



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #11

REQUESTED ACTION: Approval of the report and recommendations of the Commercial and Federal Litigation Section.

In 2017, the Women's Initiative Task Force issued a report entitled, "If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and ADR." The report found that women attorneys have low rates as lead counsel and speaking roles in the courtroom, as well as appearing in ADR proceedings or serving as neutrals. The report recommended steps that law firms, courts and clients could take to achieve equality. In November 2017 the House approved the report; in February 2018 the ABA House of Delegates passed a resolution adopting the report.

This year, the Task Force undertook a review of changes since the issuance of the 2017 report; it found that while there has been some progress, there continues to be large disparities for women, particularly women of color. The report also outlines efforts that have been undertaken since 2017 to implement recommendations that were contained in the 2017 report and efforts that should be undertaken going forward.

The Dispute Resolution Section is a co-sponsor of this report.

The report will be presented at the June 13 meeting by representatives of the Commercial and Federal Litigation and Dispute Resolution Sections.



NEW YORK STATE
BAR ASSOCIATION

THE TIME IS NOW: Achieving Equality for Women Attorneys in the Courtroom and in ADR

2020 Women's Initiative Task Force Follow-Up Study

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Report of the New York State Bar Association
Commercial and Federal Litigation Section

Thanks to DOAR, which provided analysis and technical support

**THE TIME IS NOW: ACHIEVING EQUALITY FOR WOMEN
ATTORNEYS IN THE COURTROOM AND IN ADR**

2020 WOMEN’S INITIATIVE TASK FORCE FOLLOW-UP STUDY

**REPORT OF THE NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION**

I. INTRODUCTION

Three years ago in 2017, the Women’s Initiative Task Force of the New York State Bar Association, Commercial and Federal Litigation Section (the “Task Force”) wrote a ground-breaking report entitled “If Not Now When? Achieving Equality for Women Attorneys in the Courtroom and in ADR” (the “2017 Report”). The 2017 Report included the results of a first-of-its-kind observational study based on questionnaires completed by state and federal judges throughout New York State that tracked the appearances of women in speaking roles in New York courts during the period September-December. The 2017 Report also compiled statistics on the percentage of women appointed as mediators and arbitrators in alternative dispute resolution (“ADR”).

The 2017 Report revealed that female attorneys comprised only about 25 percent of attorneys in lead counsel roles in courtrooms throughout New York State. This low percentage of women attorneys appearing in a speaking role in courts was found at every level and in every type of court: upstate and downstate, federal and state, trial and appellate, criminal and civil, *ex parte* applications and

multi-party matters. The 2017 Report found similar results in ADR regarding both the appearance of counsel in arbitration and mediation proceedings and the neutral conducting the hearing.

To help improve these percentages, the 2017 Report explored solutions that would hopefully move the needle towards full equality for women in the legal profession. Toward that end, the 2017 Report focused on efforts by law firms, clients, and courts to achieve that goal.

The 2017 Report was well received in the legal community. Initially, it was adopted by the Commercial and Federal Litigation Section (the “Section”). It was then formally adopted as a report of the New York State Bar Association (“NYSBA”) at a meeting of its House of Delegates on November 4, 2017. Finally, the American Bar Association (“ABA”) House of Delegates passed a resolution adopting the 2017 Report at its meeting on February 5, 2018 (Resolution No. 10A). The 2017 Report also received a great deal of publicity and has been the subject of innumerable articles, panels, webinars, and discussions, as well as generated substantial changes to policy and procedures within law firms, the business community, and the judiciary.

Even with the positive changes spurred by the 2017 Report, an important question remains: Have the statistics improved and what tangible changes have occurred? In order to answer that question, the Task Force decided it would repeat

the original study three years later. Most of the original Task Force members participated once again, with the addition of the current Section chair. The follow-up study included a questionnaire, annexed to this Report as Appendix A, and similar to the questionnaire used for the original study, to be completed by judges throughout New York State for the period September through December 2019 (the same months as the 2017 survey). This time, the Task Force received the professional assistance of DOAR, which graciously provided its services on a *pro bono* basis, to input and analyze the data received from the questionnaires.¹

This follow-up Report closely follows the organizational structure of the 2017 Report. It begins with an Executive Summary, which provides the most salient findings of the recent survey. The next section is a review of the recent literature regarding women in litigation and in ADR. The Report then presents the detailed results of the recent survey, followed by an update on the efforts made by

¹ The Task Force is greatly indebted to DOAR for its invaluable assistance, specifically to Paul Neale, its founder and CEO, for taking on this project and assigning two of his best researchers – Dr. Ellen Brickman and Natalie Gordon – who performed much of the survey analysis. The Task Force also acknowledges the assistance of Anuja Thatte, who spent many hours reviewing relevant studies and articles appearing during the last three years in order to provide an updated review of the literature on the issue of gender equality in the legal profession. Further, the Task Force acknowledges Lena Hughes, an associate at Morrison & Foerster LLP, and Laura M. Santana and Ashley A. Stephenson, paralegals at Morrison & Foerster LLP, for their invaluable assistance on various aspects of this Report. Finally, the Task Force gives special acknowledgement and thanks to Deborah Masucci, who although not a member of the Task Force, worked tirelessly on the ADR sections of this Report.

The Task Force notes that this Report was released in the midst of the COVID-19 pandemic. Notwithstanding the challenges facing the legal community, we remain resolute in continuing the forward momentum toward providing greater opportunities for women and minorities. The Task Force hopes that the recommendations and best practices in this Report further those efforts both during and after the current global health crisis.

law firms, in-house legal departments, and the courts to improve the presence of women in the courtroom and in ADR. It is our hope that this updated Report will provide both evidence that we are making progress but also that much work remains in order to achieve our goal of full equality.

II. EXECUTIVE SUMMARY

This comprehensive Report explores the results of our survey and also updates efforts by law firms, in-house legal departments, courts, and ADR providers to increase speaking opportunities for women attorneys. Set forth here are the key survey findings:

- The results summarized in this Report are based on more than 5,000 responses as opposed to approximately 2,800 in the 2017 Report.
- Female attorneys represented 26.7% of attorneys appearing in civil and criminal cases across New York. This represents a rise of 1.5 percentage points in the past three years.
- Female attorneys accounted for 25.3% of lead counsel roles and 36.4% of additional counsel roles. This represents a disappointingly tiny increase of only one-half of a percentage point in lead counsel roles but a healthy increase of 9 percentage points in additional counsel roles – which means

that more women attorneys are appearing in court even if they are not lead counsel.

- Once again, there was a disappointing disparity in the appearance of women attorneys based on the number of parties in the case, which often reflects the complexity of a matter. When the case involved only one party per side, women appeared as lead counsel at the encouraging rate of 43%. But, as the number of parties increased, the percentages of women appearing shrank to 26.6% (two parties on at least one side); 26% (three-five parties); and 23.5% (six or more parties). However, all of these figures reflect an increase from three years ago where the comparable numbers were: 31.6%; 26.4%; 24.8%; and 19.5%.
- Women appeared with greater frequency in trial courts than in appellate courts, although the difference was not great, approximately one percent. In the last survey, women made up 24.7% of appearances in trial courts but now the figure is 26.3% – a rise of nearly 2 percentage points. But, the appellate court appearances for women were nearly identical at 25.2% (first survey) and 24.7% (current survey).
- Federal courts appeared to be more hospitable to women attorneys than state courts. Women lead attorneys made up 27.5% of appearances in federal

court, contrasted with 23.1% of appearances in state courts – a significant gap of four percentage points. Women attorneys had the highest rate of lead roles in the Commercial Division of the Eighth Judicial District in Erie County (35.1%) and the Southern District of New York (31.8%) and the lowest rate of appearances in the Commercial Division of New York County (18.7%) – a very stark disparity. A possible explanation is that the federal courts included a large number of criminal matters often handled by public sector attorneys, but state criminal cases were not included in the survey, which only surveyed the state trial courts in the commercial divisions.

- A similar gap was noted between upstate and downstate courts, with upstate courts reflecting women in lead roles 27.9% of the time versus 24.2% of the time in downstate courts. A gap of 3.7 percentage points is not insignificant.
- A major finding in the 2017 Report was the large gap between the public and private sector. In the current study, women made up 35.1% of public sector lead attorneys but just 20.8% of private practice lead attorneys. The numbers from the previous study showed 38.2% of public sector lead attorneys but just 19.4% of private practice lead attorneys. These figures show little progress with respect to private sector attorneys, whose appearances as lead attorneys grew by just over one percentage point..

II. LITERATURE REVIEW

Since the Task Force issued its 2017 Report in July of 2017, the #MeToo movement has cast an even brighter light on discrimination, harassment, and inequality in many fields, including the law. Despite increased attention on these issues, however, there are still stark disparities in the legal profession for women and particularly women of color.² This section of the Report summarizes some of the recent literature that was reviewed by the Task Force in preparing this Report.

A. Women in Litigation: Nationwide

1. ABA Presidential Initiative on Achieving Long-Term Careers for Women in Law

The disproportionately high rate of attrition among women lawyers—and relatedly, the disproportionately low number of leadership positions held by women lawyers—is well documented. For example, a 2018 study showed that although women have comprised 45-50% of incoming law firm associates for many years, they account for just 29% of new equity partners and 20% of equity partners overall.³ Likewise, more than 75% of law firm management committee members,

² While not the focus of the survey or this Report (or the 2017 Report), women of color and diverse women are often even more disadvantaged than white women. Several participating state judges noted their desire to include race, national origin, and ethnicity in the survey and while such a survey would be extremely desirable, this Initiative was focused on women in the courtroom and in ADR. Nonetheless, the Task Force hopes that our work spurs others to take similar action to help combat the disturbing statistics that highlight the difficulties faced by diverse women in the legal profession.

³ See Roberta D. Liebenberg and Stephanie A. Scharf, *Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice*, ABA and ALM Intelligence Report, at 1 (Nov. 2019), <https://www.americanbar.org/content/dam/aba/administrative/women/walking-out-the-door-4920053.pdf>.

practice group leaders, and office heads were men.⁴ Indeed, *The American Lawyer* has forecast that given current trends, gender parity among equity partners will not be achieved until the year 2181.⁵

Against this backdrop, in 2017, then-ABA President Hilarie Bass launched the ABA’s Presidential Initiative on Achieving Long-Term Careers for Women in Law (the “Presidential Initiative”).⁶ The Presidential Initiative sponsored research aimed at developing “recommendations for what law firms, corporations, bar associations, and individual lawyers can do to enhance the prospects for women to reach the highest levels of practice and remain in the profession.”⁷

Among the research sponsored by the Presidential Initiative was a survey of 1,262 lawyers (men and women) at *National Law Journal* 500 firms who had been practicing law for at least 15 years.⁸ The final results of that survey were published in a November 2019 report—authored by the Co-Chairs of the Presidential

⁴ See *id.*

⁵ See *id.* at 1 (citing *The American Lawyer*, *Special Report: Big Law is Failing Women* (May 28, 2015)) <https://www.americanbar.org/content/dam/aba/administrative/women/walking-out-the-door-4920053.pdf>.

⁶ See ABA, Presidential Initiative on Achieving Long-Term Careers for Women in Law, <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/summer/aba-presidential-initiative-on-achieving-long-term-careers-for-w/>.

⁷ *Id.*

⁸ See Roberta D. Liebenberg and Stephanie A. Scharf, *Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice*, ABA and ALM Intelligence Report, at 3 (Nov. 2019), <https://www.americanbar.org/content/dam/aba/administrative/women/walking-out-the-door-4920053.pdf>.

Initiative, Roberta D. Liebenberg and Stephanie A. Scharf—titled “*Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice.*”⁹

The survey results revealed striking differences in the experiences of senior men and women in large law firms. (Because the number of participating lawyers of color was so low, the survey did not break out its findings for minority women.¹⁰) Among other things, 50% of female respondents reported having experienced unwanted sexual conduct at work, compared to only 6% of male respondents; 75% of female respondents reported having been subjected to demeaning comments, stories, or jokes, compared to only 8% of male respondents; and 82% of female respondents reported having been mistaken for a lower-level employee, compared to 0% of male respondents.¹¹

Unsurprisingly, these disparities extended to compensation and professional development experiences as well: 54% of female respondents reported having been denied a salary increase or bonus on account of their gender, whereas only 4% of male respondents said the same; and 46% of female respondents reported a lack of access to sponsors in the workplace, compared to just 3% of male

⁹ See *id.* at 1.

¹⁰ See *id.* at 3.

¹¹ See *id.* at 7-8.

respondents.¹² Nearly 70% of male respondents felt “extremely” or “somewhat” satisfied with their firm’s compensation structure, but only 46% of female respondents reported the same.¹³

The data further indicated that women lawyers have significantly higher levels of responsibility at home than their male counterparts—and that such responsibilities affected their decisions to leave law firms. For example, 54% of the women said that they were fully responsible for arranging childcare, compared to 1% of men.¹⁴ When asked why women leave law firms, nearly 60% of the senior women lawyers surveyed cited childcare commitments as an “important” influence.¹⁵ Other top responses were “emphasis on marketing or originating business,” “billable hours,” “no longer wishes to practice law,” “work life balance,” and “personal or family health concerns.”¹⁶

Reflecting on this data, the report observes:

These top reasons why experienced women leave private practice boil down to the stress and time needed to “do it all,” especially around non-substantive responsibilities at the office that do not reflect the quality of an individual’s legal work. Pressures to bill a large number of hours, and

¹² *See id.* at 8.

¹³ *Id.* at 6.

¹⁴ *See id.* at 12.

¹⁵ *See id.*

¹⁶ *Id.*

then spend more time to originate business, and then meet caretaking commitments lead to increased stress and an inability to strike an acceptable work/life balance.¹⁷

At the same time, “[c]lient demands for the breadth of talent that comes with diversity are being heard today, and will increase each year.”¹⁸ In discussing the project, Ms. Scharf noted that “[i]n looking at the parameters where women are much less satisfied than men, those factors are pretty much within the control of the law firm.”¹⁹ With respect to the types of policies that experienced women lawyers did cite as beneficial, the report states:

The policies that at least 75% of women believe are important to advancing senior women are work from home (78%); paid parental leave (76%); clear consistent criteria for promotion to equity partner (75%); and a formal part-time policy for partners (75%).²⁰

However, “when a firm does not implement these policies in a meaningful way, it is undercutting its ability to retain and advance women into senior roles.”²¹

¹⁷ *Id.*

¹⁸ *Id.* at 18.

¹⁹ Roy Strom, *Women Partners, Law Firm Leaders, Have Vastly Different Big Law Lives, Study Shows*, law.com (Aug. 3, 2018), <https://www.law.com/2018/08/03/women-partners-law-firm-leaders-have-vastly-different-big-law-lives-study-shows/>.

²⁰ Roberta D. Liebenberg and Stephanie A. Scharf, *Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice*, ABA and ALM Intelligence Report, at 17 (Nov. 2019), <https://www.americanbar.org/content/dam/aba/administrative/women/walking-out-the-door-4920053.pdf>.

²¹ *Id.*

As to what firm leadership might do differently, the report concludes by offering various “recommended best practices” for firms, including: (i) taking ownership over “the business case for diversity” — *i.e.*, that, as more and more clients are recognizing, “promoting greater diversity in the law firms they hire will lead to better decision-making, work product, and results”; (ii) establishing a concrete timeline for what the firm wants to achieve; (iii) using metrics to track key factors over time; (iv) training employees, including partners, on implicit bias and sexual harassment in the workplace; and (v) adopting meaningful policies to alleviate the family pressures disproportionately borne by women—including promoting, rather than penalizing, employees who utilize such options.²²

Critically, however, the report urges that male partners cannot simply put this work onto the (few) female partners within their ranks because “[o]nly the full strength and voice of a firm’s leaders can give teeth to a firm’s efforts.”²³

²² *Id.* at 18-20.

²³ *Id.* at 20.

2. Other Recent Literature Regarding Gender Disparities Within the Profession and Initiatives for Change

Other recent literature corroborates the extent to which gender disparities pervade the legal profession, particularly within law firms.

A 2018 Major, Lindsey & Africa survey found that, on average, male partners in the United States out-earn their female counterparts by 53%.²⁴ One possible explanation may be that partner compensation is driven largely by business origination, and relatedly, valuable client relationships tend to be passed down among partners who predominantly are white and male.²⁵ In other words, the lack of women and minorities currently in leadership positions may reinforce limitations for future diverse lawyers. In addition, even when women partners bring in business, research indicates that they generally receive 80% of the origination credit given to men.²⁶

Research indicates that women (and minorities) similarly have access to far fewer professional development opportunities. For example, at the trial level, an ABA study of randomly selected federal cases found that 76% of civil trial teams

²⁴ See Dan Packel, *New Survey Finds Even Bigger Gender Gap in Big Law Partner Pay*, N.Y.L.J., at 1 (Dec. 6, 2018).

²⁵ See *id.* at 3.

²⁶ See Aviva Will, *New Solutions Are Needed to Fix a Gender Pay Gap That's Getting Bigger*, N.Y.L.J. (Dec. 13, 2018).

and 79% of criminal trial teams were led by men.²⁷ And, at the apex of the litigation process, the United States Supreme Court, a mere 12% of arguments were conducted by women during the 2017-18 term.²⁸ As Stanford Law School professor and frequent Supreme Court advocate Pam Karlan recognized, “I think it is hard to get a first argument, and without getting a first argument it is hard to get more arguments. . . .There is an aggressiveness in rainmaking that not all men have, but most of the people who have it are men.”²⁹

Positive change also is being driven by judges, clients, and other industry participants. For example, as Judge Joy Flowers Conti of the Western District of Pennsylvania explained, increasing diversity within the lawyers who appear in court is “the talk of the town” amongst judges—with many judges now adopting standing orders that encourage participation from less-experienced lawyers.³⁰ Judge Conti elaborated that, “the reason for [such standing orders] is that’s where all the minorities are that never make it up to first-chair roles. . . . You just have to

²⁷ See Lynne Herrnle, *I defended Kleiner in the Ellen Pao case—here’s why we need more women leading trials*, Bus. Insider (Sept. 12, 2017), <https://www.businessinsider.com/i-defended-kleiner-in-the-ellen-pao-case-2017-9>.

²⁸ See Mark Walsh, *Number of women arguing before the court has fallen off steeply*, ABA Journal (Aug. 1, 2018), https://www.abajournal.com/magazine/article/women_supreme_court_bar/P1.

²⁹ *Id.*

³⁰ Britain Eakin, *Judges Outline Ways Judiciary Is Pushing For Attorney Diversity*, Law360, (Sept. 27, 2019), https://www.law360.com/newyork/articles/1203640/judges-outline-ways-judiciary-is-pushing-for-atty-diversity?nl_pk=2e91411e-e487-475b-a9e0-c9728ce7cb29&utm_source=newsletter&utm_medium=email&utm_campaign=newyork&read_more=1.

give them the opportunity. . . .They can do really well, and judges like it. Men and women judges like it.”³¹

Clients also increasingly are seeking diverse representation. In January 2019, a coalition of more than 170 general counsels wrote an open letter to large law firms lamenting the fact that new partner classes “remain largely male and largely white.”³² The letter pledged, *inter alia*, that “[w]e, as a group, will direct our substantial outside counsel spend to those law firms that manifest results with respect to diversity and inclusion. . . . We expect the outside law firms we retain to reflect the diversity of the legal community and the customers we serve.”³³ Many companies also have adopted specific policies around diversity for their outside counsel.

For example, Microsoft’s Law Firm Diversity Program offers financial incentives for its outside law firms that meet certain goals with respect to the hiring and inclusion of women, minority, and LGBTQ-identifying lawyers, including at the partnership level.³⁴ As Microsoft’s General Counsel Dev Stahlkopf explains,

³¹ *Id.*

³² Christine Simmons, *170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business*, N.Y.L.J. (Jan. 27, 2019).

³³ *Id.*

³⁴ See Caroline Spiezio, *Microsoft Seeks Diversity in its Outside Counsel*, Corporate Counsel (Oct. 1, 2018), <https://www.law.com/corpocounsel/2018/10/01/microsoft-seeks-diversity-in-its-outside-counsel/>.

such incentives are good business: “Studies show that diverse teams work more effectively and produce better results, . . . [a]nd it’s really important for us that our employees and the people who do work on our behalf reflect the full diversity of our global customer base.”³⁵

The federal government too has focused attention on these issues. For example, in April 2019, the Office of Federal Contract Compliance Programs advised that it was looking into “serious issues” with respect to the underrepresentation of women and minorities in the law firms serving the federal government.³⁶

And, as one possible solution with respect to the compensation disparity between male and female partners, litigation finance company Burford Capital has launched a \$50 million fund earmarked for financing commercial litigation and arbitrations led by women.³⁷ With this capital, women can “pitch client-friendly alternative billing arrangements to their management committees,” “pursue

³⁵ *Id.*

³⁶ MP McQueen, *Government Warns Law Firms of Consequences for Diversity Failures*, N.Y.L.J. (Apr. 11, 2019).

³⁷ *See* Aviva Will, *New Solutions Are Needed to Fix a Gender Pay Gap That’s Getting Bigger*, N.Y.L.J. (Dec. 13, 2018).

leadership positions,” and “ease pathways towards origination and client relationship credit for them and their firms.”³⁸

B. Women in ADR

1. ABA Resolution on the Selection and Use of Divers Neutrals

In 2008, the ABA adopted “Eliminate Bias and Enhance Diversity” as one of its four primary goals.³⁹ This goal recognized “that clients, the legal profession and society are best served when lawyers reflect the broader community in which they serve” and “when organizations are diverse and inclusive at every level.”⁴⁰ Yet even as more women and minorities have entered the legal profession, diversity has continued to lag—particularly at the top. As one 2017 Vault/MCCA study showed:

Even though one in four law firm associates is a person of color, more than 90 percent of equity partners are white. Among women, the figures are especially stark: women of color represent 13 percent of associates but less than 3 percent of equity partners.⁴¹

³⁸ *Id.*

³⁹ American Bar Association, “ABA Mission and Goals,” https://www.americanbar.org/about_the_aba/aba-mission-goals/; see American Bar Association Section of Dispute Resolution, Report to the House of Delegates Resolution 105 (Aug. 2018), <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/105.pdf>.

⁴⁰ *Id.* at 1.

⁴¹ *Id.* at 2.

In August 2016, the ABA’s House of Delegates passed Resolution 113 urging, *inter alia*, that “all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys [and that] clients . . . direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys.”⁴²

Two years later, in August 2018, the ABA’s House of Delegates passed another resolution focused specifically on “elimination of bias and enhancing diversity in Dispute Resolution—a segment of ‘legal’ services that has been described as ‘arguably the least diverse corner of the profession’” (the “2018 Resolution”).⁴³ The 2018 Resolution urges “all users of domestic and international legal and neutral services to select and use diverse neutrals.”⁴⁴

The 2018 Resolution was accompanied by a detailed report by the ABA Section of Dispute Resolution.⁴⁵ The data compiled in that report showed, as an initial matter, that “diversity within Dispute Resolution significantly lags the legal profession as a whole.”⁴⁶ Because of the confidential nature of most dispute resolution proceedings, the report was based on limited data regarding the diversity

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See id.* at 2.

⁴⁶ *Id.*

of ADR professionals but included data showing a consistent underrepresentation of women and minorities on rosters of neutrals. For example, 2015 data published by the Financial Industry Regulatory Authority, Inc. (“FINRA”) showed that its roster was 75% male and 86% Caucasian.⁴⁷ Other ADR providers reported similarly low levels of diversity among their rosters (*e.g.*, JAMS (22% women; 9% persons of color); American Arbitration Association (“AAA”) (25% women and minorities); CPR Institute (15% women; 14% persons of color)).⁴⁸ Based on available statistics, the report concluded “that gender and racial/ethnic diversity of institutional providers of dispute resolution is likely to be less than one-half that of law firms.”⁴⁹

Compounding the problem, the report found that even if the roster is diverse, very few diverse neutrals are selected to preside over disputes. For example, in 2015, AAA reported that only 26% of its arbitrations had a diverse panelist.⁵⁰ The figures appear even more stark for high-value cases: “[a]s a 2017

⁴⁷ *See id.* at 4.

⁴⁸ *See id.*

⁴⁹ *Id.*

⁵⁰ *See id.* at 5.

article examining gender differences in dispute resolution practice put it, “the more high-stakes the case, the lower the odds that a woman would be involved.”⁵¹

The report identifies two main contributing factors to these figures: (i) the reality that dispute resolution is highly dependent on entrenched referral networks, and (ii) the confidential nature of most dispute resolution proceedings.⁵² With respect to the first factor, the report observes that because neutrals are generally chosen based on the parties’ consent, “many neutrals are chosen or at least vetted through the networks of equity law firm partners” and “established neutrals are often asked to make referrals to other neutrals.”⁵³ As a result, “[i]n both cases, the networks are largely white and male, and the recommendations and referrals subject to implicit bias.”⁵⁴ The report notes that “[t]his dynamic[] flows at least partly from a sense among attorneys that retired judges and veteran litigators, a largely older, white, and male cohort, are the most palatable figures to clients when

⁵¹ *Id.* Indeed, a previous 2014 study by the ABA Dispute Resolution Section found that for cases where the amount-in-controversy was between one and ten million dollars, 89% of arbitrators were men. For cases involving one billion dollars or more, one survey estimated that a woman arbitrator was involved just 4% of the time. The ABA’s research further found that parties were more likely to select a male neutral for corporate and commercial matters, and more likely to select a female neutral in cases where the dispute was primarily nonmonetary. *Id.*

⁵² *See id.* at 7.

⁵³ *Id.*

⁵⁴ *Id.*

pursuing a dispute outside the courtroom.”⁵⁵ Additionally, “this tendency is reinforced by implicit biases to which we are all subject that often lead even well-meaning individuals to pass over those who are ‘different.’”⁵⁶

As to the second factor, the report observes that “the confidentiality and privacy that are integral elements of most dispute resolution processes” also has the effect of reducing “public awareness of the scope of the problem, most notably awareness on the part of the stakeholders in the best position to bring about change—clients.”⁵⁷ Relatedly, because clients tend to defer to outside counsel on the selection of neutrals, they “often fail to focus on enhancing opportunities for diverse neutrals” even “as part of their broader and influential efforts to enhance diversity in the legal profession.”⁵⁸ Thus, the report concludes by urging clients to take an active role in promoting the selection of women and minority neutrals: “Achieving real progress will not only require continued attention from providers in terms of recruiting and supporting women and minority mediators and

⁵⁵ *Id.* at 8.

⁵⁶ *Id.*

⁵⁷ *Id.* at 7-8.

⁵⁸ *Id.* at 9.

arbitrators, but also clients who are willing to ask questions that perhaps they haven't in the past.”⁵⁹

III. SURVEY METHODOLOGY AND FINDINGS

In this follow-up study, the Task Force prepared a questionnaire for state and federal judges, nearly identical to the questionnaire used three years ago. With appreciation to the judiciary, the response rate was more robust this time with more judges completing questionnaires. Three of the four federal district courts participated, as well as the United States Court of Appeals for the Second Circuit. The New York Court of Appeals, as well as all of the Appellate Divisions participated. Seven of the Commercial Division courts returned surveys.⁶⁰ A total of 5,429 responses were received, although 1,184 of those responses provided the data in a format different from the questionnaire. Nevertheless, data gathered from all sources were incorporated into the results of the study.

A high-level overview of the survey findings is set forth earlier in the Executive Summary. What follows is a more granular analysis of those findings. Where possible, the findings are contrasted with those obtained three years ago to highlight progress, or the lack thereof.

⁵⁹ *Id.*

⁶⁰ The following Commercial Divisions participated: Eighth Judicial District, Onondaga, New York, Queens, Suffolk, Westchester, and Nassau.

A. Women Litigators in New York State Courts

At the New York Court of Appeals, based on 33 arguments involving a total of 67 attorney appearances during the relevant time period, 18 women spoke at oral argument, for an appearance rate of 26.8%. In the 2017 Report, women attorneys comprised 39.4% of appearances in the New York Court of Appeals during the identical timeframe.

In cases in the New York Court of Appeals in which at least one party was represented by a public sector office, women attorneys comprised 41.7% of appearances (a drop from 51.3% in the 2017 Report). In civil cases overall, women attorneys appeared as lead counsel in 35.3% of the cases, an increase from 30% in the 2017 Report. The figure for women appearances in criminal cases was higher at 50%, which was a slight increase from 46.8% found in the 2017 Report. This high percentage of women as lead in criminal cases is not surprising given that prosecutors and public defenders are public employees.⁶¹

As to the Appellate Divisions, the responses from the First Department showed that women attorneys took the lead in 26% of the cases. Yet, female attorneys in the public sector appeared more frequently than their male counterparts at the astounding rate of 55.9% of appearances, although this figure

⁶¹ Because of the disparity in the amount of data collected in this survey compared to the previous survey, it is difficult to determine whether there has been a significant decline in women appearing before the State's highest court or whether the lower percentages is a result only of the smaller amount of data.

was based on very limited data (34 appearances). In the Second Department, a woman attorney took the lead in 24.3% of the arguments. Once again, female attorneys appeared in 49.4% of arguments on behalf of public entities, which was remarkably similar to the 50% appearance rate in the 2017 Report. In the Third Department, women attorneys were the lead in 28% of the cases. And, once again, they appeared with greater frequency – 34.8% – when representing a public entity. Finally, in the Fourth Department, women attorneys took the lead in 27.7% of the cases. In the public sector, women took the lead in 26.7% of cases, but in the private sector, this figure was significantly lower at 20.5%. Putting these figures together, in state court appellate arguments, a woman attorney was the lead appellate advocate 26.5% of the time.

The responses from the Commercial Divisions around the State showed vast differences in the representation of women attorneys in speaking roles in the courtroom. Despite a large response rate from the Commercial Division of New York County, the percentage of cases in which female attorneys took the lead in that court was a disappointing 18.7%. Women fared better in most of the other Commercial Divisions, with the exception of Nassau County, where women attorneys appeared in lead roles only 15% of the time. However, in Suffolk County, women attorneys took the lead 24.7% of the time, which was a significant increase from the 2017 Report when women attorneys appeared as lead in only

13.7% of the cases. In Queens County, women attorneys took the lead 21% of the time. The returns from the Commercial Division in the Eighth Judicial District in Erie County showed women in lead roles 35.1% of the time, which again was a significant increase from the 26.9% in the 2017 Report. Finally, Onondaga County had women attorneys in the lead 24.6% of the time, which was a slight decrease from 26.9% in the 2017 Report. While there is a significant variation from 18.7 to 35.1%, the average of all of the Commercial Divisions shows female attorneys in lead roles 23.2% of the time.

In total, the percentage of female attorneys in lead roles in *all* state courts surveyed (from a total of 1,766 responses), in *civil* cases was only 22.6%, a decrease from the 2017 Report statistic of 26.9%. Simply put, this finding is not encouraging and far below expectations.

B. Women Litigators in Federal Courts

Unlike the first survey, the statistics of female attorneys appearing in the Second Circuit surpassed those from the New York Court of Appeals. Of the 765 attorneys appearing before the Second Circuit during the survey period, 24.3% were female. This represents a rise of close to 4 percentage points from three years ago. While this is surely not enough progress, it does show *some* progress for female federal appellate advocates.

In the district courts, women represented 22.7% of attorneys in criminal cases and 24.3% of attorneys in civil cases. Of the 160 attorneys who were identified as either working in the public or private sectors, women represented 10.3% of public sector attorneys and 17.5% of private sector attorneys.

The Southern District of New York recorded the highest percentage of women attorneys in lead roles at 31.7% (an increase from 26.1% in the 2017 Report) and this percentage was based on responses recording appearances by 1,142 attorneys, evenly split between plaintiffs and defendants. In the Southern District, women represented a higher percentage of attorneys in criminal cases (34.3%) than civil cases (29.2%). Public sector lead attorneys were two times more likely to be women (41.4%) than private sector lead attorneys (20.4%).

The Western District of New York had women attorneys appear as lead counsel in 26.2% of appearances, an increase from 22.9% in the 2017 Report, but nearly 5 percentage points less than in the Southern District of New York despite its particularly high response rate. Its response rate also was split almost evenly between plaintiffs and defendants. Women represented a slightly higher percentage of attorneys in criminal cases (26.4%) compared to in civil cases (25.7%). And, once again, public sector lead attorneys were two times more likely to be women (26.8%) than private sector lead attorneys (13.8%).

Finally, the Northern District of New York, which had not participated in the first survey, reported women attorneys as lead counsel in 28.4% of appearances, falling between the percentages in the Southern and the Western Districts. In the Northern District, women appeared in 32% of criminal cases and 23.5% of civil cases. Women made up 43.3% of attorney appearances in cases involving public entities but only 13.2% of cases involving private parties.

In sum, when totaling all of the attorneys appearing in the three federal district courts that participated, female attorneys held lead roles 28.5% of the time (1,095 women attorneys divided by 3,837 total attorney appearances).

C. Women Litigators: General Observations

When comparing upstate to downstate courts, women fared slightly better upstate in civil cases (26.7% upstate, 23.9% downstate) but not in criminal cases (28.1% upstate, 30.6% downstate). Comparing appellate to trial level proceedings, women attorneys were better represented at the trial level in criminal cases than in civil cases. In civil cases in trial courts, women attorneys had lead roles 24.1% of the time versus 25.4% in appellate arguments. In criminal cases, by contrast, the reverse was true. Female attorneys had lead roles in 29.4% of criminal cases in the trial courts versus 22.7% in the appellate courts.

In attempting to determine whether there were disparities by subject matter in the appearances of women attorneys in lead counsel roles, the results are

interesting. The highest percentage of women in lead roles was in all aspects of family law at 40.7%. By contrast, the lowest percentage of women attorneys in lead roles was in all varieties of contract disputes at just 17.7%. In between, the following percentages were found in descending order: Criminal 28.6%; Civil Rights 28.1%; Torts 27.7%; Financial Disputes 23.4%; Intellectual Property 21.1%.

Finally, comparing federal courts to state courts in the distinctions between civil cases and criminal cases and public sector versus private sector also provided interesting data. On an aggregate basis, women attorneys represented 27.5% of attorneys at the federal level and 23.2% of attorneys at the state level. At the federal level, women comprised 28.8% of attorneys in criminal cases and 26% of attorneys in civil cases. There was virtually no data (*i.e.*, only one data point) to calculate the percentage of women attorneys appearing in criminal cases at the state level, but women appeared in 24.1% of civil cases.

At both the federal and state level, women made up a higher percentage of attorneys in the public sector than in the private sector. Specifically, at the federal level, women represented 30.9% of attorneys appearing who worked in the public sector and 17.4% of attorneys appearing who worked in the private sector; at the state level, women comprised 43.1% of attorneys appearing who worked in the public sector and 22.4% of attorneys appearing who worked in the private sector.

D. Conclusions

Unfortunately, during the three year period since the 2017 Report was issued, there has been only slight improvement in percentages of women appearing in speaking roles in courtrooms throughout New York State. Again, there was a significant gap between public sector and private sector attorneys, perhaps revealing that the private sector should try to learn from the public sector. There also was a significant disparity between trial and appellate courts, in particular, the higher the court, the less likely a woman will appear as lead counsel.

While no data was collected from the United States Supreme Court, it has been reported that the appearances of female attorneys in that court have been declining. During the Supreme Court's 2017-2018 term, for example, only 12% of appearances at oral argument were by women, which was *lower* than in the previous five years where appearances by women ranged from a low of 15% to a high of 19%.⁶²

Of additional concern is the apparent subject matter disparity that appears to show fewer appearances by female attorneys in commercial cases than in other types of cases. This is also reflected by the low rate of appearances by female attorneys in the Appellate Division First Department, which hears a greater number

⁶² See Mark Walsh, *Number of Women Arguing Before the Supreme Court Has Fallen Off Sharply*, A.B.A.J. (Aug. 1, 2018).

of commercial appeals than the other Appellate Divisions because Manhattan – the business center – is in the First Department.

On the other hand, there is an uptick in appearances of female attorneys in lead roles in trial courts – particularly in the Southern District of New York and there is also a significant rise in the appearances of female attorneys in all New York courts, in what this Report refers to as additional counsel roles (*i.e.*, not in lead counsel roles). These are encouraging developments.

In sum, there is still significant need for improvement in achieving gender equity in the courtroom. Later sections of this Report address additional actions that can be taken by law firms, clients, and courts to further improve these results.

IV. ALTERNATIVE DISPUTE RESOLUTION

None of the ADR providers used the Task Force’s suggested questionnaire with some asserting confidentiality concerns. Several ADR providers, however, maintain their own statistics with respect to the diversity of their panels, but not all track appointments to cases by race, gender or subject matter. Six providers (or entities) agreed to share their statistics for inclusion in this report and those statistics are summarized in relevant part below.

FINRA operates the largest securities dispute resolution forum in the United States,⁶³ and due to the volume of cases, is considered a gateway to allowing new neutrals to gain valuable experience. FINRA began an aggressive campaign to diversify its arbitral panels in 2015. To monitor the results of its efforts, each November it conducts a survey of its arbitrator and mediator population through an external consulting firm. The voluntary and confidential survey of the roster is conducted annually and the results are published on its website.⁶⁴ A comparison of the survey results from 2016 to 2019 for the State of New York, show that the number of female neutrals increased from 30% to 32% on the overall roster. The national results show that the number of female arbitrators increased from 24% to 29%. FINRA does not track gender or race of appointments.

Another private ADR national provider, Resolute Systems, LLC (“Resolute”),⁶⁵ reported that it had a 45% increase of women on its New York panels between December 2016 and December 2019, with a 39% increase of women nationally over the same time period. Resolute also reported an 8% increase of women selected as mediators and arbitrators in New York and a 14%

⁶³ FINRA Dispute Resolution Services, Arbitration & Mediation, <https://www.finra.org/arbitration-mediation>.

⁶⁴ FINRA, Our Commitment to Achieving Arbitrator and Mediator Diversity at FINRA, Why Diversity is Important, <https://www.finra.org/arbitration-mediation/our-commitment-achieving-arbitrator-and-mediator-diversity-finra>.

⁶⁵ Resolute Systems describes itself as one of the nation’s largest ADR Providers. *See* <https://resolutesystems.com>.

increase nationally from December 2016 through December 2019. Notably, Resolute also keeps statistics on woman participants in the ADR process, noting that overall, there were 1,062 women involved in ADR proceedings as either neutral, counsel or claims representative. Resolute noted that it had made concerted efforts to recruit female neutrals to its panels

The AAA⁶⁶ reported an increase in the number of women in its rosters from December 2016 to December 2019. In New York, the increase was 12% with a 4% increase nationally. The percentage of the number of women appointed to cases also increased between 2016 and 2019. In New York, the number of women appointed to panels increased by 25% with a national increase of 13%.

JAMS⁶⁷ reported an increase of both women on its panel and women assigned to cases between 2016 and 2019. JAMS increased the number of women on its panel from 101 in 2016 to 135 in 2019. The percentage of women assigned to both mediation and arbitration cases rose from 29% in 2016 to 35% in 2019.

JAMS separately reported statistics for its New York City location, its only office in New York State. JAMS reported 20 women neutrals in New York as of

⁶⁶ The AAA-ICDR describes itself as the largest private global provider of alternative dispute resolution services in the world. See <https://www.adr.org/mission>.

⁶⁷ JAMS describes itself on its website as the largest private ADR provider. See <https://www.jamsadr.com/about>.

2019 out of a total of 58 neutrals. The percentage of women assigned to mediation and arbitration cases rose from 44% in 2016 to 45% in 2019.

The International Institute for Conflict Prevention and Resolution⁶⁸ (“CPR”) did not provide a year-by-year comparison to measure diversity progress but did note that of all cases commenced in 2019, women served as a neutral in 39% of the cases.

In June of 2018, the International Chamber of Commerce⁶⁹ (“ICC”) International Court of Arbitration reported that for the Court’s 2018-2021 term, the ICC World Council nominated Court members with full gender parity. The percentage of female Court members rose from 23% to 50%.⁷⁰

Notably, however, except for FINRA where disputes relate to the financial services business, the subject matter of the cases in which women were chosen as neutrals is unknown. Previous data from ADR providers generally shows that women more often are chosen as neutrals in employment, domestic relations, and personal injury rather than in commercial matters.⁷¹

⁶⁸ CPR is an independent nonprofit organization that helps prevent and resolve legal conflict more effectively and efficiently. See <https://www.cpradr.org/about>.

⁶⁹ The ICC Court of Arbitration is the world’s leading arbitral institution that has been helping resolve international commercial and business disputes since 1923. See <https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration>.

⁷⁰ Arbitral Women, “Gender Equality Achieved on the ICC Court – Another Year of Progress” (June 25, 2018), <https://www.arbitralwomen.org/gender-equality-achieved-on-the-icc-court-another-year-of-progress>.

⁷¹ Further disparity may occur when an organization selects the neutral versus selection by organizations.

Because of the differences in the way the statistics were reported, it is difficult to draw any detailed conclusions other than to note a general uptick in both the numbers of women neutrals on ADR provider panels and the number of women actually selected to serve on cases, representing what appears to be notable progress.

IV. Innovations and Moving Forward

A. Law Firms

1. Innovations

Law firms recognize the strategic, financial, and principled benefit of increasing diversity within their firms.⁷² During the years that followed the Section’s 2017 Report, firms have increased their efforts “to move the needle”⁷³ and have taken concrete action to advance diversity and inclusion. These efforts have and should continue to evolve.⁷⁴

a. Women’s Initiatives

⁷² See, e.g., *Strategies and Tactics For In-House Legal Departments to Improve Outside Counsel Diversity*, <https://images.law.com/contrib/content/uploads/documents/292/General-Counsel-For-Law-Firm-Diversity-Diversith-Lab-Strategy-Tactics-May-2019.pdf>; Michelle Fivel, *Millennials Are Pushing Back Against Law Firm Sexism* (May 29, 2019), <https://www.law360.com/articles/1163183/millennials-are-pushing-back-against-law-firm-sexism>.

⁷³ Lynn S. Scott, “Moving the Needle—We Can’t Give Up,” ABA Law Practice Today, May 14, 2019 <https://www.lawpracticetoday.org/article/moving-needle-cant-give/>.

⁷⁴ See, e.g., Hannah Roberts, “What Law Firms (And Men) Can Do to Improve Gender Diversity, According to Top Female Lawyers” (Mar. 6, 2020), <https://www.law.com/international-edition/2020/03/06/what-law-firms-and-men-can-do-to-improve-gender-diversity-according-to-top-female-lawyers/>.

Most major law firms have women's initiatives that have grown in importance and increasingly are embraced by firm leadership. Firms report that advocacy by their women's groups has resulted in positive changes during the past several years, including: (1) the adoption of alternative work arrangements for associates; (2) holding conferences for women attorneys that feature speakers from both inside and outside the legal community who share their experiences and the ways they have addressed gender discrimination in the workplace and also how they have worked to advance women in the legal profession; and (3) dissemination of marketing materials to clients that highlight their women attorneys and recent professional achievements of those women.⁷⁵

Women's initiatives, in concert with firm management, have moved past merely identifying the difficult issues facing women attorneys and the barriers to their success within and outside the firm, to implementing specific policies and programs to help women succeed within the firm and prevent the exodus of women from firms and even from the legal profession.⁷⁶ In seeking solutions, women's initiatives within firms have identified some of the factors that have prevented

⁷⁵ See, e.g., Arent Fox's AFWomen; Barclay Damon's Women's Forum; Bond Schoeneck & King's Women's Initiative; Morrison & Foerster's MoFo Women and Women's Strategy Committee; Seyfarth Shaw's Women's Network Affinity Group; and Strock's Women's Initiative.

⁷⁶ Yuliva Laroe, *Law Firm Women's Initiatives: Why Most Are Ineffective and What Firms Can Do to Fix Them* Law Practice Today (Jan. 13, 2017), <https://www.lawpracticetoday.org/article/law-firm-womens-initiatives-ineffective-firms-can-fix/>, (recognizing that the focus must be on business development programming, engaging lawyers as mentors and sponsors and helping women lawyers become more visible).

women from achieving success and satisfaction in their firms. These include significant compensation disparities between male and female partners, an emphasis on billable hours as a key factor in achieving advancement, a failure to provide sufficient opportunities for women attorneys to develop business, a failure to share credit for or an overemphasis on originations, a lack of credit or appreciation for managing client relationships, and insufficient credit for non-billable, but essential work for the firm.⁷⁷

The women's initiatives that have been successful in effectuating change have reported success working with firm management to set goals and targets for increasing diversity and have tracked the data to measure the success of those efforts. These efforts have led to an increase in the number of women participating in compensation decisions and on firm compensation committees, an expansion of resources available to relieve pressures from family obligations, and the provision of meaningful business opportunities for women attorneys.⁷⁸ These ramped up efforts also have led to an increase in women in firm management positions,

⁷⁷ Data reveals that women partners often do double or triple the amount of non-billable firm work, including recruiting, mentoring and performing other "firm citizenship" tasks, but are not given any credit for those endeavors, contributing to the compensation gap. Dylan Jackson, *Women, Minority and LGBTQ+ Attorneys Still Struggle to Rise Within Law Firms*, *The American Lawyer* (Jan. 28, 2020).

⁷⁸ See Roberta D. Liebenberg and Stephanie A. Scharf, *Walking Out The Door: The Facts, Figures and Future of Experienced Women Lawyers in Private Practice*, ABA and ALM Intelligence Report (Nov. 2019), <https://www.americanbar.org/content/dam/aba/administrative/women/walking-out-the-door-4920053.pdf>, which identified nine factors firms should consider and address in order to retain senior women attorneys.

including on compensation and executive committees and as practice group leaders.⁷⁹

With the growing recognition that corporations are becoming increasingly insistent that at least one woman be an integral part of a litigation or other legal team,⁸⁰ firms have begun to promote women attorneys to the business community and to their clients. Firms also have become increasingly aware that it no longer is acceptable to send a woman attorney to court as “window dressing,” because courts are aware of and taking note of what responsibilities are given to the women who appear in their courtrooms. Further, firms are well aware that clients are paying increased attention to women’s advancement.

For example, many firms have made a concerted effort to make the annual *Working Mother Magazine* “Best Law Firms for Women” list (which has recently increased from fifty to sixty law firms). This increased effort may be because the magazine is disseminated to corporations and their in-house counsel -- many of whom now insist on at least one woman taking a lead role on their matters.⁸¹

b. Sponsorship

⁷⁹ Nicholas Gaffney, *Women in Law Firm Leadership Positions, Part 1*, Law Practice Today (Mar. 14, 2018).

⁸⁰ Christine Simmons, *170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business*, N.Y.L.J. (Jan. 27, 2019) (requesting firms to increase diversity of representation).

⁸¹ While not specifically addressed in this Report, policies and programs geared to work/life balance and child care are essential to a woman’s success as an attorney and the Task Force urges readers of this Report to seek out

Despite all these efforts, many women still feel that a good number of firms are “talking the talk,” boasting of diversity efforts and initiatives, but not “walking the walk.”⁸² Accordingly, firms should implement concrete programs to support the advancement of women in law firms and commit to training their women attorneys, promoting women attorneys to the business community, and including women and minorities in management and strategic planning.

In order to address these issues with concrete plans and strategies to correct them, there has been a new focus on sponsorship. Sponsorship is different from mentorship and goes beyond providing advice and counsel on the “how to’s” of promoting oneself or getting “good assignments,” or providing a role model as a second seat at a deposition or oral argument. A sponsor is someone who uses his or her political influence within a firm to advocate for the attorney being sponsored, by, for example, ensuring that the sponsored attorney receives the opportunities she needs to succeed at the firm and that the sponsored attorney’s work is known by the partners in the relevant practice group.

and implement innovations in this area, such as reduced work schedules, remote work from home policies, and parental leaves.

⁸² Joe Drayton, *It’s Time For Big Steps Toward Law Firm Diversity*, N.Y.L.J. (Apr. 11, 2019); Xiumei Dong, *For Female Attorneys, Law Firm Diversity Initiatives Aren’t Enough*, Law360 (Apr. 9, 2020), noting that many of the firms promulgating diversity initiatives are not taking the next step to implement programs for diversity and inclusion or elimination of bias. Interestingly, these articles, written a year apart, identify the same problems that continue for women in law firms. <https://www.law360.com/articles/1262114/for-female-attys-law-firm-diversity-initiatives-aren-t-enough>.

As early as 2011, Catalyst, a recognized leader in the field of research on promoting gender equality in the workplace, issued a report entitled “Sponsoring Women To Success” in which it noted that in “openly recommending high-performing employees for assignments, opportunities, or promotions, sponsors leverage their own power and reputational capital.”⁸³ Sponsorship, Catalyst noted, is therefore high stakes for the sponsor yet also carries enormous promise for both sponsor and sponsored attorney.

For the sponsor, the relationship builds trust, communication, and commitment to the firm as well as honest reviews of the associate.⁸⁴ Sponsorship also ensures the future of the firm generationally by encouraging partners to seek out a high-quality talent pool. The sponsor not only assists the sponsored attorney, but also learns from her as well. Essential information about how the firm is doing from her perspective (such as technological issues, client feedback on a given matter, or how other junior attorneys are faring), all redound to the benefit of the sponsor and the firm. Such information is helpful to the sponsor as the one in charge of ensuring the flow of business at the firm and the sponsor’s personal productivity.

⁸³ Catalyst, *Sponsoring Women To Success*, at 1 (July 17, 2001), https://www.catalyst.org/wp-content/uploads/2019/01/sponsoring_women_to_success.pdf.

⁸⁴ *Id.*

For the sponsored attorney, the sponsor relationship similarly is life-changing and career building. As one woman critically defined it, “If [you’re with] the right people, they can give you that different look. They will listen to you more. It’s ... like the sun goes up a few wattage points.”⁸⁵ Notably, the “value added” of a sponsor exposes the junior attorney to senior management; broadens a woman lawyer’s visibility, provides career development and enhanced leadership skills, and gains support in firm-wide efforts that focus on her talent and mobility.⁸⁶ The networking opportunities and the ability to work on career-enhancing assignments that a sponsor provides to the sponsored attorney also are key elements to advancing her to partnership. A sponsor identifies high potential diverse talent for the firm generationally, as well as high-visibility opportunities for the sponsored attorney, imparts to that attorney the importance of new opportunities, paves the way by introducing her to important people in the industry, including clients, and gives candid performance-based feedback.⁸⁷

As the data presented in this Report bears out, this key sponsorship element may be lacking for female talent in law firms (as well as in business generally).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Joan C. Williams and Veta Richardson, *The Impact of Law Firm Compensation Systems on Women*. 62 *Hastings L.J.* 597, 627 (2011), *citing*, Ronit Dinovitzer, Nancy Richman, Joyce Sterling, *The Differential Valuation of Women's Work: A New Look at the Gender Gap in Lawyers' Incomes*, 88 *Soc. Forces* 819, 843, 847-48 (2009). This study surveyed more than four hundred equity and non-equity partners in law firms (hereinafter, the “Dinovitzer Report”).

The recent survey published by the ABA Commission on Women found that 46% of women who responded stated that they had no access to a sponsor in the workplace.⁸⁸ Similarly, a recent Harvard Business Review survey of respondents in business found that only 39% of women reported having a career discussion with either a mentor or a sponsor in the past 24 months while 54% of men stated that they had such a discussion.⁸⁹ Significantly, 71% of executives reported having protégés who look like them (by sex and race).⁹⁰ Because less than 1% of the top rainmakers in the AmLaw 200 law firms are women, and almost one-half of those firms (46%) have no women among their top ten rainmakers, men appear to control the vast majority of the business in law firms and thus it is crucial that they conscientiously include women in their business opportunities.⁹¹

With the increasing number of women attaining leadership positions within firms, it is incumbent on more senior women to act as sponsors and allies for the next generation of women attorneys. Experience and recent data have shown,

⁸⁸ See Roberta D. Liebenberg and Stephanie A. Scharf, “Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice” ABA and ALM Intelligence Report, at 8 (Nov. 2019), <https://www.americanbar.org/content/dam/aba/administrative/women/walking-out-the-door-4920053.pdf>.

⁸⁹ Rania H. Anderson and David G. Smith, *What Men Can Do to Be Better Mentors and Sponsors to Women*, Harvard Business Review (Aug.7, 2019).

⁹⁰ Joan C. Williams and Veta T. Richardson, *New Millenium Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, at 15 (July 2010), <https://worklifelaw.org/publications/SameGlassCeiling.pdf>.

⁹¹ Ida Abbott, *How Political Dynamics Undermine Gender Balance in Law Firm Leadership and What Your Firm Must Do About It*, at 6, <https://idaabbott.com/articles/how-political-dynamics-undermine-gender-balance-in-law-firm-leadership-and-what-your-firm-must-do-about-it/>.

however, that sponsorship efforts will be successful only if both male and female partners provide this support. Many women attorneys, particularly more senior women, have acknowledged that their sponsors, as well as their mentors and allies have been male. Data also have shown that male partners have traditionally transitioned their books of business to male associates, which has contributed to gender disparity in compensation.⁹² Firms now are encouraging male partners to transition books of business to female associates (and partners) as well.

c. Men as Allies

Firms also have recognized that if gender parity is to be achieved, men need to be active participants in closing the gender gap and should serve as allies to women. Being an ally means creating opportunities for women and speaking up for women attorneys, by, for example, crediting their suggestions during a large meeting or participating in women's initiatives. Women's initiatives that typically included only women now are introducing men as members and working with men to address the challenges and obstacles facing women's advancement. Making men part of the solution by raising their awareness of the challenges women face

⁹² Dan Packel, *New Survey Finds Even Bigger Gender Gap in Big Law Partner Pay*, *The American Lawyer* (Dec. 6, 2018).

and focusing them on the importance of advancing and retaining women attorneys will advance the success of the firm as a whole.⁹³

d. Professional Development

Many firms have become increasingly aware that female attorneys are a powerful and critical resource for their firms in both the courtroom⁹⁴ and in obtaining business. Firms should ensure that women have equal opportunities to take lead roles on cases—whether arguing a motion, taking a deposition, or examining a witness at trial. While skill courses are valuable, targeted coaching, perhaps spanning several months, often is a more effective way to help attorneys develop courtroom and business skills.⁹⁵ Some firms also provide coaching and professional development programs on how to develop business and leadership skills. These types of targeted and professional development programs are critical to help attorneys succeed in the private practice of law.

e. Leadership Opportunities Within the Firm

⁹³ Amanda Zablocki and Joanna Beckett, *How Do Titans of Industry Plan to Achieve Gender Parity? Include Men in the Conversation*, N.Y.L.J. (May 20, 2019); Yuliva Laroe, *Law Firm Women's Initiatives: Why Most Are Ineffective and What Firms Can Do to Fix Them*, Law Practice Today (Jan. 13, 2017), <https://www.lawpracticetoday.org/article/law-firm-womens-initiatives-ineffective-firms-can-fix/>.

⁹⁴ Rebecca Beyer, *Judges push for diverse voices in court*, ABA Journal (Jan. 1, 2018), https://www.abajournal.com/magazine/article/judge_standing_rule_court_diversity.

⁹⁵ Yuliva Laroe, *Law Firm Women's Initiatives: Why Most Are Ineffective and What Firms Can Do to Fix Them*, Law Practice Today (Jan. 13, 2017), <https://www.lawpracticetoday.org/article/law-firm-womens-initiatives-ineffective-firms-can-fix/>.

In 2017, the Diversity Lab pioneered the Mansfield project under which signatory law firms pledged to increase women in leadership roles within the firm by a certain percentage. Those firms that achieved the goals became Mansfield Certified and had the opportunity to participate in a client forum at which the firm's women and diverse attorneys were paired with in-house clients. The Mansfield project was inspired by the National Football League's Rooney Rule (named after the late Pittsburgh Steelers owner Dan Rooney), which requires that at least one person of color be interviewed for head coaching jobs.⁹⁶

The Mansfield Certification program was such a success that it has been expanded each year to include more law firms and certification now requires a higher percentage of women and diverse attorneys in leadership roles within the firm.⁹⁷ The Diversity Lab's efforts, especially through its Mansfield Certification program, have led to an increase in women in management positions in participating firms, including on compensation and executive committees and as practice group leaders, and hopefully also have had a widespread effect even at non-participating firms.

2. Recommendations for Moving Forward

⁹⁶ Stephanie Francis Ward, *Mandating Diversity: Law firms borrow from the NFL to address the makeup of their leadership ranks*, ABA Journal (Oct. 1, 2017).

⁹⁷ See diversitylab.com.

Recent data are somewhat encouraging. A New York Law Journal sample in 2019 showed promotions of women to partnership ranks increased from 34.5% in 2018 to 37.5%.⁹⁸ This increase in promotions of women to partnership is consistent with data from the Diversity and Flexibility Alliance showing that women accounted for 41.3% of new partners in 2019, an increase of about 2 percentage points from the prior year. The Alliance has attributed this increase to a growing recognition by law firms that attention must be paid to areas in which unconscious bias can affect management decisions, such as work allocation, origination credit, and leadership roles within the firm.⁹⁹

The results of the New York Law Journal study may not be surprising as the report tracked promotions at New York's twenty-five largest firms. It is unclear whether the same improvements also are true for the profession as a whole, including at the large number of smaller firms in New York. Moreover, the overall share of *all* law firm partners who are women (as opposed to the data on promotions) still showed a disappointing increase of less than one percentage point, from 23.4% to 24.2%.

⁹⁸ The New York Law Journal surveys and tracks partner promotion classes both firmwide and in New York, of the twenty-five firms employing the most lawyers in the State as ranked by the NYLJ 100. Six law firms surveyed reported at least half of their promotions to partnership were women, and others, including Weil Gotshal & Manges, Sullivan & Cromwell, Ropes & Gray, Kramer Levin, and Barclay Damon, more than two-thirds. Jack Newsham, *NY Firms' Promotions Rose Over Last Year, As Did Share of Female New Partners*, N.Y.L.J. (Apr. 20, 2020).

⁹⁹ *Id.*

Similarly, women's initiatives and affinity groups must take a hard look at their overall firm strategies, assess the data, and implement plans and programs that will increase the number of women at the firm as a whole and in firm leadership.

a. Sponsorship

Sponsorship as well as targeted professional development programs should continue and be expanded depending on the needs of the law firm. Achieving a successful sponsor relationship requires a firm to recognize, and perhaps include in the firm's compensation calculation, all diversity and inclusion efforts.

To attract partners to help associates, sponsorship should be considered as part of partner compensation. The existing partner compensation models do not necessarily incentivize behavior that is in the best long-term interest of the firm. When partners are encouraged to perform consequential non-billable work to promote the firm (*e.g.*, marketing, enhancing the firm's image, training, management of associates), the tangible rewards for those efforts must be increased.

b. Provide Outside Opportunities

Numerous articles on advancing women for partnership in the private sector of the legal profession have posited that a lawyer whose excellence is recognized

both within and outside her firm materially advances her partnership chances.¹⁰⁰ A law firm's executive committee, managing partner(s), and practice group heads should recognize that a woman associate who gains recognition outside the firm substantially benefits the firm, not only in client retention but also in expanding the work, attracting new clients and business opportunities, and recruiting other top-notch talent. Outside speaking and related writing opportunities thus have intrinsic firm value.

A reliable, cost-effective and valuable means for a young woman lawyer to develop a reputation for excellence, as well as sound leadership and advocacy skills, is membership in bar associations. Just as firms have developed a panoply of niche practices, so too has the Section. For example, the Section currently has 29 subcommittees in various discrete areas of practice. Subcommittees provide members with speaking opportunities through panels, webinars, and conferences with lawyers and in-house counsel, both sources for referrals of business. Indeed, the policy of the NYSBA and the Section is a commitment to include women and people of color as speakers and leaders. It is noteworthy that the women authors of this Report have Chaired this Section of more than 2,000 lawyers and are recognized as national leaders and spokespersons of the bar and the profession.

¹⁰⁰ See, e.g., Yuliya Laroe, *Law Firm Women's Initiatives: Why Most Are Ineffective and What Firms Can Do to Fix Them*, Law Practice Today (Jan. 13, 2017), <https://www.lawpracticetoday.org/article/law-firm-womens-initiatives-ineffective-firms-can-fix/>. (noting that women's initiatives should include engaging in efforts inside and outside the firm to gain visibility for ascending women associates).

As another example, for the past four years, the Section has coordinated and sponsored a program entitled “Taking The Lead: Winning Strategies and Techniques for Commercial Cases.” The program was designed to showcase effective opening and closing statements and direct and cross-examinations of witnesses through a re-enactment of a civil trial. Former Chairs of the Section have represented one side of the case, while four less senior women attorneys, selected from firms throughout the State, have represented the other side—preparing the case from start to finish—giving opening and closing arguments and examining and cross-examining witnesses. The presentations, with the presiding judge ruling on objections during the trial, are critiqued by sitting state and federal judges. The junior women attorneys who have participated in this program have been uniform in their praise for the experience it has provided and have reported that the program has given them more confidence to perform in a courtroom.

Notably, the junior attorneys who took advantage of this opportunity either volunteered or responded enthusiastically when asked to participate in this program. They willingly took the risk of public “peer review” to advance their skills, credentials and contacts. That is a lesson to all attorneys – take advantage of the opportunities offered and seek out ones you find of interest.

In addition, NYSBA President Henry Greenberg announced, at the commencement of his tenure, that all 59 NYSBA committees, task forces and

working groups would be chaired, co-chaired or vice-chaired by women or other diverse individuals.¹⁰¹ This initiative provides another great opportunity for women to have leadership roles and public speaking experience as well as outside recognition that often is quite important to succeed within a firm.

c. Crediting Traditional Non-Billable Work as Billable

Firms that encourage women associates and show support for their futures also give creditable hours towards the billable hours requirement for undertaking bar activities. Firms that do so recognize not only the value of such participation to the associate, her skills and development, and helping to establish her network and provide business opportunities, but also bar association activity garners significant media attention that highlights the lawyer's firm as well as the lawyer herself. An aspiring associate who receives such media coverage often is then viewed as an expert and a spokesperson in her field of concentration thereby creating additional press as well as potential new business.¹⁰²

Studies that reflect on the gender gap in partnership diversity focus, as they must, on the compensation system by which partners are measured.¹⁰³ To date,

¹⁰¹ Brendan Kennedy, *Being An Ally For Diversity & Inclusion*, NYSBA, State Bar News (Spring 2020).

¹⁰² The disparity shown in the data earlier in this Report is reflective of the members of the NYSBA. As of April 11, 2020, 36.1% of the members are women (as compared to 63.9 men), but the percentages for the Sections on Commercial & Federal Litigation drops (23.8% women v. 76.2% men) and the Trial Lawyers even greater disparity (20.5% women v. 79.5% men).

¹⁰³ *See, e.g.*, Dinovitzer Report.

most law firms adhere to a model for compensation that largely measures three factors: hours billed, fees generated, and originations. In those firms where partners must meet an hours threshold, partners have reported, anecdotally, that a partner's diversity efforts were given little weight in determining compensation, and his or her efforts for long-term human capital development while given slightly more weight, still was did not factor strongly in partner compensation.¹⁰⁴

Beyond the leadership, networking and exposure that bar associations provide, some firms give creditable hours' recognition to a female associate for undertaking a leadership role in the legal aspects of affinity groups, charitable or civic organizations, trade associations, or other *pro bono* activities (*e.g.*, trying a case for a legal services entity). *First*, the time spent on these activities helps satisfy the *pro bono* biennial attorney registration requirement in New York. *Second*, some firms have recognized the benefit of such activities and have established policies acknowledging the many different ways a young attorney can develop the skills essential to being a successful partner.

d. Metrics and Tracking Work Assignments

As an important part of a firm's diversity efforts, firms should attempt to monitor and review certain metrics, including measuring by gender the activities of

¹⁰⁴ *Id.* at 627.

their attorneys (both in practice and in other related activities). Tracking who gets various types of work assignments, for instance, will enable firm management to correlate and provide equal career building opportunities for all attorneys. These metrics then can and should be employed when considering a woman for partnership and for building the firm’s human capital fairly.¹⁰⁵ Of course, firms come in all sizes – from solo, to small, medium, or large. Different approaches may be warranted depending on the size of the firm as well as the assigning practices and procedures at the firm.

In sum, when considering an attorney for promotion, firms should take account of all of an attorney’s activities, both within the firm and outside the firm, in the legal community and in the public sphere as well.

e. Partnership Compensation

Compensation theory generally says that people should be rewarded for the behavior the organization seeks to promote.¹⁰⁶ Law firms should consider how to best reward all of the contributions partners are asked to make to the firm, both

¹⁰⁵ Dylan Jackson, *Women, Minority and LGBTQ+ Attorneys Still Struggle to Rise Within Law Firms*, *The American Lawyer* (Jan. 28, 2020) (showing that firms still do not account for hours spent developing their talents and skills on non-billable matters), <https://www.law.com/americanlawyer/2020/01/28/women-minority-and-lgbtq-attorneys-still-struggle-to-rise-within-law-firms/>.

¹⁰⁶ *Id.* at 670.

through mentoring and sponsoring programs, as well as for bar committee work.¹⁰⁷ While the specific way to achieve this goal will necessarily differ by firm, law firms should evaluate the following in determining partner compensation: (i) time spent on diversity efforts in general, but in particular, on sponsorship; (ii) work on client and prospective pitches (whether or not successful); (iii) recruiting; and (iv) bar association and speaking engagements. Ernst & Young, for example, has been compensating partners using four criteria: quality of work, people (which includes sponsoring and developing talent and skills), marketing (which includes revenue generation), and operational excellence.¹⁰⁸

By scaling partner compensation to include sponsorship, for example, in addition to receipts and client hours billed, there would be a measurable, concrete incentive for a sponsor to expend the time and reputational capital required to support and nurture the partnership of an aspiring woman associate. Developing such a model for the firm's compensation system and tracking the time spent on traditionally non-billable work is vital both to ensure diversity in partnership ranks and the firm as a whole.

¹⁰⁷ Complete Guide to Law Firm Compensation Models and Formulas, <https://lawyerist.com/hiring-staffing/compensation/>.

¹⁰⁸ Dinovitzer Report at 671.

It is equally important to implement clear benchmarks and guidance for associates who are on the partnership track taking into consideration attributes and contributions that include both traditionally billable and non-billable hours. It is important that a woman being groomed for partnership receives business development and personal development opportunities and inherits firm clients from retiring partners.

f. Client Transition/Succession Planning

Part of the success of women attorneys in law firms is based on the attribution of clients to that attorney, which is described differently at different firms, *e.g.*, being the relationship partner or the billing partner. Increased attention needs to be given by firms regarding how and when a woman becomes the relationship partner or billing partner for a particular client. Often, firms permit attorneys to retain “ownership” of a client even though that partner no longer actively is engaged in the day-to-day work for that client, or the work for the client is performed by a different practice group.

Given that the Baby Boomer generation is nearing retirement, the lack of succession planning is critical to the future of the firm. Nonetheless, such planning, if it exists, appears to be mostly subjective and lacking in transparency.

The long-term investment in the law firm’s future is often overlooked in favor of an attorney’s revenue production.¹⁰⁹

B. Efforts By In-House Corporate Clients

These past three years have seen a significant increase in the demand by clients for diversity in their legal teams and firms with which they work. As client demand often can drive concrete action in law firms, in-house legal departments are a critical part of the dialogue on how to best advance women in the legal profession.

1. Innovations

Global corporate recognition of multiple studies that show increased diversity often leads to increased corporate profitability has demonstrably impacted how in-house counsel approach retaining outside counsel.¹¹⁰ Demand for diversity is partly driven by vast empirical evidence that now exists showing that diversity improves a case team’s results.¹¹¹ For instance, according to one report released by marketing research firm Acritas based on interviews with nearly one thousand

¹⁰⁹ *Id.* at 625.

¹¹⁰ Kellie Lerner and Chelsea Walcker, *Judges Can Demand Diversity In Rule 23(g) Applications*, Law 360 (Aug. 15, 2018), https://www.law360.com/articles/1073189?utm_source=ios-shared&utm_medium=ios&utm_campaign=ios-shared (citing McKinsey & Co. studies demonstrating that “greater gender, racial and ethnic diversity is closely correlated with increased profitability. For example, in a report titled “Delivering Through Diversity,” companies in the top 25th percentile for gender diversity on their executive teams were 21 percent more likely to experience above average profits).

¹¹¹ Aebra Coe, *Why Diverse Legal Teams Perform Better*, Law360 (Jan. 30, 2018), https://www.law360.com/articles/1004773?utm_source=ios-shared&utm_medium=ios&utm_campaign=ios-shared.

corporate clients, mixed-gender legal teams “significantly” outperform those made up of only one gender.¹¹² Similarly, studies of ethnic diversity showed comparable results, establishing that “greater gender, racial and ethnic diversity is closely correlated with increased profitability,”¹¹³ a result that likely “stems from the diversity of thought needed to deliver top-notch legal results.”¹¹⁴ Another study of the two hundred highest-grossing law firms has also shown that “the most diverse law firms reported, on average, the highest profits per partner and revenue per lawyer.”¹¹⁵

Despite all of the empirical evidence showing a strong economic case for both clients and law firms to encourage diversity, the “leaky pipeline” problem¹¹⁶ – where women associates end up leaving their law firms at disproportionately higher rates than men – continues to persist. Why? In a report co-authored by the ABA and ALM Intelligence, “Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice,” the issue of attrition

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*, citing David Rock and Heidi Grant, *Why Diverse Teams Are Smarter*, Harvard Bus. Rev. (Nov. 4, 2016), stating that diverse teams produce better results because they “draw upon a wider collective pool of life experience when working together to solve a problem.”

¹¹⁵ *Id.*, citing Douglas E. Brayley and Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. Legal Prof. 1 (2009-10).

¹¹⁶ Roberta D. Liebenburg and Stephanie A. Scharf, *Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers In Private Practice*, ABA and ALM Intelligence Report (Nov. 2019), https://www.americanbar.org/content/dam/aba/administrative/women/walkoutdoor_online_042320.pdf

of senior women lawyers is examined. Research reportedly showed that while male and female lawyers expressed “similar levels of job satisfaction regarding the intellectual challenge of their practice areas,” they reported dissimilar levels of satisfaction regarding the “recognition received for their work;” the “compensation” structure; their “opportunities for advancement;” the “commitment to workplace gender diversity;” and the “leadership diversity of their firm.” While various women’s initiatives and diversity and inclusion programs have been implemented by most law firms, general counsels are increasingly exerting greater demands on their outside firms to diversify litigation teams.

Retention and advancement of women and diverse attorneys are among the main goals in one of the more innovative and collaborative initiatives underway through Diversity Lab, an incubator for ideas on building diversity in the law.¹¹⁷ Building on its Mansfield Certification program, *supra* at p.44, n.97, Diversity Lab now has launched its Move The Needle Fund. Under this project, more than twenty-five general counsels from such corporations as Bloomberg, Ford Motor Co., Starbucks, and 3M have committed to collaborate with five law firms to develop “researched-based and data-driven ways” for each firm to achieve their own set of “aggressive and measurable” diversity goals by 2025. For example, one

¹¹⁷ Move the Needle Fund, <https://www.mtnfund2025.com/>.

firm has committed to improve its attrition rate of women and diverse attorneys “to be equal to the retention rate of its non-diverse attorneys by 2025,” reflecting a 40% reduction of the diverse attorney attrition rate. These firms also have committed to financing a combined \$5 million fund to be leveraged by Diversity Lab to, among other things, experiment with new approaches to issues that include hiring, work allocation, sponsorship, feedback and compensation systems and evidence-based research on bias interrupters.¹¹⁸

As another approach, some general counsels have adopted benchmarking to increase diversity. For example, in 2019, Intel Corporation said that although it had spent years adopting “nearly every available tool to increase the diversity of our legal teams, including mentoring programs and clerkships,” it announced that beginning January 1, 2021, it would only retain law firms where at least 21% of its equity partners are women and at least 10% of the firm’s U.S. equity partners are underrepresented minorities.¹¹⁹

Similarly, PayPal has declared diversity a “core value” of the company and begun tracking diversity of its outside firms using metrics that collect data beyond

¹¹⁸ See diversitylab.com.

¹¹⁹ Steve Rodgers, *The Intel Rule: Action to Improve Diversity in the Legal Profession*, (Nov. 21, 2019), <https://newsroom.intel.com/editorials/intel-rule-action-improve-diversity-legal-profession/>.

just the diversity of the lawyers working on their matters.¹²⁰ Under PayPal’s policy, it considers data on law firm diversity practices, the diversity of the executive committees, the allocation of origination credit, the promotion pipeline and programs offered to diverse attorneys.

In November 2017, in response to our 2017 Report, JP Morgan Chase & Co. outlined its new “Leading With Diversity” initiative pressing for at least 50% women and diverse attorneys in leadership positions on teams handling its litigation and serving as mediators and arbitrators for its matters.¹²¹ These types of initiatives, especially by major clients who often engage outside counsel for multiple matters, are key toward achieving progress.

Most recently and as previously mentioned, in January 2019 in response to new partner classes that “remain largely male and largely white,” more than 170 general counsel and corporate legal officers signed an open letter to major law firms pledging that their companies would prioritize their legal spend to those firms that commit to diversity and inclusion.¹²² Like the JP Morgan initiative,

¹²⁰ <https://www.legal500.com/gc-magazine/interview/louise-pentland-chief-legal-officer-paypal/>.

¹²¹ Miriam Rozen, *JPMorgan Initiative Aims to Boost Women's Roles on Litigation Teams*, *The American Lawyer*, (Nov. 28, 2017), <https://www.law.com/americanlawyer/sites/americanlawyer/2017/11/28/jpmorgan-initiative-aims-to-boost-womens-roles-on-litigation-teams/>.

¹²² Christine Simmons, *170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business*, *N.Y.L.J.* Jan. 27, 2019.

these types of statements by clients make a real impact within law firms and hopefully will lead to positive change.

2. Recommendations for Moving Forward

Corporate clients should continue to infuse accountability through use of metrics and data-driven approaches to provide women with equal opportunities to participate in all aspects of litigation. Corporate clients can review bills to determine what types of work the women and diverse attorneys on their matters are performing and then engage in discussions with the partner managing the engagement to encourage equal allocation of work within a team. Corporate clients also can encourage associates to participate on team calls and attend important meetings as well as, with appropriate supervision, take and defend depositions and speak in court.

Corporate clients should continue to have open dialogue with the firms with which they work about diversity and inclusion initiatives and ways to work together to advance women and diverse attorneys in the profession. In addition, corporate clients can award work to diverse teams and discuss how billing credit is allocated with the engagement partner. In addition, corporate clients can and should continue to pledge to give their work to firms that provide them with diverse teams at all levels.

Lastly, it is critically important that clients and law firms work together to help move the needle. In-house attorneys should alert the firms to their expectations and the investments that their outside providers need to make, while being open to partnering and providing information as needed to make that happen. In-house attorneys collaborating with law firms on advancing women and diverse attorneys will help ensure that more women succeed in the legal profession, including by increasing the percentage of women taking lead roles in the courtroom.

C. The Judiciary

Members of the judiciary are increasingly playing an active role in helping women and diverse attorneys have greater access to opportunities to take on lead roles in the courtroom. Mindful of the importance of diversity in the profession and the small number of cases that are tried combined with the low rate of appearances in court by women attorneys, many judges have been seeking ways to increase the number and substance of speaking opportunities.¹²³

1. Innovations

As a result of the Section's 2017 Report, a number of federal judges, including the legendary federal judge Jack B. Weinstein in the Eastern District of New York, amended their practice rules by inviting "junior members of legal teams" to argue "motions they have helped prepare and to question witnesses with whom they have worked."¹²⁴ Designed to increase opportunities for junior attorneys, such rules also removed limits on the number of lawyers appearing per party to permit more than one lawyer "to argue for one party if this creates an

¹²³ Alan Feuer, *A Judge Wants a Bigger Role for Female Lawyers. So He Made a Rule*, N.Y. Times (Aug. 23, 2017).

¹²⁴ *Id.*

opportunity for a junior lawyer to participate.”¹²⁵ Since 2017, more than 150 state and federal judges have adopted some variations of the rule, where “less experienced lawyers, lawyers from diverse backgrounds and lawyers who are women” or historically underrepresented attorneys are encouraged to participate in courtroom proceedings.

Further, judges have demonstrated their commitment to increasing opportunities for women by inquiring directly from the bench about women who they see as part of a litigation team and knowledgeable of the case, yet not otherwise afforded a speaking role. In fact, some judges have specifically asked to hear from the woman attorney, rather than (or in addition to) hearing from lead counsel, recognizing that they may be offering a career-enhancing opportunity.

For example, upon receiving our 2017 Report, the Honorable Elizabeth Wolford of the Western District of New York had a conference with attorneys in a breach of contract case. Both sides had male partners and female associates at the meeting. Knowing that the associates had likely done the research, she

¹²⁵ Hon. Jack B. Weinstein, U.S. Dist. Judge, Individual Motion Practice, <https://img.nyed.uscourts.gov/rules/JBW-MLR.pdf>; Hon. Mary Kay Vyskocil, U.S. Dist. Judge, Individual Rules of Practice in Civil Cases, (Rev. Feb. 27, 2020), https://nysd.uscourts.gov/sites/default/files/practice_documents/MKV%20Vyskocil%20Civil%20Practice%20Rules%20-%20February%2027%202020.pdf.

recommended that the associates argue at the hearing. They did. And, she said, “It was one of the best arguments I have had the privilege of presiding over.”¹²⁶

At the State court level, the Seventh Judicial District has adopted a “Courtroom Equality Statement” which is posted on its website¹²⁷ to create opportunities for junior attorneys. The website contains the names and links to all participating judges.

Female and male judges have also begun to publicly encourage consideration of women and diverse lawyers in exercising their discretionary authority to appoint lawyers to various positions. For example, the National Association of Women Judges adopted a formal resolution acknowledging that increased diversity in court appointments of lawyers to serve in roles such as lead counsel in multi-district and class action litigations, as special masters, receivers and mediators, would benefit not only women and diverse attorneys, but also the judicial system as a whole.¹²⁸ Similarly, a male federal judge, who was appointed to preside over a multi-district litigation, gained public attention¹²⁹ and support¹³⁰

¹²⁶ Rebecca Beyer, *Judges push for diverse voices in court*, ABA Journal (Jan. 1, 2018).

¹²⁷ <http://ww2.nycourts.gov/courtroom-equality-statement-26536>.

¹²⁸ National Association of Women Judges, *Resolution on Diversity in Trial Court Appointments*, (Oct. 8, 2016), https://www.nawj.org/uploads/files/resolutions/resolution-diversity_in_trial_court_appointments_2016.pdf.

¹²⁹ Lauraann Wood, *VIX MDL Lead Should Have Young, Diverse Attys, Judge Says*, Law360 (July 11, 2018), https://www.law360.com/articles/1062197?utm_source=ios-shared&utm_medium=ios&utm_campaign=ios-shared.

when he requested details on the diversity of the litigation team when considering its application to serve as plaintiff’s lead counsel.

A number of district court judges have encouraged or considered diversity when appointing lead counsel in multi-district litigation (“MDL”) or class litigation. In *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, Judge Stanwood R. Duval, Jr. (ret.), from the Eastern District of Louisiana, compiled a “list of factors that [he and his colleagues] often consider when undertaking the difficult task of choosing counsel” for multidistrict litigation.¹³¹ Those factors include “diversity in gender, racial, and geographic terms.”¹³²

In *In re Generic Digoxin and Doxycycline Antitrust Litigation*, Judge Cynthia Rufe of the Eastern District of Pennsylvania appointed two female attorneys to serve as co-lead counsel of the plaintiffs’ steering committee.¹³³ Judge Rufe advised in her appointment order that “[t]he Court expects that the leadership will provide opportunities for attorneys not named to the PSC, particularly less-

¹³⁰ Kellie Lerner and Chelsea Walcker, *Judges Can Demand Diversity In Rule 23(g) Applications*, Law360 (Aug. 15, 2018), https://www.law360.com/articles/1073189?utm_source=ios-shared&utm_medium=ios&utm_campaign=ios-shared.

¹³¹ Stanwood R. Duval Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 La. L. Rev. 391, 392 (2014).

¹³² *Id.* at 393.

¹³³ *See* Pretrial Order 1, No. 16-md-2724 (E.D. Pa. Nov. 28, 2016), ECF No. 84.

senior attorneys, to participate meaningfully and efficiently in the MDL including through participation in any committees within the PSC and in determining which counsel will argue any motions before the Court.”¹³⁴

As another example, in *In re Gildan Activewear Inc. Securities Litigation*, the late Judge Harold Baer, of the Southern District of New York, ordered co-lead counsel to “make every effort to assign to this matter at least one minority lawyer and one woman lawyer with requisite experience.” Judge Baer explained that the “proposed class includes thousands of participants, both male and female, arguably from diverse backgrounds, and it is therefore important to all concerned that there is evidence of diversity, in terms of race and gender, in the class counsel I appoint.”¹³⁵

Most recently, Judge Robin L. Rosenberg in the United States District Court for the Southern District of Florida, created a novel leadership structure for plaintiffs in an MDL related to Zantac, a heartburn medication, in order to provide less experienced attorneys with a meaningful role in the MDL. Judge Rosenberg created a “leadership development committee,” comprised of five attorneys who did not have sufficient experience to serve as co-lead counsel but who were seen as future leaders of the MDL bar. The Judge explained that she expected the

¹³⁴ *Id.* at 3.

¹³⁵ Order 1, No. 08-cv-5048 (S.D.N.Y. Sept 20, 2010), ECF No. 59.

attorneys on the leadership development committee (the committee is co-chaired by two women) to be mentored by the co-lead counsel and be provided with meaningful opportunities in managing and participating in the MDL.¹³⁶

Bringing more attention and critical thought-leadership to the issue, members of the judiciary also have begun to discuss publicly gender disparities and greater access for women to leadership opportunities by participating in panels and roundtables that tackle some of the barriers to those opportunities. For instance, unconscious gender and ethnic bias in the courtroom and its harmful impact on career advancement have been the subject of discussions by judges who have become more cognizant and vocal about techniques that can be employed to interrupt subtler forms of implicit bias observed in the courtroom.

In addition to leading the way toward increasing diversity by creating opportunities for junior lawyers to learn and hone their courtroom skills and by encouraging diverse teams and appointees reflecting the population they represent, judges have been generous in speaking at bar associations and other programs to educate not only the public but the legal community about the importance of these issues.

¹³⁶ Carolina Bolado, *Younger Attorneys Get Chance at Big Role in Zantac MDL*, Law 360 (May 11, 2020), <https://www.law360.com/newyork/articles/1272037>.

2. Recommendations for Moving Forward

Judges should continue to amend their rules of practice to encourage women and diverse attorneys to have a lead role at court appearances. As judges in state and federal courts throughout New York State already have adopted such a rule, there are many examples to use as models. The more successful rules include the following components: (1) encouraging parties to permit attorneys who have been practicing seven years or less to speak in court; (2) holding oral argument if the court is informed that junior attorneys will argue at least part of the motion/issue before the court; and (3) increasing the permitted speaking time limits to speak if junior attorneys will argue at least part of the motion/issue before the court. Courts might consider encouraging such changes to individual rules of practice, perhaps by a notice from the Chief Judge or Administrative Judge, or by a pledge for all judges to consider joining, as was done by the Seventh Judicial District.

Judges also can, where appropriate, call on a junior attorney to present when a judge observes that a junior attorney appears prepared and able to respond to the court's questions but is not being given the opportunity to speak. Judges also can address the junior attorney specifically, perhaps praising that attorney's oral presentation and/or written briefs. In addition, judges, again if appropriate, can

contact a partner the judge knows at the law firm that appeared before the judge to praise a junior attorney who performed particularly well in the courtroom.

Judges should consider the gender and diversity of all court appointments, such as leadership roles in class actions and in multi-district litigation, and in other court appointments, such as special masters, referees, guardians ad litem, and monitors.

In sum, the judiciary plays a vital role in improving the diversity of litigants in the courtroom. The efforts by the judiciary to date have been extraordinary and continuation and expansion of those efforts surely will lead to an increase in women and diverse attorneys taking the lead in the courtroom.

D. ADR Context

1. ADR Provider and Professional Organization Initiatives

New York is an international and national market and its courts and ADR providers attract matters from all over the world and often matters of broad significance, complexity, and financial importance. As a result, it is critical that ADR professionals in New York be diverse and representative of the clients whose disputes they decide. Nearly all arbitral organizations have recognized the need to offer a diverse panel of arbitrators, including gender diversity, and have engaged in outreach efforts in order to increase gender diversity.

The natural starting point for a discussion of initiatives to advance the cause of women in ADR is ArbitralWomen (“AW”), which was founded in Paris in 1993 to promote women and diversity in international dispute resolution at a time when international arbitration was overwhelmingly dominated by white males. Over the years, AW has been a pioneer in the drive for gender equality in dispute resolution and its influence is evident in the initiatives of other organizations and ADR providers.

In addition to traditional mentoring and networking opportunities, AW has developed a number of innovative techniques for advancing the interests of women in all aspects of dispute resolution including maintaining a searchable database of female practitioners from more than 40 countries and issuing publications showcasing females in dispute resolution. Most recently, AW developed the Arbitral Women Diversity Toolkit training program. This program is offered to ADR organizations, law firms, corporations, and others interested in implicit bias training, as a full day seminar designed to recognize and explore ways to address and overcome ingrained bias that inhibit the selection of women in ADR.¹³⁷

AW is also a major proponent and partner in the promotion of pledges developed by other programs and organizations, in particular the Equal

¹³⁷ <https://www.arbitralwomen.org/diversity-toolkit/>.

Representation in Arbitration (“ERA”) Pledge, which has been embraced by major ADR providers, law firms and clients.¹³⁸ The ERA Pledge was developed in 2015 by members of the arbitration community with the purpose of increasing “the number of women appointed as arbitrators in order to achieve a fair representation as soon as practically possible, with the ultimate goal of full parity.”¹³⁹

Since its launch in March of 2016, more than 4,135 organizations and individuals have signed the ERA Pledge, including arbitration providers,

¹³⁸ The ERA Pledge states:

As a group of counsel, arbitrators, representatives of corporates, states, arbitral institutions, academics and others involved in the practice of international arbitration, we are committed to improving the profile and representation of women in arbitration. In particular, we consider that women should be appointed as arbitrators on an equal opportunity basis. To achieve this, we will take the steps reasonably available to us – and we will encourage other participants in the arbitral process to do likewise – to ensure that, wherever possible:

- committees, governing bodies and conference panels in the field of arbitration include a fair representation of women;
- lists of potential arbitrators or tribunal chairs provided to or considered by parties, counsel, in-house counsel or otherwise include a fair representation of female candidates;
- states, arbitral institutions and national committees include a fair representation of female candidates on rosters and lists of potential arbitrator appointees, where maintained by them;
- where they have the power to do so, counsel, arbitrators, representatives of corporates, states and arbitral institutions appoint a fair representation of female arbitrators;
- gender statistics for appointments (split by party and other appointment) are collated and made publicly available; and
- senior and experienced arbitration practitioners support, mentor/sponsor and encourage women to pursue arbitrator appointments and otherwise enhance their profiles and practice.

¹³⁹ Equal Representation in Arbitration, About the Pledge, <http://www.arbitrationpledge.com/about-the-pledge>.

professional arbitration organizations, law firms and individuals in the arbitration community.¹⁴⁰

Pledges have also spawned concrete initiatives. In 2018, JAMS, a signatory to the ERA Pledge, included the following model clause, inspired by the ERA Pledge:

The parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation), and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees.¹⁴¹

This clause, like the ERA Pledge, stops short of mandating a specific percentage of female participation¹⁴² but does encourage action rather than being solely aspirational.

CPR, also a signatory to the ERA Pledge, has taken the Pledge one step further in its new Diversity & Inclusion Model Clause, released on April 1, 2020. The new model clause contains a specific minimum goal and is available to parties who wish to pre-commit to a diverse panel of neutrals in a future dispute to be resolved by arbitration and provides, in pertinent part:

¹⁴⁰ As of April 14, 2020. Equal Representation in Arbitration, Time for Change, <http://www.arbitrationpledge.com>.

¹⁴¹ JAMS, Alternative Dispute Resolution (ADR) Clauses, JAMS Mediation, Arbitration and ADR Services, <https://www.jamsadr.com/clauses/#Diversity>.

¹⁴² Equal Representation in Arbitration, About the Pledge, <http://www.arbitrationpledge.com/about-the-pledge>.

The parties agree that however the arbitrators are designated or selected, at least one member of any tribunal of three arbitrators shall be a member of a diverse group, such as women, persons of color, members of the LGBTQ community, disabled persons, or as otherwise agreed to by the parties to this Agreement at any time prior to appointment of the tribunal.

The clause was developed by CPR with the help of its Diversity in ADR Task Force, co-chaired by Hon. Timothy K. Lewis (“Ret.”) and Judge Scheindlin. The model clause was drafted by a subcommittee chaired by Laura Kaster and Ben Picker.¹⁴³

CPR also joined many courts that have sought to expand opportunities for diverse lawyers as advocates by encouraging the participation of less-experienced lawyers through the adoption of a “Young Lawyer” Rule into its domestic and international arbitration rules. The Rule aims to increase the number of “stand-up” opportunities for junior attorneys -- who are often women and people of color -- to examine witnesses and present argument at arbitral hearings.¹⁴⁴

¹⁴³ International Institute for Conflict Resolution, *CPR Continues to Pioneer in Diversity Space, with Launch of Diversity & Inclusion Model Clause*, (Apr. 1, 2020), <https://www.cpradr.org/news-publications/press-releases/2020-04-01-cpr-continues-to-pioneer-in-diversity-space-with-launch-of-diversity-inclusion-model-clause>. CPR has developed other initiatives to improve the selection of diverse neutrals to panels. A diversity statement is included in all CPR nomination letters and neutrals have the option to self-identify as diverse on slates of candidates that CPR submits to parties. In 2018, CPR also produced and disseminated a brochure showcasing the female neutrals who have been admitted to its Panel of Distinguished Neutrals.

¹⁴⁴ The Rule was incorporated into the 2019 CPR Rules for Administered Arbitration of International Disputes, the 2019 CPR Administered Arbitration Rules, the 2018 CPR Non-Administered Rules for International Disputes and the 2018 CPR Non-Administered Arbitration Rules. *Id.*

The AAA has taken a technological approach to increasing diversity in selected panels, having developed algorithms to provide arbitrator lists to parties that comprise at least 20% diverse panelists where party qualifications are met.¹⁴⁵ This effort is coupled with the AAA’s efforts to diversify its roster of neutrals, which currently stands at 24% female and minorities according to its website. The AAA also recruits and trains diverse neutrals through its Higginbotham Fellowship Program.¹⁴⁶ The AAA has also sponsored AW Diversity Toolkit workshops in both New York and Miami.¹⁴⁷

The New York International Arbitration Center¹⁴⁸ (“NYIAC”) was founded in 2013. In November 2018, NYIAC joined with AW to celebrate AW’s 25th Anniversary using the event to launch the AW Diversity Toolkit. The full-day conference entitled “The Diversity Dividend: Moving From Bias to Inclusiveness

¹⁴⁵ American Arbitration Association, Arbitrators & Mediators, <https://www.adr.org/RosterDiversity>.

¹⁴⁶ American Arbitration Association, Diversity and Inclusion Initiatives, <https://www.adr.org/DiversityInitiatives>.

¹⁴⁷ In addition to AW there are efforts by other professional membership organizations representing the interests of ADR practitioners. The Chartered Institute of Arbitrators (CI Arb) is a leading professional membership organization with worldwide representation. In 2019, CI Arb’s New York Branch launched initiatives designed to promote diversity in international arbitration including granting full scholarships to three AAA Higginbotham Fellows for the Branch’s annual 5-day Columbia – CI Arb Comprehensive Course on International Arbitration and extending a registration discount to AW members. It is also the CI Arb NY Branch’s practice to include diverse speakers in its programs, including younger female practitioners.

¹⁴⁸ See New York International Arbitration Center, <https://nyiac.org>. NYIAC also maintains a Diversity Corner¹⁴⁸ on its site cataloguing resources and achievements. NYIAC will soon add a database of female, international arbitrators in New York, providing easy access to their bios. Women serve a prominent role within NYIAC’s leadership. The past and current Executive Directors are women as is the current Chair of the Board. Women serve on NYIAC’s Executive Committee and women represent founding firms as Directors of NYIAC.

in International Arbitration,” brought together seventy-five stakeholders in international arbitration with discussions and break-out sessions designed to move the needle on gender parity. Following the Conference, NYIAC joined the AAA-ICDR to host the first U.S. Toolkit Training with thirty delegates, running several modules to better understand unconscious bias and build individual diversity strategy plans.

In 2019, with CIArb New York Branch, NYIAC launched a diversity challenge. Titled “Reinventing the Landscape for Young IA Practitioners,” officers from eight groups collaborated on strategies to build the talent pipeline and to offer suggestions on tips and tricks for a successful career in international arbitration.

Women in Dispute Resolution (“WIDR”), a committee of the ABA’s Dispute Resolution Section, has also been active in promoting the visibility of female neutrals. Among WIDR’s 2019 -2020 most notable initiatives was to update and promote its directory of WIDR members as of January 1, 2020.¹⁴⁹ The directory is well recognized by ADR institutional providers as a source of information about neutrals. The directory has not only been promoted at ABA and other legal conferences by WIDR members, it has also been promoted digitally.

¹⁴⁹ https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/widr-directory-2020.pdf.

WIDR also has created a new flyer promoting the selection of diverse neutrals making it easily downloadable by members and linking it to various ABA online publications. WIDR further provided a toolkit to members with a sample LinkedIn post encouraging them to post links to the directory and flyer on their own LinkedIn page.

The Committee on Diversity (the “Committee”) of NYSBA’s Dispute Resolution Section (“DRS”) has intensified its focus on addressing the long-standing challenge to creating an inclusive environment in the dispute resolution community. The Committee has concentrated its efforts on practical steps such as training, mentorship programs and speaking opportunities as well as tackling broader issues such as exploring the reasons for the lack of diversity, such as implicit bias.¹⁵⁰

The ADR Inclusion Network¹⁵¹ (“Network”) is yet another example and is comprised of representatives from all stakeholders in the ADR field who are committed to increasing the awareness of, use, visibility, availability, and selection

¹⁵⁰ For example, in order to overcome financial barriers to ADR training, DRS offers its signature “Diversity Mediation Scholarship” and “Diversity Arbitration Scholarship” selecting applicants and offering financial assistance related to DRS commercial mediation and commercial arbitration training programs. As another example, DRS has a “Diversity Mentorship Program” that is two years in duration and provides opportunities for mentees to observe arbitrations and/or mediations with experienced practitioners

¹⁵¹ See <https://www.adrdiversity.org/>.

of diverse neutrals within New York State in all aspects of the ADR field.¹⁵²

Founded in 2017, the organization has published a best practices tip sheet for making events more inclusive and developed a one-page sheet discussing the benefits of having a diverse panel of arbitrators.

When litigants in both domestic and international arbitration are asked what criteria are used to select a neutral they often cite the expertise of the candidate in the subject matter of the dispute¹⁵³ and the candidate's ADR experience. To obtain this information, litigants increasingly seek prior awards as indicators of the candidate's performance.

FINRA was the first organization to fill this information gap. All arbitration awards issued under FINRA rules are publicly available. FINRA offers the awards on its website¹⁵⁴ and the Securities Arbitration Reporter offers several services to research and analyze awards issued by FINRA arbitrators.¹⁵⁵ Similarly, the AAA makes its employment arbitration awards publicly available.¹⁵⁶ The purpose is to provide transparency to employees about how cases similar to theirs

¹⁵² See *id.*

¹⁵³ See <https://icsid.worldbank.org/en/Pages/resources/ICSID%20NewsLetter/January%2017/How-to-Select-an-Arbitrator.aspx>.

¹⁵⁴ <https://www.finra.org/arbitration-mediation/arbitration-awards>.

¹⁵⁵ <http://www.sacarbitration.com/research-home.htm>.

¹⁵⁶ See Rule 39 (b) of the AAA Employment Arbitration Rules. The names of parties and witnesses are not publicly disclosed unless the parties expressly agree.

were decided in arbitration. Employment arbitration awards have been publicly available since 1994. A similar rule was adopted under the AAA Consumer Arbitration Rules¹⁵⁷ in 2014. This Rule also was adopted to provide transparency about how consumer cases are decided.

There are several ways to obtain information from past international arbitration awards. In 2014, Arbitrator Intelligence¹⁵⁸ (“AI”) began providing data about arbitrator decision-making. AI collects information from counsel and parties to create data analytics about how arbitrators make decisions. AI has cooperative agreements with ADR providers to collect their awards. AI collaborates with AW to promote greater selection of women as arbitrators.

In 2016, the ICC Court of Arbitration introduced a policy to publish¹⁵⁹ limited information about arbitrators in order to demonstrate their expertise and competency. The goal was to promote gender, as well as regional and generational diversity of its arbitrators.

Efforts should be taken by ADR providers to broaden the information about women and minority arbitrator decisions so it is publicly available and prospective litigants can assess the competency of the candidates offered. The

¹⁵⁷ See Rule 43 (c) of the AAA Consumer Arbitration Rules.

¹⁵⁸ <https://arbitratorintelligence.com/about-1>.

¹⁵⁹ <https://iccwbo.org/global-issues-trends/diversity/diversity-in-arbitration/>.

work of AI and public availability of arbitration awards fills a gap that is currently only filled by underground networks or word of mouth. As is evident from the above, the ADR space has greatly increased its focus on the importance of diversity in ADR and there are many innovative programs and policies in this field.

2. Next Steps

The initiatives discussed above for all ADR provider and professional organizations are focused on education, pledges, recommendations, and other activities intended to promote women as neutrals and gain commitments to their appointment to cases. While it is important that providers encourage diversity, by, for example, recommending incorporation of diversity selection criteria into pre dispute clauses and suggesting specific language for that purpose, in order to be effective, such clauses need to be adopted by lawyers. Professional organizations should play a role in educating lawyers and clients regarding the clauses and the importance of diversity in decision making in general. Companies with strong diversity and inclusion programs should be targeted to receive educational material on how to add the clause to their agreements.

Aggressive promotion of the clauses should raise awareness, but a monitoring mechanism should also be established to determine whether the clause is being adopted and improving the diversity of appointments. Notably, although one of the recommendations of the ERA Pledge is to maintain and publish statistics

with respect to the gender of appointments, most providers do not make those statistics available on their websites or otherwise make them public. Metrics on gender appointments should not be limited to ADR Providers. Law firms and corporations that adopt diversity programs should create and monitor metrics to demonstrate improvement on their diversity initiatives. These statistics and metrics are key to determining whether the measures that have been adopted have proven to be effective.

All members of the bar should be responsible for developing the next generation of neutrals. Women and minorities should take a more prominent role in representing parties in ADR proceedings. The NYS Presumptive ADR initiative affords a perfect opportunity for women and minorities to gain experience as lead advocates with demonstrated competency and success. In addition, law firms should encourage women and minority associates and partners to volunteer as part of court-annexed mediation and arbitration panels.

The courts have adopted Diversity Statements recognizing the importance of their programs to attract and retain neutrals with broad professional, gender, racial and socioeconomic backgrounds to complement the diversity of its litigants.¹⁶⁰

¹⁶⁰ Southern District of New York ADR Diversity Statement: <https://nysd.uscourts.gov/sites/default/files/pdf/Mediation/Diversity%20Statement.pdf>; New York County Commercial Division ADR Diversity Statement: <http://ww2.nycourts.gov/courts/comdiv/ny/ADR-Applications-Ns-Page.shtml>.

Without law firm management support, women and minorities will be reluctant to fill these pro bono opportunities especially with the emphasis on billing. There is an added benefit to serving on these panels. A recent study¹⁶¹ concluded that cases in which the parties were represented by attorney-mediators had a reduced decision error rate suggesting that advocates' decision-making skills are improved by dispute resolution training.

Law firms increasingly are establishing Arbitration or ADR practice areas as specialties within the firm. Women and minority partners and associates can and should take a more visible role in these practices. Their publications and involvement in policymaking through ADR institutions should be highlighted on a local, national, and international level. Whether or not a firm has an Arbitration or ADR practice area, firms should provide professional development opportunities for women to develop and sharpen their skills. Women and minorities should take a leading role in delivering these programs, both internally to lawyers and clients, and externally through bar and business associations. In this way, women and minorities can more easily transition from the role of practicing lawyer to neutral because of their recognized expertise in the area, as many men do today.

¹⁶¹ See Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1740-1461.2008.00133.x>.

VI. CONCLUSION

While there is still a significant gender gap in courtroom and ADR participation by women attorneys, there has been some improvement in both during the three years since the 2017 Report was released. That improvement deserves recognition. The Task Force believes that the 2017 Report was instrumental in causing this improvement and helped broaden the focus on the issues raised in that Report by all sectors of the legal profession – including law firms, corporate legal departments, government entities, and the judiciary as well as private and public sector individual attorneys.

The progress noted in this Report, however, is incremental and certainly not sufficient to end the campaign to achieve full equality for women and all diverse attorneys in the courtroom and in ADR. Much more needs to be done before that goal is achieved. The Task Force remains committed to that endeavor and encourages all sectors of the legal profession, including individual attorneys, to continue to focus on all of the issues raised in this Report. Once again, this Report makes many recommendations that should lead to more opportunities and greater success for women in the legal profession. The Task Force is proud to have made a contribution to advancing this important cause.

**NYSBA Commercial & Federal Litigation Section
Women's Initiatives Task Force**

The Honorable Shira A. Scheindlin (ret.), Stroock & Stroock & Lavan

Carrie H. Cohen, Morrison & Foerster LLP

Tracee E. Davis, Seyfarth Shaw

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APPENDIX A

Judicial Form for Tracking Court Appearances.

I. Identify your court: _____

(e.g., SDNY, NDNY, 1st Dep't; 3d Dept; 2d Cir, Commercial Div NY Co):

II. Type of Case: Criminal ___ (Federal only) Civil ___

Subject Matter: _____
(e.g., contract, negligence, employment, securities):

III. Is this a class action? Yes ___ No ___

IV. Is that an MDL (Federal only)? Yes ___ No ___

V. Is this an appeal? Yes, criminal (Fed. only) ___ Yes, civil ___ No ___

VI. Type of Proceeding (Please circle your answer)

- A. Pre-trial Conference
- B. Arraignment (Federal only)
- C. Bail Hearing (Federal only)
- D. Sentencing (Federal only)
- E. Oral Argument on Motion ___

Type of motion: _____
(e.g., discovery, motion to dismiss, summary judgment, TRO, class certification, in limine)

- F. Evidentiary Hearing
- G. Trial
- H. Appellate Argument
- I. Other

III. Number of Parties (total for all sides)

A. Two ___

- B. Two to Five___
- C. More than Five___

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

- Male___
- Female___
- Public___
- Private___

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

- Male___
- Female___
- Public___
- Private___

VI. Additional Counsel (if any) for Plaintiff(s) (other lawyer(s) at counsel table/who did not speak – please indicate number of each if more than one)

- Male___
- Female___
- Public___
- Private___

VII. Additional Counsel (if any) for Defendant(s) (other lawyer(s) at counsel table who did not speak – please indicate number of each if more than one)

- Male___
- Female___
- Public___
- Private___

APPENDIX B

TABLES PREPARED BY DOAR

Table I

Female Attorneys Appearing In Appellate Courts	
State Appellate Courts	
First Dept, Overall	26.0%
First Dept, Public	55.9%
First Dept, Private	24.7%
Second Dept, Overall	24.3%
Second Dept, Public	49.4%
Second Dept, Private	21.6%
Third Dept, Overall	28.0%
Third Dept, Public	34.8%
Third Dept, Private	25.5%
Fourth Dept, Overall	27.7%
Fourth Dept, Public	26.7%
Fourth Dept, Private	20.5%
Appellate Divisions, Overall	26.5%
NY State Ct, Public	41.7%
NY State Ct, Private	16.7%
NY State Ct, Civil	35.3%
NY State Court, Criminal	50.0%

NY State Court, Overall	26.8%
Federal Appellate Courts	
Second Circuit, Overall	24.3%

Table II

	Female Attorneys Appearing In Civil and Criminal Cases
Overall	26.7%
Lead Counsel	25.3%
Additional Counsel	36.4%
Federal Courts	27.5%
State Courts	23.1%
Trial Courts	26.3%
Appellate Courts	24.7%
Upstate Courts	27.9%
Downstate Courts	24.2%
Public Sector	35.1%
Private Sector	20.8%

Parties Per Side	Female Attorneys Appearing As Lead Counsel
1	43%
2	26.6%
3-5	26.0%
6+	23.5%

Table III

Female Attorneys Appearing As Lead Counsel By Geography	
Upstate, Civil	26.7%
Downstate, Civil	23.9%
Upstate, Criminal	28.1%
Downstate, Criminal	30.6%

Female Attorneys Appearing As Lead Counsel By Court	
Trial, Civil	24.1%
Appellate, Civil	25.4%
Trial, Criminal	29.4%
Appellate, Criminal	22.7%

Female Attorneys Appearing As Lead Counsel By Practice Area	
Family Law	40.7%
Contract Disputes	17.7%
Criminal	28.6%
Civil Rights	28.1%
Torts	27.7%
Financial Disputes	23.4%
Intellectual Property	21.1%

Female Attorneys Appearing As Lead Counsel By Jurisdiction	
Federal	27.5%
State	23.2%
Federal, Criminal	28.8%
Federal, Civil	26.0%
State, Civil	24.1%
Federal, Public	30.9%
Federal, Private	17.4%
State, Public	43.1%
State, Private	22.4%

APPENDIX C

SUMMARY OF RECOMMEDATIONS

1. Law Firms

- Sponsorship by partners of women and other diverse attorneys should be encouraged and tracked to ensure that mid-senior level associates have sponsors.
- Provide speaking and writing opportunities outside the firm, in particular through bar association activity. Examples include leadership roles on committees and sections, mock trial exercises, and authoring of reports, blog posts, and articles.
- Credit work as billable that traditionally has been treated as non-billable. Examples include bar association work, mentoring, sponsorship, committee work within the firm focusing on diversity and inclusion, and affinity group leadership roles. Consider crediting time spent on leadership roles for charitable and other civic organizations.
- Ensure that assignments are made equally to men and to women by tracking work assignments and reviewing metrics.

- Partnership compensation should be based on more than just billable hours. It should include work on client and prospective pitches, sponsorship, recruitment, bar association work, speaking and writing, and diversity and inclusion efforts.
- Ensure that both men and women transition to the role of relationship or billing partner and that transition planning is transparent.

2. In-house Corporate Legal Departments

- Demand accountability from outside counsel by requesting metrics that track lead counsel assignments, diverse teams, and roles within teams.
- Encourage associates at firms to participate in team calls and attend important meetings.
- Communicate expectations regarding diversity and inclusion to outside counsel.
- Discuss allocation of billing credit within the firm with the relationship partner to help ensure that the women and other diverse attorneys who perform the work receive appropriate billing credit.

3. The Judiciary

- Continue to expand the adoption of individual rules that encourage junior attorneys to speak in court.
- Ask junior attorneys to participate in an argument where it is apparent that the junior attorney worked on the brief and is knowledgeable on the issues.
- Consider diversity in all court appointments, such as leadership roles in class actions and in multi-district litigation.
- Consider diversity when appointing court adjuncts, such as special masters, receivers, referees, guardians ad litem, and monitors.
- Continue public speaking and participation on bar association panels about the importance of diversity in the courtroom.

4. ADR

- Encourage the selection of diverse neutrals, by, for example, using model clauses in arbitration agreements in which the parties agree, in advance of any dispute, to the appointment of at least one diverse neutral on every arbitral panel.

- Increase transparency in awards so that parties can select neutrals based on objective criteria in addition to the traditional reliance on word of mouth.
- Increase diversity of panels.
- Highlight the proven benefits of diverse panels in the quality of the decisions rendered.
- Publish metrics showing the appointments of women and minorities as arbitrators and mediators.
- Encourage junior women and other diverse attorneys to join court-annexed panels to gain experience in mediation and other dispute resolution techniques.



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Re: THE TIME IS NOW: Achieving Equality for Women Attorneys in the Courtroom and in ADR

Dear President Karson and President-Elect Brown:

The signatories of this letter are the current Chair of the Commercial and Federal Litigation Section, and 18 former Chairs of the Section.

We are writing to express our endorsement of the recommendations in the 2020 Report of the Section's Women's Initiative Task Force, "The Time is Now: Achieving Equality for Women Attorneys in the Courtroom and in ADR." The report followed up on the 2017 report "If Not Now When? Achieving Equality for Women Attorneys in the Courtroom and in ADR."

The Section's Women's Initiative Task Force is comprised of seven highly distinguished trial lawyers and former female Chairs of the Section: The Honorable Shira A. Scheindlin (ret.), Carrie H. Cohen, Tracee E. Davis, Laurel R. Kretzing, Bernice K. Leber, Sharon M. Porcellio and Lauren J. Wachtler.

Both reports were based on data collected by the Task Force regarding appearances of women in New York courts. The 2017 Report revealed that female attorneys comprised only about 25 percent of attorneys in lead counsel roles in the courtrooms throughout New York State. Unfortunately, the 2020 Report showed only a tiny increase in the number of female attorneys appearing as lead counsel in New York courts.

Both reports also presented data from other sources that document the disappointingly slow progress women have made in the large law firms.

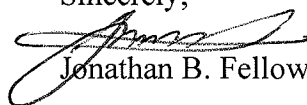
The 2020 Report contained recommendations for law firms, in-house corporate legal departments, the judiciary and ADR panels.

The 2020 Report was unanimously adopted and approved by the Executive Committee of the Section at its meeting on May 21, 2020.

The current chair and former chairs of the Section are leaders of law firms, in-house legal departments, and the judiciary. We plan to circulate the recommendations of the Women's Initiative Task Force and to urge implementation of those recommendations across the legal community. We agree wholeheartedly with the statements in the report that male attorneys must take action to address gender inequity by acting as mentors, sponsors and allies.

We are proud of and thankful for the work of the Section's former Chairs on the Women's Initiative Task Force, and look forward to working to implement its recommendations.

Sincerely,



Jonathan B. Fellows, Chair

Former Chairs:

Mark Alcott
Gregory Arenson
Mark Berman
Peter Brown
Robert Haig
Robert Holtzman

Mitchell Katz
Jonathan Lupkin
John Nonna
Gerald Paul
Jay Safer
Paul Sarkozi

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MEMORANDUM

To: Kathy Baxter
CC: Commercial and Federal Litigation Section
From: Terri A. Mazur, Chair, Women in Law Section
Date: June 9, 2020
Re: Commercial and Federal Litigation Section Women's Initiatives Task Force Report: "The Time is Now: Achieving Equality for Women in the Courtroom and in ADR"

The Women in Law Section has reviewed the Commercial and Federal Litigation Section Women's Initiatives Task Force Report: "The Time is Now: Achieving Equality for Women in the Courtroom and in ADR" ("2020 Report") which updates the Women's Initiatives Task Force's groundbreaking 2017 Report "If Not Now, When? Achieving Equality for Women in the Courtroom and in ADR." This well-researched and well-written 2020 Report reveals that there has been some progress made in the number of women attorneys appearing in lead roles in court, in support roles and in ADR, but it clearly reveals that there remains significant, ongoing inequality between women and men attorneys in the courtroom and in ADR. The 2020 Report demonstrates that much more has to be done for women attorneys to achieve full equality with men in the legal profession. This Report also includes excellent recommendations for moving forward beginning on page 44, with suggestions ranging from more equitable succession planning to more inclusive shared origination credit systems.

We have identified a few minor edits to be made in the Report:

1. Page 6: Remove the second period on the last line of the page.
2. Page 14: In the last line, typo -- "al" should be "all".
3. Typo on page 17: B (1) Diverse (missing the e).
4. There are all different formats of hyphens in the Report, from long dashes to short dashes to double dashes ("—")

The Women in Law Section commends the Task Force and the Commercial Federal Litigation Section for this important work and the 2020 Report.

