctant to rank it among priorities.⁴⁶ As one noted, “I don’t want to give you pablum. Every company says it’s a high priority. The issue is whether you are doing something about it.”⁴⁷ Most emphasized the same reasons as law firm leaders. Diverse teams provided a more diverse perspective; they avoided “group think.”⁴⁸ Corporations wanted to “reflect and represent the communities in which we operate.”⁴⁹ It is the “right thing to do and smart business.”⁵⁰ It was not just a “check the

with Larren Nashelsky, Chair & Chief Exec. Officer, Morrison & Foerster LLP (June 24, 2014); Telephone Interview with Thomas Reid, *supra* note 26; Telephone Interview with Nadia Sager, Global Chair of Diversity Leadership Comm., Latham & Watkins LLP (May 7, 2014). Some leaders, including several who spoke off the record, had the diversity officer make a presentation at partner meetings. *See, e.g.*, Telephone Interview with John Soroko, Chairman and Chief Exec. Officer, Duane Morris LLP (July 24, 2014).

39. Telephone Interview with Carter Phillips, *supra* note 25.

40. Telephone Interview with Ahmed Davis, *supra* note 1 (“come to Jesus” talk); Telephone Interview with Robert Giles, *supra* note 25; Telephone Interview with Guy Halgren, *supra* note 27; Telephone Interview with Tyree Jones, Dir. of Global Diversity & Inclusion, Reed Smith LLP (July 2, 2014).

41. *See* Telephone Interview with Maya Hazell, *supra* note 25 (website and annual report); Telephone Interview with Lee Miller, *supra* note 38 (newsletter).

42. *See, e.g.*, Telephone Interview with Bob Couture, Exec. Dir., McGuireWoods LLP (June 30, 2014).

43. Interview by Deborah L. Rhode with participant (June 26, 2014) (on file with author).

44. For the conclave, *see* Telephone Interview with Lee Miller, *supra* note 38. For the diversity retreats, *see* Telephone Interview with John Soroko, *supra* note 38. The information about the partners’ meeting came from an interview not for attribution.

45. Telephone Interview with Robert Giles, *supra* note 25 (leadership); Telephone Interview with Nadia Sager, *supra* note 38 (new hires).

46. These general counsel did not speak for attribution.

47. Telephone Interview with Stephen Cutler, Exec. Vice President & Gen. Counsel, JPMorgan Chase & Co. (Aug. 7, 2014).

48. Telephone Interview with Stephanie Corey, Chief of Staff for Gen. Counsel, Flextronics Int’l Ltd. (July 17, 2014); Telephone Interview with Charles Parrish, Exec. Vice President, Gen. Counsel & Sec’y, Tesoro Corp. (July 25, 2014).

49. Telephone Interview with Teri McClure, Chief Legal Commc’ns & Compliance Officer & Gen. Counsel, United Parcel Serv., Inc. (July 17, 2014); *accord* Telephone Interview with Tara Rosnell, Assoc. Gen. Counsel, Procter & Gamble Co. (June 6, 2014).

50. Interview by Deborah L. Rhode with participant (June 12, 2014) (on file with author).

box” program.⁵¹ One mentioned being sued as a reason for focusing attention on the issue.

In terms of communication, corporations relied on more informal or indirect methods than law firms. The commitment could be conveyed through the leadership’s involvement with minority bar associations or the Leadership Council on Legal Diversity.⁵² Others stressed their diversity programming.⁵³ One noted leaders’ emphasis on diversity to the people making hiring decisions.⁵⁴ Another pointed to its inclusion in performance evaluations.⁵⁵ Whatever the method of communication, it mattered that leaders were “personally and professionally committed.”⁵⁶

B. Diversity Initiatives

Diversity initiatives varied. Among law firms, some involved formal plans or goals.⁵⁷ Rarely did these specify numerical targets.⁵⁸ As the chair of one major Wall Street firm explained, “we don’t want to be limited” or to “set up unrealistic expectations.”⁵⁹ Most firms had a committee, council, or task force charged with coordinating diversity efforts.⁶⁰ For example, Wilmer Hale has a diversity committee with six partners representing the firm’s six offices, each of whom is responsible for heading a separate committee on diversity in each office.⁶¹ Orrick has an Inclusion Leadership Council, comprised of the heads of women’s and diversity initiatives, two rising star partners, and two former members of the firm’s board of directors.⁶² In addition to sponsoring training, speakers’ programs, and retreats, firms often had formalized mentorship or sponsorship initiatives. These sought to ensure that associates and junior partners of

51. Telephone Interview with Charles Parrish, *supra* note 48.

52. Telephone Interview with Gretchen Bellamy, Assistant Gen. Counsel, Wal-Mart Stores, Inc. (July 16, 2014); Telephone Interview with Debra Berns, Chief Compliance, Ethics & Privacy Officer & Senior Deputy Gen. Counsel, UnitedHealth Grp., Inc. (July 25, 2014); *see also* LEADERSHIP COUNCIL ON LEGAL DIVERSITY, <http://www.lclldnet.org/> (last visited Mar. 25, 2015).

53. Telephone Interview with Susan Blount, Exec. Vice President & Gen. Counsel, Prudential Fin., Inc. (n.d.); Telephone Interview with Tara Rosnell, *supra* note 49.

54. Telephone Interview with Jonathan Hoak, Exec. Vice President & Gen. Counsel, Flextronics Int’l Ltd. (n.d.).

55. Telephone Interview with Mary Francis, Chief Corp. Counsel, Chevron Corp. (Apr. 29, 2014).

56. Telephone Interview with Debra Berns, *supra* note 52.

57. Telephone Interview with Brad Malt, *supra* note 26.

58. Telephone Interview with Lee Miller, *supra* note 38 (goals and objectives, not quotas for recruitment, retention, and promotion). *But see* Telephone Interview with Nicholas Cheffings, *supra* note 25 (global diversity plan that aspires to having women be 25 percent of partners in 2017 and 30 percent in 2022).

59. Interview by Deborah L. Rhode with participant (June 26, 2014) (on file with author).

60. Some had a committee and a smaller steering council. *See* Telephone Interview with Guy Halgren, *supra* note 27.

61. Telephone Interview with Peggy Giunta, Chief Legal Pers. & Dev. Officer, & Kenneth Imo, Dir. of Diversity, Wilmer Cutler Pickering Hale & Dorr LLP (July 28, 2014).

62. Telephone Interview with Mitch Zuklie, Global Chairman & Chief Exec. Officer, Orrick, Herrington & Sutcliffe LLP (May 9, 2014).

underrepresented groups had the professional development opportunities and assistance necessary to ensure retention and promotion.⁶³ McGuireWoods is piloting a reverse mentoring program in which diverse associates mentor department chairs; the firm also gives a diversity and inclusion award at its annual partnership retreat.⁶⁴ Some firms have adopted policies that conformed to best practices developed by outside groups, such as the Project for Attorney Retention.⁶⁵ One firm required a slate that included at least one diverse candidate for every open lateral position.⁶⁶ That practice is modeled on the Rooney Rule, which the National Football League established to ensure that minority candidates were considered for coaching positions.⁶⁷

Most firms had a dedicated budget for diversity; others financed their efforts with funds allocated for other purposes, such as business development or recruiting. Thomas Reid, managing partner at Davis Polk, explained his firm's preference for an integrated approach: "I don't want people thinking of this as just a cost. Diversity is part of business development efforts. If it's seen as something we just have to do, it will not be sustainable."⁶⁸

General counsel reported similar initiatives. Some have also adopted a modified Rooney Rule to guarantee diverse slates of candidates. One large technology company has a numerical goal for female hiring and promotion because the company found it challenging to achieve diversity in the technology industry. Most general counsel, however, did not focus on numerical goals. Many corporations had mentorship and sponsorship programs as well as speaker programs and training on unconscious bias.⁶⁹ Also common were minority summer internships and other pipeline initiatives such as street law for high school students.⁷⁰ J.P. Morgan has recently established a legal reentry program targeting lawyers—generally women—who have been out of the workforce for at least a year.⁷¹ After an

63. Telephone Interview with Carter Phillips, *supra* note 25.

64. Telephone Interview with Bob Couture, *supra* note 42.

65. Telephone Interview with Lee Miller, *supra* note 38.

66. Telephone Interview with Bob Couture, *supra* note 42.

67. Brian N. Collins, *Tackling Unconscious Bias in Hiring Practices: The Plight of the Rooney Rule*, 82 N.Y.U. L. REV. 870, 871 (2007); Greg Garber, *Thanks to Rooney Rule, Doors Opened*, ESPN (Feb. 9, 2007, 3:03 PM), <http://sports.espn.go.com/nfl/playoffs06/news/story?id=2750645>.

68. Telephone Interview with Thomas Reid, *supra* note 26.

69. Telephone Interview with Susan Blount, *supra* note 53; Telephone Interview with Stephen Cutler, *supra* note 47; Telephone Interview with Bruce Kuhlik, Exec. Vice President & Gen. Counsel, Merck & Co., Inc. (July 18, 2014); Telephone Interview with Maryanne Lavan, Senior Vice President, Gen. Counsel & Corp. Sec'y, Lockheed Martin Corp. (July 17, 2014).

70. Telephone Interview with Debra Berns, *supra* note 52; Telephone Interview with Susan Blount, *supra* note 53; Telephone Interview with Maryanne Lavan, *supra* note 69; Telephone Interview with Teri McClure, *supra* note 49; Telephone Interview with Mary O'Connell, Head of Legal Operations, Google Inc. (June 5, 2014); Telephone Interview with Ashley Watson, Senior Vice President & Chief Ethics & Compliance Officer, Hewlett-Packard Co. (May 16, 2014).

71. Telephone Interview with Stephen Cutler, *supra* note 47.

eight-week internship, the company hopes to place them in permanent positions in the legal department.⁷²

Evaluations of the success of diversity initiatives were mixed. Virtually all managing partners and general counsel were proud of their efforts but varied in their assessments of results. Those who spoke for attribution had particular reasons to put their best foot forward, and some were confident that their workplace was an inclusive meritocracy.⁷³ A number mentioned awards from clients and minority or women's organizations, as well as positive ratings from Working Mother Magazine or Yale Law Women.⁷⁴ Most felt that their numbers were better than their peers, and most general counsel felt that their offices were often more successful than their companies as a whole. Many firm leaders and general counsel cited progress for women at leadership levels as an example of success. Although women are still underrepresented at the top, a common perception was that this was on the path to being fixed. Some general counsel were also proud of their records in channeling increased business to women- and minority-owned firms, although it could be a challenge finding them in areas where the corporation had the greatest needs. On the whole, participants mentioned more success in recruiting than in promotion and retention. Many mentioned the lack of progress concerning African American partners as a continuing challenge. Some were particularly careful not to be complacent. Comments included:

- "We could be better."⁷⁵
- "I don't think anyone is satisfied with the profession overall. And despite all the efforts, it's hard to see meaningful success in outside counsel."⁷⁶
- "We do pretty good with hiring but we struggle with retention. It's a constant effort."⁷⁷
- "With minorities, we are hiring but not keeping them."⁷⁸

72. *Id.*

73. For example, one participant felt confident that diversity efforts were successful because "there isn't any perception that people are here for any reason other than that they are doing a great job." Interview by Deborah L. Rhode with participant (July 30, 2014) (on file with author). Another noted, "I really do perceive a color-blind and gender-blind environment." Interview by Deborah L. Rhode with participant (June 30, 2014) (on file with author). One firm chair reported that "in terms of culture and inclusiv[ity], our feedback suggests we are very successful." Telephone Interview with Mitch Zuklie, *supra* note 62.

74. Telephone Interview with Tyree Jones, *supra* note 40; Telephone Interview with Brad Malt, *supra* note 26; Telephone Interview with Wally Martinez, *supra* note 26; Telephone Interview with Lee Miller, *supra* note 38; Telephone Interview with Jim Rishwain, Chair, Pillsbury Winthrop Shaw Pittman LLP (Aug. 2, 2014); Telephone Interview with Tara Rosnell, *supra* note 49; *see also* YALE LAW WOMEN, <http://yalelawwomen.org/> (last visited Mar. 25, 2015).

75. Telephone Interview with Maryanne Lavan, *supra* note 69.

76. Telephone Interview with Susan Blount, *supra* note 53.

77. Telephone Interview with Robert Giles, *supra* note 25.

78. Interview by Lucy Buford Ricca with participant (July 21, 2014) (on file with author).

- “You look at the numbers and it’s pretty depressing, but it’s better than it would have been without initiatives.”⁷⁹
- “It’s hard for us to walk away and say that we’ve moved the needle even though we’ve been trying. . . . It’s not a lack of trying, it’s a lack of impact.”⁸⁰
- “There’s always room for improvement.”⁸¹
- “The numbers [concerning African American partners] are pathetic.”⁸²
- “Not nearly successful enough, no question about it.”⁸³

C. Challenges and Responses

When asked about the challenges they faced in pursuing their diversity objectives, participants stressed common themes. With respect to minorities, the greatest obstacle was the limited pool of candidates with diverse backgrounds and the fierce competition for talented lawyers.⁸⁴ As one firm leader put it, “We hire many young diverse lawyers and then they often leave to go in-house, and then the clients come back and want diverse teams. That makes it difficult.”⁸⁵ A director of diversity lamented that “[o]ur firm is a place where others come to poach.”⁸⁶ Others complained about the difficulties of achieving diversity in lateral hiring, because “if firms have diverse lawyers, they work hard to keep them.”⁸⁷ Corporate counsel noted that they often could not pay as much as large law firms. Carter Phillips, chair of the executive committee of Sidley Austin, expressed a common frustration: “It’s tough even when you succeed in getting them in the door and giving them the best work, and they leave.”⁸⁸

A related frustration was that leaders were depending on a pipeline controlled by others. For example, across the technology industry, legal departments find it difficult to have a certain percentage of lawyers that meet their diversity goals because the entire pool of attorneys available to fulfill those goals is below that percentage.⁸⁹ Some put the blame squarely

79. Interview by Deborah L. Rhode with participant (June 30, 2014) (on file with author).

80. Interview by Lucy Buford Ricca with participant (July 21, 2014) (on file with author).

81. Telephone Interview with Teri McClure, *supra* note 49.

82. Telephone Interview with Thomas Reid, *supra* note 26.

83. Interview by Deborah L. Rhode with participant (July 18, 2014) (on file with author).

84. Telephone Interview with Joseph Andrew & Jay Connolly, *supra* note 25; Telephone Interview with Susan Blount, *supra* note 53; Telephone Interview with David Braff, Partner & Co-Chair of Diversity Comm., Sullivan & Cromwell LLP (July 31, 2014); Telephone Interview with John Soroko, *supra* note 38.

85. Telephone Interview with Bob Couture, *supra* note 42.

86. Telephone Interview with Kenneth Imo, *supra* note 61.

87. Telephone Interview with Robert Giles, *supra* note 25.

88. Telephone Interview with Carter Phillips, *supra* note 25.

89. Telephone Interview with Mark Chandler, Gen. Counsel, Cisco Sys., Inc. (July 24, 2014).

on law schools.⁹⁰ One law firm chair declined to participate in the study, explaining, “I simply believe that the academy is the principal problem and should be the focus of your inquiry. You’re losing the war at the intake, and we are dependent upon you. . . . Fill our pipeline with diverse talent, and through sponsorship and other initiatives we’ll know what to do with it.”⁹¹ Other participants put some of the responsibility on society: “A law firm alone can’t make overnight changes; some of where we would like to be depends on [the] broader society.”⁹² To one managing partner, the situation regarding African American lawyers was “hopeless” given issues with the pipeline.⁹³

With respect to women, the principle problem mentioned was a “culture that focuses heavily on hours as a metric of contribution.”⁹⁴ According to one general counsel:

Until law firms make certain fundamental changes in their business model, it’s going to be hard to make meaningful statistical change. . . . When you look at women after forty years [of being in the pipeline] and look at leadership levels, law firms don’t seem to be the right stewards on these issues. . . . To get beyond [current levels] firms will have to look at how people coach and invest in talent.⁹⁵

A further challenge was “getting everybody to buy into the issue. Not all men see that there is a need to address women’s issues. They see women partners and don’t see inhibitions.”⁹⁶

Some firms identified broader attitudinal problems. They specified implicit bias, “diversity fatigue,”⁹⁷ and the difficulty of having an “honest conversation” on the issue.⁹⁸ “Keeping the dialogue fresh and avoiding platitudes” was a continuing challenge.⁹⁹ At Lockheed Martin, “the struggle is to avoid backlash and people just checking the box.”¹⁰⁰ United Parcel Service worked hard to keep diversity as a “consistent focus . . . incorporat[ed] in the ways we do business, as opposed to . . . the next flavor of the month.”¹⁰¹ For one smaller company, not part of the study’s sample, the biggest challenge was “pushback from white males. . . . We need to reassure [them that they] aren’t being displaced, [and] get [them] engaged in the process.”¹⁰²

90. Telephone Interview with Tyree Jones, *supra* note 40 (noting drop in diverse attorneys attending law schools).

91. Email from Peter Kalis, Chairman & Global Managing Partner, K&L Gates LLP, to Deborah Rhode, Professor of Law, Stanford Law School (June 13, 2014, 14:06 PST) (on file with author).

92. Telephone Interview with Nicholas Cheffings, *supra* note 25.

93. Interview by Deborah L. Rhode with participant (June 3, 2014) (on file with author).

94. Telephone Interview with Maya Hazell, *supra* note 25.

95. Telephone Interview with Susan Blount, *supra* note 53.

96. Telephone Interview with Nicholas Cheffings, *supra* note 25.

97. Telephone Interview with Kenneth Imo, *supra* note 61.

98. Telephone Interview with Ahmed Davis, *supra* note 1.

99. Telephone Interview with Mary Francis, *supra* note 55.

100. Telephone Interview with Maryanne Lavan, *supra* note 69.

101. Telephone Interview with Teri McClure, *supra* note 49.

102. Telephone Interview with Jonathan Hoak, *supra* note 54.

For some participants the biggest challenge was the location or nature of their organization. A few had their principal offices in Midwestern cities that “don’t have a critical mass of racially diverse professionals.”¹⁰³ Aetna has its corporate headquarters in Hartford, Connecticut, a city not all that “attractive to diverse groups.”¹⁰⁴ Boston was reportedly less attractive to African American lawyers than other cities.¹⁰⁵ Some companies were in an industry not seen as “sexy” to “diverse lawyers [who] have a lot of options.”¹⁰⁶ The general counsel of an oil and gas company noted that “[it’s n]ot easy to recruit. You can’t get any more old industry than us.”¹⁰⁷

Other participants expressed frustration with the pace of progress. Those in organizations where attrition was low had to realize that “change is very slow.”¹⁰⁸ Pipeline programs took a long time to have immediate impact. “It’s a marathon, not a sprint,” said the Global Co-Chairman of DLA Piper.¹⁰⁹ The Chair of Morrison & Foerster agreed: “There’s no magic bullet or overnight fix. . . . You never get a boulder up the hill.”¹¹⁰ The long-term nature of the struggle required a consistency in focus that was challenging to maintain. As one general counsel put it, “[W]hen [your] day job is putting out fires, [diversity] doesn’t always make it to [the] priority of the day. Then six months out, you realize [you] haven’t made much progress.”¹¹¹

Responses to these challenges took a variety of forms. Many firms invested in mentorship and sponsorship programs. Some took special steps to support their rising stars, such as pairing them with a partner mentor or sending them to outside leadership programs.¹¹² One placed “a thumb on the scale” for qualified diversity candidates for leadership positions.¹¹³ Often the diversity officer sat in on evaluations and/or hiring decisions, or was notified when a diverse candidate received adverse performance ratings. One firm established a diversity challenge, which asked all attorneys to devote forty hours a year to diversity-related efforts, including recruiting, mentoring, participating in various events, and so forth. Some firms and clients partnered on diversity programs, which often increased their appeal. Some companies also offered internships or secondments for

103. Telephone Interview with Andrew Humphrey, Managing Partner, Faegre Baker Daniels LLP (July 18, 2014).

104. Telephone Interview with William Casazza, Executive Vice President & Gen. Counsel, Aetna, Inc. (June 30, 2014).

105. Telephone Interview with Brad Malt, *supra* note 26.

106. Interview by Lucy Buford Ricca with participant (July 21, 2014) (on file with author).

107. Telephone Interview with Charles Parrish, *supra* note 48.

108. Interview by Lucy Buford Ricca with participant (July 30, 2014) (on file with author).

109. Telephone Interview with Lee Miller, *supra* note 38.

110. Telephone Interview with Larren Nashelsky, *supra* note 38.

111. Telephone Interview with Mary O’Connell, *supra* note 70.

112. Telephone Interview with Diane Patrick, Co-Managing Partner & Chair of Diversity Comm., Ropes & Gray LLP (May 9, 2014).

113. Telephone Interview with Robert Giles, *supra* note 25.

minority law firm attorneys that could enhance their skills and build personal relationships.

Diversity training, particularly around unconscious bias, was common. One firm had lawyers take the implicit bias test or a refresher course before making promotion decisions.¹¹⁴ Others required it for new hires or anyone involved in recruitment. Evaluations of its effectiveness were mixed. Some felt the programs were “not solving a problem that we had.”¹¹⁵ In one firm, the training had created a “bad tone around the subject. . . . It made people feel nervous.”¹¹⁶ In another firm, “people felt preached to and imposed upon.”¹¹⁷ The same program provoked disagreement in one firm. The firm’s leader did not see the “value” of it; the firm’s head of human relations disagreed.¹¹⁸ According to the Chair of Hogan Lovells, “[M]ost people don’t think they need it, but most take from the training the need for understanding the possibility of unconscious bias.”¹¹⁹ Another agreed: “[People] don’t know what they don’t know.”¹²⁰ Lawyers were sometimes “pleasantly surprised” at the usefulness of the programs. A few leaders felt that it helped if programs were billed as something other than “diversity” initiatives, and many believed that the experience “helped with opening dialogue and making people aware.”¹²¹ No one had a concrete basis for his or her perception. As one chair of a diversity initiative acknowledged, “[I w]ould like to . . . know whether participants are taking away anything which affects practice. [I d]on’t have any data.”¹²²

Another strategy involved affinity groups, variously named, which almost all firms and corporations sponsored.¹²³ Some groups included not just traditional categories based on race, ethnicity, sexual orientation, and gender, but also religion, disability, parent, and veteran status. Many of these groups were actively involved in recruiting, mentoring, and providing business development skills and opportunities. Some held retreats. Many had sponsors from the senior ranks of the organization. Their formality and usefulness varied.¹²⁴ One concern was that white men felt excluded or threatened, or that certain groups were better than others in getting their issues addressed. “I’ve always believed [that] separating people rather than

114. Telephone Interview with Joseph Andrew & Jay Connolly, *supra* note 25.

115. Telephone Interview with Brad Malt, *supra* note 26.

116. Interview by Deborah L. Rhode with participant (July 21, 2014) (on file with author).

117. Telephone Interview with Diane Patrick, *supra* note 112.

118. Interview by Lucy Buford Ricca with participant (June 30, 2014) (on file with author).

119. Telephone Interview with Nicholas Cheffings, *supra* note 25.

120. Telephone Interview with Darren Nashelsky, *supra* note 38.

121. Interview by Deborah L. Rhode with participant (July 1, 2014) (on file with author).

122. Telephone Interview with Ahmed Davis, *supra* note 1; *accord* Telephone Interview with Carter Phillips, *supra* note 25 (“[It’s] hard to tell how successful they have been.”).

123. At most companies, the affinity groups were company-wide, not specific to the legal department.

124. At several law firms, the only formal group was the women’s initiative/group.

bringing them together is not the way to go,” said one firm chair.¹²⁵ One general counsel felt that the groups were “not as effective as people hoped they would be. . . . I don’t think they’ve made a difference.”¹²⁶ Others had received feedback that they were “incredibly” important. One company had had senior executives come out in LGBT forums.¹²⁷ At the very least, most participants believed that these groups provided a sense of community and an opportunity for raising concerns that should be communicated to management. They helped ensure that diversity was “front and center” in the workplace.

D. Accountability

Participants were asked a number of questions about the structures used to achieve accountability on diversity-related issues. The first was whether they did anything to monitor the experience of employees concerning diversity. Eleven firms and sixteen companies reported relying on surveys to assess experiences related to diversity.¹²⁸ “We survey ourselves up the wazoo,” reported one general counsel.¹²⁹ Most included diversity-related questions as part of a general quality of life survey; some had conducted surveys just on diversity. Some organizations held focus groups as a supplement or substitute for surveys. However, many leaders appeared to see no necessity for formal assessments; they believed that the organization’s “culture and open door policy” made people feel that they could raise concerns. One firm worried that the issues could be “somewhat uncomfortable, so we have left it to informal dialogue.”¹³⁰ But it is precisely because of the discomfort connected with raising such issues openly that some organizations found anonymous surveys useful. Many firms also collected information from exit interviews and 360 performance reviews. One conducted “stay” interviews with minority attorneys to find out what factors were most important to their retention.¹³¹

Participants were also asked what, if any, measures were in place to hold employees accountable for progress on diversity issues. “Nothing that has teeth,” said one general counsel.¹³² “I wish there were some,” responded another, “That’s a good idea.”¹³³ It is, in fact, an idea that many companies

125. Interview by Deborah L. Rhode with participant (June 24, 2014) (on file with author).

126. Interview by Deborah L. Rhode with participant (July 30, 2014) (on file with author).

127. Telephone Interview with Maryanne Lavan, *supra* note 69.

128. Some law firms did not conduct their own survey but relied on the responses of their attorneys to Vault or Am Law surveys. These were included in the survey number.

129. Interview by Deborah L. Rhode with participant (June 12, 2014) (on file with author).

130. Interview by Deborah L. Rhode with participant (July 21, 2014) (on file with author).

131. Telephone Interview with Andrew Humphrey, *supra* note 103.

132. Interview by Deborah L. Rhode with participant (July 16, 2014) (on file with author).

133. Interview by Deborah L. Rhode with participant (June 30, 2014) (on file with author).

and law firms have embraced in some form. Seventy-seven percent of companies and 80 percent of firms surveyed make some effort to assess individual employees' performance on diversity. Some used the data from employee surveys to assess the performance of managers. Others used 360 performance reviews or information submitted as part of lawyers' self-evaluations. Some allocated specific dollar amounts to diversity contributions.¹³⁴

Participants divided on the usefulness of tying compensation to performance on diversity. Twenty-nine percent of companies and 43 percent of firms surveyed acknowledged that an individual's diversity efforts could play a role in compensation decisions. According to one firm leader, financially rewarding diversity efforts gets people's attention and makes them realize that diversity is part of their job. Other leaders disagreed. Hogan Lovells had "taken the view that artificially incentivizing people to do the right thing is not the right way. We want it to be part of the culture of the firm. . . . [But] commitment to diversity above and beyond what we would normally expect is something we would take into account."¹³⁵ Other organizations similarly made it a matter for those who had "gone [the] extra mile" on diversity issues.¹³⁶ One company had gone "back and forth" and was still debating the issue.¹³⁷ The general counsel wanted it to be "part of [the] culture" but was unsure if incentives were the way to get there.¹³⁸

Corporate clients also had opportunities to hold law firms accountable by requiring data on diversity and allocating their business on that basis. Most companies reported asking for general information on firms' composition as well as specific information about the staffing of their own matters.¹³⁹ Rarely did general counsel report terminating representation over the issue, although some seemed prepared to do so.¹⁴⁰ As the chief of legal operations at Google noted, "as much as we encourage it, there isn't a penalty or reward."¹⁴¹ Only one firm reported losing business over the issue. Some companies gave awards and some had targeted expenditures

134. Associates as well as partners were rewarded.

135. Telephone Interview with Nicholas Cheffings, *supra* note 25.

136. Interview by Deborah L. Rhode with participant (June 26, 2014) (on file with author).

137. Telephone Interview with Teri McClure, *supra* note 49.

138. *Id.*

139. One general counsel did not ask because "we are hiring individual lawyers and not basing on social criteria." Telephone Interview by Deborah L. Rhode with participant (July 24, 2014) (on file with author).

140. One had "moved matters from firms that didn't have the same commitment as we have." Telephone Interview with Teri McClure, *supra* note 49. Another recalled letting a firm go about eight years ago because of its record on women. Another said she would terminate a firm if she didn't see a "diverse slate." Telephone Interview with Maryanne Lavan, *supra* note 69. One said he would not take an existing matter away but would "decrease business and channel it to firms doing the right thing." Interview by Deborah L. Rhode with participant (June 12, 2014) (on file with author). Another said, "[W]e have not dropped a firm but it is a factor in who we approve." Telephone Interview with Ashley Watson, *supra* note 70.

141. Telephone Interview with Mary O'Connell, *supra* note 70.

on minority or women-owned firms. One leader reported experience with a bonus program allocating additional business to firms that had a certain number of minorities and women working on their matters.¹⁴² Most general counsel thought, “[T]he firms get it. This isn’t a hard sell.”¹⁴³ Evaluations of the effectiveness of these accountability efforts varied. A number of general counsel felt frustrated by the lack of progress made by outside firms. The senior vice president and chief ethics and compliance officer at Hewlett Packard expressed common views with uncommon candor. “We’ve always tracked it . . . but we’re not that great at [getting results].”¹⁴⁴ According to one general counsel, “they want to send glossy documents describing their programs. It’s not very productive.”¹⁴⁵ Some faulted themselves for not “following through” on the reports. One felt frustrated with firms that “want me to goad them into doing the right thing.”¹⁴⁶

For their part, firms found it “frustrating . . . when clients take a hard stick on this and then don’t do anything in response. People are doing cartwheels to comply and then don’t get an increase in business . . .”¹⁴⁷ Some corporations “say this is important but don’t pay attention to it.”¹⁴⁸ “A lot of it is half-hearted. . . . Even the most detailed response to questions never gets a follow-up.”¹⁴⁹ One firm chair noted that clients’ concern ran the gamut; some made diversity their top priority while others got questionnaire results year after year “and that’s the last we heard of it.”¹⁵⁰ “It ebbs and flows. If you get a [general counsel] who is passionate about the issue, it gets a lot of traction. If that person leaves or gets preoccupied, it fades.”¹⁵¹ Most of the interest came from large corporations; midsize companies and individual clients showed little interest. One firm chair thought that clients on the whole had gotten more serious about their inquiries. “[This] has moved over the last five years from ‘we want to be [seen as] doing this’ to ‘we want to see that it’s happening.’”¹⁵²

When asked if pressure from clients had changed firm practices, many leaders said it had not.

- “We would be doing it anyway.”¹⁵³

142. Telephone Interview with Ahmed Davis, *supra* note 1 (describing Microsoft’s approach).

143. *See, e.g.*, Telephone Interview with Mary Francis, *supra* note 55.

144. Telephone Interview with Ashley Watson, *supra* note 70.

145. Telephone Interview with participant (n.d.) (on file with author).

146. Interview by Deborah L. Rhode with participant (July 18, 2014) (on file with author).

147. *See, e.g.*, Interview by Deborah L. Rhode with participant (July 21, 2014) (on file with author).

148. Interview by Deborah L. Rhode with participant (June 23, 2014) (on file with author).

149. Interview by Deborah L. Rhode with participant (Aug. 6, 2014) (on file with author).

150. Telephone Interview with Guy Halgren, *supra* note 27.

151. Interview by Deborah L. Rhode with participant (July 21, 2014) (on file with author).

152. Telephone Interview with Nicholas Cheffings, *supra* note 25.

153. *Id.*

- “We expect as much from ourselves or more than our clients do.”¹⁵⁴
- “I’d like to believe [this] hasn’t affected our commitment.”¹⁵⁵
- “We haven’t been dragged to [the] conclusion” that diverse teams make for better lawyering.¹⁵⁶

Other firm leaders registered a positive impact from the requirements. “Partners are responsive to anything clients highlight as a concern and follow up.”¹⁵⁷ Some “wished there were more pressure. . . . It has helped to get people to see diversity as a bottom line issue. . . . It gets partners’ attention.”¹⁵⁸ Others similarly “welcomed” client interest because it “reinforces the importance of our own efforts.”¹⁵⁹ At the very least, the “collective pressure from a lot of committed counsel has prevented things from being worse than they are.”¹⁶⁰ According to Perkins Coie’s managing partner, client pressure “really does help send the message home. . . . You get what you measure. It’s a good thing to do, and if this [pressure] helps us achieve it, so be it.”¹⁶¹ Others agreed. Client inquiries had “raised awareness among partners—they were paying attention because they know clients care about it.”¹⁶² Senior lawyers who “may not have been all that committed listen when a client says we care about quality, cost, and diversity.”¹⁶³

E. Work/Family Issues

A final question asked leaders how they had addressed issues of work/life balance and how successful they had been. The vast majority claimed to have been successful. “If you don’t want to lose good people, you have to be flexible.”¹⁶⁴ A common view was that “we work hard but it’s not a sweatshop.”¹⁶⁵ Most organizations guaranteed fairly generous parental leaves, permitted flexible time and reduced hour schedules, and allowed telecommuting at least to some extent. A few had emergency childcare or on-site centers.¹⁶⁶ Law firms often were at pains to “demonstrate that you can be a successful partner with a balanced schedule—reduced hours or part time. This is important to attract the best talent: you don’t need to be a

154. Telephone Interview with Jim Rishwain, *supra* note 74.

155. Telephone Interview with Andrew Humphrey, *supra* note 103.

156. Telephone Interview with John Soroko, *supra* note 38.

157. Telephone Interview with Maya Hazell, *supra* note 25.

158. Interview by Deborah L. Rhode with participant (July 1, 2014) (on file with author).

159. Accord Telephone Interview with Darren Nashelsky, *supra* note 38 (“Clients reinforce the message.”); Telephone Interview with Diane Patrick, *supra* note 112 (“Some general counsel are active in pressing the issue. That’s a good thing for us.”).

160. Telephone Interview with Susan Blount, *supra* note 53.

161. Telephone Interview with Robert Giles, *supra* note 25.

162. Telephone Interview with Kenneth Imo, *supra* note 61.

163. Telephone Interview with Mitch Zuklie, *supra* note 62.

164. Telephone Interview with Lee Miller, *supra* note 38.

165. Telephone Interview with Guy Halgren, *supra* note 27.

166. Telephone Interview with David Braff, *supra* note 84 (emergency care); Telephone Interview with Thomas Milch, *supra* note 25 (on-site childcare).

staff attorney or [on a] different track.”¹⁶⁷ Championing flexibility was also important in corporations. As one leader noted: “It’s feasible for . . . caregivers to have a flexible work schedule; [they] really can do the work from anywhere.”¹⁶⁸

“But,” she added, “there is the inherent obstacle in that in the legal profession [there is] a lot of work to do.”¹⁶⁹ Many leaders made a similar point:

- “Everyone feels stressed. . . . It’s the profession we’ve chosen. It’s a client service profession and a demanding job.”¹⁷⁰
- “It’s a tough environment to be part-time in.”¹⁷¹
- “Clients expect availability twenty-four hours a day.”¹⁷²
- “We run a 24/7 business and it’s international. We have a difficult and time-committed job.”¹⁷³
- “It’s really difficult in the industry, especially for primary caretakers.”¹⁷⁴
- “It’s a real tough [issue]. We do programs on the subject but I’m not sure people have time to attend. I don’t think we’ve done anything really to address that issue.”¹⁷⁵
- “You have to be realistic. It’s a demanding profession. . . . I don’t claim we’ve figured it out.”¹⁷⁶

Although some leaders were sensitive to the problem of “schedule creep,” and tried to avoid escalation of reduced hours, others saw the problem as inevitable. As one firm chair put it, “When you go on a reduced schedule, there are times when [you] have to work full-time to demonstrate [you] can do the job. [Lawyers] need a support system in place so that they can demonstrate the skills to be promoted. Sometimes people don’t recognize that.”¹⁷⁷

Most general counsel felt that “corporations are easier places to combine work and family than law firms are.”¹⁷⁸ As one general counsel put it, part of the reason “that lawyers move from firms to in-house is to achieve a

167. Telephone Interview with Joseph Andrew & Jay Connolly, *supra* note 25; *accord* Telephone Interview with Robert Giles, *supra* note 25 (“[We’ve] made a lot of people partner while [they were] on part-time status.”).

168. Telephone Interview with Debra Berns, *supra* note 52.

169. *Id.*

170. Telephone Interview with Susan Blount, *supra* note 53.

171. Interview by Deborah L. Rhode with participant (July 1, 2014) (on file with author).

172. Interview by Deborah L. Rhode with participant (June 24, 2014) (on file with author).

173. Telephone Interview with Teri McClure, *supra* note 49.

174. Telephone Interview with Larren Nashelsky, *supra* note 38.

175. Telephone Interview with Stephanie Corey, *supra* note 48.

176. Telephone Interview with Andrew Humphrey, *supra* note 103.

177. Telephone Interview with Kenneth Imo, *supra* note 61.

178. Interview by Deborah L. Rhode with participant (July 30, 2014) (on file with author).

better work-life balance.”¹⁷⁹ Another noted, “People could make more money in law firms. To counter that, we offer a better work/life balance as well as a competitive salary.”¹⁸⁰ Because lawyers in-house do not bill by the hour, “no one is looking over your shoulder to make sure [you] are in [your] chair twelve hours a day. We just look to people to get their jobs done.”¹⁸¹ The general counsel of Cisco stated his belief that “the point is to measure output rather than input. We don’t care how many hours are worked on a particular matter as long as the project gets done.”¹⁸² The general counsel of Aetna felt similarly: “We work pretty hard. But we let people do it at a time and place convenient to them.”¹⁸³

Leaders were of mixed views on whether to use their “family friendly” status in recruiting. Some were proud of their policies and their ranking by organizations like the Yale Law Women. Others opted for a lower profile. “I don’t put it out there because I don’t want to attract people who are coming for that reason,” said one general counsel.¹⁸⁴ A firm chair similarly recalled that “we made the mistake of recruiting around work/life balance and got people who thought we weren’t a ‘type A’ intense place.”¹⁸⁵

Whether organizations could do more to address the issue also evoked varied responses. Some leaders wished “we could stop talking about it because it raises the expectation that we can do something about it.”¹⁸⁶ Others were less resigned. “The whole company, including the legal department, has room for improvement when it comes to work/life balance,” said one general counsel.¹⁸⁷ Others similarly felt more change was inevitable, and desirable. “If we crack the code on work/life balance it will help women,” said Mitch Zuklie, Chair of Orrick.¹⁸⁸

IV. BEST PRACTICES

The findings from this study, together with other research and interviews with headhunters and a diversity consultant, suggest a number of best practices for advancing diversity in law firms and in-house legal departments.

179. Telephone Interview with Chan Lee, Vice President & Assistant Gen. Counsel, Pfizer, Inc. (July 29, 2014).

180. Telephone Interview with Gretchen Bellamy, *supra* note 52.

181. Interview by Lucy Buford Ricca with participant (July 30, 2014) (on file with author).

182. Telephone Interview with Mark Chandler, *supra* note 89.

183. Telephone Interview with William Casazza, *supra* note 104.

184. Interview by Deborah L. Rhode with participant (July 18, 2014) (on file with author).

185. Interview by Deborah L. Rhode with participant (June 12, 2014) (on file with author).

186. Interview by Lucy Buford Ricca with participant (July 21, 2014) (on file with author).

187. Telephone Interview with Charles Parrish, *supra* note 48.

188. Telephone Interview with Mitch Zuklie, *supra* note 62.

A. Commitment and Accountability

The first and most important step toward diversity and inclusion is to make that objective a core value that is institutionalized in organizational policies, practices, and culture. The commitment needs to come from the top. An organization's leadership must not only acknowledge the importance of diversity but also establish structures for promoting it and for holding individuals accountable. To that end, leaders need to take every available opportunity to communicate the importance of the issue, not just in words, but in recruiting, evaluation, and reward structures.

"What doesn't work is when leaders talk about the value of inclusion but fail to make it more than the seventh, eighth, or ninth priority," said Christie Smith, managing principal of Deloitte University Leadership Center for Inclusion.¹⁸⁹ So too, Miriam Frank, vice president of recruiters Major, Lindsey & Africa, saw "some companies purport to put it at the top of the list, but when push comes to shove, other qualities will creep up the ladder."¹⁹⁰ By contrast, true commitment from an organization's leadership can help stave off frustration or "diversity fatigue" that occurs when lawyers feel that programs are simply window dressing. What also does not work, according to Smith, are

programs and initiatives around diversity without leadership expectations tied to [them]. . . . There are a lot of well-intentioned leaders who have abdicated responsibility to a few in the organization rather than making diversity and inclusion the responsibility of every leader in their organization. . . . [They] have stated values around inclusion but [they] don't live up to those values.¹⁹¹

To institutionalize diversity, a central priority should be developing effective systems of evaluation, rewards, and allocation of leadership and professional development opportunities. Women and minorities need to have a critical mass of representation in key positions such as management and compensation committees. Supervisors need to be held responsible for their performance on diversity-related issues, and that performance should be part of self-assessments and bottom-up evaluation structures.¹⁹² Although survey participants were divided in their views about tying compensation to diversity, most research shows that such a linkage is

189. Telephone Interview with Christie Smith, Managing Principal, Deloitte Univ. Leadership Ctrs. for Inclusion & Cmty. Impact, Deloitte & Touche LLP (July 23, 2014).

190. Telephone Interview with Miriam Frank, Vice President, Major, Lindsey & Africa (June 9, 2014).

191. Telephone Interview with Christie Smith, *supra* note 189.

192. See BAGATI, *supra* note 16, at 49; Deborah L. Rhode & Barbara Kellerman, *Women and Leadership: The State of Play*, in WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE 1, 27–28 (Barbara Kellerman & Deborah L. Rhode eds., 2007); Cecilia L. Ridgeway & Paula England, *Sociological Approaches to Sex Discrimination in Employment*, in SEX DISCRIMINATION IN THE WORKPLACE 189, 202 (Faye J. Crosby et al. eds., 2007); Robin J. Ely, Herminia Ibarra & Deborah Kolb, *Taking Gender into Account: Theory and Design for Women's Leadership Development Programs*, 10 ACADEMY OF MGMT. LEARNING & EDUC. 474, 481 (2011); JOANNA BARSH & LAREINA YEE, UNLOCKING THE FULL POTENTIAL OF WOMEN AT WORK 11 (McKinsey & Co. 2012).

necessary to demonstrate that contributions in this area truly matter. Performance appraisals that include diversity but that have no significant rewards or sanctions are unlikely to affect behavior.¹⁹³

Pressure from clients to hold firms accountable is also critical. Such initiatives need to include not just inquiries about diversity, which most clients make, but also follow-ups, which occur less often. Good performance needs to be rewarded; inadequate performance should carry real sanctions. This kind of pressure ensures that “regular partners have to think about it.”¹⁹⁴

B. Self-Assessment

As an ABA Presidential Commission on Diversity recognized, self-assessment should be a critical part of all diversity initiatives.¹⁹⁵ Leaders need to know how policies that affect inclusiveness play out in practice. That requires collecting both quantitative and qualitative data on matters such as advancement, retention, assignments, satisfaction, mentoring, and work/family conflicts. Periodic surveys, focus groups, interviews with former and departing employees, and bottom-up evaluations of supervisors can all cast light on problems disproportionately experienced by women and minorities. Monitoring can be important not only in identifying problems and responses, but also in making people aware that their actions are being assessed. Requiring individuals to justify their decisions can help reduce unconscious bias.¹⁹⁶

C. Affinity Groups

Affinity groups for women and minorities are extremely common, but data on their effectiveness is mixed. Survey participants generally agreed with research suggesting that, at their best, such groups provide useful advice, role models, contacts, and development of informal mentoring relationships.¹⁹⁷ By bringing lawyers together around common interests, these networks can also forge coalitions on diversity-related issues and

193. Frank Dobbin & Alexandra Kalev, *The Architecture of Inclusion: Evidence from Corporate Diversity Programs*, 30 HARV. J.L. & GENDER 279, 293–94 (2007); Frank Dobbin, Alexandra Kalev & Erin Kelly, *Diversity Management in Corporate America*, CONTEXTS, Fall 2007, at 21, 23–24, available at http://scholar.harvard.edu/files/dobbin/files/2007_contexts_dobbin_kalev_kelly.pdf.

194. Telephone Interview with Thomas Reid, *supra* note 26.

195. PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY, ABA, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 23 (2010).

196. Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1381 (2008); Emilio J. Castilla, *Gender, Race, and Meritocracy in Organizational Careers*, 113 AM. J. SOC. 1479, 1485 (2008).

197. See Rhode & Kellerman, *supra* note 192, at 30; Alexandra Kalev, Frank Dobbin & Erin Kelley, *Best Practices or Best Guesses: Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 594 (2006); Cindy A. Schipani et al., *Pathways for Women to Obtain Positions of Organizational Leadership: The Significance of Mentoring and Networking*, 16 DUKE J. GENDER, L. & POL’Y, 89, 131 (2009).

generate useful reform proposals.¹⁹⁸ Yet their importance should not be overstated. As one senior vice president put it, “[There’s] only so much progress you can make by talking to people just like you. [You are] preaching to the choir.”¹⁹⁹ The only large-scale study on point found that networks had no significant positive impact on career development; they increased participants’ sense of community but did not do enough to put individuals “in touch with what . . . or whom they [ought] to know.”²⁰⁰

D. Mentoring and Sponsorship

One of the most effective interventions involves mentoring and sponsorship, which directly address the difficulties of women and minorities in obtaining the support necessary for career development. Many organizations have formal mentoring programs that match employees or allow individuals to select their own pairings. Research suggests that well-designed initiatives that evaluate and reward mentoring activities can improve participants’ skills, satisfaction, and retention rates.²⁰¹ However, most programs do not require evaluation or specify the frequency of meetings and set goals for the relationship.²⁰² Instead, they permit a “call me if you need anything” approach, which leaves too many junior attorneys reluctant to become a burden.²⁰³ Ineffective matching systems compound the problem; lawyers too often end up with mentors with whom they have little in common.²⁰⁴ Formal programs also may have difficulty inspiring the kind of sponsorship that is most critical. Women and minorities need advocates, not simply advisors, and that kind of support cannot be mandated. The lesson for organizations is that they cannot simply rely on formal structures. They need to cultivate and reward sponsorship of women and minorities and monitor the effectiveness of mentoring programs.²⁰⁵

E. Work/Family Policies

Organizations need to ensure that their work/family policies are attuned to the needs of a diverse workplace, in which growing numbers of men as well as women want flexibility in structuring their professional careers. To

198. Bob Yates, *Women and Minorities: The Retention Challenge for Law Firms*, CHI. LAW., Feb. 2007.

199. Telephone Interview with Ashley Watson, *supra* note 70.

200. Dobbin, Kalev & Kelly, *supra* note 193, at 25.

201. Rhode & Kellerman, *supra* note 192, at 30; *see also* IDA O. ABBOTT, THE LAWYER’S GUIDE TO MENTORING 32–33 (2000); Kalev, Dobbin & Kelly, *supra* note 197, at 594; Schipani et al., *supra* note 197, at 100–01.

202. *See, e.g.*, MINN. STATE BAR ASS’N, DIVERSITY AND GENDER EQUITY IN THE LEGAL PROFESSION, BEST PRACTICES GUIDE 65–79 (2008).

203. *Id.* at 77.

204. IDA O. ABBOTT & RITA S. BOAGS, MINORITY CORP. COUNSEL ASS’N, MENTORING ACROSS DIFFERENCES: A GUIDE TO CROSS-GENDER AND CROSS-RACE MENTORING (n.d.), available at <http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=666>; Leigh Jones, *Mentoring Plans Failing Associates; High Attrition Rates Still Hit Firms Hard*, NAT’L L.J. (Sept. 15, 2006), <http://www.nationallawjournal.com/id=900005462642/Mentoring-plans-failing-associates>.

205. CATALYST, THE PIPELINE’S BROKEN PROMISE 5 (2010).

that end, organizations should ensure that they have adequate policies and cultural norms regarding parental leave, reduced schedules, telecommuting, and emergency childcare. Most of the organizations surveyed had such formal policies. But existing research shows a substantial gap between policies and practices. One study found that although over 90 percent of law firms reported having part-time policies, only approximately 4 percent of lawyers actually use them.²⁰⁶ Those who choose reduced schedules too often find that they aren't worth the price. Their hours creep up, the quality of their assignments goes down, their pay is not proportional, and they are stigmatized as "slackers."²⁰⁷

Surveying lawyers and collecting data on part-time policy utilization rates and promotion possibilities are critical in educating leaders about whether formal policies work in practice as well as in principle. Too many organizations appear resigned to the idea that law is a 24/7 profession.²⁰⁸ Too few have truly engaged in the kind of self-scrutiny necessary to develop effective responses. As one survey participant noted, his firm's policies were "a work in progress." Other leaders need to take a similar view, and to subject their practices to ongoing self-assessment.

F. Outreach

Organizations can also support efforts to expand the pool of qualified minorities through scholarships, internships, and other educational initiatives, and to expand their own recruiting networks. The ABA's Pipeline Diversity Directory describes about 400 such initiatives throughout the country.²⁰⁹ Many survey participants were undertaking such programs in recognition of their long-term payoffs. Some organizations had also cultivated contacts with organizations that support diverse talent. As one general counsel noted, "[I]f we are creative and think outside the box about the skills and experience needed to succeed in a position, we can find more qualified talent, including qualified diverse talent, for the pools from which we hire."²¹⁰

CONCLUSION

Implementing these practices requires a sustained commitment and many leaders expressed understandable frustration at the slow pace of change. What is encouraging about this study, however, is that such a commitment

206. Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1056 (2011).

207. *Id.* at 1056–57.

208. See discussion *supra* Part III.E. (discussing work/family issues).

209. See *Search the Pipeline Diversity Directory*, ABA, <http://apps.americanbar.org/abanet/op/pipelndir/search.cfm> (last visited Mar. 25, 2015). For a discussion of such programs, see Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271, 294–99 (2014).

210. Email from Bevelyn A. Coleman, Exec. Vice President & Deputy Gen. Counsel, Wells Fargo & Co., to Deborah L. Rhode, Professor of Law, Stanford Law School (Aug. 14, 2014, 10:24 PST) (on file with author).

appears widely shared. That, in itself, is a sign of progress. As one chair noted, “Ten years ago, it wasn’t uncomfortable to walk into a room with a non-diverse team. The temperature of the water has changed. It’s hard to succeed without a commitment to diversity.”²¹¹ Leaders of the profession recognize that fact. The challenge now is to translate aspirational commitments into daily practices and priorities.

211. Telephone Interview with Greg Nitzkowski, *supra* note 28.

Appendix A: Participant List	
<i>Fortune 100 Companies</i>	<i>Am Law 100 Firms</i>
Aetna, Inc. Am. Int'l Grp., Inc. Chevron Corp. Cisco Systems, Inc. Comcast Corp. ConocoPhillips Co. Google Inc. Hewlett-Packard Co. Intel Corp. Johnson Controls, Inc. JPMorgan Chase & Co. Lockheed Martin Corp. Merck & Co., Inc. Pfizer, Inc. Prudential Fin., Inc. Tesoro Corp. The Coca-Cola Co. Procter & Gamble Co. UnitedHealth Grp., Inc. United Parcel Serv., Inc. Verizon Commc'ns Wal-Mart Stores, Inc. Wells Fargo & Co.	Arnold & Porter LLP Davis Polk & Wardwell LLP Dentons DLA Piper Duane Morris LLP Faegre Baker Daniels LLP Fish & Richardson P.C. Hogan Lovells Hunton & Williams LLP Holland & Knight LLP Kirkland & Ellis LLP Latham & Watkins LLP McGuireWoods LLP Morgan, Lewis & Bockius LLP Morrison & Foerster LLP Nixon Peabody LLP O'Melveny & Myers LLP Orrick, Herrington & Sutcliffe LLP Paul Hastings LLP Perkins Coie LLP Pillsbury Winthrop Shaw Pittman LLP Proskauer Rose LLP Reed Smith LLP Ropes & Gray LLP Sheppard, Mullin, Richter & Hampton LLP Sidley Austin LLP Sullivan & Cromwell LLP White & Case LLP Wilmer Cutler Pickering Hale & Dorr LLP Wilson Sonsini Goodrich & Rosati
<i>Additional Participants</i>	
Major, Lindsey & Africa Deloitte & Touche LLP Flextronics Int'l Ltd. NetApp	

FEMALE LAW STUDENTS, GENDERED SELF-EVALUATION, AND THE PROMISE OF POSITIVE PSYCHOLOGY

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INTRODUCTION

Despite the ranks of women entering law school every year, a significant proportion of them seem to consider legal education a uniquely difficult experience that shakes their self-confidence to a severe extent not seen in other fields. And perhaps more troubling, attention paid to gender in legal education by scholars has not eliminated the gendered divide. Several top legal minds such as Professors Lani Guinier¹ and Linda Hirshman² have written books discussing the issues women face in law school, and scores of students and lawyers have published articles in law reviews discussing the experiences of female law students and how practices might be improved.³ Yet in the decades since serious academic inquiry began, the problems of gender in legal education have made surprisingly little progress.

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1. LANI GUINIER, MICHELLE FINE & JANE BALIN, *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997).

2. LINDA R. HIRSHMAN, *A WOMAN'S GUIDE TO LAW SCHOOL* (1999).

3. See, e.g., Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 AM. U. J. GENDER SOC. POL'Y & L. 511, 531 (2005); Cara L. Nord, "What Is" and "What Should Be" an Empirical Study of Gender Issues at Gonzaga University School of Law, 10 CARDOZO WOMEN'S L.J. 60, 63 (2003); Claire G. Schwab, Note, *A Shifting Gender Divide: The Impact of Gender on Education at Columbia Law School in the New Millennium*, 36 COLUM. J.L. & SOC. PROBS. 299, 324 (2003); Catherine Weiss & Louise Mellling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1299 (1988).

At the same time that a substantial number of female students underperform in law school, however, a smaller number succeed.⁴ It appears that one source of ongoing difficulty is due to the self-criticism and self-judgment of female students who recognize the gendered nature of law school, which cause them to self-select out of activities. A large number of women—perhaps a majority—believe that they do not match the paradigm of the successful male-coded law student, and therefore do not seek out achievements such as publication in law reviews and prestigious clerkships. A smaller number, on the other hand, compare themselves favorably to the male standard and excel. Recognizing their equal potential, they apply for prestigious activities and honors and see disproportionate success.⁵ An evaluation of methods to improve the experience of female law students, therefore, should focus on this internal process of self-evaluation in addition to reforming the larger environment and pedagogy. The field of positive psychology, studying what traits make people happy (rather than studying what makes people unhappy), holds particular promise in identifying what makes the difference between a female law student who is fulfilled and satisfied with her performance and one who feels alienated from her legal education.

Part I reviews the literature discussing the experiences of female law students. Part II outlines the existing proposals for reform to legal education in order to address some of the sources of unhappiness and underperformance by female students. Part III describes the paradox of a subset of overachieving female students and proposes an explanation: female students compare themselves to an overwhelmingly male model student. Some female students feel alienated from the gendered model, and are more likely to be harshly self-critical of their capabilities and performance, whereas others look past the gendered model and judge themselves as equal to the ideal. Part IV asks how to move more female students from the former category into the latter and proposes techniques drawn from positive psychology to improve the self-assessment of female students.

I. THE EXPERIENCE OF FEMALE LAW STUDENTS

The first woman was admitted to an American law school in 1869.⁶ It was not until the late 1960s, however, that the numbers of female students rose above a token 3 or 4%.⁷ Female law students reached 20% of total law

4. See *infra* text accompanying notes 108-12.

5. Sari Bashi & Maryana Iskander, *Why Legal Education Is Failing Women*, 18 YALE J.L. & FEMINISM 389, 422 n.110 (2006).

6. Nord, *supra* note 3, at 63.

7. Richard K. Neumann Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 314 (2000); Schwab, *supra* note 3, at 309.

students in 1974,⁸ 40% in 1985,⁹ and only became a majority of law students nationwide in 2001.¹⁰ The experiences of pioneering women law students were a study in extremes: on the one hand, the treatment of female law students was markedly sexist. Professors refused to call on female students except for specific days designated as "Ladies Days," or only to discuss issues perceived as female such as sexual assault.¹¹ Even the formal curriculum was misogynist: a property casebook issued in 1968 stated that "'land, like woman, was meant to be possessed.'"¹² Despite this overwhelmingly antagonistic environment, female law students performed better than male students, receiving higher average grades.¹³

Modernly, the most overt elements of sexism in law schools have been almost entirely removed. And to some extent, the achievement of gender parity in law school is unsurprising. One persuasive reason for the higher average performance of the early female law students is that they were "'an unusually determined group and unfazed by discrimination, having experienced it earlier on.'"¹⁴ As barriers to law school admissions fell, more than the select and most ambitious female students had the opportunity to attend law school, and performances of the sexes consequently became more congruent.

There are two reasons, however, for continued concern. First, scholarly discussions have increasingly characterized law school as a damaging experience for large numbers of students.¹⁵ Research shows that law students are unhappier than students in other professional schools, even compared to medical students (often viewed as the most overworked graduate

8. Neumann, *supra* note 7, at 314.

9. *Id.*

10. Carolyn M. Janiak, Note, *The "Links" Among Golf, Networking, and Women's Professional Advancement*, 8 STAN. J.L. BUS. & FIN. 317, 319 (2003); see also Janet Taber et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1210 (1988).

11. DEBORAH L. RHODE, ABA COMM'N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 27 (2001), available at <http://womenlaw.stanford.edu/pdf/aba.unfinished.agenda.pdf>.

12. Nord, *supra* note 3, at 63 (quoting ROBERT BOCKING STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 82 (1983)).

13. Allison L. Bowers, *Women at The University of Texas School of Law: A Call for Action*, 9 TEX. J. WOMEN & L. 117, 122 & n.19 (2000).

14. *Id.* at 122 n.19 (quoting Laura Mansnerus, *Men Found to Exceed Women in Law School*, J. REC. (Okla. City), Feb. 18, 1995).

15. See Bridget A. Maloney, *Distress Among the Legal Profession: What Law Schools Can Do About It*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 307, 310-16 (2001) (summarizing literature reporting psychological distress among law students); see also Morrison Torrey, *Yet Another Gender Study? A Critique of the Harvard Study and a Proposal for Change*, 13 WM. & MARY J. WOMEN & L. 795, 797 (2007).

students).¹⁶ One study showed that “44% of law students meet the criteria for clinically significant levels of psychological distress.”¹⁷ Other studies show a striking increase among law students over time in depression and drug or alcohol abuse, “rising from 8–9% prior to matriculation to 27% after one semester, 34% after two semesters, and 40% after three years, and persisting after students pass the bar and begin practicing law.”¹⁸

In addition to the harmful impact of law school on its students generally, there is a second reason for worry that applies particularly to female law students: it is clear that for the last few decades, female law students have a markedly different and more negative experience in law school than do their male counterparts.

One of the most well-known gender-related differences in the law student experience is the comparative reticence of female law students to speak in class. This is not a phenomenon unique to law school: there have been examples of male students speaking more in class at every level of the educational process.¹⁹ The law school classroom, however, seems to be particularly gendered in this respect. As one of the most immediately visible aspects of student life, classroom participation sparked some of the earliest scholarship assessing the performance of female law students. From the early 1970s, scholars noticed lower rates of classroom participation by female students.²⁰ A group of students at Yale created a support group to study and discuss gender in the classroom after each noticed that “women’s participation in class was declining to almost nothing.”²¹ A survey given to students confirmed this perception, finding that male students self-reported more frequent class participation than female students.²² Those students later wrote an article published in the *Stanford Law Review* that described the law school classroom as “the crucible of our criticisms of ourselves and of the law school.”²³ In the early 1990s, surveys of Ohio law students found that male students were twice as likely to ask frequent questions (at least

16. Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL’Y L. & ETHICS 357, 365-75 (2009); see also Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 77 (2002).

17. Peterson & Peterson, *supra* note 16, at 359.

18. Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 764-65 (2004) (footnote omitted).

19. Marsha Garrison, Brian Tomko & Ivan Yip, *Succeeding in Law School: A Comparison of Women’s Experiences at Brooklyn Law School and the University of Pennsylvania*, 3 MICH. J. GENDER & L. 515, 539-40 (1996).

20. Alice D. Jacobs, *Women in Law School: Structural Constraint and Personal Choice in the Formation of Professional Identity*, 24 J. LEGAL EDUC. 462, 470 (1972).

21. Weiss & Melling, *supra* note 3, at 1310.

22. Taber et al., *supra* note 10, at 1239.

23. Weiss & Melling, *supra* note 3, at 1332-33.

once a week) in class,²⁴ and 13% more female students than male students reported never contributing to class discussion.²⁵ In 1996, Paula Gaber conducted interviews with twenty female students at Yale Law School, in which she asked several questions about the classroom environment.²⁶ The students reported that male students participated more in class, and described the classroom as “overtly masculine”²⁷ and as “a stage for performing” where students showed off their intellect, trying to competitively prove their intelligence.²⁸ Five years later, at Northern Illinois University College of Law, half of the male students filled out a survey indicating they asked questions at least once a week in class.²⁹ Only 16% of female students gave the same answer.³⁰ The largest proportion of female students reported asking a question in class only once a month.³¹

In 2004, a study at Harvard used monitors to count the number of comments by students of each gender in class rather than relying on self-reported data.³² According to the monitors’ reports, male students were 50% more likely to volunteer at least once in class and 144% more likely to volunteer three or more times in one class meeting.³³ Two years later, student observers similarly counted participants in class sessions at Yale.³⁴ At the time, male students made up 6% more of the student body than did females, but participated in class 38% more.³⁵ Participation by female students was more proportional in classes taught by female professors, but was even more disproportionately small in large classes and classes with higher general participation.³⁶ Sari Bashi and Maryana Iskander noted that most of the difference in participation by gender was due to differences in the rates of voluntary participation, rather than professors calling upon male students more than female students.³⁷ Six years later, the student organization Yale

24. Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 325 (1994).

25. *Id.* at 334.

26. Paula Gaber, “Just Trying to Be Human in This Place”: *The Legal Education of Twenty Women*, 10 YALE J.L. & FEMINISM 165 (1998).

27. *Id.* at 183.

28. *Id.* at 188.

29. Lisa A. Wilson & David H. Taylor, *Surveying Gender Bias at One Midwestern Law School*, 9 AM. U. J. GENDER SOC. POL’Y & L. 251, 266 (2001).

30. *Id.*

31. *Id.*

32. WORKING GRP. ON STUDENT EXPERIENCES, STUDY ON WOMEN’S EXPERIENCES AT HARVARD LAW SCHOOL 3 (2004), available at www.law.harvard.edu/students/experiences/ExecutiveSummary.pdf.

33. *Id.*

34. Bashi & Iskander, *supra* note 5, at 405-06.

35. *Id.*

36. *Id.* at 406.

37. *See id.*

Law Women performed a similar study of class participation and found that after adjusting for the proportions of each gender, 57% of class participation was by male students.³⁸

Class participation alone is one of the most visible contributors to the atmosphere of law schools, but might not be problematic in itself. Tangible markers of student performance, however, demonstrate gendered differences as well. In Lani Guinier's landmark article (and later book) *Becoming Gentlemen*, she noted that by the end of the first year of law school, male students at the University of Pennsylvania Law School were three times more likely than female students to be in the top 10% of the class as determined by grades.³⁹ The female students were later similarly underrepresented in awards at graduation, such as Order of the Coif.⁴⁰ A study of twelve years of data at the University of Texas noted that although female students entering law school had a *higher* grade point average than male students, the female students' grades in law school were lower,⁴¹ particularly in the first year of law school, which had a strong effect on female students securing law review membership, prestigious summer jobs, and (at that time) judicial clerkships after graduation.⁴² The same paradox of undergraduate versus law school grades was found in a statistical analysis of all ABA-accredited law schools.⁴³ Multiple studies of academic performance have found that female law students receive lower grades on average than male students.⁴⁴

At most law schools, law review membership is determined at least in part by grades, so it is unsurprising that female law students are underrepresented on mastheads. In the 1960s, law review membership at fourteen "elite" law schools was 95% male, declining to 83% in the 1970s, 68% in the 1980s, and 64% in the 1990s.⁴⁵ In the earlier decades, this can be ex-

38. YALE LAW WOMEN, YALE LAW SCHOOL FACULTY & STUDENTS SPEAK UP ABOUT GENDER: TEN YEARS LATER 26 (2012), available at http://www.law.yale.edu/documents/pdf/Student_Organizations/YLW_SpeakUpStudy.pdf.

39. Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 3 (1994).

40. *Id.* at 27.

41. Bowers, *supra* note 13, at 133-38.

42. *Id.* at 138.

43. Neumann, *supra* note 7, at 313.

44. See, e.g., Celestial S.D. Cassman & Lisa R. Pruitt, *A Kinder, Gentler Law School? Race, Ethnicity, Gender, and Legal Education at King Hall*, 38 U.C. DAVIS L. REV. 1209, 1255-57 (2005); cf. LINDA F. WIGHTMAN, WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCES OF WOMEN AND MEN 11-27 (1996) (finding that female students had "statistically significant" but "modest in magnitude" lower first year grades than male students, but noting that the averages masked some information about the relative performance of genders). But see Garrison, Tomko & Yip, *supra* note 19, at 520 (finding no discrepancy in grades earned by male and female students at Brooklyn Law School).

45. Mark R. Brown, *Gender Discrimination in the Supreme Court's Clerkship Selection Process*, 75 OR. L. REV. 359, 371 (1996). The law schools listed as "elite" were Har-

plained largely by the relative lack of females in the student body, but modern law review mastheads have failed to catch up. From 1990 to 1993 at the University of Pennsylvania, female students were on average 43% of the student body eligible for law review membership, but only 23% of the law review editors.⁴⁶ In Texas, law review membership was the most disparate “performance indicator[]” recorded, finding that the percentage of female law review members was only 71% of what their numbers in the general student body would predict.⁴⁷ An analysis of slightly over fifty law schools over a period of ten years found consistent underrepresentation of female law review editors: the average female student population was 47% of the student body, but only made up 39 to 43% of law review members.⁴⁸ Even *The Yale Law Journal*, which admits students solely through tests independent of class performance, was found to have disproportionately low numbers of female editors by Bashi and Iskander.⁴⁹

Along with lower numbers of law review editors relative to their population in the student body, female law students also publish fewer notes in those same law reviews. In the years 2005 through 2008, only 36% of student notes published in the law reviews of the top fifteen law schools⁵⁰ were written by female students.⁵¹ In a comprehensive analysis performed by Jennifer Mullins and Nancy Leong evaluating a decade of data from fifty-two schools, only 39.6% of student notes were written by female authors.⁵² Possible reasons for the lack of female-authored notes raise more questions. For example, a Texas study indicated that female students received lower scores on the law review writing competition than male students.⁵³ Female law professors sometimes face difficulty in placing their own professional work in student-edited law reviews, which has been hy-

vard, Yale, Chicago, Stanford, Virginia, Columbia, Michigan, Boalt (UC Berkeley), the University of Pennsylvania, Georgetown, the University of Texas, NYU, Northwestern, and UCLA. *Id.* at 371-72.

46. Guinier et al., *supra* note 39, at 28-30, 30 n.82.

47. Bowers, *supra* note 13, at 148.

48. Jennifer C. Mullins & Nancy Leong, *The Persistent Gender Disparity in Student Note Publication*, 23 YALE J.L. & FEMINISM 385, 393, 397 (2011).

49. Bashi & Iskander, *supra* note 5, at 424. *But see* Cassman & Pruitt, *supra* note 44, at 1268 (finding proportional numbers of female law review editors at UC Davis, which similarly awards membership without reference to grades).

50. This refers to the fifteen highest ranked schools by the U.S. News and World Report. *Best Law Schools*, U.S. NEWS & WORLD REP., <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited Sept. 12, 2012).

51. Nancy Leong, *A Noteworthy Absence*, 59 J. LEGAL EDUC. 279, 279 (2009).

52. Mullins & Leong, *supra* note 48, at 398.

53. Bowers, *supra* note 13, at 155-56.

pothesized as due to rigid preferences for writing styles and topics.⁵⁴ It seems logical that the same phenomenon is occurring as early as law review writing competitions and note selection. Additionally, there is some evidence that, as will be discussed further below, female students self-select out of opportunities such as publishing a student note.⁵⁵ The study at Yale authored by Bashi and Iskander examined the note publication practices at *The Yale Law Journal*.⁵⁶ From 1996 to 2003, women wrote 36% of notes published in *The Yale Law Journal*, despite constituting on average 45% of any given class.⁵⁷ Significantly, the difference is in large part a consequence of women's failure to submit the same piece more than once.⁵⁸ When a piece is submitted to *The Yale Law Journal*, rejected pieces receive a "Revise and Resubmit" letter, in which the paper is evaluated, editing suggestions are outlined, and the votes, on a scale of one to five, are anonymously tallied. A significant portion of notes—often a majority—are accepted on the second or third submission.⁵⁹ Female students, however, do not submit their notes for a second or third time as frequently as male students do, leading to a striking imbalance in acceptances: while women submit notes on the whole at a slightly lower rate than their representation in the student body, in the years covered by the Bashi/Iskander study, women's notes were accepted 8% of the time, compared to 35% for ultimately successful male submissions.⁶⁰

A lack of self-confidence may also contribute to female law students not taking advantage of a more intangible, but extremely important, opportunity: mentoring relationships with their professors. Although relationships with professors cannot be quantified as easily as grade point averages, developing connections with professors who will write letters of recommendation, serve as references, and otherwise provide valuable advice significantly impacts students' achievements well beyond graduation. Female students, however, are not making these connections.⁶¹ At the University of Pennsylvania during Lani Guinier's study, male students were more likely to report feeling "very comfortable" in interactions with professors outside of the classroom.⁶² Female students reported feeling reluctant to approach faculty members during office hours without "friendliness 'cues'" from the profes-

54. See Jonathan Gingerich, *A Call for Blind Review: Student Edited Law Reviews and Bias*, 59 J. LEGAL EDUC. 269, 271-72 (2009).

55. See *infra* notes 128-131 and accompanying text.

56. Bashi & Iskander, *supra* note 5, at 425.

57. *Id.*

58. See *id.*

59. *Id.*

60. *Id.*

61. *Id.* at 423.

62. Guinier et al., *supra* note 39, at 35.

sor.⁶³ At Columbia Law School, female law students were nearly twice as likely to report that they had never or rarely contacted their professors.⁶⁴ Female students at UC Davis were less likely than male students to visit professors during office hours, go to a professor's office without an appointment, or to approach a professor after class or during a break.⁶⁵ Yale female law students similarly reported to Bashi and Iskander that they were likely to ask for letters of recommendation from their professors at a rate lower than male students.⁶⁶

Finally, there are marked differences in the quality of life for female and male students. Law school is a stressful time for many, but female students often report higher stress levels.⁶⁷ Some of this may be due to gender expectations that have nothing to do with law school. For example, one study reported that male students who had a wife or girlfriend living in the same area spent more time than single students preparing for class. Married or cohabiting female students, however, received no such advantage.⁶⁸ One implication explaining the discrepancy is that the "second shift,"⁶⁹ or household work performed by women in addition to their professional responsibilities, frees time for married male students to devote to additional coursework. This explanation does not fully explain, however, the stark discrepancy in a survey conducted at UC Davis in which students were asked to assess how often they felt stress, from one ("never") to five ("always").⁷⁰ Although male students on average reported an extremely high level of stress, highlighting that all law students are feeling overworked, female students responded on average half a point higher.⁷¹

Other markers of psychological distress also indicate greater problems for female than male students. In the same survey at UC Davis, female students also reported higher levels of depression and that they cried significantly more often than male students.⁷² One Yale student reported in 1998 that when she attempted to volunteer an answer in class or was called upon by the professor, she experienced painful back spasms.⁷³ At the University

63. *Id.* at 72.

64. Schwab, *supra* note 3, at 324.

65. Cassman & Pruitt, *supra* note 44, at 1263.

66. Bashi & Iskander, *supra* note 5, at 422.

67. See, e.g., Cassman & Pruitt, *supra* note 44, at 1272; Janet Taber et al, *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV 1209, 1254 (1988).

68. Neufeld, *supra* note 3, at 546.

69. See generally ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT* (1997).

70. Cassman & Pruitt, *supra* note 44, at 1272.

71. *Id.* (reporting that male students responded on average with 4.48, female students 4.92).

72. *Id.* at 1271.

73. Gaber, *supra* note 26, at 186-87.

of Pennsylvania, women were “significantly more likely to report eating disorders, sleeping difficulties, crying, and symptoms of depression or anxiety.”⁷⁴ Not only should these reports cause concern for the emotional and mental wellbeing of students, but unhappiness can itself contribute to the discrepancies in academic markers. As Ann L. Iijima explained in an article assessing the emotional health of law students, “There is an intimate relationship between students’ psychological state and academic performance. . . . [H]igh levels of hope, optimism, perseverance, and motivation may be stronger predictors of academic achievement than SAT scores or previous grades.”⁷⁵

The most abstract reason to be concerned with the status of female law students is a term that comes up repeatedly in existing literature: alienation. Lani Guinier’s metaphor of expecting all law students to “becom[e] gentlemen”⁷⁶ is an apt description:

Our data suggest that many women do not “engage” pedagogically with a methodology that makes them feel strange, alienated, and “delegitimated.” These women describe a dynamic in which they feel that their voices were “stolen” from them during the first year. Some complain that they can no longer recognize their former selves, which have become submerged inside what one author has called an alienated “social male.”⁷⁷

Alienation, in other words, is the name given to depersonalization. Many female law students feel they are being forced to change into people they are not in order to fit into a system they feel ambivalent about joining. In a 1988 article describing a support group for female students at Yale Law School, the students discussed “four faces of alienation: from ourselves, from the law school community, from the classroom, and from the content of legal education.”⁷⁸ Female law students consistently report “alienation, disillusionment, and silencing in law schools, more so than their male classmates.”⁷⁹ The silencing of female students, echoing the problems of class participation rates, is underscored in the Bashi and Iskander study,

74. Guinier et al., *supra* note 39, at 44.

75. Ann L. Iijima, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 J. LEGAL EDUC. 524, 526 (1998); *see also* Guinier et al., *supra* note 39, at 62 (“Along with a formal link between classroom participation and examination success, we suspect that there exists a psychological link between self-confidence, alienation, and academic performance. Students who are alienated by the formal classroom methodology, hierarchy, and size are arguably not psychologically prepared to succeed on the formal examinations. Those who doubt themselves or doubt whether they belong in the Law School do not perform as well.” (footnotes omitted)).

76. Guinier et al., *supra* note 39, at 1.

77. *Id.* at 4 (footnotes omitted).

78. Weiss & Melling, *supra* note 3, at 1299.

79. Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1107 (2011).

which concludes that low female class participation “fosters and is a product of alienation from and even hostility toward law and law school.”⁸⁰ Even as students feel hostility toward their law school, law school changes their plans and possibly even their values. At the University of Pennsylvania, first-year female students expressed interest in entering public service careers at three times the rate as first-year male students.⁸¹ But by their third year, the female students’ plans to enter public service dropped to the same level as their male counterparts.⁸² In Guinier’s words, “over three years at the Law School, women students come to sound more like their male classmates, and significantly less like their first-year ‘selves.’”⁸³ Catharine MacKinnon summed up the law school experience with harsh words: “What law school does for you is this: it tells you that to become a lawyer means to forget your feelings, forget your community, most of all, if you are a woman, forget your experience.”⁸⁴

II. EXISTING REFORM PROPOSALS

In parallel with the broad-ranging study of how female students are performing and feeling as they move through their three years of law school, scholars have formulated a variety of prescriptive proposals. As a threshold matter, all scholars reject the expectation that all female students “become gentlemen” and assimilate to the existing law school world. As a practical matter, women who do not conform to gender expectations and take on stereotypically masculine characteristics are often criticized for behavior that is unremarkable when engaged in by men.⁸⁵ More problematically, expecting all students to conform to one ideal of the model student “is also to accept the premise that legal education as it currently exists is the only and best formulation of how law schools should operate.”⁸⁶ Most scholars evaluating the gendered nature of law school propose a shift in pedagogy that would help not only female students, but all students to have a richer, more diverse educational experience.⁸⁷

80. Bashi & Iskander, *supra* note 5, at 417.

81. Guinier et al., *supra* note 39, at 39.

82. *See id.* at 40.

83. *Id.* at 40-41.

84. CATHARINE A. MACKINNON, *On Collaboration*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 198, 205 (1987).

85. Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333, 351 (1996).

86. Guinier et al., *supra* note 39, at 84.

87. Nancy E. Dowd, Kenneth B. Nunn & Jane E. Pendergast, *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL’Y 11, 40 (2003); *see also* Ellen C. DuBois et al., *Feminist Discourse, Moral Values, and the Law—A Conversation*, Discussion at the 1984 James McCormick Mitchell Lecture Series (Oct. 19, 1984), in 34 BUFF. L. REV. 11, 27 (1985) (providing comments of Catharine MacKinnon).

To the extent that calls for pedagogical reform broaden the subjects and skills taught in law school, such proposals are very much in line with recent proposals to rework the law school curriculum. The MacCrate Report,⁸⁸ Carnegie Report,⁸⁹ and Best Practices report⁹⁰ all call for a greater focus on skills-based training for law students, either in addition to or instead of scholarly or intellectual subjects. Both the Carnegie and Best Practices reports also call for more inclusion of purpose or a commitment to justice.⁹¹

Similarly, multiple commentators propose including more practical skills in the curriculum as part of gender-focused reform.⁹² Courses in mediation, negotiation, and client relations have been singled out by some as particularly suited to or enjoyable for female students.⁹³ Another broad pedagogical change is to shift the tone of the classroom away from the adversarial Socratic dialogue in which professors single out one student to be on call, answering question after question. As Deborah Rhode points out, due to “patterns of gender socialization,” female students have had less practice in the skills exercised in Socratic dialogue, “such as defending a position in the face of aggressive challenge, and arguing dispassionately about emotionally weighted issues.”⁹⁴ Valuable though those skills may be, the inequalities in gendered performance indicate that throwing students into a Socratic exchange is not succeeding in making female students better or more comfortable with impromptu verbal argument. One proposed modification is to simply jettison the truest, most confrontational forms of Socratic dialogue and make the classroom less adversarial across the board.⁹⁵ Another, more compromising approach is to continue adversarial education as one of many pedagogical methods.⁹⁶ Bashir and Iskander argue that in modern legal practice, “settlement, mediation, and negotiation are at least as im-

88. See Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads*, 44 IND. L. REV. 735, 740 (2011).

89. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

90. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007).

91. Carasik, *supra* note 88, at 743; see also Louis N. Schulze Jr., *Alternative Justifications for Academic Support II: How “Academic Support Across the Curriculum” Helps Meet the Goals of the Carnegie Report and Best Practices*, 40 CAP. U. L. REV. 1, 15 (2012).

92. Weiss & Melling, *supra* note 3, at 1357-58.

93. See *id.* at 1358; Morrison Torrey, Jennifer Ries & Elaine Spiliopoulos, *What Every First-Year Female Law Student Should Know*, 7 COLUM. J. GENDER & L. 267, 308 (1998).

94. Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1557 (1993).

95. See Weiss & Melling, *supra* note 3, at 1358-59; Morrison Torrey, *You Call That Education?*, 19 WIS. WOMEN’S L.J. 93, 94 (2004).

96. Guinier et al., *supra* note 39, at 93.

portant as trial preparation and practice,” such that vigorous verbal battle is merely one part of zealously representing one’s client.⁹⁷

Other reform proposals focus more specifically on gender. An early approach was to counsel law schools to admit more female students.⁹⁸ Although gender balance among students has almost reached parity with the larger population, law faculties are still dominated by men,⁹⁹ so it is unsurprising that a common suggestion is for law schools to hire more female faculty members.¹⁰⁰ In a survey at Chapman Law School, Judith Fischer found better student reports of mentorship with faculty members as well as higher student self-esteem as compared to other student surveys, and attributed the better student quality of life at least in part to a more diverse faculty.¹⁰¹

Other proposals related to student and faculty interactions include diversity training for faculty members so that professors are aware of the particular challenges and stresses facing their female students.¹⁰² Both professors and students have argued that schools should better connect students and faculty, particularly creating mentorship relationships.¹⁰³ Bashi and Iskander also argue that professors should do a better job of not only communicating expectations, but giving greater feedback to students and affirmatively reaching out to students, creating the “friendliness cues” that female students sometimes need in order to feel comfortable contacting

97. Bashi & Iskander, *supra* note 5, at 435.

98. Krauskopf, *supra* note 24, at 318. *But see* Bowers, *supra* note 13, at 160 (arguing that in years with the highest percentage of female students, “women’s overall performance has not been better than an average year”).

99. Neumann, *supra* note 7, at 322 (finding that in the years 1996-99, only 9% of law school deans and 26% of tenured or tenure-track faculty were female); Bashi & Iskander, *supra* note 5, at 394-95 (noting that in 2006, females “comprise one-third of law school faculty members, where they are concentrated in non-tenured positions”).

100. Cassman & Pruitt, *supra* note 44, at 1282-83; Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean’s Perspective*, 96 IOWA L. REV. 1549, 1550 (2011); Torrey, *supra* note 15, at 813; Weiss & Melling, *supra* note 3, at 1356-57; Bashi & Iskander, *supra* note 5, at 429-31; *see also* Meera E. Deo, Maria Woodruff & Rican Vue, *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 CHICANA/O-LATINA/O L. REV. 1, 26 (2010) (arguing that faculty of color and female faculty are more likely than white male faculty to incorporate discussions involving race and gender into first-year core courses); YALE LAW WOMEN, *supra* note 38, at 63-64. *See generally* Kathleen S. Bean, *The Gender Gap in the Law School Classroom—Beyond Survival*, 14 VT. L. REV. 23 (1989) (providing a trenchant analysis of the difficulty of being a female law professor dealing with the gender gap between male ideal and female reality).

101. *See generally* Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 UCLA WOMEN’S L.J. 81 (1996).

102. Dowd, Nunn & Pendergast, *supra* note 87, at 42-44.

103. Iijima, *supra* note 75, at 533-35; YALE LAW WOMEN, *supra* note 38, at 6-7.

professors outside of the classroom.¹⁰⁴ (At the same time, however, more than one article also recommends that schools have clear sexual harassment policies that regulate relationships both among students and between students and faculty.)¹⁰⁵

Finally, and unsurprisingly, multiple individual studies call for continued examination of the status of gender and the classroom.¹⁰⁶ Further analysis would not only help to identify effective reforms, but as Celestial Cassman and Lisa Pruitt discovered when they surveyed students at UC Davis, simply being asked how they were doing made students feel better: “[T]here is value in the very exercise of consulting one’s constituencies. We were struck by students’ enthusiasm for the survey because it represented the opportunity to voice their opinions and, essentially, to give feedback to the law school.”¹⁰⁷

It is troubling, however, that there are so many studies over so many years with such similar findings. As Marsha Garrison pointed out eight years after *Becoming Gentlemen* was published, “Our data thus support the efficacy of the reforms urged by the Penn researchers, but cast doubt on their sufficiency.”¹⁰⁸ It seems beyond dispute that legal education has improved for female students, and that there is much to learn from existing literature and its prescriptions for educational reform. But it is not enough.

III. EXCEPTIONS TO THE RULE

In order to broaden the perspective to identify additional responses to the gender problem in the classroom, it is important to note a fascinating paradox embedded in all of the statistics showing underperformance or unhappiness in female law students: a subgroup of female law students do very well in law school. To some extent, this is likely a regression to the mean: numbers of female students increased, law schools began to address some of the most explicit expressions of sexism, and female students, in the words of a Columbia law student, begin to “get the hang of things” as much as male students do.¹⁰⁹ Furthermore, no study has found that *all* female stu-

104. Bashir & Iskander, *supra* note 5, at 438-39.

105. Krauskopf, *supra* note 24, at 333; Wilson & Taylor, *supra* note 29, at 271-73; Torrey, *supra* note 15, at 801-02, 814.

106. Krauskopf, *supra* note 24, at 339; Garrison, Tomko & Yip, *supra* note 19, at 542; Bowers, *supra* note 13, at 165; Mullins & Leong, *supra* note 48 at 428; Judith Resnik, *A Continuous Body: Ongoing Conversations About Women and Legal Education*, 53 J. LEGAL EDUC. 564, 569 (2003).

107. Cassman & Pruitt, *supra* note 44, at 1284-85.

108. Garrison, Tomko & Yip, *supra* note 19, at 539.

109. See Schwab, *supra* note 3, at 327, 336-37.

dents perform worse than expected or are unhappy in law school. Many students succeed in, as Lani Guinier put it, becoming gentlemen.¹¹⁰

There is a distinct cohort of successful female students who seem to perform particularly well, yet whose performance can be masked in averages. In the Bashi and Iskander study at Yale, as outlined above, female students were found to be generally less likely to speak in class.¹¹¹ Yet breaking out the population of students who are willing to speak in class removes the gendered pattern: looking only at students who spoke in class at least once, there was no difference in how frequently male and female students spoke.¹¹² Similarly, when assessing academic performance in law school, female students on average perform worse than male students—unless the group of students with the highest undergraduate GPAs is broken out.¹¹³ Among students who graduated college with a GPA between 3.76 and 4.0, the female students earn higher grades in law school than their male counterparts.¹¹⁴ Although Bashi and Iskander found disproportionately low female membership on *The Yale Law Journal*, women served as Editor-in-Chief in numbers equal to men.¹¹⁵

What, then, is the difference between women who perform better than expectations in law school and those who are alienated by their experience? One hypothesis is that high-achieving female law students are simply “most like men,”¹¹⁶ and thus thrive in an environment that is ill-suited to the majority of their fellow women. This solution is deeply unsatisfying to scholars such as Deborah Rhode, who argue that “efforts to claim an authentic fe-

110. Guinier et al., *supra* note 39, at 59-60.

111. Bashi & Iskander, *supra* note 5, at 409-12.

112. *Id.* at 406-07.

113. WIGHTMAN, *supra* note 44, at 19.

114. *Id.*

115. Bashi & Iskander, *supra* note 5, at 424 & n.120 (“In five of the last ten years, women have held the journal’s most senior post.”). Because only one person serves as Editor-in-Chief at one time, this figure can change very quickly. Bashi and Iskander do not refer to a specific ten-volume span, but the only pre-publication range with five male and five female Editors-in-Chief is Volumes 104 through 113, reaching through 2004. A similar count is possible with Volumes 108 (1998-99) through 117 (2007-08), for which I served as Editor-in-Chief. The Editor-in-Chief for all four Volumes since then has been male.

116. Weiss & Melling, *supra* note 3, at 1301. Multiple commentators cited above refer to Carol Gilligan’s book *In a Different Voice*, which argues that men and women generally understand rights differently (through a rights-based for men or care-based for women lens), and concludes that legal education should offer a different approach that is more hospitable to this theoretically female perspective. See Taber et al., *supra* note 10, at 1212 & n.26; Guinier et al., *supra* note 39, at 15-16; see also Krauskopf, *supra* note 24, at 316 (“Much of the literature, both empirical and anecdotal, postulates fundamental differences between females and males that could cause the same educational experiences to be understood differently by men and women. Whatever the cause of these differences (and opinion is divided), many agree that a significantly higher percentage of females than males in our culture are *relationship-oriented* rather than *rights-oriented*.”).

male voice illustrate the difficulty of theorizing from experience without homogenizing it. To divide the world solely along gender lines is to ignore the ways in which biological status is experienced differently by different groups under different circumstances.”¹¹⁷

It is the contention of this Article that most existing analysis of the gendered impact of legal education misses one critical step: it is not that most female law students are faced with legal education and find it disadvantageous across the board. Rather, many female law students are faced with a specific model of the ideal law student, *who is male*, and unfavorably compare themselves to that model.

Professor Guinier compares the ideal law student to an absolute height requirement for police officers in New York City: because the actual height requirement was drawn from a conception of the police officer as male, the absolute requirement resulted in two immediate effects.¹¹⁸ First, almost no women qualified to be police officers because they didn’t meet the requirement.¹¹⁹ But more insidiously, the relatively arbitrary height requirement became a defining characteristic: it “defined the job of police officer as something only tall people are capable of doing, and normalized a particular type of officer—tough, brawny, macho.”¹²⁰

In the same way, law school privileges a certain set of characteristics because they are partly typical of some of the historically successful students in a student body that used to be exclusively male. The circle is then completed when those characteristics are institutionalized as defining what a successful law student looks like. These characteristics include being willing to speak up aggressively in class, voicing half-formed arguments and verbally sparring with other students and the professor. Such a student is eager to explicitly compete with his peers, such as vying for limited spots on the school’s law review either through academic performance or successful execution of a writing competition or other admissions mechanism. He “rushes the podium” to speak with his professors after class, and visits their office hours frequently enough to feel confident asking them for letters of recommendation for his clerkship applications.

These characteristics are not the only ones necessary to be a successful law student—indeed, given the widespread derision of “gunners,” such traits are recognized as negative ones when exhibited to excess. Neither are these characteristics universally male—there are plenty of male students who are intimidated by the Socratic method, or do not feel comfortable going to a professor’s office hours. But because every model of a successful law student in previous decades has been male—because virtually every

117. Rhode, *supra* note 94, at 1551.

118. GUINIER, FINE & BALIN, *supra* note 1, at 18-19.

119. *Id.*

120. *Id.* at 18.

portrait hanging on the wall is of a male figure—the most visible characteristics of law school success have become conflated with traditional indicia of masculinity.

So what happens when women compare themselves with that male ideal? Much of the time, female students rate themselves unfavorably, predicting their abilities as well below their actual performance. Female students assessed themselves as, in the words of Adam Neufeld, “alarmingly lower than men in skills like legal analysis, quantitative reasoning, and ability to think quickly on one’s feet.”¹²¹ For example, in a survey of law students, 33% of men believed themselves to be in the top 20% of their class as rated by legal reasoning skills.¹²² Only 15% of women had the same confidence.¹²³ Forty percent of men believed themselves to be in the top 20% by quantitative skills, versus only 11% of women.¹²⁴ Such discrepancies still appeared when controlling for undergraduate major, and more strikingly, even after controlling for grades in their first semester of law school.¹²⁵ In other words, female students who were actually performing at the same level as their male counterparts still assessed their legal reasoning skills as lower than the men.¹²⁶ Furthermore, this gap in self-assessment may only appear after legal studies begin: at one survey of students attending law school in Ohio, 41% of female students, but only 16% of male students, said “that they often feel less intelligent and articulate than they did before law school.”¹²⁷ Female students are often aware of their lower participation in activities such as speaking in class, leading to greater feelings of frustration and low self-esteem.¹²⁸ The *Twenty Women* support group at Yale wrote plainly: “We are disappointed with ourselves for not always being active and engaged members of our academic community because we thereby

121. Neufeld, *supra* note 3, at 514; see also Sandra R. Farber & Monica Rickenberg, *Under-Confident Women and Over-Confident Men: Gender and Sense of Competence in a Simulated Negotiation*, 11 YALE J.L. & FEMINISM 271, 291-92 (1999) (finding that female students rated their own competency as lower than male students following a negotiation exercise); WORKING GRP. ON STUDENT EXPERIENCES, *supra* note 32, at 4 (“Given the opportunity to rank their abilities in various areas, women gave themselves significantly lower scores in skills like legal analysis, quantitative reasoning, and ability to think quickly on one’s feet, even after controlling for demographics and undergraduate major.”).

122. Neufeld, *supra* note 3, at 548.

123. *Id.*

124. *Id.* at 548-49.

125. *Id.* at 548.

126. See *id.*

127. Krauskopf, *supra* note 24, at 314.

128. See Cassman & Pruitt, *supra* note 44, at 1249-50 (reporting that female students perceived male students as speaking more in class and that female students were less likely than male students to say they were satisfied with their rate of class participation).

frustrate our opportunities to gain the power of law and we perpetuate our subjugation to its use by others.”¹²⁹

This frustration and low self-assessment then perpetuates itself as female law students self-select out of other opportunities. Yale Law School established a 1995-96 Dean’s Ad Hoc Committee on the Status of Women at Yale which studied the success rates of female clerkship applicants and found that while women applied less frequently than men, the success rates of female law students were higher than those of their male peers—and explicitly theorized that the difference was “because they self-selected to a greater degree.”¹³⁰ As discussed above, female students at Yale are markedly less likely to resubmit notes for publication in the law review.¹³¹ Students who believe their skills are below average are more likely to take less traditional classes such as clinics or negotiation courses—obviously not problematic in themselves, but to the extent such students opt out of traditional markers of achievement and courses taught by professors whose mentorship would further benefit them, those students are disadvantaging themselves.¹³² Similarly, female students who feel that they are underperforming in the classroom are less comfortable reaching out to their professors outside of the classroom, either for advice or to request letters of recommendation.¹³³

As discussed above, a smaller number of female law students do not share this experience of poor self-assessment and subsequent opting-out of traditional paths to achievement. An individual in this smaller population takes stock of the traditional markers of law school success, compares herself to the ideal, and judges herself favorably. It is unclear, and probably unimportant, whether such a student does not perceive or simply does not judge significant the gendered nature of the traditional law student. It is enough that she is able to disregard the gendered elements, and accurately take stock of her intelligence, initiative, and willingness to be assertive.

IV. POSITIVE PSYCHOLOGY’S LESSONS

The key question, then, is whether it is possible to identify why this subgroup of female law students is relatively unaffected by the gendered

129. Weiss & Melling, *supra* note 3, at 1319.

130. Bashi & Iskander, *supra* note 5, at 422 n.110.

131. See *supra* notes 57-60 and accompanying text.

132. Neufeld, *supra* note 3, at 547. Interestingly, the Women, Leadership and Equality program at the University of Maryland School of Law offers a course called Gender Negotiation that focuses on personal (as opposed to client-generated) negotiation, giving students practical experience in contexts such as salary negotiation. See Nina Schichor, *Mitigating Gender Schemas: The Women, Leadership & Equality Program at the University of Maryland School of Law*, 30 HAMLINE J. PUB. L. & POL’Y 563, 572-79 (2009). The course has received universally positive feedback from students. *Id.* at 579.

133. Bashi & Iskander, *supra* note 5, at 422.

aspects that hamper the larger group of her fellow students. One answer might lie in the application of positive psychology. Positive psychology is in contrast to a “disease model” of psychology, which examines problems with an eye to fixing or removing them. Rather than focus on the problems, positive psychology identifies behaviors and characteristics that make people happy and healthy in order to promote those traits in others.¹³⁴ In other words, it is not simply a lack of depression that makes someone happy, so focusing on removing negative elements of a patient’s life is not enough.¹³⁵ In addition, psychology can identify “a whole host of states, traits, and emotions that combine to make life worth living.”¹³⁶

It might be argued that because law students are generally overworked and overstressed, the objectives of positive psychology are not achievable—no one can be happy in law school. There is general agreement among psychologists, however, that happiness is determined by more than internal predisposition and external influences. Todd David Peterson and Elizabeth Waters Peterson, who examined the promise positive psychology holds for legal education, explain “that while 50% of our happiness is genetically predetermined and 10% is based on external circumstances, up to 40% is within our control and can be altered through intentional activities.”¹³⁷ Positive psychologists, as well as law faculties and students, should therefore explore what intentional activities will make female law students happier.

Some recommendations from positive psychology overlap with the reforms suggested above. A major suggestion by the Petersons involves the concept of encouraging students to play to a “signature strength.”¹³⁸ This does not refer to superior ability with regard to torts versus contracts—rather, “signature strengths” mean advantageous qualities of character; traits such as curiosity, authenticity, social intelligence, fairness, forgiveness, or gratitude.¹³⁹ Several commentators examining the performance of female students have proposed a broader curriculum, both in terms of subject matter and teaching style, so that adversarial dialogue is not the only tool by which students are assessed.¹⁴⁰ Positive psychology provides an additional justification for wider course options: a student who is particularly strong in social intelligence will not only perform particularly well in a course on negotiation or alternative dispute resolutions, but will feel reaffirmed, more confident, and quite possibly happier when such a course is available. Addi-

134. Peterson & Peterson, *supra* note 16, at 387.

135. *See id.* at 386-87.

136. *Id.* at 386.

137. *Id.* at 393.

138. *Id.* at 416.

139. *See* CHRISTOPHER PETERSON & MARTIN E.P. SELIGMAN, CHARACTER STRENGTHS AND VIRTUES: A HANDBOOK AND CLASSIFICATION 29-30 (2004).

140. *See supra* notes 90-95 and accompanying text.

tionally, people are happier when they believe what they do is important. Satisfaction, in other words, can turn on the “perceived meaningfulness of work.”¹⁴¹ It may be a futile goal to make all of legal education feel meaningful to students, but at least two suggestions can be emphasized: first, many students derive great satisfaction from work in clinics, in which they work on actual cases and in some cases have individual clients. The importance of being engaged in work perceived as meaningful reaffirms the utility of clinics not only to teach students practice skills, but also to make them happier students. Second, many students do not plan to take jobs that require the verbal gymnastics characteristic of Socratic dialogue. Such skills are important for litigators, but students who are interested in corporate work, or even students aware that their first years of practice in law firms will be much more oriented toward document review rather than courtroom time, may feel particularly frustrated when asked to practice skills they do not necessarily need. This is not to say that Socratic dialogue should be eliminated, but it is doubly important to offer courses to students who are not only more comfortable in other pedagogical methods, but who see other methods as teaching techniques more relevant to their future careers.

Another recommendation deals with self-assessment: how to make more female law students compare their own capabilities favorably to their peers’. One of the skills taught in law school, particularly in the usually disorienting first year, is learning to “think like a lawyer.”¹⁴² A crucial component of this is searching for weaknesses in arguments, logically critiquing legal positions from a rational and skeptical viewpoint. Emotions have no part in thinking like a lawyer.¹⁴³ This shift in viewpoint in how to argue, how to decide what is relevant, and how much to critique can affect analysis of personal as well as professional issues.¹⁴⁴ In essence, female students may be thinking like a lawyer too much, by counting all the ways in which they differ from the ideal law student with a critical eye. It may thus be particularly helpful to provide examples that show that self-criticism can be constructive and need not determine ultimate success or happiness in law school. For example, in a legal writing course for first-semester 1Ls, one

141. Nisha C. Gottfredson et al., *Identifying Predictors of Law Student Life Satisfaction*, 58 J. LEGAL EDUC. 520, 522 (2008).

142. Carmen M. Rodriguez & Hon. Rebecca F. Doherty, *The Art of Arguing*, 37 S. TEX. L. REV. 365, 368 (1996) (book review).

143. *Id.* (“We are made to argue both sides of a case with little emotional commitment to either. We are told that emotions have no role to play in learning how to think like a lawyer, that emotions make messy things out of arguments.”).

144. See Gary A. Munneke, *Law Practice Management: Everything You Need to Know (About Practicing Law) . . . You Learned in Law School*, N.Y. ST. B.A.J., May 2009, at 32, 32 (“I would argue that this ability to think like a lawyer transforms not only the way you deal with legal questions, but also the way you address other issues in your personal and professional life.”).

instructor has the class publicly critique a writing sample before revealing that it was her own first legal writing assignment as a student.¹⁴⁵ The instructor thus provides concrete proof that although students will likely experience plenty of critical evaluation in law school, it does not mean that they lack a talent that others have, nor should they judge themselves harshly in a determinist way.

Finally, one of the most important lessons from positive psychology deals with classroom participation. Multiple studies of female law students have found that professors treat female contributions to discussion differently than remarks from male students.¹⁴⁶ Sometimes professors are dismissive or respond negatively to female students, which for obvious reasons would inhibit contributions from women.¹⁴⁷ But sometimes the disparate treatment may be thought benign, or even motivated by a desire to help female students. At UC Davis, while some students reported that professors were less respectful of female students, others believed that professors were “more gentle” towards women, tried to “make questions easier for women,” or as one male student put it, were “nicer to women” because they “assume [women] can’t respond to intense questioning.”¹⁴⁸ A study by the Association of American University Women found that professors were more likely to “probe a male student’s response to a question for a fuller answer requiring a higher level of critical thinking [and] wait longer for a man to answer before going on to another student.”¹⁴⁹ Bashi and Iskander suggested that professors at Yale treated female students differently because of “hesitation on the part of some faculty members to challenge women or to engage their ideas.”¹⁵⁰

This is not to say that the problem in law school is that professors are not hard enough on female students. It is worth stressing that much of the feedback emphasized professors were dismissive or outright patronizing of female students. But there are also professors who are quicker to cease questioning students they perceive to be struggling, or who are reluctant to let a classroom sit in silence for a full minute as a student on call attempts to formulate an answer. Positive psychology has suggestions for both those scenarios: use feedback in the style of optimistic attribution.

145. Terri L. Enns, *Students Critiquing Novice Writing: Building Hope by Building Bridges*, 48 DUQ. L. REV. 403, 421-22 (2010).

146. See, e.g., Cassman & Pruitt, *supra* note 44, at 1250-51.

147. *Id.* at 1251.

148. *Id.* at 1251 (alteration in original).

149. Katharine T. Bartlett, *Feminist Perspectives on the Ideological Impact of Legal Education upon the Profession*, 72 N.C. L. REV. 1259, 1268 (1994) (arguing that dominance theory provides a better explanation of gender differentials in law school experience than different voice theories).

150. Bashi & Iskander, *supra* note 5, at 409.

Optimistic attribution is a straightforward concept: if you ask people to explain things about the world, do they use positive or negative language? If you ask a law student how she is doing in her coursework, does she say, "I just don't think fast enough to keep up in class"? Such a statement would demonstrate a pessimistic outlook: not only is the statement negative, but it has the three dimensions of "permanence, pervasiveness, and personalness."¹⁵¹ The problem is internal to her own capabilities; she cannot change it, and it will affect her performance throughout her law school career. In contrast, a student with an optimistic attribution style believes that any negative statements are "temporary, specific, and hopeful."¹⁵² Such a response might be "I got lost today in class, but I think I did the assigned reading too fast." The student with a pessimistic attribution style is more likely to be depressed and more likely to be intensely self-critical. The student with an optimistic attribution style will not only have more faith in their capabilities, but will likely be happier.

In the fraught atmosphere of the law school classroom, professors can try to use the language of optimistic attribution to respond to students. This will model optimistic attribution as well as provide more positive feedback even to students who are not giving the correct answer every time. In her article *Creating the Optimistic Classroom*, Corie Rosen provides a particularly clear explanation of the danger of both pessimistic and neutral responses to incorrect student answers:

[A] common feedback situation is one in which a professor is confronted with a clearly incorrect answer in the course of a Socratic dialog and, not wanting to respond to the incorrect student with targeted criticism, simply ignores the answer, dismisses it out of hand, and calls on another student to tackle the problem before the class. That feedback may be silent, but in many important respects, it is likely just as negative as a directed pessimistic statement. This silent response not only fails to encourage flexible optimism, but likely also serves to defeat and embarrass the student in the same way that pessimistic feedback would.¹⁵³

In contrast, Rosen suggests that professors use temporary, specific, and hopeful language to respond to an incorrect answer, such as: "'You haven't reached the right answer yet,' (Temporary); 'There is a better answer to this problem,' (Specific); [or] 'You have the case in front of you—use its exact language, and you can develop a better answer,' (Specific/Hopeful)."¹⁵⁴ Criticism in the form of optimistic attribution still corrects the answer, but also expresses a belief that the problem is a fleeting one, and that the student has the skills to identify a stronger argument. Such tech-

151. Corie Rosen, *Creating the Optimistic Classroom: What Law Schools Can Learn from Attribution Style Effects*, 42 MCGEORGE L. REV. 319, 328 (2011).

152. *Id.* at 329.

153. *Id.* at 339.

154. *Id.*

niques thus both address some of the criticisms of Socratic dialogue and provide additional “friendliness cues” that may encourage female students to contact professors outside of the classroom.¹⁵⁵

Positive psychology provides a particularly fruitful avenue for reform for several reasons. Although aspects of positive psychology will likely prove especially beneficial for female students, the reforms are not seen as targeting women for different treatment. This is both a pragmatic advantage, as proposals are less likely to generate opposition from traditionalist stalwarts, and is more palatable for feminists who reject the contention that women generally benefit from different educational models than men do. And it is certainly no small advantage that positive psychology would likely make all students happier, regardless of their gender. But there is particular reason to believe that positive psychology and optimistic attribution will be effective for female students. There is some research showing that pessimistic explanatory styles correlate with a higher LSAT score,¹⁵⁶ perhaps because the criticism of the pessimist lends itself to the logical reasoning skills of thinking like a lawyer. As discussed earlier, female students entering law school on average have higher undergraduate grades, while male students on average have higher LSAT scores. There is reason to believe, therefore, that female students may learn to employ optimistic attribution styles quicker or better than their male counterparts.¹⁵⁷

CONCLUSION

For several decades, women in law school have been less happy and less successful, on average, than their male counterparts. Part of their negative experience is likely due to an unfavorable environment and pedagogy, but some of the stress and pressure of legal education appears to be caused by overly harsh self-criticism as female students compare themselves to a male norm. Although examination of negative factors affecting most women is still useful, lessons from positive psychology offer a new avenue of reform to address this internal judgment. Positive psychology's lessons may improve the mental and emotional wellness of all law students, which in the changing legal market and educational world is particularly important, but will likely prove particularly helpful to female students.

155. See *supra* note 63 and accompanying text.

156. Peterson & Peterson, *supra* note 16, at 398-99.

157. See *id.* at 399. Of course, the flip side to this is that learning optimistic attribution styles might somehow harm a student's logical reasoning skills. See *id.* This likely confuses correlation with causation, however, and is also a pessimistic response!

