



# **IF NOT NOW, WHEN?**

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

**Report of the New York State Bar Association**

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

**I. Introduction**

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

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

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

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

### **A. Women in Litigation: Nationwide**

#### *ABA Commission on Women in the Profession*

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

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

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

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

<sup>2</sup> *See id.*

<sup>3</sup> *See id.*

<sup>4</sup> *Id.* At 4.

<sup>5</sup> *See id.*

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

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

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

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

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

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

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<sup>6</sup> *Id.*

<sup>7</sup> *See id.* at 8-10.

<sup>8</sup> *See id.* at 12.

<sup>9</sup> *See id.* at 12-13.

<sup>10</sup> *Id.* *See also id.* at 14-17.

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

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

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

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<sup>11</sup> Liane Jackson, *How can barriers to advancement be removed for women at large law firms?*, ABA Journal (Jan. 1, 2017), [http://www.abajournal.com/magazine/article/visible\\_difference\\_women\\_law](http://www.abajournal.com/magazine/article/visible_difference_women_law).

<sup>12</sup> *See id.*

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

<sup>14</sup> *See id.*

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

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

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

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

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

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

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

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<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

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

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

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

trial.”

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

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

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

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

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

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

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*



home office.”<sup>26</sup>

### *ABA Presidential Task Force on Gender Equity*

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

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

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

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

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

<sup>28</sup> *Publications from the ABA Presidential Task Force on Gender Equity*, AMERICAN BAR ASSOCIATION (2012), [https://www.americanbar.org/groups/women/gender\\_equity\\_task\\_force/task\\_force\\_publications.html](https://www.americanbar.org/groups/women/gender_equity_task_force/task_force_publications.html).

<sup>29</sup> *Id.*

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

<sup>31</sup> *Id.* at 9.

<sup>32</sup> *Id.* at 8.

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

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

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

### *Call for Diversity by Corporate Counsel*

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

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<sup>33</sup> *Id.* at 10.

<sup>34</sup> *See id.* at 11.

<sup>35</sup> *See id.* at 13.

<sup>36</sup> *Id.* at 10.

<sup>37</sup> *Id.* at 15.

<sup>38</sup> *Id.*

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

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

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

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

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

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

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

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

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

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

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

<sup>46</sup> *See id.*

<sup>47</sup> *Id.*

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

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

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

## B. Women in ADR

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>60</sup> See *id.*

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

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

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

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

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

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

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

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

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

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

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

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

<sup>71</sup> *Id.*

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

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

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

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

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<sup>72</sup> *Id.*

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

<sup>74</sup> *Id.* at 19.

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

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

### III. Survey: Methodology and Findings

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

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

The results of the survey are striking:<sup>78</sup>

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

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

<sup>77</sup> Each questionnaire is attached hereto as [Appendix A](#).

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



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

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

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

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

### **A. Women Litigators in New York State Courts**

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

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

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

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

Set forth below are some standout figures by county:

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

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

## **B. Women Litigators in Federal Courts**

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

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

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

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

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

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

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

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

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

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

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

## **D. Women in Alternative Dispute Resolution**

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

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

## **IV. Going Forward: Suggested Solutions**

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

### **Litigation Context**

#### **A. Women’s Initiatives**

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

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

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

Women’s Initiative programs depend on the support from all partners and associates.<sup>83</sup>

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

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

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

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

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

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

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

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

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

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

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

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

now significantly underrepresented in both capacities.<sup>85</sup>

### C. Efforts to Provide Other Speaking Opportunities for Women

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

### D. Sponsorship

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

### **E. Efforts by the Judiciary**

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

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

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

## F. Efforts by Clients

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

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

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

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

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

<sup>94</sup> *Id.*

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

<sup>96</sup> *Id.* at 5.

<sup>97</sup> *Id.*

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

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

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

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

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

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

<sup>102</sup> Ann T. Greeley & Karen L. Hirschman, “*Trial Teams and the Power of Diversity*,” at 2 (2012).

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

<sup>104</sup> *Id.*

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

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

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

## G. ADR Context

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

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

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

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<sup>106</sup> *Id.*

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

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

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

<sup>110</sup> *Id.*

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

## **V. Conclusion**

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

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

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

Task Force on Women's Initiatives\*

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## APPENDIX A

### JUDICIAL FORM FOR TRACKING COURT APPEARANCES

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

I. *Type of Case*

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

II. *Type of Proceeding*

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

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

- A. Two \_\_\_ B. Two to Five \_\_\_ C. More than Five \_\_\_

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

- |                 |                 |                 |
|-----------------|-----------------|-----------------|
| Plaintiff No. 1 | Plaintiff No. 2 | Plaintiff No. 3 |
| Male ___        | Male ___        | Male ___        |
| Female ___      | Female ___      | Female ___      |
| Public ___      | Public ___      | Public ___      |
| Private ___     | Private ___     | Private ___     |

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

- |                 |                 |                 |
|-----------------|-----------------|-----------------|
| Defendant No. 1 | Defendant No. 2 | Defendant No. 3 |
| Male ___        | Male ___        | Male ___        |
| Female ___      | Female ___      | Female ___      |
| Public ___      | Public ___      | Public ___      |
| Private ___     | Private ___     | Private ___     |

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

- |                 |                 |                 |
|-----------------|-----------------|-----------------|
| Plaintiff No. 1 | Plaintiff No. 2 | Plaintiff No. 3 |
| Male ___        | Male ___        | Male ___        |
| Female ___      | Female ___      | Female ___      |
| Public ___      | Public ___      | Public ___      |
| Private ___     | Private ___     | Private ___     |

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

- |                 |                 |                 |
|-----------------|-----------------|-----------------|
| Defendant No. 1 | Defendant No. 2 | Defendant No. 3 |
| Male ___        | Male ___        | Male ___        |
| Female ___      | Female ___      | Female ___      |
| Public ___      | Public ___      | Public ___      |
| Private ___     | Private ___     | Private ___     |

**ADR FORM FOR TRACKING APPEARANCES IN ADR PROCEEDINGS**

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



## APPENDIX B

TABLE 1  
SUMMARY OF FINDINGS

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

TABLE 2  
DETAIL DATA CITED IN REPORT

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

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

## APPENDIX C

### SUMMARY OF RECOMMENDATIONS

#### 1. The Law Firms

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

#### 2. The Judiciary

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

### 3. The Client

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

### 4. ADR Context

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