

Stanford Law School

Women in Law Policy Lab Practicum

Retaining and Advancing Women in National Law Firms

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White Paper: Retaining & Advancing Women in National Law Firms

May 2016

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The Law and Policy Lab at Stanford Law School is composed of students committed to improving public policy in a variety of fields. The Stanford Law students enrolled in this practicum have spent the last four months researching the complex factors contributing to the lack of retention and advancement of women in the legal profession and identifying potential solutions from within the profession and beyond. We have been supervised by Professor Robert W. Gordon, Susan Robinson, Associate Dean for Career Services, and Lucy Ricca, Executive Director of the Stanford Center on the Legal Profession. This research and analysis informs our white paper. Our goal is to provide an informed perspective to the Women in Law Hackathon teams as they develop their pitch concepts and proposals. We would like to thank Michelle Galloway, Marianne Cooper, Michelle Banks, Marie Huber, Kirsten Rhodes and Luciana Herman for their time and assistance. We would also like to thank Diversity Lab for partnering with Stanford Law School on the Women in Law Hackathon and giving our students this unique opportunity.

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Overview and Context

I. Executive Summary

A. Problem Statement

In the elite law firm environment, there are significant disparities between the experiences of men and women lawyers at a number of levels. On average, women lawyers bill fewer hours than men,¹ earn lower incomes than men (even after controlling for a number of factors, including fewer billed hours),² they are retained at lower rates,³ and ultimately, are much less likely to advance to partnership.⁴

As a result, of the nation's largest 250 firms, only five firms report women as accounting for more than 25 percent of their equity partners.⁵ This means that the pipeline of 50%-plus female law graduates and entry-level law firm hires for the last 30 years is simply not resulting in more female partners. This is a very real and costly exodus of talent for firms—one study estimates the cost to the firm on average of the attrition of each associate is up to US\$400,000.⁶

The failure of legal practice to advance women is not self-correcting. Professor Deborah Rhode labels this belief that it is self-correcting the “no problem” problem; the assumption that women are making headway in the legal profession and that it is only a matter of time before equality occurs organically.⁷ Treating the problem of equality in the law as self-correcting over time disregards the unacceptably glacial pace at which market forces are working.⁸ In one article released in 1995, the author optimistically projects when equality will be reached: “The percentage of women partners in large firms was 3% in 1980. Fourteen years later it had quadrupled to 12%. Were that rate of growth to continue for another fourteen years, one would expect women to gain equal representation as partners by 2009.”⁹ This obviously hasn't occurred. Growth rates in women equity partners are near stagnant despite almost equal hiring

¹ LAUREN STILLER RIKLEEN, WOMEN LAWYERS CONTINUE TO LAG BEHIND MALE COLLEAGUES: REPORT OF THE NINTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 3, 9-10 (October 2015).

² See Deborah Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1043-44 (2011); Joyce S. Sterling & Nancy Reichman, *So, You Want to Be a Lawyer? The Quest for Professional Status in a Changing Legal World*, 78 FORDHAM L. REV. 2289, 2300 (2010).

³ See Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2255 (2010).

⁴ See *id.* at 2255; Rhode, *supra* note 2, at 1043-44.

⁵ Molly McDonough, *NLJ Survey: Slow Progress for Women Partners in BigLaw*, A.B.A. J. (July 24, 2012, 2:41 PM), http://www.abajournal.com/news/article/nlj_survey_slow_progress_for_women_partners_in_biglaw_5_firms.

⁶ Edward Poll, *So Associates Are Dissatisfied? It's Not Hard to See Why*, LAW PRACTICE TODAY, August 2006 (“the cost to the firm during the first year of employment is already \$295,000. Most managing partners with whom I've discussed these issues have said that the average cost/loss is \$200,000 to \$400,000 per departing lawyer.”)

⁷ Deborah L. Rhode, *Gender and the Profession: The No-Problem Problem*, 30 HOFSTRA L. REV. 1001 (2002).

⁸ Wald, *supra* note 3, at 2252-53 (“Early scholars speculated, and many lawyers continue to believe today that the underrepresentation of women lawyers among large law firm partners was going to gradually decline, as more female associates got hired and subsequently promoted . . . [but] even pursuant to the ‘no problem’ problem logic, gender equality might be considered a problem because of the extremely long time it would take the ‘market’ to overcome it.”).

⁹ Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 357 (1995).

rates across genders. The very slow pace of change makes it seem as though the ceiling is not so much glass as “impenetrable concrete.”¹⁰

This is not to say that elite law firms have done nothing in the face of these retention and advancement issues. For the past thirty years, most firms have expressed a strong commitment to equity and inclusion of all minorities, including women.¹¹ This commitment has been backed up through a number of institutional strategies directed at recruiting and retaining diverse attorneys, including diversity committees, affiliation networks, formal mentoring programs, and part-time models. However, these efforts are not increasing the numbers of women in leadership roles and a large percentage of women continue to leave big law firms.¹² Notwithstanding the public perception that women’s advancement is hindered by the choice to work less or that these women may choose to leave the profession due to family responsibilities, Harvard Law School’s Center on the Legal Profession recently released results of a widespread survey of its graduates which suggests women work more hours on average than men.¹³ Why is it then that the diversity programs being implemented by law firms have failed, despite good intentions, to effectuate change?

It is clear that broader problems exist, and are not being addressed by existing strategies. These broader problems are complex and multifaceted, and have both structural dimensions—such as the impact on women lawyers of “conservative and rigid workplace structures,”¹⁴ including the billable hour and associated expectations of total availability, or the opacity of firm management—as well as societal and cultural dimensions, such as the influence of implicit and in-group biases on purportedly “meritocratic” systems. These problems also manifest themselves in a number of ways, and ultimately result in disproportionate impacts upon the retention and advancement of women lawyers.

B. Goals and Methodology

The purpose of this White Paper is to review, and provide an overview of the findings and recommendations resulting from, existing research and scholarship into the problems of the retention and advancement of women lawyers in elite national law firms.

This White Paper looks at the most current research on a number of key areas relating to the structure of law firms, as well as societal and cultural influences on their workings and management. It brings together most recent research, highlighting persistent or unresolved questions. It also selectively considers examples from within the legal industry as well as other industries, including the technology and accounting industries, in order to obtain a better understanding of current best practice. Finally, this White Paper provides some initial recommendations, as well as considering where further or more law firm-specific research may be warranted.

¹⁰ Wald, *supra* note 3, at 2257.

¹¹ See Russell G. Pearce et al., *Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407 (2015).

¹² DEBORAH L. RHODE, *THE TROUBLE WITH LAWYERS* 61 (2015).

¹³ Gabe Friedman, *Harvard Study: Women Lawyers Work More Than Men*, BLOOMBERG BNA (May 12, 2015) <https://bol.bna.com/harvard-study-women-lawyers-work-more-than-men>.

¹⁴ See 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, 1121 (2011).

As this White Paper looks to (and draws together) the current state of the research, its conclusions remain only preliminary in nature, identifying the specific problems suggested by existing scholarship as well as some initial recommendations for addressing these problems.

C. Limitations

As noted above, this White Paper focuses on the representation of women in elite, U.S. national law firms (best described by reference to the Am Law 100), rather than the legal profession more generally. In addition, given the timing and methodology of this White Paper, it sets out preliminary findings and initial recommendations only, and is fairly limited in its ability to consider those findings and recommendations in greater depth. As noted above, there are many opportunities for further research in this area; this White Paper is intended to provide a roadmap and starting point for such research.

D. Preliminary Findings

The preliminary findings of this White Paper, explained in detail in the following Parts, are as follows:

Overarching Societal and Cultural Factors

1. Gender stereotypes and role-incumbent schemas influence the hiring of women in law firms.
2. Gender stereotypes influence the perception of women lawyers' competence and potential.
3. A system of formal equality is not creating equal opportunities for women.
4. In-group bias and homophily¹⁵ impact the retention of women in law firms, particularly women of color.

Billing Structures and Time-Based Expectations

5. The billable hour disproportionately impacts the retention of women lawyers.
6. Discrepancies exist between hours billed vs. hours worked by men and women lawyers as a result of a number of external factors.
7. Women lawyers' billable hours are influenced by cultural or societal factors, such as gender stereotypes and in-group bias.
8. The billable hour persists as a purportedly "objective" measure of performance, despite extensive criticism and the availability of alternative billing arrangements.
9. Women lawyers command lower billing rates than their male counterparts, for reasons that are not immediately apparent.
10. Because of the dominance of time-based performance metrics such as the billable hour, part time and flexible work policies are stigmatized.

Compensation of Women Lawyers

11. Women lawyers receive lower compensation than their male counterparts at all levels due to non-objective criteria, contributing to women lawyers' attrition.
12. Women's lower compensation (and therefore advancement) is tied to their lower levels of receipt of origination credit than their male colleagues.
13. Women lawyers are not receiving fair credit for the generation of business as a result of a number of structural and social barriers.

¹⁵ Homophily: The tendency of individuals to associate and bond with others like themselves.

Evaluation and Promotion of Women Lawyers

14. The subjective nature of the attorney evaluation process is exacerbated by the influence of stereotypes and dominant ideologies.
15. Feedback received by women attorneys in performance evaluations negatively affects their perceptions of the attainability of partnership.
16. One-tier partnerships tend to have a greater percentage of women equity partners than two-tier or multi-tier partnerships, which may be influenced by the role played by non-equity partnership in a firm.

Firm Leadership and Committees

17. Women are significantly underrepresented in positions of leadership (particularly on compensation committees) at large law firms.

Mentorship

18. As has been consistently demonstrated, mentoring relationships are important to the advancement of women lawyers.
19. Women have less access to informal mentorship, which is often more successful and beneficial than formal programs.
20. Women lawyers at all levels may be better served by ensuring that associates receive full-fledged, high-effort mentoring by powerful partners.

Formal and Informal Networks

21. Women lawyers are likely to be disadvantaged in their advancement due to the lack of availability of informal networks and, therefore, access to rainmaking opportunities.
22. Although affiliation networks may increase women lawyers' sense of community, they may not be assisting in their advancement in any meaningful way.

The Impact of Diversity Committees

23. The data on the impact of diversity committees is mixed, but indicates that their effect on the retention and advancement of women and minority lawyers is minimal.

E. Research Opportunities

As noted above, in addition to the preliminary findings and recommendations, this White Paper identifies a number of opportunities for further research. These are identified throughout the White Paper where relevant to the particular area of discussion, as well as more generally in Part XI.

F. Recommendations

The initial recommendations of this White Paper, explained in detail in Part XIII, are as follows:

Ensuring Firm Leadership and Accountability

1. Ensure that firm leaders are truly committed to addressing the problem of the advancement and retention of women in law firms.
2. Ensure that firm leaders and partners are held accountable for the outcomes of diversity and inclusion efforts.
3. Take steps to ensure that a “critical mass” of women are appointed in leadership roles at law firms, particularly to the compensation committee.

Providing Choice and Control

4. Provide associates with greater control over, and choice with respect to, their career progression.
5. Help associates navigate their careers by identifying and evaluating progression based on skills, rather than year level.

Reassessing Value Metrics

6. Ensure greater transparency and objectivity in compensation at all levels in firm hierarchy.
7. In order to better address the compensation gap, rethink the allocation of origination credits, both at the outset and as part of partner succession.

Rethinking Commitment and the Workplace

8. Leverage technology to provide greater flexibility to associates and trust in their ability to complete work.
9. Rethink associate “commitment” from a team- and project-based perspective.

Bias Interrupters: Implementing Objectivity and Transparency

10. Create objective evaluation criteria and communicate those criteria to associates.
11. Provide regular feedback and monitor for bias.
12. Centrally monitor the distribution of assignments in practice groups to ensure that each associate receives the opportunities they should.

Fostering Associate Involvement and Mentoring

13. Empower associates at an earlier stage, and allow associates to participate in management and decision-making.
14. Adopt a holistic view of associate mentoring.

Ensuring Continual Review and Assessment

15. Conduct meaningful exit interviews.
16. Constantly monitor, review and update strategies and approaches to ensure their continued success.

II. Background and Context: The Large Law Firm Model

A comprehensive understanding of the very nature of the large U.S. law firm, and the changes that have occurred both within its structure and more broadly within the economy, is fundamental in scoping and understanding the problems of retention and advancement of women in law firms. These structural factors, and how they have evolved over time, both influence and clarify the role of the other factors noted in this White Paper.

The large, elite American law firm, as it is known today, began to emerge at the beginning of the twentieth century.¹⁶ Its client base was predominately made up of business organizations and wealthy industry leaders with few, if any, in-house attorneys. Firms tended to have an exclusive relationship with these clients, and provided them with a wide range of legal services. Partners managed the firm and shared the profits, while junior lawyers (called “associates”) competed for a limited number of partnership positions, which would be available at the end of what was

¹⁶ Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 8 (2011).

effectively a long apprenticeship. There was little to no lateral movement of lawyers between firms under this model, which became known as the “Cravath system” or tournament model.¹⁷

From 1970 up until the 2008 recession, firms began to diverge from a purely tournament-style model. U.S. law firms faced accelerated growth, going from 38 firms with more than 50 lawyers in the late 1950s to 700 firms with over 50 lawyers in 2008.¹⁸ Beginning in the late 1970s, in-house legal departments also became significantly larger and began handling more of their company’s day-to-day contractual and regulatory issues, as well as many kinds of litigation.¹⁹ At the same time as lateral movement of both partners and associates increased dramatically, access to information and a more robust in-house counsel created a competitive market for in-demand specialized partners.²⁰ Partnership as a whole became less stable; firms imposed compensation reductions, “de-equitizations,” and outright dismissals on partners who were seen to be insufficiently productive.²¹

In the late 1980s, associates’ time to partnership slowed and some firms began to develop a two-tier or multi-tier partnership structure. These firms created a “lower tier” of non-equity partners, who received a fixed salary as compensation and were essentially partners in name only. By 1988, half of U.S. firms with more than 75 lawyers had two tiers of partners and by 2004, 79% of the 200 largest law firms in the U.S. had two tiers.²² In addition, law firms employed a growing share of non-tournament lawyers, such as of counsel, staff lawyers, staff associates, contract lawyers and lawyers at outsourced locations.²³ Firms also introduced separate management roles performed by non-lawyer specialists, as well as management auxiliaries like marketing, public relations, and technology.

Due to this law firm growth and the need for a large amount of junior associates to sustain a tournament-style model, associate salaries rose dramatically.²⁴ Salaries jumped from \$53,000 to \$65,000 in 1986, to \$95,000 to \$125,000 in 2000, and up to \$160,000 in 2007.²⁵ These increased associate salaries led to increased billing rates, with a small number of partners reaching a \$1000 per hour threshold in 2008.²⁶ Due to the resulting increase in billing rates, junior attorneys found themselves doing a lot of their work as subordinated members on large, complex matters in crowded firm teams.

Following the economic downturn in 2007-2008, big law firms let go of large numbers of personnel and curtailed associate hiring. The total number of lawyers in the National Law Journal 250 firms decreased by 4.3% in 2009.²⁷ The total number of associates in the 250 largest firms fell about 10% over two years and many partners were demoted to non-equity status.²⁸ A

¹⁷ *Id.* at 9.

¹⁸ *Id.* at 11-12.

¹⁹ *Id.* at 23.

²⁰ *Id.* at 15.

²¹ *Id.* at 16.

²² *Id.* at 18.

²³ Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1876 (2008).

²⁴ Burk & McGowan, *supra* note 16, at 20.

²⁵ *Id.* at 20.

²⁶ *Id.* at 22.

²⁷ *Id.* at 29.

²⁸ *Id.* at 30.

significant amount of elite-firm partners left large firms to join smaller, boutique firms with lower overhead, a configuration *American Lawyer* calls the “Economy Model.”²⁹ In response to this crisis, firms began restructuring some of their policies. Associate compensation was reduced or frozen and traditional client pricing was reexamined, with some firms looking at discounting fees or creative fee arrangements.³⁰ At the same time, market and cost trends that had been visible for some time became more pronounced, including: “outsourcing” routine tasks within a lawsuit or transaction; “downsourcing” such work within the firm from full-cost associates to low-cost staff, contract lawyers, or non-lawyer specialists; and “insourcing” to in-house counsel recurrent tasks that are commoditized or dependent on client-specific knowledge.³¹

In addition, following the economic downturn, the number of large law firms with two-tier or multi-tier partnership structures significantly increased. Twenty percent of the firms surveyed in 2015 were one-tier while 80 percent were two-tier (with no separate category for multi-tier). This is a significant change from 2008, when 31 percent of firms were one-tier and 54 percent were two-tier (although this was a different study author).³² This shift has been attributed by some to the economic downturn.³³ Many changes in firm structure, including those noted above, and financial pressures that have been exacerbated since the recession, are thought to disadvantage women lawyers in terms of status and compensation.³⁴

²⁹ *Id.* at 5.

³⁰ *Id.* at 36.

³¹ *Id.* at 5.

³² NAT’L ASS’N WOMEN LAWYERS & NAWL FOUND., REPORT OF THE THIRD ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 10 (2008).

³³ V. Dion Haynes, *Rethinking Legal Fees For Lean Times*, WASH. POST, Oct. 20, 2008, at D01.

³⁴ *Id.*; Cynthia Fuchs Epstein & Abigail Kolker, *The Impact of the Economic Downturn on Women Lawyers in the United States*, 20 IND. J. GLOBAL LEGAL STUD. 1169 (2013).

Literature Review: Findings and Opportunities

III. Cultural and Societal Factors: An Overarching Problem

A. Stereotypes, Schemas, and Bias

1. *What are stereotyping and schemas?*

Gender stereotypes are cultural constructs which indicate what a woman or man is supposed to be like.³⁵ Individuals sometimes use these stereotypes, consciously or unconsciously, to: (a) forego processing information about individuals on a case-by-case basis and to fill in details about them; and (b) influence how people may interpret what they perceive. We perpetuate stereotypes unconsciously by either agreeing with them or acting in ways that prove to make them true.³⁶ For example, when a woman lawyer is not given a high-status assignment because her supervisors assume that family commitments will detract from the time she can commit to her work, but is then denied partnership because she has not taken on enough challenging assignments, stereotypes with respect to women lawyers' family commitments and commitment to their work are reinforced. The influence of stereotypes is so strong that we often do not perceive or act on information that counters those beliefs.³⁷

Schema theory holds that we maintain unconscious models of reality to categorize the many pieces of information we perceive at any given time.³⁸ A "stereotype" is the colloquial term we use to refer to schemas that attach to people.³⁹ "Role-incumbent schemas" are perceptions about who will be successful in a position and what qualities that person will have.⁴⁰ These schemas are often built up out of common traits associated with those who performed the job well in the past. Therefore, when jobholders are predominately male or female, the workers and employers tend to conclude that the relevant gender is an asset for successful job performance.⁴¹

2. *What are implicit bias, in-group bias and homophily?*

Implicit biases are unintentional but fundamental biases that exist across a range of institutions and environments.⁴² Research indicates that most instances of discrimination now extend not from obvious discrimination or rejection of minorities, but instead, as a function of implicit cognitive biases in favor of people from the "in-group."⁴³

Homophily is the related idea that most people form bonds of mutual affinity with each other more easily when they share common tastes, life experiences, preferences, and values. People tend to want to work and associate with those similar to themselves. This manifests within

³⁵ Elizabeth H. Gorman, *Gender Stereotypes, Same-Gender Preferences, and Organizational Variation in the Hiring of Women: Evidence from Law Firms*, 70 AM. SOC. REV. 702, 703 (2005).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Pearce et al., *supra* note 11, at 2424.

³⁹ *Id.*

⁴⁰ Gorman, *supra* note 35, at 705.

⁴¹ *Id.*

⁴² Pearce et al., *supra* note 11, at 2423.

⁴³ *Id.*

groups, and results in groups taking steps to obtain or maintain power and privilege for their own members at the expense of other groups.⁴⁴ Homophily and in-group bias can influence workplace decisions because individuals are more likely to give favorable evaluations, mentoring, loyalty, cooperation, rewards and opportunities to other individuals who are similar to them in important respects, like gender, race and ethnicity.⁴⁵

B. Impact of Societal Factors on the Retention and Advancement of Women

Finding No. 1: Gender stereotypes and role-incumbent schemas influence the hiring of women in law firms.

Elizabeth H. Gorman proposes that gender stereotypicality of selection criteria, and the decision maker's preferences for the same gender, operate to intensify gender inequality in hiring.⁴⁶ To test this hypothesis, she looked at data from large U.S. law firms in the mid-1990s. She investigated whether firm decision makers' gender stereotypes and preferences for candidates of their own gender serve as organization mechanisms that intensify the impact of gender on hiring. Gorman found that when the hiring criteria included a greater number of stereotypically masculine characteristics, women constituted a smaller proportion of new hires, but the number of women increased with the number of stereotypically feminine characteristics in such hiring criteria.⁴⁷ She also found that the gender of an organizational decision maker matters, except when it comes to hiring laterally.

Gorman's findings suggest that organizational decision makers perceive male and female candidates through the lens of gender stereotypes and compare these perceptions to the cultural schemas that prevail within their organizations.⁴⁸ Organizations tend to develop these schemas based on the individuals who have performed the relevant roles successfully in the past, or could do so in the future. When these schemas are more stereotypically masculine, male candidates appear to offer a better fit and are more likely to be selected.⁴⁹ Therefore, in law firms that are historically male dominated, many of the job qualifications are seen as masculine qualities. For example, law firms are looking for assertive, ambitious, decisive, business-oriented leaders, all of which are considered stereotypically masculine qualities.

This finding has implications beyond the hiring of women in law firms, as these gendered qualifications are continually used, whether formally or informally, in evaluations of female lawyers.⁵⁰ Women lawyers are therefore likely to be continually penalized for not possessing or successfully exhibiting these characteristics simply because they are women. For instance, individuals would often assume that women lawyers would be less assertive than male lawyers because assertiveness is considered to be a masculine characteristic. However, if a woman lawyer is assertive, a coworker or supervisor would either still not perceive her as assertive (due to the persistent nature of stereotypes) or would see assertiveness as a negative quality for a woman.

⁴⁴ Gorman, *supra* note 35, at 707.

⁴⁵ RHODE, *supra* note 12, at 68-69.

⁴⁶ Gorman, *supra* note 35, at 702.

⁴⁷ *Id.* at 722.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ For more on evaluations of women lawyers, see Part VI *infra*.

Gorman's study also found that firms with female hiring partners tended to fill a higher proportion of positions with women, and that the proportion of female associates within a firm more generally had a strong positive effect on the proportion of women among all groups of new hires. However, in firms with equal numbers of women, female hiring partners no longer filled a higher proportion of positions with women.⁵¹ The results indicate that female decision makers may feel a stronger motivation to help other women or a stronger preference for interacting with other women,⁵² at least until gender parity is reached. Alternatively, Gorman suggests that women decision makers may find their male peers are willing to tolerate a high level of hiring of women when there are few women at higher organizational levels, but become more resistant as women increasingly reach positions of power.⁵³

As noted above, Gorman found that the gender of the hiring partner had no significant impact on the gender of lateral hires.⁵⁴ She theorizes that a pattern may be less discernable in such cases because lateral hires are less frequent and can be hired based on more particular needs. However, this occurrence is something that should be investigated further. Elite law firms hire a large proportion of their equity partners laterally, but the numbers of women equity partners hired on a lateral basis remains low. For every five male equity partners law firms hire laterally, they hire only one woman equity partner laterally.⁵⁵ In this respect, as lateral hires comprise the largest source of equity partners at large law firms, methods of increasing the proportion of women lawyers that are hired laterally should be considered.

Research Opportunity No. 1: Further research on the lateral hiring process would be useful to determine why there are so few female lawyers hired as lateral equity partners. For example, is this a pipeline problem (that is, have too many women already left the law by the time firms are seeking to laterally hire partners)? Alternatively, are additional biases operating in this hiring process, possibly compounded by the smaller attorney networks most women lawyers have?

Finding No. 2: Gender stereotypes influence the perception of women lawyers' competence and potential.

Deborah Rhode examined the impact of gender stereotypes and biases on women in law firms, concluding that cognitive biases compound the force of these stereotypes, because people are more likely to notice and recall information that confirms their stereotypical assumptions than information that contradicts those assumptions.⁵⁶ For example, when a woman lawyer is assumed to be less effective, her failures will then be recalled more readily than her achievements. Since women are thus given less latitude for mistakes, they may be reluctant to seek risky assignments that could better demonstrate their capabilities.⁵⁷ Biases against women lawyers also affect the allocation of work assignments to them, because partners may assume that a woman lawyer cannot handle a high-status project as well as a male colleague could, or that she is too busy with familial commitments. The fact that women are not seeking out these high-status assignments,

⁵¹ Gorman, *supra* note 35, at 722.

⁵² *Id.* at 722.

⁵³ *Id.*

⁵⁴ *Id.* at 723.

⁵⁵ RIKLEEN, *supra* note 1.

⁵⁶ *Id.* at 10.

⁵⁷ RHODE, *supra* note 12, at 68.

and are not given such assignments, compounds the problem of women lawyers not receiving the same opportunities as their male colleagues.

In reaching these conclusions, Rhode considered several prior research findings on the impact of gender stereotypes on women lawyers, including that:

- women, like minorities, often fail to receive the presumption of competence that is given to white men;⁵⁸
- women believe—and many studies indicate—that they are held to a higher standard than their colleagues and are given lower evaluations for similar work;⁵⁹
- mothers, regardless of whether they are working part time or full time, are viewed as less committed to the firm.⁶⁰ On the other hand, women without family relationships were seen as “not quite normal” and “not quite leadership material”;⁶¹ and
- women were rated lower when they adopted authoritative, seemingly masculine styles, particularly when the evaluators were men or when the woman occupies a role typically occupied by a man.⁶² Similarly, self-promotion, which is acceptable in men, is viewed as unattractive in women.⁶³

Rhode concluded that to create an equal workplace, lawyers need a “deeper appreciation of how racial, ethnic, and gender stereotypes affect not just evaluations of performance but the performance itself, and the relative value attached to specific performance measures.”⁶⁴ This suggestion could be difficult to implement in a law firm setting that is heavily based on meritocratic ideals. This is because Rhode’s research indicates that a woman lawyer’s actual work product suffers (because of the biases and stereotypes at play within a law firm), which may lead law firm partners and management to believe that they would need to accept a lower quality work product in order to retain women lawyers. In an atmosphere where firm survival is paramount, law firms would likely not find palatable the idea of giving any attorney more leeway in the quality of work product. It is therefore important to seek to address the cause, rather than the effect—that is, to implement techniques such as bias interrupters or creating bias awareness, rather than looking to the resulting work product.⁶⁵

Finding No. 3: A system of formal equality is not creating equal opportunities for women.

Russell G. Pearce et al. found that implicit biases and homophily result in a “range of dangerous professional ideologies and particular stereotypes as well as a set of hazardous organization effects like unequal training, mentoring, and networking opportunities.”⁶⁶ Pearce et al. examined law firm biases by looking at two different institutional approaches: the difference blindness model and the bias awareness model. The difference blindness approach is traditionally used in law firms; it assumes that partners and associates are “atomistic actors” and that their

⁵⁸ RHODE, *supra* note 12, at 66.

⁵⁹ *Id.* at 66-67.

⁶⁰ *Id.* at 67.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 65.

⁶⁵ For more on these techniques, *see infra* Finding No. 3; *supra* Part XIII.E.

⁶⁶ Pearce et al., *supra* note 11, at 2423.

achievement is a function of individual merit.⁶⁷ However, Pearce et al. argue that this model is based on a “flawed presumption of merit because it is built on conformity to an historical ideal worker who is white, heterosexual, and male.”⁶⁸ The authors recommend that law firms instead shift toward a bias awareness model, which reflects a relational understanding of achievement, merit and identity. This model centers on two ideas: (a) that formal equality is sometimes substantively unequal; and (b) that ignoring implicit bias undermines the grander goals that organizations aim to achieve.⁶⁹

The authors go on to hypothesize that, absent the effort that bias awareness would require, most white men will be more comfortable evaluating, mentoring, or networking with other white men.⁷⁰ White men often report difficulty in having conversations across race and gender and the effects of homophily and implicit bias make it less likely that white male partners will devote their resources and those of their firms to the development of associates who are not white men.⁷¹ By focusing on individual outcomes and ignoring the interactional and institutional processes that produce them, the evaluation of workers is both incomplete and unjust. It is therefore necessary to move institutions away from a false notion of meritocracy and towards a more equal workplace for women.

Finding No. 4: In-group bias and homophily impact the retention of women in law firms, particularly women of color.

Kevin Woodson found that sharing certain cultural and social traits with senior colleagues were often critical to workers’ prospects of career advancement.⁷² Workers provided greater advocacy and more generous praise to jobseekers with whom they shared cultural and experiential traits. In workplaces where senior workers have autonomy in distributing work to junior colleagues; the impact of homophily can thus be exacerbated.⁷³ For example, in law firms, high quality work assignments given early in one’s career can provide opportunities to develop career-enhancing skills and reputational capital. Employees who receive inferior assignments will not develop these personal relationships, and high-status work experience and advice and advocacy skills, nor the generous performance reviews that come with them.

The effects of homophily and in-group bias are especially pronounced for women of color, because the intersectionality of their race and gender result in very few shared traits or experiences with a firm’s power players. In addition to women, minorities also feel the negative effects of biases and stereotypes that impact their work opportunities, mentorship networks, and evaluations. Lawyers of color make up 8% of equity partners and women of color make up only about 1-2% of equity partners.⁷⁴ Women of color likely face the worst effects from in-group bias because they have little to no representation in the management of the law firm and have a very small internal support system. Veronica Root argued that, by incentivizing equity partners to instill greater loyalty in minority attorneys through the investment of these partners’ time in

⁶⁷ *Id.* at 2411.

⁶⁸ *Id.* at 2412.

⁶⁹ *Id.* at 2412.

⁷⁰ *Id.* at 2429.

⁷¹ *Id.* at 2430.

⁷² Kevin Woodson, *Derivative Racial Discrimination* 16 (Jan 2016) (unpublished manuscript) (on file with the Stanford Journal of Civil Rights and Civil Liberties).

⁷³ *Id.* at 19.

⁷⁴ RIKLEEN, *supra* note 1.

developing minority attorneys, firms could solve a large portion of their retention problem because those attorneys will develop a greater sense of loyalty to the firm.⁷⁵

IV. Billing Structures and Time-Based Expectations

A. The Billable Hour

Finding No. 5: The billable hour disproportionately impacts the retention of women lawyers.

Bruck and Canter, among others, have chronicled the steep rise in the average hours billed by lawyers in large law firms over time, from an average of 1200 in 1961 to “between 2000 and 2500 hours” by the mid-1990s.⁷⁶ These figures of actual hours worked are reinforced by the billable hour requirements imposed by firms themselves, which became more demanding both in the late 1990s and 2000s and then again following the economic downturn of 2007-2008.⁷⁷

The rising pressure for lawyers, both partners and associates, to bill hours has been linked to the overall structures of law firms, even as these structures have changed over time. Under the “tournament model” outlined in Part II, lawyers were incentivized to work longer hours in order to advance to partnership.⁷⁸ More recently, with a diminished likelihood of promotion to partnership and increased pressures to bring in revenue even once lawyers have advanced to partnership,⁷⁹ including the threat of de-equitization or other punitive measures,⁸⁰ the importance of billable hours to lawyers at all levels has only increased. For junior lawyers, billable hours “become a primary focus of competition” and method of advancement; for partners, billable hours lead to greater “income and influence.”⁸¹

Wald also posits an alternative view of billable hours under a recent law firm model he calls “hypercompetitiveness,” whereby the “excessive and inflexible hours” expected of lawyers, as well as their “instant responsiveness and total availability to clients,” may be perceived as a response to increased competition for clients among law firms.⁸² Under this model, the long billable hours worked by lawyers are an indicator of their “elite status,” a way for lawyers to prove to themselves that their work is not “disposable.”⁸³

An additional source of increasing billable hour requirements is the overall levels of law firm attorney compensation, as noted in Part II. When law firms pay such high salaries to new associates (and pay high incomes to partners), which they cannot pass through to clients based on

⁷⁵ Veronica Root, *Retaining Color*, 47 U. MICH. J.L. REFORM 575 (2014).

⁷⁶ Andrew Bruck & Andrew Canter, *Supply, Demand, and the Changing Economics of Large Law Firms*, 60 STAN. L. REV. 2087, 2095-96 (2008).

⁷⁷ See Wald, *supra* note 3, at 2260, 2262; DEBORAH L. RHODE, A.B.A. COMM'N ON WOMEN IN THE PROFESSION, *BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE* 19 (2001); Sterling & Reichman, *supra* note 2, at 2296.

⁷⁸ Bruck & Canter, *supra* note 76, at 2093.

⁷⁹ RHODE, *supra* note 77, at 19; see also Galanter & Henderson, *supra* note 23, at 1871.

⁸⁰ See *supra* Part II.

⁸¹ RHODE, *supra* note 77, at 19; see also Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171, 177 (2005).

⁸² Wald, *supra* note 3, at 2256-57.

⁸³ *Id.* at 2272.

the billing rates charged for such lawyers alone, they respond by raising billable hour requirements for associates.⁸⁴

It is not news to suggest that high billable hours requirements, and the excessive hours that must be worked to generate them, are key drivers of attorney dissatisfaction and unhappiness.⁸⁵ Pressures from high billable hour requirements have more generally been found to significantly affect lawyers' personal lives, "fulfillment outside of work," and "mental and physical wellbeing."⁸⁶

This dissatisfaction is not confined to women lawyers, but it appears that the effects of billable time pressures have been felt disproportionately by women with competing family responsibilities and among those who anticipate having such responsibilities.⁸⁷ Ironically, single and widowed lawyers with arguably no competing responsibilities are also impacted, as firms perceive them to have more time to dedicate to work and expect correspondingly high billable hours of them.⁸⁸

Research Opportunity No. 2: Further research into women who did not have any children when they worked at large law firms (as distinct from working mothers, about whom more research is available) would be useful in this respect. For example:

- if and how women who did not have any children when they worked at large law firms experienced the pressure of billable hours differently from mothers; and
- for those women who left large law firms before having children, or without subsequently having children, what their specific motivations were for leaving.

This dissatisfaction leads young lawyers to become "uncertain" about whether advancement in the profession is achievable or even desirable,⁸⁹ and thereby motivates them to move out of large law firms.⁹⁰ Some observers have attributed this desire to leave the profession to the changing expectations of the new generation of "Millennial" lawyers, who are unwilling to make the same "sacrifices" of a personal life for work that earlier generations may have accepted.⁹¹ Garth and Sterling also suggest that, in a "two-lawyer couple," women are likely to be the ones who "take[]

⁸⁴ RHODE, *supra* note 77, at 20; Rhode, *supra* note 2, at 1057, 1058; Bruck & Canter, *supra* note 76, at 2097; Fortney, *supra* note 81, at 172, 179.

⁸⁵ See Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UKMC L. REV. 239, 241 (2000); Patrick J. Schlitz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 888-95 (1999); Ronit Dinovitzer & Bryant G. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 LAW & SOC'Y REV. 1, 34 (2007).

⁸⁶ Fortney, *supra* note 85, at 265-66, 269, 271; Fortney, *supra* note 81, at 183.

⁸⁷ Bruck & Canter, *supra* note 76, at 2104-05; Bryant G. Garth & Joyce Sterling, *Exploring Inequality in the Corporate Law Firm Apprenticeship: Doing the Time, Finding the Love*, 22 GEO. J. LEGAL ETHICS 1361, 1386 (2009); RHODE, *supra* note 12, at 71-72.

⁸⁸ Fortney, *supra* note 85, at 265.

⁸⁹ Sterling & Reichman, *supra* note 2, at 2301.

⁹⁰ Dinovitzer & Garth, *supra* note 85, at 41; see also Fortney, *supra* note 81, at 183-85.

⁹¹ Galanter & Henderson, *supra* note 23, at 1922; RHODE, *supra* note 77, at 15; Wald, *supra* note 3, at 2288; Kristin Choo, *The Right Equation*, 87 A.B.A. J. 58, 61 (2001).

the heat and move[] out” of the law firm environment.⁹² Galanter and Henderson ask the simpler question, “why bill more hours when the payoff of partnership is increasingly less attractive?”⁹³

For those lawyers who stay in the firm, it appears that they may have certain opportunities open to them, such as (among others) more interesting and higher quality work, and “greater communication regarding partnership prospects,” that make the “tradeoffs” for these hours personally worthwhile to them.⁹⁴ It is not clear, however, that women are as likely as men to receive these opportunities and possible benefits, or that they value them as highly. The potential gender differences between the availability and desirability of these tradeoffs therefore merit further consideration.

Research Opportunity No. 3: As noted above, it would be useful to further examine the quality of work assignments given to women lawyers (and the role that high billable hours among women lawyers may play in ensuring such assignments and/or result from such assignments).

Finding No. 6: Discrepancies exist between hours billed vs. hours worked by men and women lawyers as a result of a number of external factors.

A recent survey by the National Association of Women Lawyers (NAWL) found a significant gender gap in billing despite the fact that women are working as hard or even longer hours than men.⁹⁵ The NAWL note that the questions raised by this data include:

[A]re women being billed at significantly lower rates?⁹⁶ Are women being asked to undertake more non-client billable committee roles, such as mentoring and associate recruitment that men are not asked, or possibly decline, to do? If so, does the time that women spend on these roles impede the time they might otherwise be able to devote to business development? Is it possible that there are differences in work flow and assignment opportunities?⁹⁷

The available literature suggests that all these questions can be answered in the affirmative. There is evidence that women are “overrepresented” and “overburdened” with “support” and “service” work, both in terms of representation on committees and on “housekeeping” tasks, which reduce the available amount of billable time.⁹⁸ Wald notes that, in contrast, a white male lawyer can not only work longer billable hours (or enjoy greater personal time), but also “receive

⁹² Garth & Sterling, *supra* note 87, at 1385.

⁹³ Galanter & Henderson, *supra* note 23, at 1893.

⁹⁴ Galanter & Henderson, *supra* note 23, at 1893, 1920.

⁹⁵ RIKLEEN, *supra* note 1, at 9-10; *see also* María 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, 64 (2008); SILVIA HODGES SILVERSTEIN, SKY ANALYTICS, GENDER STUDY: LEGAL SPEND MANAGEMENT (2014); *but see* Ronit Dinovitzer et al., *The Differential Valuation of Women’s Work: A New Look at the Gender Gap in Lawyers’ Incomes*, 88 SOC. FORCES 819, 825, 830 (2009).

⁹⁶ *See infra* Part IV.B.

⁹⁷ RIKLEEN, *supra* note 1, at 10.

⁹⁸ Nancy J. Reichman & Joyce S. Sterling, *Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers*, 14 TEX. J. WOMEN & L. 27, 67 (2004); Eli Wald, *BigLaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509, 2511 (2015); Jennifer Smith, *Female Lawyers Still Battle Gender Bias*, N.Y. TIMES (May 4, 2014, 6:03 PM), <http://www.wsj.com/articles/SB10001424052702303948104579537814028747376>; Joan C. Williams, *Hacking Tech’s Diversity Problem*, HARVARD BUS. REV. (Oct. 2014), <https://hbr.org/2014/10/hacking-techs-diversity-problem>; Dinovitzer et al., *supra* note 95, at 831.

superior training . . . form stronger mentorship relationships with powerful partners . . . receive higher quality assignments and end up better positioned to develop a book of business.”⁹⁹

This link between the quality of work received and the resulting hours billed by women lawyers also merits further investigation. As noted in this Part above, high quality work is one of the “tradeoffs” accepted by lawyers that do not leave the large law firm environment, and Wald’s theory of men’s higher billable hours leading to their higher quality assignments is persuasive. However, further data would be useful in this respect.¹⁰⁰

In addition, while the pressure of the billable hour impacts on the time devoted to pro bono work, mentoring and training programs,¹⁰¹ the NAWL survey found that women had “more pro bono hours” even as they had fewer billable hours.¹⁰² The reasons for the gender disparity here are not clear.

Research Opportunity No. 4: Further research on the reasons for the higher proportion of pro bono work undertaken by women lawyers would be useful in this respect.

Finally, although the NAWL study does not point to this as a potential factor, it may also be the case that women “routinely discount the amount of work they do,” by being more cautious and scrupulous in their recording of billable hours relative to men.¹⁰³

Finding No. 7: Women lawyers’ billable hours are influenced by cultural or societal factors, such as gender stereotypes and in-group bias.

Even when women work similar hours, billable or otherwise, as men, their workloads may not be perceived accurately by others. A study of lawyers in Indiana found that over a quarter of male lawyers thought that “female lawyers do not work as many hours as their male counterparts,” and a fifth considered that the number of hours worked by women lawyers could be rated as “fair to poor.”¹⁰⁴ Figures from New York indicate that almost half of female attorneys (as well as almost 10 percent of male attorneys) “expressed the view that female attorneys have to work harder than male attorneys to achieve the same results.”¹⁰⁵

The misperception of how hard women lawyers work, if real, apparently arises from a combination of two key assumptions or images. The first is the normative assumption, consistent with the high billable hours expectations detailed in this Part above, that “law is a 24/7

⁹⁹ Wald, *supra* note 98, at 2512, 2537.

¹⁰⁰ This is also likely to tie in with the allocation of work assignments and the impact of unconscious bias and in-group bias on women lawyers more generally. *See, e.g.*, RHODE, *supra* note 12, at 68-71.

¹⁰¹ AMERICAN BAR ASSOCIATION, ABA COMMISSION ON BILLABLE HOURS REPORT 5 (2002); Fortney, *supra* note 85, at 281, 289; RHODE, *supra* note 77, at 17; Bruck & Canter, *supra* note 76, at 2101.

¹⁰² RIKLEEN, *supra* note 1, at 9.

¹⁰³ Dinovitzer et al., *supra* note 95, at 849.

¹⁰⁴ López, *supra* note 95, at 65-66; *see also* RHODE, *supra* note 12, at 64.

¹⁰⁵ López, *supra* note 95, at 89.

profession,”¹⁰⁶ such that the “ideal” lawyer needs to have “total loyalty and commitment” to his or her profession at all hours, at the expense of his or her personal life and personal identity.¹⁰⁷

As noted above, this assumption in itself has consequences for lawyer satisfaction. But it also “implicitly assume[s] that lawyers will have someone at home to care for the personal aspects of life,”¹⁰⁸ and that person cannot be the lawyer him- or herself. The concept of the “ideal” lawyer is therefore already based on “gendered assumptions” and “masculine-oriented definition[s]” of commitment,¹⁰⁹ which women may reject or be unable to meet out of hand, particularly where family responsibilities intervene.¹¹⁰

In addition, this assumption then collides with “prevailing gender stereotypes.”¹¹¹ Gender stereotypes operate such that women, even those that do not yet have spouses or children, and still less those who are full-time working mothers, cannot meet this “ideal” in the eyes of their law firms. The particular stereotypes, outlined in Part 0, that women lawyers are “less available and committed” to their professional lives¹¹² are not limited to those that are already mothers, as all women lawyers are assumed to want to get married and become mothers (and “ironically lack the capacity to prove otherwise”).¹¹³ This means that all female associates are assumed to be less “committed to the firm and its clients,” and therefore likely to “work and bill fewer hours relative to male associates.”¹¹⁴ Wald notes that even the retention of some female lawyers notwithstanding the persistence of these assumptions does not affect the impact of this stereotype, as their presence merely “proves” that commitment necessitates either remaining childless or “prioritizing” their professional lives above their family responsibilities.¹¹⁵

Other cultural factors arising out of the pressures of the billable hour are also likely to impact on the retention and advancement of women lawyers. For example, as noted in this Part above, billing pressures may also limit the time that more senior lawyers are able to devote to mentoring.¹¹⁶ With less mentoring time to spare, partners then focus their scarce attention on

¹⁰⁶ Deborah L. Rhode & Lucy Buford Ricca, *Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel*, 83 FORDHAM L. REV. 2483, 2504 (2015).

¹⁰⁷ Wald, *supra* note 3, at 2272; Garth & Sterling, *supra* note 87, at 1365; Fortney, *supra* note 81, at 177.

¹⁰⁸ Garth & Sterling, *supra* note 87, at 1365; Fiona Kay & Elizabeth Gorman, *Women in the Legal Profession*, 4 ANN. REV. L. & SOC. SCI. 299, 319 (2008).

¹⁰⁹ Reichman & Sterling, *supra* note 98, at 70; Pearce et al., *supra* note 11, at 2447; Kay & Gorman, *supra* note 108, at 308.

¹¹⁰ Reichman & Sterling, *supra* note 98, at 70-71; Bruck & Canter, *supra* note 76, at 2105.

¹¹¹ Wald, *supra* note 3, at 2272-2273; Reichman & Sterling, *supra* note 98, at 70.

¹¹² RHODE, *supra* note 12, at 64, 67; Pearce et al., *supra* note 11, at 2437.

¹¹³ Wald, *supra* note 3, at 2284-85.

¹¹⁴ *Id.* at 2274-2275. It should be noted that women without children experience a lower likelihood of retention and advancement to partnership than “similarly situated men”: see Mary C. Noonan & Mary Corcoran, *The Mommy Track and Partnership: Temporary Delay or Dead End?*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 142 (2004); Kenneth G. Dau-Schmidt et al., *Men and Women of the Bar: The Impact of Gender on Legal Careers*, 16 MICH. J. GENDER & L. 49, 97, 101-02 (2009).

¹¹⁵ Wald, *supra* note 3, at 2276. These women are also likely to suffer different penalties, in that they will be “seen as bad mothers and bad people,” and therefore “disliked and held to higher performance standards”: Williams, *supra* note 98. See also discussion of stereotypes generally, *supra* Part 0.

¹¹⁶ See Bruck & Canter, *supra* note 76, at 2101; Fortney, *supra* note 85, at 281.

associates that “they perceive, correctly or incorrectly, to be more like them and therefore more likely to learn faster.”¹¹⁷

Finding No. 8: The billable hour persists as a purportedly “objective” measure of performance, despite extensive criticism and the availability of alternative billing arrangements.

The billable hour has been the subject of extensive criticism, on the basis that it fails to promote productivity, efficiency and does not require “actual proof of value creation.”¹¹⁸ Nonetheless, the billable hour endures and shows no signs of disappearing.¹¹⁹

The billable hour does “serve[] legitimate firm needs” by providing a mechanism of clear accounting to clients and a measurement of “the performance and output of their associates and partners.”¹²⁰ However, it is this latter use of the billable hour, and its ongoing importance in law firm billing and compensation structures, which causes concern about gender equity.¹²¹ Promoted as a purportedly objective, “neutral” standard for measuring lawyer performance, the use of billable hours creates the appearance of gender neutrality, since both men and women must meet the “same bar” for advancement to partnership.¹²² This obscures the reality that other factors—including non-billable work, work assignments more generally, gender stereotypes and in-group bias—may favor men over women lawyers in this measurement of billable hours, as noted in this Part.¹²³

Research Opportunity No. 5: Given the persistent use of billable hours as a purportedly objective measure of performance, it would be useful to further examine:

- how women lawyers’ performance and compensation are measured where alternative fee arrangements are in place (particularly given that these may be even harder to measure “objectively” than the billable hour, however problematic and non-objective such measurement may be); and
- the importance of billable hours relative to the measurement of women lawyers’ performance (including as this may differ by seniority), as other factors, such as origination credit or subjective measurements of “soft skills,” may prove to play a greater role in this respect.

¹¹⁷ Wald, *supra* note 98, at 2516. This is an example of in-group bias, as discussed *supra* Part 0.

¹¹⁸ Wald, *supra* note 3, at 2263, 2272; RHODE, *supra* note 77, at 20; Choo, *supra* note 91, at 60-61.

¹¹⁹ See Stuart L. Pardau, *Bill, Baby, Bill: How the Billable Hour Emerged as the Primary Method of Attorney Fee Generation and Why Early Reports of Its Demise May Be Greatly Exaggerated*, 50 IDAHO L. REV. 1 (2013); Sterling & Reichman, *supra* note 2, at 2291; Judith S. Kaye & Anne C. Reddy, *The Progress of Women Lawyers at Big Firms: Steadied or Simply Studied?*, 76 FORDHAM L. REV. 1941, 1963-64 (2008).

¹²⁰ Wald, *supra* note 14, at 1123.

¹²¹ It should be noted that this use of the billable hour as a measurement of output and accounting also causes concern from a number of other perspectives. This includes increasing concerns from clients about the productivity, efficiency and effectiveness of their lawyers (as distinct from the number of hours billed by them). See, e.g., Mark Chandler, Address at Northwestern School of Law's Annual Securities Regulation Institute (Jan. 2007), http://blogs.cisco.com/news/cisco_general_counsel_on_state_of_technology_in_the_law.

¹²² Pearce et al., *supra* note 11, at 2445, 2447; see also AMERICAN BAR ASSOCIATION, *supra* note 101, at 10; Sterling & Reichman, *supra* note 2, at 2292; Fortney, *supra* note 81, at 176.

¹²³ See also Pearce et al., *supra* note 11, at 2447.

B. Billing Rates of Women Lawyers

Finding No. 9: Women lawyers command lower billing rates than their male counterparts, for reasons that are not immediately apparent.

However many hours they bill, women lawyers command lower billing rates than their male counterparts.¹²⁴ Female law firm partners have billing rates that are, on average, 10% lower than those of male law firm partners, even when controlling for experience and market.¹²⁵ In the case of junior associates, gender differences in billing rates persist despite the fact that such associates are often paid on a “lock-step” basis.¹²⁶

The causes of these discrepancies are not entirely clear, but the practice areas in which women are working may play some role. In particular, different practice areas may charge more or less depending on status and market rates,¹²⁷ and women appear to occupy a higher proportion of “low-status” or lower-charging specialties.¹²⁸

Further data both on the influence of practice area on billing rates, and on whether (and, if so, how) women are concentrated in “lower-paying and less desirable” practice areas in the first instance,¹²⁹ would be useful. For example, is it the case that women in large law firms are (unconsciously) “channel[ed] into groups with lower revenue potential”?¹³⁰ If they are, does this lead to a self-fulfilling prophecy or vicious cycle, in which women are perceived as less valuable, therefore assigned to lower-status work, confirming then that they are less valuable?

Research Opportunity No. 6: It would be useful to further research practice area differences, in particular:

- the differentiation in hours billed, hourly rates and compensation between practice areas; and
- to the extent possible, the reasons why women may be found in greater proportions in “lower-status” practice areas.

C. The Introduction of Flexible Work Structure and Leave Policies

Finding No. 10: Because of the dominance of time-based performance metrics such as the billable hour, part time and flexible work policies are stigmatized.

One of the ways in which large law firms have sought to increase gender equity is through the introduction of part-time and flexible work structures. Broadly speaking, part time and flexible work policies have had positive impacts on employee quality of life in contexts outside of the law firm. For instance, in the context of a Fortune 500 company, one recent study showed that employees were “definitively” happier, healthier, and more productive after the rollout of a pilot

¹²⁴ Smith, *supra* note 98; SILVERSTEIN, *supra* note 95; Erin Fuchs, *Women Lawyers Less Valued, Lower Billing Rates Show*, LAW360 (Apr. 11, 2011, 7:41 PM), <http://www.law360.com/articles/238044/women-lawyers-less-valued-lower-billing-rates-show>.

¹²⁵ Smith, *supra* note 98.

¹²⁶ *Id.*

¹²⁷ *Id.*; Galanter & Henderson, *supra* note 23, at 1898; Wald, *supra* note 3, at 2251.

¹²⁸ Smith, *supra* note 98; Wald, *supra* note 3, at 2251; Reichman & Sterling, *supra* note 98, at 61; Dau-Schmidt et al., *supra* note 114, at 83-84; *but see* Kay & Gorman, *supra* note 108, at 303 (finding “only slight variation in gender composition” across specialty areas of corporate firms).

¹²⁹ Reichman & Sterling, *supra* note 98, at 61.

¹³⁰ Williams, *supra* note 98 (referring to a study of women in high finance); Dinovitzer et al., *supra* note 95, at 823.

work flexibility program.¹³¹ This led the researchers to conclude that “workplace flexibility is beneficial—not detrimental—to organizations.”¹³²

However, when it comes to large law firms, flexible work structures have not been as beneficial, which perhaps suggests a problem with the normative structure of the firm model. The research suggests that law firm culture stigmatizes part-time work choices.¹³³ As noted in Part IV.A above, elite firms assume that it is important that everyone devote 100% of their time and attention to firm matters.¹³⁴ Only if everyone does this, will the firm “survive.”¹³⁵ As a result, “anyone seeking to reduce their schedule or inject flexibility into their working lives is immediately viewed as someone who does not ‘get’ how competitive the market is.”¹³⁶ This stigmatization of such policies has led some researchers to conclude that “[t]he option of reducing hours by itself is insufficient to retain women.”¹³⁷

Cynthia Fuchs Epstein and Carroll Seron argue that time itself takes on an important symbolic meaning in law firm settings: “in addition to its economic value, time thus gains symbolic currency; a willingness to prioritize work over family life by submitting to demanding and extended work schedules becomes a proxy for qualities which are far more slippery and harder to quantify, such as commitment, ambition, and reliability under pressure.”¹³⁸ As noted above, when time is a primary method of evaluation used in place of less quantifiable metrics, women choosing part-time options have faced bleak prospects. Indeed, Epstein’s study of part-time lawyers reveals that only one percent end up as a partner.¹³⁹

That’s not to say, however, that part-time options are unsuccessful for all female attorneys who choose to pursue them. Sevita Kumra emphasizes that women in supportive environments who are generally respected by colleagues are often the ones who find part-time schedules the most rewarding.¹⁴⁰ Additionally, such scholars as Joan Williams have challenged the notion that part-time schedules are necessarily disruptive to the law firm business model.¹⁴¹ In her research, Williams found that for any area where it was claimed that a part-time schedule would not

¹³¹ See Press Release, MIT Sloan School of Management, First Ever Use of Control Group To Measure Effectiveness of Workplace Flexibility Program Shows Increased Job Satisfaction, Reduced Burnout And Stress (Jan. 13, 2016), <http://www.prnewswire.com/news-releases/first-ever-use-of-control-group-to-measure-effectiveness-of-workplace-flexibility-program-shows-increased-job-satisfaction-reduced-burnout-and-stress-say-u-minnesota-and-mit-sloan-co-authors-300203452.html>.

¹³² *Id.*

¹³³ See, e.g., Rhode & Ricca, *supra* note 106, at 2505.

¹³⁴ Joan C. Williams, *Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality*, 26 T. JEFFERSON L. REV. 1, 1-2 (2003).

¹³⁵ *Id.*

¹³⁶ See Sevita Kumra, *Busy Doing Nothing: An Exploration of the Disconnect Between Gender Equity Issues Faced by Large Law Firms in the United Kingdom and the Diversity Management Initiatives Devised to Address Them*, 83 FORDHAM L. REV. 2277, 2286 (2015).

¹³⁷ See Ellen Ostrow, *Could This Be the Reason Your Diversity Initiative Has Not Succeeded?*, (Oct. 2008), <http://www.lawyerslifecoach.com/newsletter-archive/issue-52-october-2008>.

¹³⁸ See Cynthia Fuchs Epstein & Carroll Seron, *The Symbolic Meaning of Professional Time*, in LEGAL PROFESSIONS: WORK, STRUCTURES AND ORGANIZATION, 79-94 (Jerry Van Hoy ed., 2001).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See Kumra, *supra* note 136, at 2292.

¹⁴¹ Joan C. Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 FORDHAM L. REV. 2221, 2225 (2002).

work—such as mergers and acquisitions—there are examples of attorneys successfully working part-time.¹⁴² Nevertheless, it seems that on the whole, “too many organizations appear resigned to the idea that law is a 24/7 profession.”¹⁴³

Research Opportunity No. 7: Given the connection between time-based metrics and the stigmatization of part-time options, it would be useful to look more closely at the connection between part-time options and the billable hour. If part-time options are stigmatized within law firms because time takes on a symbolic currency, then is it even possible for the stigma to be eliminated while the billable hour is still in effect? Are part-time options doomed to be ineffectual in increasing gender equity at the senior level of the profession for this reason? Or, is there a way to keep the billable hour but remove the stigma, perhaps by focusing on the fact that time becomes a proxy for qualities which are harder to quantify? Future research in this area should explore how these part-time policies are situated within the broader law firm culture and business model.

V. Compensation of Women Lawyers

A. Compensation Generally

The recent NAWL survey revealed a clear gap in compensation between male and female lawyers at all levels of seniority, with female associates earning 93 percent, of counsel 91 percent, non-equity partners 96 percent and equity partners 80 percent, of their male counterparts’ salaries.¹⁴⁴ These figures are also likely to exclude bonuses, which would constitute a significant proportion of lawyers’ income and may also exhibit gender differences, particularly because they are increasingly based on subjective and ambiguous criteria.¹⁴⁵

Finding No. 11: Women lawyers receive lower compensation than their male counterparts at all levels due to non-objective criteria, contributing to women lawyers’ attrition.

The compensation received by women lawyers is often tied to a significant extent to their billable hours,¹⁴⁶ as a purportedly objective measure, and may also correspond to their (lower) billing rates.¹⁴⁷ Fuchs views this as an overall indication of the lower “dollar value that firms place on female attorneys’ work,”¹⁴⁸ a finding that may be echoed by Kay and Gorman’s findings with respect to the higher “rate of return” men experience on their billable hours.¹⁴⁹

As noted in Part IV.A above, there are a number of reasons why the use of billable hours as a performance metric and hence a determining factor in compensation may not be as objective as it appears. However, other compensation criteria may be even more “subjective,” allowing for

¹⁴² *Id.* at 2292.

¹⁴³ See Rhode & Ricca, *supra* note 106, at 2505.

¹⁴⁴ RIKLEEN, *supra* note 1, at 7.

¹⁴⁵ Epstein & Kolker, *supra* note 34, at 1189; BARBARA M. FLOM & STEPHANIE A. SCHARF, NAT’L ASS’N WOMEN LAWYERS, REPORT OF THE SIXTH ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 8 (October 2011).

¹⁴⁶ Fortney, *supra* note 85, at 277, 281-83; Fortney, *supra* note 81, at 172, 176; López, *supra* note 95, at 97-98; RHODE, *supra* note 77, at 14; FLOM & SCHARF, *supra* note 145, at 8.

¹⁴⁷ Fuchs, *supra* note 124.

¹⁴⁸ *Id.* See also Dinovitzer et al., *supra* note 95, at 847.

¹⁴⁹ Kay & Gorman, *supra* note 108, at 314-15.

greater discretion and leading to even greater gender disparities in pay.¹⁵⁰ Whatever the cause, the result is significantly lower levels of satisfaction with compensation, one of the reported causes of women lawyers' career changes (along with "their interest in an alternate lifestyle," consistent with the findings noted in Part IV.A above).¹⁵¹ Sterling and Reichman note that the impact of this failure to retain women lawyers for these reasons is "to move women away from more lucrative compensation and reinforce gendered expectations about commitment and competence."¹⁵²

B. The Impact of Firm Origination Credit Systems

Finding No. 12: Women's lower compensation (and therefore advancement) is tied to their lower levels of receipt of origination credit than their male colleagues.

A classic perception is that "[a] lawyer's ability to generate business is the single most determinative factor in whether a lawyer will become an equity partner."¹⁵³ But this statement needs refining. The ability to generate business does not necessarily coincide with receiving the *credit* for the generation of that business.¹⁵⁴ Only business development credit that is awarded can drive a successful practice, and research suggests that women are not receiving fair credit for the business they generate. As mentioned above, the typical female equity partner earns 80 percent of what a typical male equity partner earns,¹⁵⁵ and the NAWL study ties the origination credit issue tightly to the compensation gap:

To achieve gender parity in compensation, law firms must provide a credit origination system that: ensures rainmaking opportunities and pitch teams are inclusive of women; fairly allocates credit among teams; offers a process for resolving credit disputes among partners; removes decisions about the "inheritance" of client credit from individual partners; and develops a system that systematically involves clients, firm leadership, and the partners who service the work in credit succession decisions.¹⁵⁶

The origination credit issue has developed along with a monumental shift in law firms' approach to clients. Clients in the past belonged to "the firm" as a whole and were served by the most qualified lawyers in each practice area, as needed. Starting around the 1990s, there was a shift within firms; the power and brand of the firm declined, and became held by individual lawyers. The individual rainmaker lawyer profits from "their" clients under the new model, and clients are drawn by the reputations of individuals, rather than firms.¹⁵⁷ This shift has been necessarily accompanied by a legacy system for bequeathing of clients as older lawyers leave the firm. The issue of origination credit is thus relatively new, and was added to the NAWL survey for the first time in 2014. The significance of this shift cannot be understated. Most firm business comes from a core group of high value clients—by some estimates, 80% of business comes from 20%

¹⁵⁰ FLOM & SCHARF, *supra* note 145, at 7-8; RIKLEEN, *supra* note 1, at 7; Reichman & Sterling, *supra* note 98, at 70.

¹⁵¹ Reichman & Sterling, *supra* note 98, at 47-48.

¹⁵² *Id.* at 48-49.

¹⁵³ LINDA BRAY CHANOW, A.B.A., ACTIONS FOR ADVANCING WOMEN INTO LAW FIRM LEADERSHIP: REPORT OF THE NATIONAL ASSOCIATION OF WOMEN LAWYERS (National Leadership Summit, July 2008).

¹⁵⁴ See, e.g., *id.* at 18 (identifying fair credit attribution as key to the advancement of women lawyers).

¹⁵⁵ RIKLEEN, *supra* note 1, at 3.

¹⁵⁶ *Id.*

¹⁵⁷ See generally Galanter & Henderson, *supra* note 23.

of existing clients,¹⁵⁸ meaning that the origination credits are already held by firm partners. If individual lawyers hold the power to bequeath existing clients, then they hold the key to success at the firm.

Finding No. 13: Women lawyers are not receiving fair credit for the generation of business as a result of a number of structural and social barriers.

The NAWL survey asked firms how the next client relationship partner is chosen when the current relationship partner retires or leaves the firm.¹⁵⁹ Twenty-five percent of the firms responding used an “inheritance” model, in which an individual partner chooses who continues as the originating partner after their departure. In six percent of cases, the practice group chooses. The remaining models are not described in the NAWL’s report. The 2015 NAWL survey shows a wider gender gap in client origination credit over the prior year.

Research Opportunity No. 8: Further research into whether and how origination credit is used in firms would be useful. For example:

- what percentage of firms use origination credit overall?
- what are the different models for origination credit, other than the two described here, and is this changing?

Another study suggests that women are not being credited with the business they originate: “[e]ven when women reported originating similar amounts of business as their male peers, they still earned less most of the time. In 12 of 16 origination tiers, ranging from less than \$500,000 to more than \$10 million, men reported making more money than women even when they reported the same originations—in one case as much as \$1.1 million more.”¹⁶⁰

The billing credit phenomenon may be connected to other structural and social barriers for women in the law. First, many commentators interviewed for one study attribute “inflexible” billing credit structures as a major reason why women become stuck at the mid tier of non-equity partnership.¹⁶¹ Billing credits are often provided for origination of business, so women who act as “minders and grinders” rather than “finders” of clients will never have sufficient client origination credits to advance. The study does not address why origination credit systems disproportionately affect women (if they do), as opposed to impacting all non-equity partners.

Second, the inheritance of origination credit on an informal basis is closely related to networks within the firm. One researcher notes “that women are often excluded from the internal networks where male colleagues assist one another’s efforts and, in many cases, are bullied or otherwise intimidated by more senior male colleagues who aggressively pursue credit allocation.”¹⁶²

¹⁵⁸ CHANOW, *supra* note 153, at 19 (estimating that “[f]irms get 80 percent of their new business from 20 percent of existing clients”).

¹⁵⁹ RIKLEEN, *supra* note 1, at 8.

¹⁶⁰ Judy Friedman, *A Few Good Women*, AM. LAW. (May 28, 2015) (referencing a study by Major, Lindsey & Africa).

¹⁶¹ Linda Chiem, *Equity Partnership More Attainable for Women At 1-Tier Firms*, LAW 360 (April 22, 2015, 6:48 PM), <http://www.law360.com/articles/644249/equity-partnership-more-attainable-for-women-at-1-tier-firms>.

¹⁶² LAUREN STILLER RIKLEEN, A.B.A. PRESIDENTIAL TASK FORCE ON GENDER EQUITY & A.B.A. COMM’N ON WOMEN IN THE PROFESSION, CLOSING THE GAP: A ROAD MAP FOR ACHIEVING GENDER PAY EQUITY IN LAW FIRM PARTNER COMPENSATION 15 (2013) (referring to Eleanor M. Fox, *Being a Woman, Being a Lawyer and Being a Human Being: Women and Change*, 57 FORDHAM L. REV. 955 (1989)).

Although her example is hypothetical, Rikleen envisions the probably common scenario in which a senior partner feeds all of the work for a major client to one associate. But, upon promotion from associate to partner, the associate has the work revoked because the partner does not want potential competition for credits at the partnership level, even though this shift could be detrimental to the client. Such a revocation can be “devastating” for new partners, who are then left without the work they had as associates, and without the client origination credit for the clients for whom they most often work.¹⁶³ This type of scenario reinforces the more general perception of several members of the Hackathon Teams 3 and 4, who consider new (non-equity) partners to be a key area of sensitivity for the retention of women.¹⁶⁴

The origination credit issue may be one of representation in initial wins of client business as well. The NAWL survey suggests that the issue may be a lack of equal access to business development opportunities; for example, women spend time building pitch presentations, but are rarely afforded the opportunity to carry out the pitch with clients, where they gain real world experience and the potential to win origination credits.¹⁶⁵

Research Opportunity No. 9: More specific research on access to business development opportunities for women in law would be useful in this respect.

As discussed at the outset of this Part V.B, the fundamental shift in culture from “firm”-held to individualized clients laid the basis for the origination challenges facing women lawyers today. Firms that resist this cultural force within their structures, steering away from allowing the partners with the biggest books of business to treat their clients as proprietary, may lay better groundwork for origination credits to be fairly distributed or unimportant overall to success. Taking the centralized approach to client’s business also presents clear opportunities to better serve clients, who can access the best-skilled lawyer on a given matter, rather than always facing the high-value originating partner guarding their fiefdom.

VI. Evaluation and Promotion of Women Lawyers

A. The Nature of the Evaluation and Promotion Process

Finding No. 14: The subjective nature of the attorney evaluation process is exacerbated by the influence of stereotypes and dominant ideologies.

The evaluation process for lawyers is inherently subjective, making it fertile ground for gender bias and stereotypes to affect the advancement of women lawyers. The stereotypes faced by women lawyers, as noted in Parts 0, are often compounded by the subjective nature of performance evaluations, which are influenced by confirmation bias.¹⁶⁶ That is, partners and clients are more likely to recall information that confirms their biases and include that information in evaluations. For example, “attorneys who assume that working mothers are less committed tend to remember the times they left early, not the nights they stayed late.”¹⁶⁷ The effects of bias and stereotypes, and the subjective nature of the evaluation process, are likely to

¹⁶³ RIKLEEN, *supra* note 162.

¹⁶⁴ *Id.* at 15.

¹⁶⁵ CHANOW, *supra* note 153, at 18.

¹⁶⁶ Wald, *supra* note 3, at 112 (citing DEBORAH L. RHODE, A.B.A. COMM’N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA, WOMEN AND THE LEGAL PROFESSION 15 (2001)).

¹⁶⁷ *Id.* See generally *supra* Part 0.

be especially pronounced in law firms where little attention is given to evaluation and promotion until the partnership decision—which decision is, at most firms, shrouded in complete opacity.

Further, the model of “hypercompetitiveness” outlined in Part IV.A above, and the fundamental disconnect it causes between the chosen features of professional identity and ideology, and women lawyers in practice, seems to underlie much of the dynamic seen in the evaluation (as well as the advancement, or lack thereof) of women lawyers.

B. Substance of Evaluations

Research has found that in performance reviews, women are 2.4 times more likely than men to receive feedback referencing their team rather than individual accomplishments, and 2.5 times more likely to receive feedback about having an overly aggressive communication style. Men’s performance reviews, by contrast, were twice as likely to contain references to their technical expertise and “vision.”¹⁶⁸ Similarly, in a sample of 248 performance reviews from 28 (non-legal) companies, the reviews given to women were more likely to contain feedback in the form of criticism than the performance reviews of men (71% of women’s review contained negative feedback and only 2% of men’s). The term “abrasive” was used in 17 women’s reviews and was not used in the reviews of any men.¹⁶⁹ Interestingly, both studies found the gender of the reviewer did not have any relevance. Both of these studies looked at the technology industry rather than the legal profession.

Research Opportunity No. 10: Similar studies of legal performance reviews, if any, would assist in confirming the application of these findings to the legal industry.

Finding No. 15: Feedback received by women attorneys in performance evaluations negatively affects their perceptions of the attainability of partnership.

Evaluations also play a feedback role in encouraging candidates to reach for partnership. In a survey of lawyers at eight New York law firms, “many partners mention that positive evaluations encouraged them in their pursuit of partnership.”¹⁷⁰ Conversely, in the absence of such positive evaluations, the perception may be that partnership is not attainable for women. The small numbers of female partners in many firms reinforces this perception. The result is that women who “voluntarily” leave firms may thus be responding to the message that partnership is unavailable and so “tailor their aspirations to what they believe is available to them.”¹⁷¹

C. Promotion to Partnership under Two-Tier and One-Tier Partnerships

Finding No. 16: One-tier partnerships tend to have a greater percentage of women equity partners than two-tier or multi-tier partnerships, which may be influenced by the role played by non-equity partnership in a firm.

As noted in Part II, the legal profession in the U.S. has seen a relatively recent shift from single tier partnership structures to two-tier or multi-tier firm structures, in which firms have a non-

¹⁶⁸ Shana Lebowitz, *Stanford University Researchers Analyzed The Language In 125 Performance Reviews From A Tech Company And Found Something Disturbing*, BUS. INSIDER (Oct. 1, 2015, 5:15 PM), <http://www.businessinsider.com/gendered-language-in-performance-reviews-2015-10>.

¹⁶⁹ Kieran Snyder, *The Abrasiveness Trap: High-Achieving Men and Women and Described Differently in Reviews*, FORTUNE (Aug. 26, 2014, 5:00 AM), <http://fortune.com/2014/08/26/performance-review-gender-bias>.

¹⁷⁰ Fuchs Epstein et al., *supra* note 9, at 362.

¹⁷¹ *Id.* at 299.

equity partnership level. A recent study of 308 U.S. law firms found a significant difference in the percentage of female partners at two-tier firms and one-tier firms.¹⁷² Almost 29% of non-equity partners were women (i.e. those at two-tier firms), while total equity partners were approximately 17% women.¹⁷³ NAWL's 2015 data similarly indicated that there are 28% women non-equity partners and 18% equity partners, which has changed in each case by approximately 2% since the 2006 comparator data.¹⁷⁴ Yet another study identifies a trend of growth in non-equity partnership of women between 2010-2014.¹⁷⁵

Some authors argue that women have more success in one-tier partnership firms than in two-tier or multi-tier firms.¹⁷⁶ Others, such as authors Epstein and Kolker, point to firm culture as more important than structure, but offer only anecdotal support from the experience of women at Wilmer, Cutler, Pickering, Hale, and Dorr (now Wilmer Hale), which had a higher than average percentage of female partners. One of the more compelling arguments on the role of the non-equity partnership tier in advancement of women is that it depends on whether it is used as a “parking lot” or a “stepping stone.”¹⁷⁷

The parking lot narrative describes the non-equity partnership stage as a sort of limbo, where women are beholden to billable hour targets but unable to sufficiently develop business to make the leap to partnership. The parking lot narrative, in casting non-equity partnership as a negative, tends to disregard the potential that women may choose a role with more flexibility in hours or less downside risk for reasons of work/life balance and that non-equity partnership could offer this.

The stepping stone narrative casts non-equity partnership as a necessary and useful step on the way to full-fledged equity partnership. It offers the chance to build a book of business before taking the leap to partnership, with less of the downside risk of investment of equity into the firm.¹⁷⁸ From the perspective of the firms, it seems possible that non-equity partnership could provide a training or testing ground that could conceivably lead to better success for those individuals who go on to become equity partners. So while two-tier partnership may not be an “advancement” win, it could ultimately be a “retention” win. This theory is not addressed in the available research. Also, non-equity partnership seems to be one area where near-parity has been reached in salaries, although data reported was based on a small number of respondents.¹⁷⁹

Similar questions and arguments have been raised with respect to women's higher representation in other non-equity roles such as “of counsel.” In its 2015 figures, the NAWL notes the percentage of women designated as “of counsel” has increased significantly since 2006. The

¹⁷² Chiem, *supra* note 161. However, note the low response rate on the gender split of equity partners—47 of 73 firms overall responded.

¹⁷³ Overall, the study found a slightly higher blended rate of partnership across firms with almost 22% partners being women when both equity and non-equity partnership are considered together.

¹⁷⁴ RIKLEEN, *supra* note 1, at 2.

¹⁷⁵ Triedman, *supra* note 160 (“The absolute number of women non-equity partners reported by The Am Law 200 surged by 9.5 percent between 2011 and 2014, while the number of female equity partners remained flat.”).

¹⁷⁶ On women being promoted less frequently to equity partnership in 2-tier firms, *see*: Vivia Chen, *At Big Firms, Equity Gender Gap Continues*, NAT'L L.J. (July 23, 2012).

¹⁷⁷ Chiem, *supra* note 161.

¹⁷⁸ *Id.*

¹⁷⁹ RIKLEEN, *supra* note 1, at 7, 9 (“the typical female non-equity partner earns 96 percent of the typical male non-equity partner.”).

NAWL notes that it “fully supports the availability of alternative career paths for men and women, and recognizes that the of counsel designation can be a beneficial way to retain lawyers who are not seeking partnership. The difficulty arises, however, when women are slotted in these roles less by choice than by the impact of unconscious biases, leading to a limiting of career options.”¹⁸⁰

It is difficult to reconcile literature criticizing the tournament model as “bad” for women with the parking lot narratives regarding two-tier structure systems. Under a single-tier partnership model, which is largely synonymous with the tournament model, career progression is either up or out. Commentators often note that “[w]omen have fared poorly under the “up and out” system.”¹⁸¹ Yet when more flexibility in the form of non-equity tiers is added to soften the tournament-like nature of progression in law firms, this too is being labeled by some researchers as “bad for women.” Criticizing both suggests that either the structure is not the root of the problem, or that if the “parking lot” narrative is correct, some other, more novel structure is required.

Research Opportunity No. 11: It is not clear if women are being slotted into non-equity partnership or of counsel roles, or are freely choosing them. To test which hypothesis is correct, it would be helpful to have data on how long women stay on average in the non-equity partnership tier, their ambitions for equity partnership and how many consider that they have chosen non-equity partnership freely.

VII. Firm Leadership and Committee Representation

Finding No. 17: Women are significantly underrepresented in positions of leadership (particularly on compensation committees) at large law firms.

The power and decision-making structures and positions in law firms are overwhelmingly male. Only 5% of managing partners at large law firms are women.¹⁸² Women are underrepresented on the top governance committees in U.S. law firms. The typical firm has two women and eight men on their highest U.S.-based governance committee, or about 22% (up from 16% in 2006).¹⁸³ A 2015 survey found 35 percent of the respondents had zero or one woman member, 41 percent had 2 or 3 women, and only 24 percent had four or more women on their highest governance committee.¹⁸⁴ The result of this imbalance may be significant—a study by the New York City Bar Association found that having at least three women on the management committee correlates with higher representation of women at nearly all levels of the firm (although the study is clear to note it could not measure causality).¹⁸⁵

In particular, women are under-represented on law firm compensation committees. Research suggests firms with more women on the compensation committees have much smaller gaps between the pay of men and women equity partners. In the 12 firms that reported having two or fewer female members on the compensation committee, the typical female equity partner earns

¹⁸⁰ *Id.* at 4.

¹⁸¹ Fuchs Epstein et al., *supra* note 9, at 358.

¹⁸² RHODE, *supra* note 166.

¹⁸³ RIKLEEN, *supra* note 1, at 3, 11.

¹⁸⁴ RIKLEEN, *supra* note 1, at 10.

¹⁸⁵ LISA D’ANNOLFO LEVEY & AMY MCPHERSON, NEW YORK CITY BAR ASS’N, 2011 DIVERSITY BENCHMARKING STUDY: A REPORT TO SIGNATORY LAW FIRMS 8 (October 2012).

77 percent of that earned by a typical male equity partner.¹⁸⁶ In the 18 firms that reported three or more women on the compensation committee, the typical female equity partner earns 87 percent of that earned by a typical male equity partner.¹⁸⁷ This study does not address causality and the small sample size may make the findings somewhat anecdotal.

Research Opportunity No. 12: It would be useful to look into these findings further. For example, are there other studies with similar findings? How do the recent initiatives regarding the representation of women on boards of directors inform this issue?

VIII. Mentorship

A. The Importance of Mentorship

Finding No. 18: As has been consistently demonstrated, mentoring relationships are important to the advancement of women lawyers.

Mentorship is frequently identified as a key to success in legal practice,¹⁸⁸ just as it is for many other professions. Earlier in the dialogue on women in the law, inadequate access to mentoring was identified as significant in women's inability to advance in law firms,¹⁸⁹ but today, almost all firms, at least on paper, have mentoring programs.¹⁹⁰

Research Opportunity No. 13: It would be useful to look further into the impacts of mentoring programs offered by law firms, and the reasons why they have succeeded or failed to do so. For example:

- For how long has it been true that mentoring programs have been almost universally offered?
- If the existence of mentoring is widespread to the point of being standardized, yet the advancement of women has scarcely improved in the time over which this occurred, is mentoring being implemented in an ineffective way?
- Alternatively, and more fundamentally, was mentoring mis-identified as a key limitation to success of women in the profession?

Ramaswami notes that “high-quality mentoring provides perceived legitimacy and access to status-enhancing experiences,” and identifies that a lack of mentoring may be an important cause of gender equity problems in the legal profession.¹⁹¹ In the same study, she canvases literature through 2010 on mentoring in the law and gender, but notes that little research has specifically explored the importance of mentoring for female lawyers.¹⁹² Much of the literature on mentorship starts from the presumption that mentoring assists in advancement,¹⁹³ or imports the

¹⁸⁶ RIKLEEN, *supra* note 1, at 3.

¹⁸⁷ *Id.*

¹⁸⁸ Wald, *supra* note 98, at 2531.

¹⁸⁹ Rhode, *supra* note 7, at 1001.

¹⁹⁰ CHANOW, *supra* note 153, at 10 (reporting that 90 percent of U.S. law firms have mentoring programs).

¹⁹¹ Aarti Ramaswami et al., *The Interactive Effects of Gender and Mentoring on Career Attainment: Making the Case for Female Lawyers*, 37 J. CAREER DEV. 692, 694 (2010).

¹⁹² *Id.*

¹⁹³ Fiona M. Kay et al., *Principals in Practice: The Importance of Mentorship in the Early Stages of Career Development*, 31 Law & Pol'y 69 (2009) (“Mentoring relationships are critical to launch successful careers in law and, at a minimum, necessary to adequate career development in law.”).

conclusions from non-legal contexts to draw the same conclusion for law.¹⁹⁴ Considering the emphasis placed on mentorship in literature, it is surprisingly lacking in empirical data supporting its effectiveness, but this may well be attributable to the nature of mentoring itself as an organic and highly personal experience.

Ramaswami finds studies support the link between mentoring and career success; mentoring has been associated with higher earnings, greater job satisfaction and greater likelihood of obtaining partner status. The quality and number of mentoring relationships has been found to correlate with work satisfaction, partner status, and intention to remain in the firm.¹⁹⁵ Although such benefits of mentoring are discussed for both genders, some research suggests mentoring is of even greater importance to the success of women. Female lawyers with senior male mentors had higher compensation, higher career progress satisfaction, and were more likely to be partners or senior executives in comparison with male lawyers with senior male mentors.¹⁹⁶

Research also suggests feedback between mentoring and other challenge areas identified here, such as business development and origination credit. An A.B.A. study identified that new female partners and associates reported “obstacles to business development because they lack training, mentoring, and business development resources.”¹⁹⁷ This included gender bias in assignments and exclusion or limitations on their participation in pitch groups and team selling opportunities. Similarly, an NAWL report identifies the same issues and encourages the measurement of number of women on pitch teams and the number of women on high-profile, high-revenue representation teams.¹⁹⁸ Since skills like pitching clients are required for business development, this can limit the long term potential success of women lawyers who are excluded.¹⁹⁹

B. Formal vs. Informal Mentorship

Finding No. 19: Women have less access to informal mentorship, which is often more successful and beneficial than formal programs.

Several studies have found that male and female lawyers are equally likely to have mentors, and some have found it more likely for females to have mentors.²⁰⁰ However, research suggests that women experience more difficulty than men in finding *informal* mentors.²⁰¹ This long-recognized problem has led to the institution of formalized mentoring programs at almost all firms, as noted above. This leaves the significant question as to whether assigned, formalized mentors can provide the same career value as organic, informal mentors. As Cynthia Fuchs Epstein observes, “the bonds that develop in mentoring relationships cannot be arranged or

¹⁹⁴ See, e.g., 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, 100 (2009).

¹⁹⁵ Ramaswami et al, *supra* note 191, at 694 (summarizing the findings in existing literature through to 2010).

¹⁹⁶ *Id.* (“in order for women to become good business developers, they must have equal access to business development opportunities at all stages of their careers. One participant observed, ‘Unless women are part of the client team and given those opportunities, the rest of it isn’t going to matter.’”)

¹⁹⁷ HARRY KESHET, KESHET CONSULTING, WOMEN ATTORNEYS BUSINESS DEVELOPMENT STUDY 37 (2007).

¹⁹⁸ CHANOW, *supra* note 153, at 19.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* (canvassing existing literature).

²⁰¹ Wald, *supra* note 3, at 112 (“women lawyers often experience difficulties in finding partner and senior associate mentors, who play an important role in advancing a junior associate’s career. Mentors provide subject-matter expertise and act as a reference source, offer informal insight and analysis of the firm’s politics and inner workings, and, closer to promotion time, provide necessary support and advocacy on behalf of the candidate.”).

instituted through programs.”²⁰² Anecdotally, informal mentoring has been identified as a key factor for firms that have high levels of female partnership. Wilmer Hale is one of the twenty firms with the highest percentage of women equity partners—at the time of the relevant article, 23.2 percent of its equity partners were women—and the women attribute this to informal cultural factors (“informal mentoring and a general appreciation for and acceptance of women rather than formal policies and programs”).²⁰³

Research Opportunity No. 14: Further research into informal mentoring more specifically would be useful in this respect. For example, what does the research suggest are effective means of encouraging informal mentorship to develop? Is informal mentoring becoming less common because of widespread changes in the legal profession, like the obsession with the billable hour and the individualization of practice, such that there is less time and fewer incentives for senior lawyers to invest in junior talent?²⁰⁴

C. Who Are the Mentors? Who Should They Be?

Finding No. 20: Women lawyers at all levels may be better served by ensuring that associates receive full-fledged, high-effort mentoring by powerful partners.

In considering *who* mentors should be, older survey research found that associates often preferred mentors of the same gender because it “provides the foundation for a greater sense of identification and mutual understanding.”²⁰⁵ The sense was this foundation made it easier to form organic connections, and that some of the issues were unique to women and female mentors were more attuned to those issues. However, the same study found that a frequently identified drawback to having a female mentor was that “women tend to be less powerful than men in the firms, thus limiting their effectiveness in sponsoring associates for partnership.”²⁰⁶ When women did recommend their female mentees for partnership, that recommendation was often discounted because it was perceived as being simply because they were looking out for other women.²⁰⁷ There were also challenges raised regarding the lack of availability of female partners to act as mentors.²⁰⁸

Wald conceptualizes the exchange between firms and associates as one of capital, in which firms offer “three types of capital: economic capital—a salary and deferred compensation in the form of promotion to the partnership; cultural capital—training; and social capital—mentoring.”²⁰⁹ The inability of women lawyers within the firm to access the social capital of mentoring means they are being short-changed in the exchange of capital struck with the firm, losing out on the benefit to her of the powerful network of the firm and its clients.²¹⁰ Female or minority associates

²⁰² Fuchs Epstein et al., *supra* note 9, at 344.

²⁰³ Epstein & Kolker, *supra* note 34, at 1181.

²⁰⁴ Wald, *supra* note 3, at 112 (“Increased intrafirm competition and a shift from the traditional ‘[c]lients belonging to the firm’ perspective to the notion that clients belonged to rainmaking partners in the 1990s and 2000s made mentorship and business networks even more important to the development of ‘partner’ skills and correspondingly made lack of mentorship and limited access to business networks even more devastating to women lawyers.”). See also *supra* Parts II IV.

²⁰⁵ Fuchs Epstein et al., *supra* note 9, at 351.

²⁰⁶ *Id.* at 353.

²⁰⁷ *Id.* at 354.

²⁰⁸ *Id.* at 353.

²⁰⁹ Wald, *supra* note 98, at 2529.

²¹⁰ *Id.* at 2531.

tend to be matched with like mentors based on assumed affinity. But this has two effects: (a) it fails to compensate for the lesser social capital of the mentee; and (b) it burdens female and minority mentors, undermining their own ability to spend time building the social capital they lack. He argues instead for mentoring that matches that make up for social capital, wherein the most powerful partners are paired with female or minority mentees to help fill the gap in their social capital in the firm.²¹¹

The research on mentoring often identifies perception problems as a barrier to men mentoring younger women. An older ABA study identifies that “90 percent of white male partners fear that a mentoring relationship with a woman will be misperceived as improper.”²¹² Worse, one author notes that perceived inappropriate personal ties between a male sponsor and a female associate led to his recommendation of her for partner being discounted.²¹³

Given that only 18 percent of equity partners are female, on average, and there are almost twice that number of female associates, the hesitancy of men to serve as mentors leaves a mentoring disconnect. Women partners should not be expected to take on twice the number of mentees as their male peers.²¹⁴ Although not specific to the legal profession, Schipani reviews literature on the downsides of mentorship, and finds senior women reported feeling discounted or overburdened as mentors, feeling afraid that mentoring will be risky to their careers, or that mentoring will take too much time, while junior women found senior women competitive with them or unreceptive.²¹⁵

There has been a recent shift from the narrative of “mentoring” as key to the narrative of “sponsorship” as key.²¹⁶ In a Catalyst study of MBA graduates in the U.S. and abroad,²¹⁷ high-potential women who adopted the known “advancement strategies” were found to have *more* mentors than men, yet promotion and pay gaps persisted. The study indicated that the mentors of men tended to be more senior, which meant they were more likely to receive “sponsorship.” More active than the traditional “mentor”, Catalyst defines a sponsor as “someone with clout who actively advocates on your behalf at the decision-making table, putting your name forward for promotions and highly visible opportunities.”²¹⁸ An alternative interpretation may be that

²¹¹ *Id.* at 2550.

²¹² CHANOW, *supra* note 153, at 11; *see also* Rhode, *supra* note 7, at 1007; Fuchs Epstein et al., *supra* note 9, at 353 (referencing that survey respondents identified the “problem of ‘appearances’ in being connected to male mentors”).

²¹³ Fuchs Epstein et al., *supra* note 9, at 348.

²¹⁴ *See* Rhode, *supra* note 7, at 1007 (noting several studies and literature pieces on the overcommitment of women leaders, leading to an inability to assist all the juniors seeking their attention).

²¹⁵ Schipani et al, *supra* note 194, at 115 (citing Victoria A. Parker & Kathy E. Kram, *Women Mentoring Women: Creating Conditions for Connection*, 36 BUS. HORIZONS 42 (1993)).

²¹⁶ *See, e.g.*, Susan Letterman White, *Where Mentoring Ends and Sponsorship Begins*, WOMAN ADVOC., Winter 2012, at 23.

²¹⁷ Christine Silva & Nancy Carter, *New Research Busts Myths About the Gender Gap*, HARVARD BUS. REV. (Oct. 2011), <https://hbr.org/2011/10/new-research-busts-myths-about>; NANCY M. CARTER & CHRISTINE SILVA, CATALYST, THE MYTH OF THE IDEAL WORKER: DOES DOING ALL THE RIGHT THINGS REALLY GET WOMEN AHEAD? (2011) (this study involved 3,345 MBAs, each of whom stayed on a “traditional” career path following graduation from a full-time MBA program. The “advancement strategies” included many identified behaviors such as actively seeking high-profile assignments, networking with influential leaders, communicating openly and directly about their career aspirations). *See also* NANCY M. CARTER & CHRISTINE SILVA, CATALYST, MENTORING: NECESSARY BUT INSUFFICIENT FOR ADVANCEMENT (2010).

²¹⁸ Silva & Carter, *supra* note 217.

mentoring has become overly formalistic and is not truly embraced as an organic approach to mentoring (that is, formalistic mentoring is seen as a “check the box” exercise). The emphasis on “sponsorship” may simply be a rephrasing to the effect that mentorship has to be full-fledged and high-effort to be effective, and in fact early literature on mentorship identifies five roles of mentors: sponsorship, coaching, protection, exposure to higher power in the organization, and challenging work assignments.²¹⁹ Schipani surveyed non-law mentorship studies and finds they suggest overall that those individuals engaged in a mentoring relationship achieved better compensation and promotion for both men and women. The formality or non-formality of the relationship did not impact these outcomes, but “overall” benefits, such as positive attitudes and psychosocial benefits were greater from informal mentoring.²²⁰

IX. Formal and Informal Networks

A. Informal Networks and Business Development

Finding No. 21: Women lawyers are also likely to be disadvantaged in their advancement due to the lack of availability of informal networks and, therefore, access to rainmaking opportunities.

From a broad organizational behavior perspective, networks—both formal and informal—generally serve as a basis for resource accumulation during careers.²²¹ Further, research shows that those who have relationships established at the outset of their careers should be able to form more extensive networks post entry than those without an initial structural advantage.²²² For these reasons, networks are generally recognized as an excellent tool for career development.

However, one survey of eight New York law firms found that both men and women perceived women to be disadvantaged in becoming rainmaker partners because fewer of their friends were likely to become clients, because they have less time to devote to client development, and because they are not part of traditional business-generating networks.²²³ Another study finds that while engaging in networking behavior might be viewed as a promising career management strategy for women, “networking behaviors are not as advantageous for women as for men,” although the precise reasons for this finding were not clear from the available data.²²⁴

B. Affiliation Networks

Finding No. 22: Although affiliation networks may increase women lawyers’ sense of community, they may not be assisting in their advancement in any meaningful way.

In contrast to the availability of informal networks, affinity or affiliation groups for women are common, although data on their effectiveness is mixed.²²⁵ In the context of large law firms, the

²¹⁹ KATHY E. KRAM, MENTORING AT WORK: DEVELOPMENTAL RELATIONSHIPS IN ORGANIZATIONAL LIFE (1985).; Fuchs Epstein et al., *supra* note 9, at 345 (referring to the “mentor advocate” and noting “[p]erhaps most importantly, mentors can serve as advocates for their junior colleagues. In this role, senior lawyers offer sponsorship by recommending protégés . . .”)

²²⁰ Schipani et al, *supra* note 194, at 111-112.

²²¹ Adina D. Sterling, *Preentry Contacts and the Generation of Nascent Networks in Organizations*, 26 ORG. SCI. 650 (2015).

²²² *Id.*

²²³ Fuchs Epstein et al., *supra* note 9, at 297.

²²⁴ Monica L. Forret & Thomas W. Dougherty, *Networking Behaviors and Career Outcomes: Differences for Men and Women?*, 25 J. ORG. BEHAV. 419, 430-32 (2004).

²²⁵ See Rhode & Ricca, *supra* note 106.

goal of formalized affinity groups is to provide an institutional mechanism for harnessing the resource accumulation potential of networks. To that end, there is evidence that affinity groups have achieved some degree of success. Generally, affiliation networks in firms have been able to organize events, provide business development skills and opportunities, and engage in dialogue with firm members and others in the community.²²⁶ There is also research that indicates that affinity networks have been able to provide “useful advice, role models, contacts, and development of informal mentoring relationships.”²²⁷ A survey of managing partners in large U.S. firms conducted by Deborah L. Rhode and Lucy Buford Ricca confirms that high-level partners generally agree with the findings of this research.²²⁸ Lastly, as an additional benefit, law firm affinity networks can also generate useful reform proposals by bringing lawyers together around common interests.²²⁹

However, several studies indicate that affinity groups may have relatively little positive impact, and can be harmful when viewed in the context of the broader culture of law firms. Citing the only large-scale study on the topic, Rhode and Ricca note that “[affiliation] 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.’”²³⁰ The negative effects may even be stronger if one considers the cultural ramifications of these networks. Pearce et al. explain in their study how affinity groups risk affirming the status and identity of women attorneys as outsiders within the firm:

It is not just that minority lawyers may be encouraged to join an affinity group, whereas white male partners are not similarly encouraged to join an affinity group (which, importantly, does not exist). Rather, it is that white male attorneys in the alternative may join subject-matter bar associations that allow them to enhance their skills . . . or simply use the time to bill more hours and get ahead of their counterparts.²³¹

Thus, the impact of affinity networks on law firm culture is two-fold. First, these networks affirm the “othering” of women and minorities, which reaffirms institutional stereotypes. Second, these networks give women less time to engage in activities that could be more conducive to advancement within the firm. Commentary from firm leaders gathered in Rhode and Ricca’s survey corroborates this interpretation, with one firm chair stating that, “I’ve always believed [that] separating people rather than bringing them together is not the way to go.”²³² In sum, it seems that affinity networks are helpful in generating a sense of community, but that these networks separate women from their male peers, and may have negative cultural implications that hinder women’s professional development in large law firms.

Research Opportunity No. 15: It would be interesting to probe further into whether law firms’ reliance on affinity networks is useful or counterproductive. Existing research indicates that these networks provide some sense of community, but that they have not helped to advance

²²⁶ Kumra, *supra* note 136.

²²⁷ See Rhode & Ricca, *supra* note 106.

²²⁸ *Id.*

²²⁹ See Bob Yates, *Women and Minorities: The Retention Challenge for Law Firms*, CHI. LAW., Feb. 2007.

²³⁰ Frank Dobbin & Alexandra Kalev, *The Architecture of Inclusion: Evidence from Corporate Diversity Programs*, 30 HARV. J.L. & GENDER 279, 293-94 (2007), in Rhode & Ricca, *supra* note 106, at 2504.

²³¹ See Pearce et al., *supra* note 11, at 2418.

²³² See Rhode & Ricca, *supra* note 106, at 2495.

women's professional development outside of providing a vehicle for developing relationships with other women. Is this because there has been only one large-scale study to date on the topic? Are these networks in fact having zero impact on women's retention and promotion within law firms? If the answer is the latter, and affinity networks are having no impact, we then need to ask whether it is possible to replace affinity networks with an alternate mechanism that provides a sense of community, but also moves the needle when it comes to women's professional development in law firms.

X. The Impact of Diversity Committees

Finding No. 23: The data on the impact of diversity committees is mixed, but indicates that their effect on the retention and advancement of women and minority lawyers is minimal.

Diversity committees are prevalent in virtually all large law firms, but data on their effectiveness is mixed. Pearce et al. explain in their recent study that “[t]he diversity committee, usually a small group of partners and associates, has nominal responsibility for examining hiring, retention, and promotion practices, as well as the culture of the firm.”²³³ The study further indicates that, with regard to entry-level hiring, firms usually have a strong record of diversity largely because of the strength of these diversity committees.²³⁴ This is in part because firms have been structurally open to hiring diverse professionals, and have been receptive to diversity committee efforts to recruit diverse entry-level classes of associates.²³⁵ However, “when it comes to retention, promotion, and the culture of the firm, diversity committees tend to have nonspecific goals and little to no power.”²³⁶ This may be because these committees, and diversity initiatives in general, rarely specify numerical targets.²³⁷ The result is that diversity committees have been ineffectual in bringing about changes in women's retention and promotion.

How exactly are the diversity committees trying to effect change, and what success do they have? Inevitably firms vary, but Pearce et al. maintain that in many firms the committees are often “reduced to collecting and disseminating diversity materials, hosting diversity events that tend to celebrate rather than scrutinize the firm's commitment to it, and sponsoring diversity trainings that may do more harm than good.”²³⁸ Others, such as María Pabón López, point out that, while female attorneys serve on diversity committees and committees focused on associates, male attorneys tend to serve on committees related to the leadership and governance of the firm.²³⁹ This phenomenon, where women are absent from important leadership committees such as compensation and firm governance, has been termed a “second glass ceiling.”²⁴⁰

Unfortunately, this inequality in powerful firm committees further perpetuates the “othering” of women by sending the message that: (a) gender equity is a problem for women only; and (b) gender equity does not warrant the attention of the male firm partners, who are otherwise engaged in firm leadership.²⁴¹ For those reasons, both López and Pearce et al. go on to conclude

²³³ See Pearce et al., *supra* note 11, at 2416.

²³⁴ *Id.*

²³⁵ *Id.* at 2409.

²³⁶ *Id.*

²³⁷ See Rhode & Ricca, *supra* note 106, at 2503.

²³⁸ See Pearce et al., *supra* note 11, at 2417.

²³⁹ López, *supra* note 95, at 71.

²⁴⁰ A.B.A. COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW 2005 1 (2005).

²⁴¹ *Id.*

that, because of the diversity committees, women firm partners have less time to become involved in the more powerful firm committees, which unintentionally validates deep-seated institutional stereotypes about male and female roles in the firm.²⁴²

Research Opportunity No. 16: It would be helpful to know more about how diversity committees affect back-end hiring and retention. It seems clear from existing research that such committees have played a role in helping the front-end pipeline issue,²⁴³ but what is unclear is why they are failing when it comes to retention and promotion decisions, and culture of the firm. Pearce et al. argue that it is because diversity committees tend to have nonspecific goals and little to no power, but what do others in the industry observe? Do all of these committees have nonspecific goals and little to no power, or are there firms in which these committees have more clearly defined goals? Is there a correlation between clearly delineated goals and better retention and promotion of women?

XI. Further Opportunities for Research

In addition to the opportunities for research set out throughout this document, there are a number of other areas that could be productively explored through further research. These include:

- **Research Opportunity No. 17:** Comparative research on international law firms to see if they have higher numbers of women in leadership roles may be illustrative. For example, if higher numbers are found, this research could investigate what different structures these firms possess that result in higher numbers of women in leadership roles.
- **Research Opportunity No. 18:** How satisfied are women with the substance of the work they are assigned at various stages at law firms, and how does this impact their retention and advancement? One author explains, “unlike their white and male counterparts, minority women have fewer opportunities to travel for work, to handle matters entirely on their own, and to formulate strategy. Rather, they report that they are assigned to do mainly routine tasks.”²⁴⁴ This was reinforced by an empirical study that found women bill under codes for more menial tasks, while men are more likely to bill for strategy/analysis.²⁴⁵
- **Research Opportunity No. 19:** Further research into mid-career attrition may be beneficial, as it has been identified by Hackathon participants as a key issue in the legal profession. One study found that “[a]mong junior or non-equity partners . . . a third of the women leave firm practice, compared to only 15% of the men.”²⁴⁶ Several of the Hackathon Team 3 and 4 participants voiced particular concern over young female partners leaving. The perception is that many initiatives at retention are strongly focused on female associates, while the young female partners are left to struggle once they have “made it.” One article suggests that after ambitious women make equity partner, there “isn't a clear path to advancement beyond a very thin layer of management,” while business and government positions offer room for advancement that leads to departure from the firm.²⁴⁷

²⁴² See Pearce et al., *supra* note 11, at 2417.

²⁴³ See Pearce et al., *supra* note 11, at 2416.

²⁴⁴ Epstein & Kolker, *supra* note 34 (citing GITA Z. WILDER, NALP & THE NALP FOUND. FOR L. CAREER RES. & EDUC., ARE MINORITY WOMEN LAWYERS LEAVING THEIR JOBS? 10 (2008)).

²⁴⁵ SILVERSTEIN, *supra* note 95.

²⁴⁶ MONA HARRINGTON & HELEN HSI, WOMEN LAWYERS AND OBSTACLES TO LEADERSHIP 8 (2007).

²⁴⁷ Triedman, *supra* note 160.

- **Research Opportunity No. 20:** More current research on the attitudes of women towards partnership would be useful in obtaining a more up-to-date view of female associates' attitudes. In a study that dates back to 1995, when surveyed on their aspirations of partnership "women associates were more likely to express negative feelings regarding partnership, citing the conflict between firm and family responsibilities."²⁴⁸ Often, the concerns about having and raising children "coincide with the period when associates are being most closely scrutinized for partnership."²⁴⁹ Have the attitudes changed among today's associates?

²⁴⁸ Fuchs Epstein et al., *supra* note 9, at 359.

²⁴⁹ *Id.* at 361.

Conclusion and Recommendations

XII. Addressing the Problems and Implementing Robust Solutions

As the complex and multifaceted nature of the issues outlined above makes clear, there is no one “silver bullet” that will definitively ensure the ongoing retention and promotion of women in elite national law firms.

Given the many structural, social and cultural factors at play, both internal and external to any one law firm—and many of which may operate subconsciously or unconsciously—this White Paper recommends a similarly multifaceted approach. The recommendations set out in this White Paper focus on addressing the most pressing problems described herein through specific, actionable steps, but keeping in mind the impact of the broader cultural and sociological factors that underlie the key problems being addressed.

XIII. Recommendations

A. Ensuring Firm Leadership and Accountability

Recommendation No. 1: Ensure that firm leaders are truly committed to addressing the problem of the advancement and retention of women in law firms.

The example set by firm leadership can make a real difference not just in modelling behaviors and attitudes that value gender equity, but in ensuring that real actions are taken to achieve it. A diversity program on paper alone, targeted at good PR or luring new recruits, is a world away from leadership who value diversity in their everyday operations and show that value in practice.²⁵⁰ Studies in the business context show a significant disconnect between leaders asserting gender diversity as a priority and the perception at lower levels of the organization that diversity is truly a priority.²⁵¹ As one Deloitte publication notes, “[r]esearch consistently demonstrates that visible leadership commitment, behaviors and symbols speak loudly as employees look towards leaders to decipher what the organization really stands for.”²⁵²

How can this commitment be identified and demonstrated? Two examples of firms that have implemented this commitment in practice (both inside and outside the legal industry) are illustrative. The French law firm TAJ achieved a 50/50 gender balance through the personal initiative of Gianmarco Monsellato, who was and remains the head of the firm. Monsellato tackled the problem of gender equity in law firms personally, and insisted on gender parity from the outset. For example, he personally ensured that the best assignments were evenly awarded to

²⁵⁰ See generally Rhode & Ricca, *supra* note 106, at 2502 (“What also does not work... 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.”).

²⁵¹ One study found almost three quarters of companies asserted that their CEO is making gender diversity a priority, while at the same time less than half of workers believed it was a priority for the CEO and only one-third thought their direct manager considered it a priority. MCKINSEY & CO., WOMEN IN THE WORKPLACE (2015), http://womenintheworkplace.com/ui/pdfs/Women_in_the_Workplace_2015.pdf?v=5

²⁵² See DELOITTE, INCLUSIVE LEADERSHIP: WILL A HUG DO? 5 (March 2012), available at http://www.demos.org/sites/default/files/publications/Inclusive%20leadership_Will%20a%20hug%20do_FINAL%20March%202012.pdf.

men and women.²⁵³ Similarly, at accounting firm Deloitte, which has achieved parity in its rates of promotion of men and women,²⁵⁴ the Board and Executive ensure a continued focus on making diversity and inclusion a key pillar of the cultural values of the firm, making it “a way of life” for the firm,²⁵⁵ and demonstrate these values through their actions.

In practice, a commitment to gender equity could be shown through actions both large and small. Monsellatto at TAJ “tracked promotions and compensation to ensure parity. If there was a gap, he asked why. He put his best female lawyers on some of his toughest cases. When clients objected, he personally called them up and asked them to give the lawyer three months to prove herself.”²⁵⁶ Firm leadership could also make seeking to eliminate the stigma around part-time or flexible work schedules a priority, in order to make them real options that do not label participants as “non-partner track.”²⁵⁷ This could include a commitment to pay employees in a manner that is proportionate to amount and value of work actually done (rather than discounting pay for part-time employees commensurate with a part-time schedule, but allowing hours to “creep up” without acknowledgement). Firm leadership could prioritize developing a track record of promoting “on schedule” for those who take advantage of flexible work arrangements but whose work and commitment to the firm clearly merit promotion.²⁵⁸ Firm leaders could also help to instill broader cultural acceptance of these arrangements through their own personal example, akin to the example set by Mark Zuckerberg’s much-publicized parental leave.²⁵⁹

Inclusive behavior can also involve smaller and more subtle shifts in communication to indicate the ways in which firms value their employees. Deloitte describes how leaders acknowledge their lives outside the workplace in communications with employees, and also a shift in how participants at meetings are introduced, focusing on their values, attributes and passions, rather than their seniority.²⁶⁰ The ultimate goal is to foster an inclusive workplace that sees diversity as an asset rather than a cost, and where non-linear career trajectories are accepted and valued.

These “top down” approaches use the power and capital of partners and firm leaders to catalyze change from the top. This means that the leadership of the firm is committed to diversity (an attitude that is modeled to the entire firm), and reinforces this commitment through its own actions. This commitment is then essential to championing widespread cultural change, in order to truly value diversity throughout an organization, and subsequently assists in ensuring the success of the following recommendations.

²⁵³ Avivah Wittenberg-Cox, *How One Law Firm Maintains Gender Balance*, HARV. BUS. REV. (May 27, 2014), <https://hbr.org/2014/05/how-one-law-firm-maintains-gender-balance>.

²⁵⁴ Kirsten Rhodes, Deloitte, Address to the Stanford Law School Policy Practicum: Advancement and Retention of Women in National Law Firms (Feb. 25, 2016).

²⁵⁵ DELOITTE, OUR JOURNEY TO INCLUSION: FY 2013 DIVERSITY ANNUAL REPORT (2013), <https://www2.deloitte.com/content/dam/Deloitte/ca/Documents/about-deloitte/ca-en-about-deloitte-annual-diversity-report.pdf>.

²⁵⁶ Wittenberg-Cox, *supra* note 253.

²⁵⁷ See generally THE PROJECT FOR ATTORNEY RETENTION, DIVERSITY AND FLEXIBILITY CONNECTION: BEST PRACTICES 4 (2009), http://worklifelaw.org/Publications/DiverFlexConn_BestPractices.pdf (discussing non-stigmatized flexible work).

²⁵⁸ *Id.*; Wittenberg-Cox, *supra* note 253.

²⁵⁹ See Jena McGregor, *How Mark Zuckerberg’s Paternity Leave Affects the Rest of Us*, L.A. TIMES (Dec. 6, 2015, 4:00 AM), <http://www.latimes.com/business/la-fi-on-leadership-zuckerberg-20151206-story.html>.

²⁶⁰ Rhodes, *supra* note 254.

Recommendation No. 2: Ensure that firm leaders and partners are held accountable for the outcomes of diversity and inclusion efforts.

As noted above, commitment from firm leadership is important in order to drive cultural change, and implement new approaches to addressing the retention and advancement of women lawyers, within a firm. However, firms should also implement clear mechanisms to ensure that firm leaders, including individual practice group leaders and partners, are following through on these changes.

At Deloitte, the organization sought to drive leadership commitment and its own accountability by adding outside oversight to the structure of its diversity initiatives. The Inclusion External Advisory Council, comprising high-profile leaders in business, academia, government, and community, meets regularly with senior leaders within Deloitte “to review and challenge results and progress on key performance measures, and provide on-going guidance and insight.”²⁶¹ The organization’s leaders thus face an even higher power to which they are accountable for driving success in diversity efforts.

Firms should also consider driving accountability at the practice group and individual partner level through the use of additional compensation or other incentives.²⁶² For example, practice group chairs could be given an additional monetary bonus if they are able to achieve gender equity in rates of promotion. For individual partners, compensation committees could consider whether that partner has included women lawyers on key matters and pitches, or has participated in formal and informal mentoring of women lawyers. Alternatively, firms could consider publishing these metrics internally in order to provide further transparency and accountability.

Recommendation No. 3: Take steps to ensure that a “critical mass” of women are appointed in leadership roles at law firms, particularly to the compensation committee.

As outlined earlier in this White Paper, women lawyers are underrepresented in the powerful committees leading U.S. law firms. Only 5% of managing partners at large law firms are women,²⁶³ and few women serve on the most powerful compensation and management committees at law firms.²⁶⁴ Women face a “double” glass ceiling at law firms. Breaking through to equity partnership is difficult, but breaking through to firm leadership is even harder. However, research suggests greater representation of women in law firm leadership has a significant impact on representation in the firm generally. Firms with more women among their leadership have greater female representation throughout their ranks. In the case of increased

²⁶¹ *Inclusion*, DELOITTE, <http://www2.deloitte.com/us/en/pages/about-deloitte/articles/deloitte-inclusion.html> (last visited Apr. 10, 2016).

²⁶² See, e.g., Rhode & Ricca, *supra* note 106, at 2497-98.

²⁶³ Rhode, *supra* note 166.

²⁶⁴ The lack of representation of women in law firm leadership is unsurprising, given the extensive research on the double-bind women face in self-promotion. See generally Laurie A. Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74 J. PERSONALITY SOC. PSYCHOL. 629, 629 (1998) (“Designed to augment one’s status and attractiveness, self-promotion includes pointing with pride to one’s accomplishments, speaking directly about one’s strengths and talents, and making internal rather than external attributions for achievements Unfortunately, women who behave confidently and assertively are not as well received as men who engage in the same behaviors.”); Epstein et al., *supra* note 9, at 304 (“Women also face double-binds when they do not exhibit behavior based on male models (leading them to be branded as not tough enough) but are regarded as impaired women for acting “like men.” Such “damned if you do; damned if you don’t” situations act as a ceiling on their acceptance as a partner and a leader.”).

representation of women on compensation committees specifically, as noted in Part VII above, this may even result in higher compensation for women lawyers.²⁶⁵

Appointing one token woman to leadership committees, however, is unlikely to achieve this significant diversity benefit at a given firm. The lone appointee may face an “unrealistic burden” to represent the interests of women generally. In contrast, studies of corporate boards suggest that including a critical mass of women in leadership can “create a tipping point where women are no longer seen as outsiders and are able to influence the content and process of board discussions more substantially, with positive effects on corporate governance.”²⁶⁶ The “magic number” discussed is often three or more women on a given committee.²⁶⁷ Michelle Banks, until recently general counsel of the Gap, notes in this respect that she has:

personally seen the corporate board room impact of increasing from one to four women directors and my personal experience supports the research claims that there is a tipping point for increased engagement when a critical mass of three women directors is reached. It was a bit surprising to me to watch the obvious increased comfort and engagement levels at each step one, two, three, four women with three being the most noticeable point of difference.²⁶⁸

The power of a critical mass of women in leadership roles at law firms is twofold in promoting diversity. First, there is “comfort in similarity”, and this comfort facilitates the expression of diverse (and often dissenting) voices amongst firm leadership.²⁶⁹ True representation of such voices can help shape a firm that reflects the values and goals of women lawyers. Second, the inclusion of women in firm leadership at meaningful proportions is a powerful signaling mechanism. It signals to the rest of the organization that there is a true leadership commitment to valuing diversity. On a more individual level, it also signals to younger female lawyers that “you can succeed here” at the upper echelons, by providing role models for such success. This could therefore help to build the buy-in and “sponsors at the top” that lead to increased job satisfaction and likelihood of retention.

Firms could proceed with a bottom up or top down approach to achieve a critical mass of women in law firm leadership. In a top-down approach, firms commit to “just do it.” Rather than tiptoeing around the edges of advancing women using generalized initiatives, firms could agree to promote a certain percentage of women onto their leadership committees or to achieve leadership equality by a set date. This approach is reflected in the Austin Manifesto, a statement

²⁶⁵ See, e.g., RIKLEEN, *supra* note 1, at 3.

²⁶⁶ Rikleen, *supra* note 162, at 18 (referencing Vicki W. Kramer et al., *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance*, 28 WELLESLEY CENTERS FOR WOMEN RES. ACTION REP., (2006). The power of such research in the corporate context has led to regulatory developments in other jurisdictions targeted at transparency of the promotion of women on boards. The Toronto Stock Exchange requires as of January 1, 2015 that listed companies report on how many of their directors and senior officers are women, and provide details of their written policies and internal targets for female directors. The requirement is “comply-or-explain”, meaning companies must include such information in their financial reporting or instead explain why they do not have such policies or targets. See Barbara Shecter, *New Rules Should See ‘Significant Progress’ In Increasing Women On Boards Of TSX-Listed Firms*, FIN. POST (Oct. 14, 2014, 6:55 PM), <http://business.financialpost.com/news/fp-street/new-guidelines-for-women-on-ontario-boards-coming-wednesday>.

²⁶⁷ RIKLEEN, *supra* note 162, at 18.

²⁶⁸ Email from Michelle Banks to authors (on file with authors).

²⁶⁹ See generally *id.*

drafted by participants in the 2009 Women's Power Summit on Law and Leadership with the overarching goal of "achiev[ing] gender parity in positions of leadership, influence, and responsibility in the legal profession."²⁷⁰ The principles include pledges to "achieve parity for the generations of women lawyers who follow us" and "to identify goals and timetables that are specific, measurable, achievable, relevant, and trackable."²⁷¹ The effects of a strong, straightforward commitment to parity of women in leadership should filter down, as suitable candidates would have to be tapped for inclusion and set on a leadership track to be trained accordingly. This powerful approach makes the firm accountable and provides women in the firm with clear opportunities to strive toward.

The alternative approach is to adopt a more incremental, bottom-up set of initiatives that aim to build women into leadership roles over time. The NAWL has identified several moderate steps to include more women among the candidates for firm leadership, by:

- publishing the criteria for advancement to equity partner and beyond, which can make the advancement process more objective, and lead to buy-in and loyalty from women lawyers, because they can see a path forward within the organization;
- refining evaluation systems at all levels to reflect criteria for leadership, which can be helpful in informing women associates of the skills and qualities they will need to develop to stay on the path to partnership; and
- appointing a nominating committee with a critical mass of diverse participants. Nominating committees generally put forth the candidates for firm leadership votes. A diverse nominating committee can help bring to light process flaws or barriers to diverse leadership that may not otherwise be visible. The presence of diverse evaluators may also reduce bias in the appointment process and it signals that the committee is open to nominating diverse candidates.²⁷²

Alternatively, another approach to leadership appointment could be to design a leadership appointment processes where self-nomination is culturally accepted or taught as a norm.²⁷³ In the technology industry, research suggests this approach can be effective, because women are generally more hesitant to self-nominate than men are for leadership roles.²⁷⁴ In contrast to the above, more concrete measures, these incremental changes are intended to produce cumulative increases in women in leadership at firms over time.

²⁷⁰ LINDA BRAY CHANOW & LAUREN STILLER RIKLEEN, UNIV. OF TEX., CTR. FOR WOMEN IN THE LAW, POWER IN LAW: LESSONS FROM THE 2011 WOMEN'S POWER SUMMIT ON LAW AND LEADERSHIP 32 (2012), https://law.utexas.edu/wp-content/uploads/sites/26/Summit_White_Paper-FINAL.pdf.

²⁷¹ *Id.*

²⁷² CHANOW, *supra* note 153.

²⁷³ Joan Williams, *Hacking Tech's Diversity Problem*, HARV. BUS. REV. (Oct. 2014), <https://hbr.org/2014/10/hacking-techs-diversity-problem>.

²⁷⁴ *Id.*

B. Providing Choice and Control

Recommendation No. 4: Provide associates with greater control over, and choice with respect to, their career progression.

The rigid “tournament model” of law firms, despite having undergone some changes since first being introduced (as described in Part II above), continues to endure and is often perceived as a source of blame for the problems of retaining and promoting women lawyers. However, there is room for change, and law firms should consider an evolution in their approach to the pace and direction of career progression within the same organizational structure.

Deloitte, which featured a traditionally rigid organizational structure typical of accounting firms—of approximately six “levels” and a frequently “up or out” model of job progression, with some specialist positions having recently emerged just below the highest levels of the firm—achieved parity in its rates of promotion of men and women notwithstanding this historical model,²⁷⁵ by (among other things) instituting such cultural and other changes within this structure. As part of its shift to a more inclusive and diverse culture, Deloitte moved to a customized model of career advancement that is referred to as the “corporate lattice.” The intent is to allow “mass career customization” wherein employees can ramp up or dial down the level and type of work contributions, to better integrate their life and career progression.²⁷⁶ For example, in a given year, an employee might change the amount of travel or of business development they plan to do based on their demands outside of work.

This approach to mass customization of careers is likely to become an essential response to the emergence of Millennials as a driving force in the workplace. By 2025, it is estimated that Millennials will comprise 75% of the overall workforce.²⁷⁷ Research suggests Millennials place a high value on flexible work/life balance but, almost counter-intuitively, also highly value the opportunity to progress and become leaders.²⁷⁸ The more customized lattice approach provides lawyers with greater control over the ability to balance life and leadership than a traditional A-to-B career progression, making it a key tool in engaging and building loyalty and trust among Millennial generation employees.²⁷⁹

²⁷⁵ Rhodes, *supra* note 254.

²⁷⁶ *Id.*; Cathy Benko et al., The Corporate Lattice: A Strategic Response to the Changing World of Work, Deloitte Rev., Jan. 2011, at 93. In addition, one law firm, Orrick, Herrington, Sutcliffe LLP, has implemented a similar model of “individualized career progression” in order to allow associates more choice with respect to the pace of their development and take into account their preferences and career aspirations. This model effectively augments the traditional tournament-style model of law firm career progression (the “Partner Track”) and newer “career associate” positions (with no prospect of advancement to partnership, referred to as the “Career Track”) with an additional “Custom Track” pathway, which allows associates—whether on a short-term basis or more permanently—to shift off the Partner Track in order to determine a more customized pace of advancement to partnership, or a more customized professional role. See *Lawyer Development*, ORRICK, <https://www.orrick.com/About/Lawyer-Development/Pages/default.aspx> (last visited Apr. 10, 2016); ORRICK, ORRICK’S TALENT MODEL, <https://www.orrick.com/Events-and-Publications/Documents/3092.pdf>.

²⁷⁷ Lydia Dishman, *Half of Millennial Women Feel They Are Being Overlooked for Leadership Positions*, FAST COMPANY (Jan. 25, 2016, 5:00 AM), <https://www.fastcompany.com/3055783/the-future-of-work/half-of-millennial-women-feel-they-are-being-overlooked-for-leadership-po>.

²⁷⁸ DELOITTE, THE 2016 DELOITTE MILLENNIAL SURVEY: WINNING OVER THE NEXT GENERATION OF LEADERS 20 (2016), <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-millennial-survey-2016-exec-summary.pdf>.

²⁷⁹ *Id.* at 21.

Recommendation No. 5: Help associates navigate their careers by identifying and evaluating progression based on skills, rather than year level.

Firms should move away from tracking attorney capability simply by their class year and towards measuring through competency frameworks. To create competency frameworks, law firms should identify the skill sets that attorneys must develop over the course of their careers and measure their success against these skill sets.²⁸⁰ Measuring success based on attorney competency at these desired skill sets will make sure that every associate is learning the skills that are necessary to advance in the firm. However, measuring by competency will make a difference only if the firm leadership follows through on making sure junior lawyers have the opportunities to develop those skills. The firm should require initial consultations between associates and partners as to how young associates can develop the required skills with clear timelines on when such skills can be developed.²⁸¹ The associate also needs regular meetings to see how she is progressing, what opportunities she has received, and what skills she still wants or needs to develop in order to maintain a steady path of advancement.

C. Reassessing Value Metrics

Recommendation No. 6: Ensure greater transparency and objectivity in compensation at all levels in firm hierarchy.

Of necessity, the choice and customization reflected in Part XIII.B above (Recommendation Nos. 4 and 5) involve a move away from a “lockstep” model of associate advancement. As a result, compensation models will need to adapt accordingly. In this respect, any new or modified compensation models must be both transparent and objective.

As noted in Part IV.A above, despite its many problems, the billable hour continues to persist as a purportedly objective measure of attorney performance, and hence as a factor in attorney compensation. If law firms intend to maintain the primacy of the billable hour, they may want to again consider the example set by Deloitte. Like law firms, accounting firms are driven by the billable hour, but Deloitte’s model features one important difference: it employs utilization rate as a key metric, which measures employees according to the number of hours they have worked as a percentage of the total hours that they are expected to put in. This means that, rather than looking to a numeric figure that represents total hours only, firms can measure the proportion of time spent each day, month, or year, on average, on billable and other valuable activities. This utilization model allows a firm to determine which important (but non-billable) activities—like vacation time—should be removed from the equation (i.e. the denominator of hours that employees are expected to work) or otherwise be counted as equivalent to billable hours. The ability to subtract from the denominator enables the firm to recognize important contributions that otherwise would be seen as “taking away” from billable hours.

Given that women work longer hours but have fewer billable hours than men,²⁸² a switch to utilization rather than total hours could prove positive. However, as might be expected, the key to any utilization model will lie in the individual determinations that need to be made by each firm: namely, the number of “total hours” against which utilization will be measured, as well as what the utilization model considers to be of equal importance to billable hours. For example,

²⁸⁰ PATRICIA K. GILLETTE, OPT-IN PROJECT REPORT 20 (2007).

²⁸¹ *Id.*

²⁸² See *supra* Part IV.A.

how should training, pro bono and volunteer hours be treated in this model? These questions will need to be carefully considered, especially in light of the findings set out in Part IV.A above, in order to ensure that the model results in a truly objective metric. In addition, firms will need to be transparent about how any such model will work in practice.

Recommendation No. 7: In order to better address the compensation gap, rethink the allocation of origination credits, both at the outset and as part of partner succession.

Disparities in the allocation of origination credits are strongly tied to the compensation gap in law firms.²⁸³ Origination credits are crucial for compensation and for promotion within the firm. In order to retain female partners and achieve gender parity in compensation, law firms need to reevaluate their credit origination systems.

First, as briefly noted in Recommendation No. 1, law firms should ensure rainmaking opportunities and pitch teams are inclusive of women. Practice groups need to start tracking and ensuring that women are getting these crucial opportunities. Second, origination credit should be fairly allocated among teams. As noted in Part V.B, women lawyers are often the “minders and grinders” and work the majority of the hours on the project but the “finder” will receive the majority of credits. A new credit system should offer a substantial amount of credit to the partner that works the case, not just the partner who found the client. Third, the firm should offer a process for resolving credit disputes among partners. An informal system where partners must bicker amongst themselves for credit would disadvantage women because they are often penalized for acting too aggressive or boastful about their work.²⁸⁴ It could be helpful to use a neutral third party like a practice group leader to decide on the allocation of credit.

Finally, firms should remove the decisions about the “inheritance” of client credit from individual partners and develop a system that systematically involves clients, firm leadership, and the partners who service the work in credit succession decisions.²⁸⁵ Allowing individual partners to decide on their successors tends to disadvantage women lawyers, who are often excluded from the informal networks and mentorships provided to male attorneys.²⁸⁶ Firms should create a formal system where clients, firm leadership, and the partners who service the work can weigh in on the succession plan.

D. Rethinking Commitment and the Workplace

Recommendation No. 8: Leverage technology to provide greater flexibility to associates and trust in their ability to complete work.

Part IV.B described how the expectation of associates’ 24/7 commitment to their law firm, and associated assumptions and gender stereotypes, have had a significant impact on the retention and advancement of women lawyers. One way to move away from this notion, and demonstrate trust in associates’ ability to complete their work even in the absence of “face time,” is through leveraging technology and encouraging more flexible ways of working.

In this respect, law firms can consider the example set by “virtual” organizations. Often touted as a more flexible option for female attorneys, the virtual approach is characterized by less face

²⁸³ RIKLEEN, *supra* note 1, at 3. See also *supra* Part V.B.

²⁸⁴ See Williams, *supra* note 273.

²⁸⁵ RIKLEEN, *supra* note 1, at 3.

²⁸⁶ See RHODE, *supra* note 12, at 69.

time, a de-centralized organizational structure, and increased utilization of technology to connect attorneys from disparate locations. The Geller Law Group is one firm that exemplifies this approach and has recently been making headlines for the advantages it offers working mothers. Geller is a six-woman firm in Fairfax, Virginia whose founding credo is family-friendly and anti-office “face time.”²⁸⁷ Geller has no offices, and instead, the firm uses shared workspaces from a company called Metro Offices, renting a conference room for an hour or an office for a day, as needed.²⁸⁸ This encourages employees to work from home and on their own schedules, and decreases overhead costs. To keep track of one another, the lawyers update their shared calendars and communicate constantly through Google’s Gchat instant messaging tool.²⁸⁹

Although the differences between the Geller model and the business models of large law firms are vast, firms could consider drawing on aspects used in the more flexible Geller model to help achieve their diversity and inclusion goals and dispel the idea that “face time” is a useful measure of an attorney’s commitment and ability to complete assignments. More flexible features of Geller’s model can be implemented on a smaller scale—akin to law firm Shearman & Sterling LLP’s recent announcement that it will allow associates to work remotely two days each month²⁹⁰—or on a much wider scale. For example, several Australian companies, including professional services firm PricewaterhouseCoopers, have implemented policies that provide for all roles to be flexible by default, unless managers can demonstrate that such flexibility is simply not possible.²⁹¹

Recommendation No. 9: Rethink associate “commitment” from a team- and project-based perspective.

One further way of addressing client demands and the associated expectations of lawyers’ 24/7 availability and commitment is to emphasize and ensure that matters, projects and clients are staffed by tightly knit teams of lawyers.

It is inevitably challenging for one person to be available at all times for a client. However, well-integrated teams can provide constant client service, while still enabling each team member to have better work/life integration. At Deloitte, team planning is emphasized at the outset of a project, so that each team member can set expectations and transparently express their needs for any workplace flexibility. This ensures that, both for lawyers who work part-time and for those who have personal commitments, goals or activities outside of work (regardless of what they may be), they are able to maintain these schedules with the reassurance that the client or matter is being attended to in their absence. Further, Deloitte ensures that recognition of success on projects is similarly team focused.

²⁸⁷ Noam Scheiber, *A Woman-Led Law Firm That Lets Partners Be Parents*, N. Y. TIMES (May 1, 2015), <http://www.nytimes.com/2015/05/03/business/a-woman-led-law-firm-that-lets-partners-be-parents.html>.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ Kathryn Rubino, *BigLaw Firm Actually Does Something About Work/Life Balance*, ABOVE THE LAW (Apr. 7, 2016, 5:42 PM), <http://abovethelaw.com/2016/04/biglaw-firm-actually-does-something-about-worklife-balance>.

²⁹¹ Fiona Smith, *PricewaterhouseCoopers “Trusts” Staff, Makes All Roles Flexible*, AUSTL. FIN. REV. (Aug. 3, 2015, 12:23 PM), <http://www.afr.com/leadership/careers/pricewaterhousecoopers-trusts-staff-makes-all-roles-flexible-20150727-gileg0>.

This team-based perspective also has longer-term aspects, such as a requirement that business succession planning include diverse candidates, whose training and development are planned as they build toward leadership roles.

E. Bias Interrupters: Implementing Objectivity and Transparency

Law firms are failing to retain and promote women in part because they are failing to counter the gender biases that impact the advancement and retention of women lawyers. Implicit bias thrives in systems with opaque criteria, minimal documentation, and subjective decisions. As noted in Part VI above, systems of evaluation and promotion in law firms are often inherently subjective, infrequent and opaque.

One key method of reducing the impact of bias on women, and of establishing the importance of objectivity and transparency, in law firms is through the use of bias interrupters. A bias interrupter is a change to the basic business system that stops bias in its tracks without ever explicitly raising the issue of bias.²⁹² It is a metric-based approach that “pulls from the lean start-up playbook” by first, collecting detailed data about whether gender bias plays a role in daily workplace interactions; second, identifying company-specific ways to measure its effect; third, creating hypotheses about what “interrupters” might move those metrics; and lastly, experimenting with solutions, measuring what happens, adjusting the hypotheses, and trying again.²⁹³



There are a number of ways to implement bias interrupters in the law firm structure as follows:

Recommendation No. 10: Create objective evaluation criteria and communicate those criteria to associates.

One way of creating objective evaluation criteria through the use of bias interrupters is to hire an outside evaluator, who is trained in methods to document and counter biases, to review firms’ existing criteria and suggest changes that will reduce the influence of bias on evaluations.²⁹⁴ A second option is to review past evaluations for evidence of bias under each current criterion. Is the current evaluation providing substantively different feedback for men and women? For example, are women receiving more team-based feedback while men are receiving feedback based on their individual performance?²⁹⁵ Are women receiving more criticism, while men

²⁹² Williams, *supra* note 273.

²⁹³ *Id.*

²⁹⁴ *See id.*

²⁹⁵ Men’s reviews were twice as likely to contain references to their technical expertise and “vision”. Shana Leibowitz, *Stanford University Researchers Analyzed the Language In 125 Performance Reviews From A Tech Company And Found Something Disturbing*, BUS. INSIDER (Oct. 1, 2015, 5:15 PM), <http://www.businessinsider.com/gendered-language-in-performance-reviews-2015-10>.

receive more constructive feedback? This assessment should also consider whether similar evaluations translate into greater rewards for men than women.

After making any necessary changes to the evaluations, the law firm should communicate its evaluation criteria to all its attorneys so they know the firm's expectations for its associates from the beginning. Finally, law firm leadership should continually review the evaluations to make sure that the current evaluations are not subject to biases, and to make changes to the criteria as needed.

Recommendation No. 11: Provide regular feedback and monitor for bias.

Law firms are notorious for not giving much feedback. Frequently, the only feedback associates receive is at the time of their annual evaluations.²⁹⁶ The current generation of junior lawyers wants meaningful feedback and they want it more often.²⁹⁷ Women, particularly women of color, already receive less feedback than their male colleagues.²⁹⁸ Too often, when a young female associate makes a mistake on an assignment, instead of receiving immediate feedback and guidance from the supervising attorney, she will be left to figure out her own mistakes. Instead of seeing the associate as having potential, the supervising attorney—often an older, male partner—may view her mistake through the lens of gender stereotypes that lead him to believe that the woman is less capable.²⁹⁹ Instead of giving the associate feedback on how to improve, the partner simply chooses another associate to work with.

Law firms should encourage their partners to provide regular feedback to the associates they work with so that all associates are given the chance to improve and develop the skills necessary to rise in the firm. In addition, formal evaluations should be done more than once a year and should be periodically checked for implicit bias. As mentioned in Recommendation No. 10, evaluations should be reviewed to see if men and women are receiving substantively different types of evaluations.³⁰⁰

Recommendation No. 12: Centrally monitor the distribution of assignments in practice groups to ensure each associate is getting the opportunities they should.

Partners need to ask: are the women in our practice group getting to go on pitches, tackle the big client cases, or argue in court? Not all of those assignments apply to every practice group, but the key question is whether women are getting the opportunities they need to progress and to be interested in their work. Without these opportunities, women lawyers cannot gain the experience they need to become partners and the skills they need to recruit clients and help build the business of the firm.

Firms should start by documenting which associates have received these opportunities and which have not, and by more broadly documenting the differences (if any) in assignments given to men and women. Firms will subsequently need to address the outcomes of this process and counter any differences that may arise. This can be implemented through training that explains how

²⁹⁶ Pat Gillette, *Millennial Manifesto: Young Big Law Lawyers Demand Change*, AM. LAW. (Feb 29, 2016), <http://www.americanlawyer.com/id=1202749824980/Millennial-Manifesto-Young-Big-Law-Lawyers-Demand-Change>.

²⁹⁷ *Id.*

²⁹⁸ BETH HASLETT ET AL., *THE ORGANIZATIONAL WOMAN: POWER AND PARADOX* 119 (1992).

²⁹⁹ See RHODE, *supra* note 12, at 66-67.

³⁰⁰ Williams, *supra* note 273.

patterns of bias may affect work assignments, through the use of formal assignment systems, and/or through ensuring that the relevant partner or practice group leader is held responsible for making sure every associate gets a chance to have these opportunities.

F. Fostering Associate Involvement and Mentoring

Recommendation No. 13: Empower associates at an earlier stage, and allow associates to participate in management and decision-making.

Women lawyers, and Millennials as a whole, are eager to develop and grow, and to get involved in the firm's projects and decision-making. If firms implement policies of involving associates in management decision-making and the partnership decision process, then this is more likely to lead to increased loyalty and "buy-in" to the culture of the firm, and a lower likelihood of attrition.

One example of how firms can use committee involvement at the associate level to create junior "buy-in" is seen in the policy adopted by Latham & Watkins LLP of involving associates in management decision-making as part of its extensive committee system. In 1970, at the initiative of Clint Stevenson, the firm's managing partner, Latham set up its associates committee.³⁰¹ The associates committee is composed of approximately 50% partners and 50% associates, drawn from almost every office of the firm.³⁰² In 2012, for instance, the committee consisted of 25 associates and 25 partners.³⁰³ The committee manages associate reviews and evaluations, work assignments, policies affecting associates, and associate bonus allocation. More strikingly, the associates committee includes associates in the partnership decision process, and plays a pivotal role in that decision process. Initiatives that have occurred as a result of the associates committee's decisions include the firm's "PRO-RATA" program, which gives associates returning from parental leave an option to work a reduced pace schedule for six months without seeking prior approval.³⁰⁴

Does Latham's policy of involving associates in management decision-making increase women's retention and promotion within the firm? Not surprisingly, Latham believes that it does.³⁰⁵ Although it is difficult to prove causation, Latham's numbers, while not overwhelming, suggest that it may be having some effect. The percentages of women partners in Latham's New York, Los Angeles and London offices are 24% (or 20 of 102), 21% (11 of 63), and 20% (11 of 66) respectively,³⁰⁶ although it is not clear what proportion of these partners are equity partners.

³⁰¹ ARK GROUP, THE FUTURE OF LEGAL SERVICES: EXPERT ANALYSIS 76 (2012) https://www.ark-group.com/sites/default/files/product-key-contents/ARK2230%20-%20The%20Future%20of%20Legal%20Services%20-%20Expert%20Analysis_Part%20report.pdf.

³⁰² See *Associate Participation in Firm Management*, LATHAM & WATKINS LLP (last visited Feb. 28, 2016), <https://www.lw.com/joinus/careerAssociateParticipation>.

³⁰³ ARK GROUP, *supra* note 301, at 76.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ There is no differentiation in this data between equity and non-equity partners. See NALP Directory of Legal Employers: Latham & Watkins LLP – New York, New York, NALP DIRECTORY OF LEGAL EMPLOYERS (2015), http://www.nalpdirectory.com/employer_profile?FormID=5922&QuestionTabID=34&SearchCondJSON=%7B%22SearchEmployerName%22%3A%22Latham%22%7D; NALP Directory of Legal Employers: Latham & Watkins LLP – Los Angeles, California, NALP DIRECTORY OF LEGAL EMPLOYERS (2015), http://www.nalpdirectory.com/employer_profile?FormID=5203&QuestionTabID=34&SearchCondJSON=%7B%22SearchEmployerName%22%3A%22Latham%22%7D; NALP Directory of Legal Employers: Latham & Watkins

Recommendation No. 14: Adopt a holistic view of associate mentoring.

Almost all firms today, at least on paper, recognize the importance of mentoring for attorney development and advancement and have implemented formal mentoring programs. However, as demonstrated in Part VIII, formal mentoring relationships are often less successful than informal mentorship, and success is likely to be highly dependent upon who the mentors are.

In order to counter women lawyers' lesser access to informal mentorship, and foster increased success of formal mentoring programs, firms should consider mentorship and sponsorship more holistically. Firms should seriously contemplate what it is that their program is intended to achieve: what opportunities should mentorship provide? What skills and experiences should mentorship aim to cultivate? What gaps does mentorship seek to fill? In this respect, firms may find that a more comprehensive program is necessary: for example, an "affinity" mentor may assist women lawyers in fostering a sense of community and allowing for the discussion of shared experiences,³⁰⁷ and firms may therefore not want to abandon this form of matching mentors entirely. However, if retained, this should then be bolstered by an additional aspect of mentorship or sponsorship by powerful partners with "social capital."³⁰⁸

In addition, firms should not be constrained by thinking of mentors as a resource that is solely internal to the law firm. It may be the case that client representatives, such as company general counsel, could serve as mentors to high-performing or high-potential women lawyers, or that external coaches could be hired for such lawyers.

G. Ensuring Continual Review and Assessment

Recommendation No. 15: Conduct meaningful exit interviews.

Firms need to set up a robust exit interview process to determine why women are actually leaving their firms. Once they have this information, they can better utilize it to improve their retention of women lawyers. In order to obtain candid feedback, firms should set up a system that provides for some degree of anonymity or that reassures former employees that their comments will not negatively influence future recommendations from firm partners. To ensure anonymity and honest answers, former lawyers could be given an online anonymous survey that would be compiled by Human Resources. The surveys could then be aggregated and presented at specified intervals, for example, as part of a biannual firm leadership review.

Recommendation No. 16: Constantly monitor, review and update strategies and approaches to ensure their continued success.

As this section makes clear, addressing the problems of the retention and advancement of women in law firms is likely to be a long, complex and constantly evolving process. As a result, any strategies adopted by firms in this respect must be continually reviewed and assessed in order to determine whether they are on track to success, or otherwise require updating.

As noted in Part XIII.E above, this cycle of measurement and update is built into the nature of bias interrupters, and helps to make them a potent strategy for addressing implicit bias. The

LLP – London, United Kingdom, NALP DIRECTORY OF LEGAL EMPLOYERS (2015), http://www.nalpdirectory.com/employer_profile?FormID=5920&searchCondJSON=%7B%22SearchEmployerName%22%3A%22Latham%22%7D.

³⁰⁷ See *supra* Parts VIII.C and IX.B.

³⁰⁸ See *supra* Part VIII.C.

objective metrics and iterative nature of bias interrupters allow companies to try small interventions, accurately measure whether they have been successful, and then scale them up (or alternatively adjust them and try again).³⁰⁹ Bias interrupters also build change into the basic business systems that perpetuate bias, so they assume more permanence and are not dependent on the whims of individual firm leaders.

The success of measures taken to ensure the retention and advancement of women in law firms more broadly should then be capable of continual monitoring, assessment and adjustment. At Deloitte, the organization is careful not to rest on its laurels, and constantly reviews and, where necessary, adjusts its performance against its metrics and goals (as well as the metrics and goals themselves). Given the evidently long path to gender equity in national law firms, any viable—much less successful—approach will need to do the same.

XIV. Conclusion

Taken together, the number of recommendations set out in this White Paper may mean that it would be difficult for any particular firm to implement all of these strategies at once. However, all of the recommendations have several key themes in common: namely, accountability, transparency, objectivity and the establishment of trust within a law firm. Further, as the experiences of law firms to date makes clear, a robust and coordinated strategy is likely to have the best chance at truly “moving the needle.”

³⁰⁹ Williams, *supra* note 273.