

MAKING IN-ROADS TO CORPORATE GENERAL COUNSEL POSITIONS: IT'S ONLY A MATTER OF TIME?

LISA H. NICHOLSON*

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There were 40,018 law graduates in the class of 2004, of which almost half were women.¹ Many of these women, equipped with exceptional educational credentials, predictably have high hopes of as-

* Associate Professor of Law, University of Louisville, Louis D. Brandeis School of Law. The author thanks all who read and debated the points raised herein, especially Associate Professor Dana Brakman Reiser and the members of the Brooklyn Law School Junior Faculty Workshop, who helped me to frame the issue. The author also thanks Cutler Professor of Law at William and Mary's Marshall-Wythe School of Law Jayne W. Barnard, as well as Professors Laura Rothstein, Enid Trucios-Haynes, and Annette Harris Powell, her colleagues at the University of Louisville. Finally, for their research assistance, the author wishes to acknowledge Dominic Maurice Moore and Roosevelt Joseph Stennis.

1. See NAT'L ASS'N FOR LAW PLACEMENT, INC. (NALP), JOBS & JD'S: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 2004, at 8 (2005); Press Release, NALP, Women and Attorneys of Color Continue to Make Only Small Gains at Large Law Firms (Nov. 5, 2004), available at <http://www.nalp.org/press/details.php?id=53>. "In 2001, women made up the majority of first-year law students for the first time, and accounted for 44 percent of enrollment at top-tier law schools." Carolyn M. Janiak, *The "Links" Among Golf, Networking, and Women's Professional Advancement*, 8 STAN. J.L. BUS. & FIN. 317, 319 (2003); see also Jonathan D. Glater, "Women Are Close to Being Majority of Law Students," N.Y. TIMES, Mar. 26, 2001, at A1 (reporting that women "accounted for 49.4 percent of the 43,518 students who began law school" in 2000). If enrollment rates remain steady, forty percent of all lawyers will be women before 2010. See Diane C. Yu, Chair, ABA Comm'n on Women

ending to the upper hierarchy of law practice.² They can be heartened by the fact that by the end of 2003, women comprised 29% of the bar nationally,³ represented 43% of all associates at the nation's major law firms,⁴ and accounted for 31.5% of all in-house counsel.⁵ Unfortunately, their hopes of obtaining the fabled "corner office" may be dashed when they note who actually practices at the highest levels in those law firms and corporations.

Indeed, by the end of 2004, women lawyers⁶ would only account for seventeen percent of law partners at the nation's major law

in the Profession, Leadership and Accountability, Opening Remarks at Women's Summit II (Aug. 10, 2003), in *WOMEN LAW. J.*, Winter 2004, at 8, 8.

2. By 2000, women represented just above half of the law school applicant pool and had generally matched men in LSAT scores and law school performance. Cynthia Fuchs Epstein, *Women in the Legal Profession at the Turn of the Twenty-First Century: Assessing Glass Ceilings and Open Doors*, 49 U. KAN. L. REV. 733, 737 (2001) [hereinafter *Twenty-First Century*]. But see LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 35-42 (1997) (finding that although women law students had performed as well as men in LSAT scores and undergraduate GPA, they did not achieve the same level of success as men once enrolled in law school).

3. Press Release, ABA Comm'n on Women in the Profession, *A Current Glance of Women in the Law* (2003), available at <http://www.abanet.org/women/glance2003.pdf> [hereinafter 2003 Glance]; Yu, *supra* note 1, at 8.

4. While the presence of women lawyers in large law firms has risen steadily since 1993, such gains have been incrementally small. See Press Release, NALP, *supra* note 1 (reporting that women lawyers held 43.36% of associate positions in law firms in 2004); Press Release, NALP, *Women and Attorneys of Color Continue to Make Small Gains at Large Law Firms* (Nov. 7, 2003), available at <http://www.nalp.org/press/details.php?id=31> (reporting that women lawyers held 43.02% of associate positions in law firms in 2003).

5. *The Color Barrier: Minority Corporate Counsel Make Diversity a Top Priority*, CORP. LEGAL TIMES, Nov. 2003, at 42, 42 [hereinafter *The Color Barrier*].

6. While this Article focuses on the underrepresentation of women lawyers in the upper ranks of corporations and law firms and posits that corporations must see gender diversity as an important objective (particularly in this post-Enron environment), this Article is equally mindful of the underrepresentation of lawyers of color in these areas as well. Although a discussion of the need to increase racial diversity in the upper echelon of the legal profession is beyond the scope of this Article, there are numerous articles and studies which have focused on this issue. See, e.g., AM. BAR ASS'N (ABA) COMM'N ON WOMEN IN THE PROFESSION, *UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR* 25-27 (1995) (discussing the need to improve diversity in the workplace and to satisfy clients and remain competitive in the marketplace); ABA COMM'N ON WOMEN IN THE PROFESSION & COMM'N ON OPPORTUNITIES FOR MINORITIES IN THE PROFESSION, *THE BURDENS OF BOTH, THE PRIVILEGES OF NEITHER* (1994) (noting the disadvantages facing multicultural women attorneys); ELIZABETH CHAMBLISS, COMM'N ON RACIAL AND ETHNIC DIVERSITY IN THE LEGAL PROFESSION, *MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION* (2004); Vivia Chen, *Pride and Prejudice*, AM. LAW., July 2005, at 80, 80 (discussing the under-representation of lawyers of color in the upper ranks of the *American Lawyer* 100 list of law firms); Leigh Jones, *Anemic Minority Hiring at Firms Rankle GCs*, NAT'L L.J., Mar. 28, 2005, at 1, 1, 17 (reporting that law firms have not done enough to hire minority lawyers five months after hundreds of corporate general counsel signed the *Call to Action*, stating that these corporations, to promote real change, "will select firms that demonstrate meaningful progress in diversity and reject firms that continue to fall short of the mark"); see also Leonard M. Baynes, *Fall-*

firms⁷ and fourteen percent of the Fortune 500 general counsel.⁸ These percentages parallel the number of women professionals who work at the upper echelon in other industries. A recent study found that only 15.7% of Fortune 500 officers are women, with only 7.9% of them serving at a level of executive vice president or above.⁹ Even so, many of these female corporate officers do not head the business units as line officers, but instead serve in so-called “support roles” leading public relations, human resources, or government relations divisions.¹⁰ There were even fewer women serving as corporate direc-

ing Through the Cracks: Race and Corporate Law Firms, 77 ST. JOHN'S L. REV. 785 (2003) (discussing the use of contract and partnership law concepts to address discrimination by law firms against minority attorneys); Valerie Fontaine, *Progress Report: Women and People of Color in Legal Education and the Legal Profession*, 6 HASTINGS WOMEN'S L.J. 27 (1995) (noting that despite the increase in women and minorities entering the legal profession, they have not yet reached equal representation at the top of the profession); Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005 (1997) (discussing the divide between the liberal social policies advocated by attorneys and the selection system used by attorneys which has the effect of limiting opportunities for minorities and women, and recommending a return to critical race theory as a solution); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?: An Institutional Analysis*, 84 CAL. L. REV. 493 (1996) (arguing that the discriminatory hiring and recruiting practices of law firms act to shield the firms from competitive disadvantage while discouraging black applicants from obtaining the skills necessary for success). Moreover, many of the arguments made in support of increased gender diversity are equally applicable to increased racial diversity. See generally Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL'Y 119, 124 (1997) (“[T]he problems made visible by patterns in many women's experience may well affect members of other groups who do not conform to the dominant culture or practice.”).

7. See Press Release, NALP, *supra* note 1. This percentage represents a very modest improvement over 2000, when women comprised only 15.6% of partners in firms with over 250 lawyers. Matt Fleischer, *Women in NLJ 250 Hit a Glass Plateau*, NAT'L L.J., Dec. 11, 2000, at A1, A1. Moreover, the percentages of women law associates in 2004 have also modestly improved over 2000—from 41.2% to 43.36%. *Id.* at A11; Press Release, NALP, *supra* note 1.

8. Ashby Jones, *Women GCs: Holding Steady*, CORP. COUNSEL, July 2004, at 75, 75; *They've Got the Power*, LAW.COM, http://www.law.com/special/professionals/corp_counsel/2004/women_gcs.shtml (last visited Mar. 14, 2006). Fourteen of these women either departed their general counsel positions or their companies were no longer ranked among the Fortune 500 in 2005. Their departures, however, were balanced by sixteen new appointments. See *infra* note 87 for a discussion of the new class of Fortune 500 general counsel.

9. CATALYST INC., 2002 CATALYST CENSUS OF WOMEN CORPORATE OFFICERS AND TOP EARNERS OF THE FORTUNE 500, at 1 (2002); accord Miriam A. Cherty, *How to Succeed in Business Without Really Trying (Cases): Gender Stereotypes and Sexual Harassment Since the Passage of Title VII*, 22 HOFSTRA LAB. & EMP. L.J. 533, 544 (2005). Catalyst Inc. is a nonprofit research and advisory organization that works to advance women in business and the professions.

10. Women executives filled only 9.9% of the total line positions held by corporate officers, compared to men who fill 90.1%. CATALYST INC., *supra* note 9, at 1. The so-called line positions are those with revenue-generating or profit-and-loss responsibility. *Id.* at 2; see also Christina Katz, An Interview with Sheila Wellington, [BLUESUITMOM.COM](http://www.bluesuitmom.com), [http://](http://www.bluesuitmom.com)

tors. Indeed, women accounted for only 13.6% of directors serving on Fortune 500 boards.¹¹

This four-part Article focuses on the underrepresentation of women lawyers practicing in the upper levels of Fortune 500 corporations. Because law firm partners and senior associates are essential participants in any corporation's applicant pool for senior-level in-house positions, this Article also addresses the promotional barriers encountered by women lawyers who practice at major law firms. To that end, Part I of this Article summarizes the reasons for the paucity of senior-level women lawyers at law firms and explains why corporations should be concerned. Part II proffers the beneficial impact of improving gender diversity throughout the upper ranks of corporate legal departments. In Part III, this Article examines the assertion that in-house legal practice is better than law firm practice for women lawyers by questioning whether corporate legal departments do, in fact, provide better advancement opportunities, and work-life balance than law firms—particularly in light of the fact that those law firm pathologies have begun creeping in-house in recent years. Finally, Part IV provides solutions that may be implemented to address the limited gender diversity in the upper ranks of law practice at corporations.

In a world where diversity is inevitable, corporations that respond effectively will enjoy a measure of competitive advantage, and those that do not will suffer inevitable costs.¹² Moreover, increased gender diversity can enhance good corporate governance as well as the corporation's bottom line by improving the depth of the decision-making process because different kinds of people have "different ways of perceiving the world, processing information, and thinking about solutions."¹³

www.bluesuitmom.com/career/management/beyourownmentor.html (last visited Mar. 14, 2006) (discussing Catalyst's research findings).

11. Press Release, Catalyst Inc., 2003 Catalyst Census of Women Board of Directors: A Call to Action in a New Era of Corporate Governance 1 (2003), available at <http://www.catalyst.org/files/fact/WBD03factsheetfinal.pdf>.

12. See generally ANTHONY PATRICK CARNEVALE & SUSAN CAROL STONE, *THE AMERICAN MOSAIC: AN IN-DEPTH REPORT ON THE FUTURE OF DIVERSITY AT WORK* 59 (1995) ("[T]he benefits of diversity tend to fall into three broad categories: workforce quality, market sensitivity, and organizational agility.").

13. Carrie Menkel-Meadow, *Toward a Theory of Reciprocal Responsibility Between Clients and Lawyers: A Comment on David Wilkins' Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 *Geo. J. Legal Ethics* 901, 907 (1998).

I. THE UNDERREPRESENTATION OF SENIOR WOMEN LAWYERS

Commentators attribute the paucity of women business professionals in the upper ranks of all industries to the following promotional obstacles: gender-based stereotypes about aptitude, lack of mentoring relationships, exclusions from informal networking opportunities, and difficulties achieving an adequate “work-life” balance.¹⁴ In one of many studies conducted on the status of women in the legal profession,¹⁵ the Association of the Bar of the City of New York’s Committee on Women in the Profession selected Cynthia Fuchs Epstein (a noted professor of sociology) to commence a study more than a decade ago to determine the nature, extent, and causes of barriers to the advancement of women lawyers at major law firms.¹⁶

Among the many findings, her report noted that while women lawyers were hired in numbers equivalent to male hires, promotional barriers such as (1) pressures to become “rainmakers,” (2) the time demands of practice, and (3) the lack of mentoring relationships and their attendant benefits contributed to women lawyers’ flight from law firms at rates greater than their male counterparts.¹⁷ Epstein also

14. E.g., CARNEVALE & STONE, *supra* note 12, at 95-96; see also Joan C. Williams et al., *Better on Balance? The Corporate Counsel Work/Life Report*, 10 WM. & MARY J. WOMEN & L. 367 (2004) (discussing whether in-house attorneys achieve better work-life balance and how this can be used as a recruiting tool).

15. The so-called “glass ceiling” has been plaguing women lawyers for years and has resulted in numerous studies over the years. The ABA has compiled numerous statistics that reveal that while women are entering the legal profession in large numbers, they are not making it into the profession’s most prestigious positions and that race plays a heavy role in their success. See, e.g., MARILYN TUCKER & GEORGIA A. NIEDZIELKO, ABA COMM’N ON WOMEN IN THE PROFESSION, OPTIONS AND OBSTACLES: A SURVEY OF THE STUDIES OF THE CAREERS OF WOMEN LAWYERS 36 (1994); see also Larry Rulison, *Female Lawyers Still Behind Men in Leadership Slots, Report Says*, PHILA. BUS. J., May 13, 2005, available at <http://philadelphia.bizjournals.com/philadelphia/stories/2005/05/16/newscolumn4.html> (reporting that while women make up thirty percent of all lawyers in Pennsylvania, only eighteen percent of law partners are women); *supra* note 6.

16. Epstein’s study of women lawyers’ progression into partnership at large private firms, henceforth called *The Glass Ceiling Study*, focused on eight major New York firms and resulted in a report to the Commission on Women in the Profession, published completely in the *Fordham Law Review* in 1995. Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291 (1995) [hereinafter *1995 Report*].

17. *Id.* at 441-44. Epstein reports that

since 1980, there has been a steady upward trend in the proportion of women associates hired, to the point where their numbers are nearly equal to those of men. . . . [However, their] unsuccessful search for a niche that [would allow] women practitioners during a few early years of their working lives, to keep regular hours, take vacations, go home when their kids are sick [was a] major factor in the remarkable attrition rate of women lawyers

Id. at 296-98 (internal quotation marks and citation omitted).

noted that (not unlike their business counterparts) women lawyers experienced gender-based stereotypes, including perceptions of aptitude, which created “serious obstacles to [their] mobility both pre- and post-partnership.”¹⁸ She concluded that until the nature of law practice changed at law firms, “the current pattern of women lawyers spending a few years at prestigious firms and then ‘voluntarily’ dropping out will repeat itself.”¹⁹ Her decade-old prediction is proving true today.

Little has changed to alleviate the pathologies of law practice cited a decade ago that have hindered the advancement of women lawyers at law firms,²⁰ notwithstanding the gains made to increase the number of women law partners to 17.06% nationwide—up from 15.6% in 2000²¹ and only 11.2% in 1992.²² Indeed, the progress made has been incrementally small, particularly when one considers that those figures include many women who have reached partnership through nontraditional means.²³ Moreover, despite the gains to increase the number of women partners, there are still very few women partners who head a practice group or have a management role in their law firms.²⁴ Consequently, until changes are made to the legal profession to address those promotional barriers cited over a decade ago, the percentage of women lawyers who attain partnership status is likely to remain low despite predictions that “it’s only a matter of time” before women are well represented throughout law firms.

In the meantime, corporations must realize that the promotional barriers to partnership increasingly are impacting a woman’s ability to

18. *Id.* at 297.

19. *Id.* at 299; *accord* Sturm, *supra* note 6, at 131-32 (“The legal profession typically is structured in ways that conflict with the demands of many women’s lives . . .”).

20. Five years later, Epstein revisited her earlier study and found that many of the earlier noted problems facing women at law firms still existed as imbedded obstacles in the legal profession’s very structure. *Twenty-First Century*, *supra* note 2, at 752. More recently, the Minority Corporate Counsel Association observed that women lawyers were leaving law firms more rapidly than their male counterparts as a result of the same obstacles cited by Epstein. Alea Jasmin Mitchell, *The Status of Fortune 500 Women General Counsel in 2004*, DIVERSITY & BAR, Mar.-Apr. 2004, available at <http://www.mcca.com/site/data/magazine/2004-03/womengc0304.shtml>.

21. Fleischer, *supra* note 7; 2003 Glance, *supra* note 3; Press Release, NALP, *supra* note 1.

22. *1995 Report*, *supra* note 16, at 314.

23. See *Twenty-First Century*, *supra* note 2, at 739 (“[W]omen tended to be elevated to partnership [in large private firms by] either proving themselves elsewhere and coming to the firms as lateral hires, or [as part of] a raft of promotions that occurred in the 1980s as firms were self-consciously looking to promote women.”). However, in many instances, this is still the case today.

24. *1995 Report*, *supra* note 16, at 297.

fill law positions in the upper hierarchies of corporate legal departments. It would appear that the track to partnership also runs into the corporation. While it is still true that many general counsel and other senior-level, in-house legal positions are filled through promotions from within the corporation, more and more of these positions are being filled from outside the corporation—with many corporations sweeping through the partnership ranks of the nation's major law firms for potential candidates.²⁵ Case in point, only twenty-three of the seventy-one Fortune 500 women general counsel (Class of 2004) worked their way up to that position from the entry- or mid-level positions held within their respective corporation.²⁶ At least thirty-nine of these seventy-one were recruited as general counsel within the last eleven years from outside the corporation.²⁷ The balance were promoted to their general counsel position after joining the corporation at a senior-level counsel position.²⁸ In light of this trend, corporations must confront those promotional barriers that plague women law firm associates to ensure the reliability of their pipeline to senior-level in-house positions.²⁹

Surprisingly, too few Fortune 500 corporations may be in a position to criticize law firms about their promotional barriers because those particular pathologies also have been creeping in-house over the past few years.³⁰ Indeed, a growing number of women lawyers who left law firm practice for in-house positions in search of better advancement opportunities, more challenging work assignments, greater opportunities to be part of a strategic decision-making team, and a better quality of life are finding these expectations unmet.³¹

25. Although general counsel are often promoted from within, headhunters note “a significant number of applications from partners at law firms” whenever a general counsel position opens up. Carl D. Liggio, Sr., *A Look at the Role of Corporate Counsel: Back to the Future—Or Is It the Past?*, 44 ARIZ. L. REV. 621, 632 (2002). This will continue as corporate legal departments gain even more in prominence. See *infra* notes 32-36 and accompanying text.

26. *They've Got the Power*, *supra* note 8.

27. *Id.* These general counsel were either recruited from law firm partnership ranks or from senior-level positions (including general counsel) in other corporate legal departments. This information was culled from ASPEN PUBLISHERS, DIRECTORY OF CORPORATE COUNSEL 2005-2006 (2005); MARTINDALE-HUBBELL, CORPORATE LAW DIRECTORY (2003).

28. *They've Got the Power*, *supra* note 8. Four of these women were promoted to general counsel within a year of joining the corporation. *Id.*

29. See *infra* Part III.A.

30. See *infra* Part III.B.

31. See generally Williams et al., *supra* note 14, at 448 (concluding that attorneys who are seeking to balance their lives and their work by switching from law firms to corporate law departments need to investigate the policies and culture of law departments because not all in-house legal departments are the same); Linda Tischler, *Where Are the Women?* FAST COMPANY, Feb. 2004, at 52, available at <http://www.fastcompany.com/magazine/79/wo>

Various recent factors may contribute to this newfound level of disappointment with in-house legal practice.³² The recently increased obligations imposed on all in-house lawyers following the enactment of the Sarbanes-Oxley Act of 2002³³ and the SEC's adoption of attorney accountability rules³⁴ also have worked to increase the time demands of the in-house legal practice as lawyers are once again being called to the front lines to battle corporate wrongdoing.³⁵ Although it is unlikely that corporations will experience the attrition rates reached at law firms, corporations should begin to address those promotional barriers that exist in-house to spur dissatisfaction among women in-house lawyers in order to avoid the retention failures of law firms³⁶ as well as the other costs associated with lack of gender diversity in their legal departments.

men.html (reporting that seventy-one percent of the women employed in law firms and sixty-six percent of the women in-house lawyers who participated in the study cited the difficulties of balancing personal, family, and work responsibilities as impacting their abilities to advance).

32. See *infra* Part III.C.

33. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745, 784 (codified as amended at 15 U.S.C. § 7245 (Supp. II 2002)).

34. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6269 (Feb. 6, 2003) (codified at 17 C.F.R. pt. 205).

35. Over the years, the SEC has sought to enlist corporate counsel in their efforts to thwart corporate fraud. See, e.g., *In re Gutfreund*, Exchange Act Release No. 34-31554, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,067, at 83,598 (Dec. 3, 1992) (stating that in-house counsel who learn of corporate misconduct will not be considered a mere bystander); *In re Carter*, 47 S.E.C. 471, 478 (1981) (noting that securities lawyers cannot insulate themselves from liability for wrongdoing by invoking their duty to their client); *In re Fields*, 45 S.E.C. 262, 266 n.20 (1973) (noting that in-house counsel are uniquely placed to ensure compliance with SEC regulations and failure to fulfill their obligations could result in the removal of the privilege to appear before the SEC). More than two decades ago, then SEC Chairman Harold M. Williams stated that in-house counsel are in a unique position "to focus attention on the issues of corporate responsibility; to assess the consequences of alternative courses of conduct; to weigh the short- and long-term costs and benefits; and to decide on positive steps which, in the context of the objective of each particular corporation, can help promote accountability." Harold M. Williams, Chairman, SEC, *The Role of Inside Counsel in Corporate Accountability*, Speech Before the 17th Annual Corporate Counsel Institute (Oct. 4, 1979), in [1979-80 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,318, at 82,371 (Oct. 18, 1979).

36. See Williams et al., *supra* note 14, at 368 (reporting that women lawyers who "seek in-house positions . . . to have a better quality of life" may be disappointed); see also Zoe Sanders Nettles, *From the President*, WOMEN LAW. J., Winter 2004, at 4, 4 (noting that "15.6% of women partners in law firms and 13.7% of women general counsels of Fortune 500 companies were less satisfied with their careers and opportunities for advancement than men in those positions, and women were more likely to leave their jobs three years earlier than men").

II. BUILDING A CASE FOR GENDER DIVERSITY IN CORPORATE LEGAL DEPARTMENTS: THE BOTTOM LINE IMPACT

General counsel were once relatively minor management figures, whose chief responsibilities were confined to corporate housekeeping and other routine matters, as well as to acting as a liaison to their former law firms.³⁷ Today's general counsel share a role at the top of the corporate hierarchy, serving as members of senior management, giving advice on a vast array of statutory, regulatory, and judicial rules that increasingly circumscribe the activities of public corporations.³⁸ They perform multiple other roles apart from legal counselor, including serving as business advisers, compliance officers, problem solvers, and cost-center managers.³⁹ Indeed, many corporations have come to expect their general counsel to be involved in any material, strategic issue that arises at the heart of the organization and to know intimately what is in the minds of top executives.⁴⁰

Today's CEOs select general counsel who will appreciate both their particular businesses as well as the big picture. These general counsel (as so-called "strategic lawyers") must acquire an understanding of how the businesses operate, how the companies make money, who are their chief competitors, what are their key relationships, and what are their individual goals for growth.⁴¹ In short, they must provide technical legal advice that does not, in the words of businesspe-

37. Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 277 (1985).

38. For a more detailed discussion on the role of in-house and corporate counsel and their increased numbers and significance, see H.J. Aibel, *Corporate Counsel and Business Ethics: A Personal Review*, 59 MO. L. REV. 427 (1994); Chayes & Chayes, *supra* note 37; Liggio, *supra* note 25; Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479 (1989).

39. See Stephen J. Friedman & C. Evan Stewart, *The Corporate Executive's Guide to the Role of the General Counsel*, ACCA DOCKET, May 2000, at 58, 68 ("General counsel and their staff must play a central role in managing the most significant risks that face their companies. This management function includes not only oversight of liability and regulatory concerns, but also the full range of costs associated with addressing and dealing with such concerns."); see also John J. Creedon, *Lawyer and Executive—The Role of the General Counsel*, 39 BUS. LAW. 25 (1983); John C. Taylor, III, *The Role of Corporate Counsel*, 32 RUTGERS L. REV. 237 (1979).

40. See Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1060-61 (1997); accord Scott L. Olson, *The Potential Liabilities Faced by In-House Counsel*, 7 U. MIAMI BUS. L. REV. 1, 47-48 (1998) ("The success of corporate lawyers depends on the relationship that they develop with the corporation's executives and on their ability 'to make professional contributions to the management's achievement of its business goals.'").

41. Jill Schachner Chanen, *The Strategic Lawyer*, ABA J., July 2005, at 43, 44.

ople, “ruin their deals.”⁴² As one general counsel recently noted, the “worst thing that [any] lawyer can do is tell a client no and not have another suggestion for what is [an] acceptable [solution] to the [sought after] business objective.”⁴³

Of course, these general counsel who have an understanding of both business and strategy are also aided when seeking to establish and oversee the corporations’ compliance systems that reduce the threat of subsequent litigations. By monitoring the corporations’ business activities through informal reviews and systematic audits, corporate legal departments (led by their general counsel) can determine whether regulatory requirements are being understood and met.⁴⁴ Even so, good corporate governance can only be accomplished where general counsel display strong, independent stewardship over their companies’ regulatory compliance, and internal codes of conduct programs in the face of pressure from the corporations’ business units—and their views are channeled throughout the corporate legal departments. As will be demonstrated below, gender diversity throughout the upper ranks of the corporate legal departments can serve to decrease faulty judgments that result from the groupthink phenomenon⁴⁵ and may also impact the corporations’ bottom line.

A. *The Impact of Gender Diversity on Corporate Decision-Making*

In this post-Enron environment where corporate activities are still under scrutiny, the general counsel’s ability to identify and eradicate potential legal problems before they occur to the corporation’s detriment is critical—particularly following the enactment of the more stringent attorney gatekeeping rules.⁴⁶ The chance that another En-

42. *Id.*; see also JULIE GOLDBERG & LAUREN LEE WHITE, KORN/FERRY INT’L, RE-ENGINEERING THE PHARMA GENERAL COUNSEL ROLE 1 (2005), available at <http://www.kornferry.com/Library/ViewGallery.asp?CID=1021&LanguageID=1&RegionID=23> (“The GC must help fashion long-term strategy that supports the CEO’s vision for growth, while maintaining vigilance to ensure regulatory compliance and protect the reputation of the organization.”).

43. Chanen, *supra* note 41, at 44 (internal quotation marks omitted).

44. Chayes & Chayes, *supra* note 37, at 287.

45. Irving L. Janis coined the phrase “groupthink hypothesis” while seeking to understand the group decision-making process that led to the U.S. government’s actions relating to the Bay of Pigs invasion, the invasion of North Korea, and the escalation of the Vietnam War (among others). IRVING L. JANIS, VICTIMS OF GROUPTHINK 9-11 (1972). He observed that the decisions seemed to include a “specific pattern of concurrence-seeking behavior.” *Id.* at iii.

46. Congress, through section 307 of the Sarbanes-Oxley Act, directed the SEC to promulgate rules of practice that, at a minimum, required attorneys appearing and practicing before it to report evidence of material securities law violations, fiduciary duty breaches, or similar misconduct involving a reporting company, first to the chief legal officer or CEO

ron-type meltdown will occur again is great unless the general counsel is informed of the corporation's overall business strategy, understands the resulting impact that any legal advice may have on the business's practices, and ensures the free flow of information throughout the corporate legal department.⁴⁷

To guard against surprises, general counsel have both the authority and the responsibility to insist upon early involvement in those corporate transactions that potentially will raise significant ethical and legal issues in the future. The very existence of a properly established legal department accelerates the time of involvement of in-house lawyers to an earlier phase of a transaction and shifts the in-house lawyer's mode from reactive to proactive.⁴⁸ Early intervention should allow for risk avoidance or at least pre-litigation resolution. That stated, it is not enough for the general counsel to have (and exercise) the authority to sit at the table during the strategic decision-making processes to thwart faulty judgments by other senior management or the board of directors.

The general counsel—as well as other members of the legal department—must be able to dispatch legal and business advice to senior management with an unencumbered judgment that will ensure that he or she is tenacious where appropriate in the face of pressures from the business side of the corporate entity.⁴⁹ One of the lessons from Enron is that a general counsel, as a member of senior management, must seek and be willing to engage in thoughtful debate with

and then, if those officers failed to act appropriately, up the ladder to the company's audit committee, its independent directors, or its board of directors as a whole. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745, 784 (codified as amended at 15 U.S.C. § 7245 (Supp. II 2002)). The SEC adopted its up-the-ladder reporting requirements in February 2003, and these went into effect on August 5, 2003. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296 (Feb. 6, 2003) (codified at 17 C.F.R. pt. 205).

47. It is noteworthy that in Enron's case, James Derrick (its former executive vice president and general counsel) reportedly led a decentralized, hierarchical legal department as an observer. He reportedly undertook no means to control or supervise the legal advice the company had been receiving from various outside law firms. Bruce Rubenstein, *Structural Damage: An Inside Look at the Legal Department's Role in the Meteoric Fall of One of the New Economy's Shining Stars*, CORP. LEGAL TIMES, Oct. 2002, at 1, 1 ("Enron's lawyers were like its accountants and its other specialists" who "tended to focus on solving discreet problems. There was no direction as to the ethics of those solutions, no overview of the type the general counsel [was] supposed to provide. [Derrick] never played that role. He never realized the bomb was ticking.").

48. Chayes & Chayes, *supra* note 37, at 281.

49. See Jan L. Handzlik & Stephen J. Connolly, *Playing a Dual Role*, L.A. LAW., Oct. 2003, at 30, 30 (observing that corporate law practice is a balancing act: "in-house counsel might find themselves at odds with a management team accustomed to deference regarding executive decisions").

his or her colleagues and the board of directors. The lawyer who “capitulates to the client’s desires, blindly serving the client’s wishes without judging the legality of those wishes, may be a short-term hero,” but the general counsel “with [a] serious regard for the law will influence client decisions in a positive way, communicating that compliance with the law has a long-term benefit for the corporation.”⁵⁰

In Enron’s case, the lack of dissent or unwillingness of the lawyers (both in-house and retained) to ask difficult questions prevented all from learning the true state of affairs.⁵¹ Some commentators attributed this outcome to the fact that senior management and the board of directors all fell subject to their colleagues’ perspectives on the proposed financing techniques—a phenomenon known as “groupthink.”⁵² Irving Janis, in his 1970s analysis of imperfect group decisions, coined this theory of “groupthink” to describe the “mode of thinking that people engage in when they are deeply involved in a cohesive in-group, [where] the members’ strivings for unanimity override their motivation to realistically appraise alternative courses of action.”⁵³

Stated differently, decision-makers’ close relationship and alignment with their colleagues may lead to their actions (or inactions, as appears to have been the case with Enron). The group’s homogeneity can lead its members to avoid asking those tough questions likely to spark dissension.⁵⁴ Indeed, there is a tendency in highly cohesive groups towards “a strong emphasis on politeness and courtesy, and an

50. Irma S. Russell, *Keeping the Wheels on the Wagon: Observations on Issues of Legal Ethics for Lawyers Representing Business Organizations*, 3 WYO. L. REV. 513, 519-20 (2003).

51. Janis Sarra, *Rose-Colored Glasses, Opaque Financial Reporting, and Investor Blues: Enron as Con and the Vulnerability of Canadian Corporate Law*, 76 ST. JOHN’S L. REV. 715 (2002); Jeffrey Sonnenfeld, *How Go-Along Boards Jam Up Firms*, USA TODAY, Feb. 6, 2002, at A13.

52. E.g., Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185 (2003); R. William Ide, *Post-Enron Corporate Governance Opportunities: Creating a Culture of Greater Board Collaboration and Oversight*, 54 MERCER L. REV. 829 (2003); Marleen A. O’Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233 (2003); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN’S L. REV. 837 (2003).

53. JANIS, *supra* note 45, at 9; see also IRVING L. JANIS & LEON MANN, *DECISION MAKING* 129-33 (1977). For a more recent critique of Janis’s groupthink hypothesis, see O’Connor, *supra* note 52, at 1259 (“Although Janis’s groupthink theory is well-accepted in the field of social psychology, empirical tests have produced mixed results as to the theory’s validity . . . [R]esearchers, however, have developed several case studies to support the basic notions of groupthink.”).

54. See O’Connor, *supra* note 52, at 1306 (noting that homogeneity can create an inability to critically assess the activities of corporate officers); see also Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1391, 1396 (2002) (discussing the advantages of heterogeneous groups). In studies of small groups, conformity pressure was frequently observed whereby

avoidance of direct conflict and confrontation.”⁵⁵ An effective general counsel must eschew this tendency and engage in thoughtful debate with senior managers in order to obtain compliance with regulatory norms.

Homogenous groups also can arrive at faulty judgments due to procedural defects in their decision-making processes. Such groups tend to stake out extreme positions. In the first instance, for example, the group may limit its discussions to a small number of alternative courses of action without surveying the full range of alternatives.⁵⁶ The potential to reach imperfect decisions thereafter is exacerbated where:

the group fails to reexamine the course of action initially preferred by the majority . . . from the standpoint of nonobvious risks and drawbacks that had not been [initially] considered[;] the members neglect courses of action initially evaluated as unsatisfactory [spending] little or no time discussing whether . . . there are ways of reducing the seemingly

[w]henver a member says something that sounds out of line with the group's norms, the other members at first increase their communication with the deviant . . . to influence the nonconformist member to revise or tone down his dissident ideas But if they fail after repeated attempts, the amount of communication they direct toward the deviant decreases markedly. The members begin to exclude him, often quite subtly at first and later more obviously, in order to restore the unity of the group.

JANIS, *supra* note 45, at 5. *Contra* 12 ANGRY MEN (Orion-Nova 1957) (depicting a situation where sole holdout juror number eight persuades the other eleven weary jurors to reexamine the evidence before rendering their verdict against an innocent defendant). Obviously, not all homogenous groups suffer the adverse consequences of groupthink. The quality of a group's decisions depend on the atmosphere under which the group members act, their group dynamics, and each member's personal views about him or herself. According to Janis, group members are more likely to devolve into groupthink during the decision-making process where they (1) have a sense of invulnerability, (2) engage in collective rationalization, (3) have an unquestioned belief in the inherent morality of the group's goals, (4) have stereotyped views of the enemy leader, (5) as a group, apply pressure on dissenters, (6) engage in self-censorship of deviations from apparent consensus, (7) have false unanimity, and (8) act as self-appointed mind guards. JANIS, *supra* note 45, at 197-98.

55. RAKESH KHURANA, *SEARCHING FOR A CORPORATE SAVIOR* 84 (2002); *see also* Gregory M. Heiser, "Because the Stakes Are So Small": *Collegiality, Polemic, and Professionalism in Academic Employment Decisions*, 52 U. KAN. L. REV. 385, 396-97 (2004) (observing that perspective collegiality is dangerous not only because it censors unpopular viewpoints, but because in a more subtle and insidious gesture, it excludes unfamiliar voices). A group's concurrence-seeking tendency fosters an environment of overoptimism, lack of vigilance, and sloganistic thinking about the weakness or immorality of alternatives. IRVING L. JANIS, *GROUPTHINK* 12 (1983). Unfortunately, "[t]he greater a group's cohesiveness[,] the more power it has to bring about conformity to its norms and to gain acceptance of its goals and assignment to tasks and roles." JANIS, *supra* note 45, at 4-5.

56. JANIS, *supra* note 45, at 10.

prohibitive costs that had made the alternatives seem undesirable[; the] members make little or no attempt to obtain information from experts who can supply sound estimates of losses and gains to be expected from alternative courses of action[; and] the group reacts to factual information [in a selectively biased manner by showing] interest in facts and opinions that support their initially preferred [decision] and take up time in their meetings to discuss them, [while] ignore[ing] facts and opinions that do not support their initially preferred [decision].⁵⁷

This tendency to limit the range of alternatives increases because the homogenous group may not appreciate that each member of a decision-making group tends to arrive at decisions using a cognitive map derived from their individual subculture and views (which may or may not be based on stereotypes) about any unrepresented or "out" group. The group's homogeneity gives rise to an environment where other perspectives (particularly those of the out group's) will not be heard, let alone raised. Given that most of today's public company boards of directors and their senior management are relatively homogenous groups typically comprised of upper-middle class, suburban white males, the tendency for the emergence of a single perspective is greater; the opportunity to generate new ideas, insights and better solutions is lost.⁵⁸ To combat groupthink, therefore, corporations must seek perspectives beyond those yielded by the similar experiences and insights of those individuals. Other cohorts arguably will have a picture of reality that differs markedly from that homogenous "in" group.

While any new member can bring a new perspective or a new sensibility to that group's decision-making process, scholars have recognized that gender diversity can be a proxy for diversity of viewpoints.⁵⁹ Commentators have contended that there are specific

57. *Id.*

58. See STEPHEN J. MOREWITZ, *SEXUAL HARASSMENT & SOCIAL CHANGE IN AMERICAN SOCIETY* 124 (1996) (noting that men made up ninety-five percent of senior level managers in the Fortune 1000 and Fortune 500); Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What to Do About It*, 61 WASH. & LEE L. REV. 1583, 1589-90 (2004) ("[E]xecutives will seek to fill boards with demographic and cultural reproductions of themselves.").

59. Heiser, *supra* note 55, at 397; accord Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 835 (1990) ("[G]ender remains a category that can help to analyze and improve our world."). See generally Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 572-75 (2002) (discussing racial diversity as a proxy for diversity of viewpoints); Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in Bostick v. Florida*, 67 TUL. L. REV. 1979, 2049 (1993) (arguing that demographic diversity would be a good

differences between the genders. Some of these gender-based differences may reflect scientifically measurable behavioral traits, while others are simply perceived differences that have not been scientifically established.⁶⁰ In any event, these gendered differences arguably can impact the dynamics of the decision-making group by combating groupthink.

Indeed, there is some well-received literature that contends that women are oriented toward different kinds of morality and interpersonal styles.⁶¹ The difference theorists draw on the early works of Carol Gilligan who contended that women's moral development followed a different trajectory from that of men such that a woman's mode of thinking is "contextual and narrative rather than formal and abstract."⁶² In other words, they claim that women are more sensitive to situations and context such that they resist the application of universal principles and generalizations. For example, in Gilligan's "Jake and Amy" case studies in which the children were asked to solve a moral dilemma, Jake balanced individual rights, while Amy used the "ethic of care" to demand more information about the persons involved in the scenario, rather than making abstract decisions based on universal principles to arrive at her conclusion.⁶³

There also is some evidence that some life experiences of women (as minorities) result in more flexible problem-solving styles that allow

initial proxy for diverse viewpoints); Timothy L. Hall, *Educational Diversity: Viewpoints and Proxies*, 59 OHIO ST. L.J. 551, 574 (1998) (discussing both race and gender as proxies).

60. Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299, 309 (1999); cf. Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1550-52 (1993) (noting that most empirical studies show that men and women are more similar than they are different; "small statistical distinctions do not support sweeping sex-based dichotomies").

61. See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 7-14, 100 (1982) (noting gender differences and comparing the "moral imperative" of women and men); Kingsley R. Browne, *Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, 38 SW. L.J. 617, 618-19 (1984) (suggesting that biological differences significantly impact temperament and cognitive functioning); Joan M. Shaughnessy, *Gilligan's Travels*, 7 LAW & INEQ. 1, 3-4 (1988) (analyzing whether Carol Gilligan has demonstrated the existence of a woman's different voice); see also DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION (1990); Bartlett, *supra* note 59, at 835 (noting the usefulness of recognizing women's differences, but cautioning against viewing women as a homogenous group); Rhode, *supra* note 60, at 1547-48 (discussing how arguments for equal opportunities for women in legal education have shifted from emphasizing similarities to highlighting differences). See generally DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 38-44 (2000) (discussing the perceptions and presumptions that women and minorities are different).

62. GILLIGAN, *supra* note 61, at 19.

63. *Id.* at 25-29.

them to move more easily than majority males between their roles as leaders and followers.⁶⁴ Proponents of this view argue that “[w]omen generally contribute to collaborati[ve] and productive workplace relationships, bring dispute resolution skills, and the ability to build firm loyalty.”⁶⁵ As lawyers, women may be “more likely to use less adversarial methods of legal problem-solving” and may be “more conscious of how legal decision-making might affect those beyond the immediate client, such as employees, other family members etc.”⁶⁶ It is asserted that “[w]omen tend not to compartmentalize their lives, but rather bring innovation, collaboration and relationship building [skills] . . . to the [corporate] enterprise.”⁶⁷

On the other hand, women are not monolithic. Some commentators will argue that difference theorists reinforce stereotypes of women.⁶⁸ In particular, some scholars assert that reliance on difference

64. CARNEVALE & STONE, *supra* note 12, at 60; *see also* Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 43 (1987) (“[W]omen express concerns about care, connection, relationship, and empathy for the other.”); Rochelle Sharpe, *As Leaders, Women Rule*, BUS. WEEK, Nov. 20, 2000, available at http://www.businessweek.com/2000/00_47/b3708145.htm (reporting that women typically outscore their counterparts in male dominated industries because “the type of woman who succeeds in such environments . . . must be superior in every way”).

65. Janis Sarra, *The Gender Implications of Corporate Governance Change*, 1 SEATTLE J. SOC. JUST. 457, 481 (2002); *see also* Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621, 639-40 (1994) (observing that there are some who claim that women lawyers perform differently from men because of their gendered characteristics: women may be more likely to adopt less confrontational, more mediational approaches to dispute resolution and transaction planning; women employ different moral and ethical sensibilities in the practice of law; women will be more sensitive to their client’s needs and interests; and women will employ less hierarchical managerial styles); Rhode, *supra* note 60, at 1550-51 (noting that studies have found that women “rank competitiveness lower than men,” “are more likely than men to prefer collaborative, interactive leadership styles,” and value “empathetic reasoning processes”); Sharpe, *supra* note 64 (“Women think through decisions better than men, are more collaborative, and seek less personal glory . . .”); Shaughnessy, *supra* note 61, at 3-4 (discussing Gilligan’s findings that women, motivated by an ethic of care, are more focused than men on creating and maintaining relationships).

66. Menkel-Meadow, *supra* note 13, at 906; *see also* Cynthia Grant Bowman, *Women and the Legal Profession*, 7 AM. U. J. GENDER SOC. POL’Y & L. 149, 172 (1999) (arguing that women lawyers may be focused on dispute resolution rather than on winning in the adversarial system); *accord* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39, 50-55 (1985).

67. Sarra, *supra* note 65, at 485.

68. *See, e.g.*, Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 802 (1989) (“[I]nstitutionalizing a correlation between gender and sex necessarily reinforces gender stereotypes and the oppressive gender system as a whole.”); *accord* Bartlett, *supra* note 59, at 835 (“Although ignoring difference means continued inequality and oppression based upon difference, using difference as a category of analysis can reinforce stereotyped thinking and thus the marginalized status of those within it.”); Rhode, *supra* note 60, at 1551 (“There is no ‘generic woman’”).

theory potentially can reify the experiences of a homogenous group of women as the experience of all women, thus excluding others' experiences.⁶⁹ Indeed, some even assert that gender is a social construct that may not even reflect the nature of experience and perspectives of all women and may even include characteristics shared by members of other groups.⁷⁰ These critics further argue that women lawyers, as a diverse group, should not be subject to those stereotypes that do not recognize the range of behaviors demonstrated by both men and women lawyers.⁷¹ Women lawyers must be as keen and crafty, as assertive and feisty, and as diplomatic and combative as their male colleagues in negotiations, deal-making, litigation, and other lawyerly tasks. Moreover, how ethical a person is in any given instance depends upon the particular situation, that individual's social roles, and the opportunity.⁷²

In light of these arguments, one may reasonably conclude that there is no certainty that women will act more ethically than men in every situation. Indeed, there may not have been a change in the outcome at Enron if the women lawyers viewing the Enron transactions (like their male counterparts) believed that the transactions were le-

69. See Bartlett, *supra* note 59, at 834 (discussing the tendency to assume a standard for "women's experiences" that is fixed, which is exclusionary—a tendency that feminists have criticized in others); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990) (observing that "[t]he notion that there is a monolithic 'women's experience' that can be described independent of other facets of experience like race, class, and sexual orientation" amounts to "gender essentialism," which ignores other voices); Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 47-48 (1988) (noting the "risk of treating particular experiences as universal").

70. See Sturm, *supra* note 6, at 124-25 (noting that a singular focus on gender as a social construct leads to both over- and under-inclusion); Note, *Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973, 1973-74 (1995) (arguing that feminist emphasis on the universality of women acts to repress differences among women); see also CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 216 (1989) ("[G]ender is socially constructed as difference epistemologically."); Judith Butler, *Gender Trouble, Feminist Theory, and Psychoanalytic Discourse*, in FEMINISM/POSTMODERNISM 324, 337-38 (Linda J. Nicholson ed., 1990) (asserting that gender is performative rather than natural).

71. See *Twenty-First Century*, *supra* note 2, at 734 (noting a range of behaviors necessary to be a successful lawyer exhibited by both genders). See generally Rhode, *supra* note 60, at 1552 ("[T]he similarities between men and women are far greater than the differences . . ."); Note, *Patriarchy Is Such a Drag*, *supra* note 70, at 1976-77 ("[W]omen exhibit a range of styles, behaviors, and sexual predilections—some of which are traditionally associated with masculinity . . .").

72. *Twenty-First Century*, *supra* note 2, at 735; see also Rhode, *supra* note 60, at 1552 ("Men and women who confront similar work-related pressures tend to have similar work-related responses."); Sturm, *supra* note 6, at 124 ("The claim of moral authority asserted by women . . . depends in part on their role as a signal and marker of institutional shortcomings that affect a larger, if less visible group.").

gal, albeit aggressive,⁷³ or if they were hired solely because they shared the same perspective, experiences, and insights as the other senior managers. On the other hand, while sweeping claims about women's essential nature perhaps should be avoided, one must note, however, that "particular groups of women under particular social conditions come to law with expectations and experiences different from those of men."⁷⁴ Accordingly, a different perspective arguably can develop only by diversifying the group of decision-makers.

As today's corporations appreciate the importance of good corporate governance and the need to combat groupthink, they will seek to obtain a variety of perspectives and ways of processing information in order to achieve better solutions. Promoting more women lawyers throughout the upper ranks of corporate legal departments and appointing more women general counsel should improve their efforts to obtain diverse perspectives. As Catherine Lamboley (Shell Oil Co.'s general counsel) recently noted,

It . . . stands to reason that having a variety of perspectives on a legal team can open the door to innovative thinking, strategy and solutions, [as well as] differentiated thought that [corporations] might not get from a group of white, male lawyers who share the same suburban upbringing and socioeconomic background.⁷⁵

This is particularly important where the board of directors and the executive officers are all cut from the same cloth.

B. *The Economic Value of Gender Diversity*

The tendency to hire and promote those lawyers who "fit in" or with whom male colleagues are "comfortable being with" will inexorably tend to perpetuate homogeneity since such catchphrases typically are code words for hiring other males. Such employment practices, apart from lending themselves to the groupthink phenomenon, also have the potential to negatively affect the corporation's bottom line. Indeed, the lack of gender diversity in the upper ranks of the corporation created by the so-called "glass ceiling" can be "a serious economic problem that takes a huge financial toll on American business."⁷⁶

73. Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097, 1115 (2003).

74. Rhode, *supra* note 60, at 1554.

75. Molly McDonough, *Demanding Diversity*, A.B.A. J., Mar. 2005, at 52, 52-54.

76. FED. GLASS CEILING COMM'N, A SOLID INVESTMENT: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 4 (1995). The Federal Glass Ceiling Commission, chaired by Robert Reich (former Secretary of Labor), was created by the Civil Rights Act of 1991 to

Generally speaking, corporations that are perceived to have embraced gender diversity are more attractive employers to potential recruits and indirectly to investors—as a result of the competitive edge yielded by such policies.⁷⁷ A gender-diverse workforce can enhance productivity and profitability by generating new ideas or by causing the corporation to be more responsive to diverse markets.⁷⁸ One study conducted by the American Management Association, for example, found that firms having diverse senior management teams achieved better financial performance than firms that responded negatively to the survey regarding the presence of diversity.⁷⁹ Another study of the Standard and Poor's 500 by Covenant Investment Management found that businesses committed to promoting minority and women workers had an average annualized return on investment of 18.3% over a five-year period, compared with only 7.9% for those who did not.⁸⁰ Hiring more women as general counsel would further increase the diversity of senior management.

identify barriers that have blocked the advancement of people of color and women in the private sector. *Id.* According to another series of reports sponsored by the Conference Board in 1995, despite the hardship in measuring the benefits of diversity, “businesses should recognize that diversity can be used to enhance the bottom line or can have negative consequences for companies that choose to ignore diversity issues.” Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85, 97 (2000) (citing THE CONFERENCE BOARD, REPORT NO. 1130-95-RR, DIVERSITY: BUSINESS RATIONALE AND STRATEGIES 2, 7-11 (1995)). The Conference Board was founded in 1916 for the purpose of improving the business enterprise by allowing senior executives from all industries to explore and exchange ideas of impact on business policy and practices. *Id.* at 97 n.57.

77. See Dallas, *supra* note 54, at 1386 (noting a former CEO's statement that having women on the board makes good business sense when “60% of all purchases in this country are made by women” and that such actions permit corporations to send “important signals” to their employees); Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. RACE & L. 127, 137-38 (2000) (arguing the business case for diversity); *Blue Ribbon Panel Brainstorming: The Experts Weigh In on In-House Counsel's Most Pressing Issues*, CORP. LEGAL TIMES, Nov. 2001, at 67, 69 [hereinafter *Blue Ribbon Panel*] (reporting that panelist Thomas L. Sager, Assistant General Counsel, E.I. du Pont de Nemours and Co., believes his company needs to put women and minorities in “key leadership positions” because it is vital if the corporation is to compete given the changing world and the fact that his “counterparts are increasingly women and minorities”); see also CARNEVALE & STONE, *supra* note 12 (reviewing and collecting early empirical data on benefits of diversity in decision-making processes); Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 795-97 (arguing that diversity increases the effectiveness of a corporation's board and enhances its profitability).

78. See *supra* note 77; see also Ramirez, *supra* note 76, at 98.

79. *Id.* at 99 (citing a 1998 study conducted by the American Management Association which surveyed over 1000 managers and executives to evaluate the impact of diversity on productivity and net operating profit).

80. *Id.* at 106; accord Yu, *supra* note 1, at 8.

Nevertheless, embracing diversity goes beyond merely hiring a diverse workforce, it includes addressing retention failures that detract from organizational effectiveness and increase the cost of human capital. When a departing in-house lawyer leaves the corporation, for example, the costs associated with recruiting, hiring, and training another lawyer can be quite high. These recruitment costs (including the lost productivity associated with applicant interviews by senior legal department personnel and corporate managers) and relocation expenses further drain the legal department's operating budgets. On average, it costs employers 150% of a person's salary to replace that person.⁸¹ The costs of losing an associate at the corporation's outside law firm may be equally as high. According to one study, the estimated cost of losing a second-year law firm associate can be as much as \$250,000 when one factors in the cost of training that associate, who will no longer add value either to her employer or *her clients*.⁸² Where the departing lawyer held a more senior position within the corporation or the outside law firm, the economic costs will be higher.

Apart from this economic impact, the corporation also must take into account the opportunity costs associated with the informational drain on the company whenever an in-house lawyer or a law firm associate resigns her employment. These costs include the loss of that lawyer's familiarity with the corporation's business and any established rapport that developed with the other corporate personnel. The newly-created information vacuum will continue to exist until another lawyer is recruited, hired, and trained as the replacement. The lawyer's absence harms the corporation further by impacting the productivity of the remaining lawyers. They must pick up the "slack" of the lost worker, which may lead those remaining workers to become overburdened and dissatisfied as a result of their increased workloads.

The corporation continues to suffer some productivity losses even after the new employee is hired. The new hire's lack of experience with the corporation's business and its personnel can lead to increased inefficiency during the transition period. The corporation also risks never regaining the productivity lost with each new hire, as each individual's learning curve and level of performance will differ. More importantly, the inherent knowledge, as well as some proprietary information, that is lost with each lawyer's resignation may never be recovered.

81. Angela Bradstreet, *Breaking the Glass Ceiling*, WOMEN LAW. J., Winter 2004, at 13, 14.

82. Roy Ginsburg, *Diversity Makes Cents: The Business Case for Diversity*, BENCH & B. MINN., Feb. 2005, available at http://www2.mnbar.org/benchandbar/2005/feb05/law_at_lrg.htm.

Finally, a corporation must be wary of negative publicity associated with its hiring practices. In recent years, publicity about a corporation's diversity programs (or lack thereof) can impact the corporation's bottom line. An equality policy sets a tone for whether the company *values* its employees. Empirical research suggests that announcements that an organization has obtained awards for its diversity initiatives are positively received through higher stock prices.⁸³ Alternatively, a gender discrimination lawsuit or an overall poor corporate image could negatively affect the price of the company's securities.⁸⁴ Corporations, as a result, seek to appear on lists that show them to be employers of choice, i.e., "Fortune's 100 Best Companies to Work For." These considerations have not been lost on institutional investors, who also have begun to insist that their corporations address the issue of diversity as more become aware of studies that find that the participation of diverse members could lead to superior performance.⁸⁵

Given the probable impact of gender diversity on a corporation's bottom line—both in economic terms and in terms of the quality of its decision-making process—all corporations should endeavor to make gender diversity a top priority throughout the ranks of senior management and throughout their legal departments. In so doing, however, corporations will have to understand and implement programs that address those promotional barriers that forestall women lawyers' advancement to the upper ranks of their corporate legal departments.

III. IT'S ABOUT THE PIPELINE: PROMOTIONAL BARRIERS TO ADVANCEMENT

A. *The Leak: Law Firm Promotional Barriers*

The fact that there were seventy-one women general counsel employed by Fortune 500 companies by the end of 2004⁸⁶ may lead some

83. Ramirez, *supra* note 77, at 137-38.

84. In 2003, women sued Wal-Mart Stores, Inc. for sex discrimination. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004). Following the certification of the class, Wal-Mart shares fell. *Judge Certifies Wal-Mart Class Action Lawsuit*, MSNBC, June 22, 2004, <http://www.msnbc.msn.com/id/5269131/>.

85. Ramirez, *supra* note 76, at 118.

86. *They've Got the Power*, *supra* note 8. Women general counsel lead corporate legal departments in every industry (especially those related to financial services and food services), albeit in modest percentages. Mitchell, *supra* note 20. They direct legal departments that range in size from 3 to 450 in-house lawyers in companies that employ approximately 3000 to over 100,000 workers (excluding food services and general merchandising companies). *They've Got the Power*, *supra* note 8.

commentators to assert that improvements have been made to the promotional barriers that have impeded women lawyers' ascent to the upper rank of corporate legal departments.⁸⁷ They may point to the fact that over fifty percent of them (at least forty-five of the seventy-one) were appointed since 2000.⁸⁸ However, before the accolades are extended, one must consider the fact that many of these women lawyers succeeded despite the odds against them. It is also worth noting that while there has been an increase in the number of women general counsel, there is still little pay parity between them and their male counterparts.⁸⁹ For example, of these seventy-one women general counsel, only ten were among the "100 best-paid" general counsel in fiscal year 2003—with only three women in the top fifty.⁹⁰ Nevertheless, even if one would postulate that there might one day be a critical mass of Fortune 500 women general counsel should corporations continue to appoint women lawyers at the current rate, the reality is that factors like the finite number of available general counsel positions and the relatively low turnover rate for these positions will continue the underrepresentation of women lawyers throughout the upper ranks of the corporate legal department.

More importantly, the leaky pipeline will prevent women lawyers from being well represented in the applicant pool for other senior in-house positions, given the existence of those promotional barriers that continue to impede women lawyers' ability to obtain the experience and exposure needed to fill such positions.⁹¹ In general, women have more advancement opportunities when they (1) consistently exceed expectations, (2) successfully manage others, (3) develop a style with which male managers are comfortable, and (4) have a recognized

87. Commentators also may argue that sixteen new women were appointed to general counsel positions in 2005. Sue Reisinger, *Women GCs: Holding Steady*, CORP. COUNSEL, July 2005, at 63, 63. However, these numbers were balanced by the departure of fourteen members of the class of 2004, so that the true tally is now seventy-three. *Id.* In any event, women lawyers still lead their corporate legal departments in only 14.6% of the Fortune 500 companies. *Id.*

88. *They've Got the Power*, *supra* note 8.

89. Women still earn only sixty-three cents for every dollar that a man earns, and in fields that are traditionally male dominated like law, women earn seventy-four cents for every dollar that men earn. Yu, *supra* note 1, at 8.

90. *They're the Top*, CORP. COUNSEL, Aug. 2004, available at <http://www.law.com/jsp/article.jsp?id=1090180139773>. Ellen Oran Kaden, Campbell Soup Co.'s general counsel since 1998, with cash compensation (salary plus bonus) at \$1,120,702 was the highest paid woman general counsel, but ranked only 38th among her male counterparts. *Id.*

91. See *supra* Part I for a discussion of promotional barriers. See also Janiak, *supra* note 1, at 322-23 (suggesting that work-family conflict, gender stereotypes, and exclusion from internal and external networks are all significant barriers to professional advancement).

expertise in a specific content area.⁹² That stated, those seventy-one Fortune 500 women general counsel are the success stories in that each overcame the promotional barriers that have stymied many women lawyers elsewhere to develop the requisite qualifications that would properly position them for advancement.⁹³

Specifically, they were able to withstand and overcome gender stereotyping and bias to obtain choice work assignments. They also were able to develop strong, interpersonal relationships with their male colleagues; to win the trust and confidence of law partners, corporate executives, and their subordinates; and to adequately navigate the work-life equation.⁹⁴ Of course, sheer drive and hard work alone were not enough to guarantee success. Most of these women also had the support and encouragement of mentors who helped them steer their career paths and take measured risks.⁹⁵ Many also displayed the willingness to relocate (even if overseas) from time to time.⁹⁶ Their experiences enabled them to successfully demonstrate the requisite qualities—including having displayed success in managing people, complex business transactions, and high-profile legal projects as well as having consistently worked long hours in highly pressurized settings—that enabled them to come to the attention of corporate CEOs seeking to fill senior-level, in-house legal positions.

Regrettably, too many others have found themselves particularly stymied by the lack of mentoring relationships, lack of informal networking opportunities, and the lack of an adequate work-life balance that would have enabled them to be competitive applicants for senior-level, in-house positions.⁹⁷ Whether more women lawyers will be better able to take advantage of advancement opportunities in the

92. See CATALYST INC., *WOMEN IN U.S. CORPORATE LEADERSHIP: 2003*, at 13 (2003).

93. It is noteworthy that a great many of these women graduated from the nation's top ten to twenty law schools, while approximately fifty percent of all the partners from a sample of the top 250 firms in the United States did not attend a top ten law school. See James Potter, General Counsel, Del Monte Foods Co., *Diversity*, in *WOMEN LAW. J.*, Winter 2004, at 17, 19 (citing a study by the Minority Corporate Counsel Association).

94. See *supra* note 92 and accompanying text.

95. See Janiak, *supra* note 1, at 324-25 (discussing how lack of mentoring relationships negatively impacts women attorneys).

96. For example, Carol Graebner joined Dynege, Inc. in 2003 as its general counsel after over twenty-two years of in-house experience. Mitchell, *supra* note 20. She gained the requisite experience by taking advantage of numerous opportunities to work overseas, which led to a position as general counsel for Conoco Global Power. *Id.* The assumption that women will not want to travel abroad due to family obligations is another informal barrier to promotions. M. Neil Browne & Andrea Giampetro-Meyer, *Many Paths to Justice: The Glass Ceiling, the Looking Glass, and Strategies for Getting to the Other Side*, 21 *HOFSTRA LAB. & EMP. L.J.* 61, 72 (2003).

97. CATALYST INC., *supra* note 92, at 16.

future will depend on whether corporations understand the relationship between those particular law firm promotional barriers and the applicant pool for such positions since law firms feed the pipeline to senior-level, in-house positions. Unless corporations act to address the law firm promotional barriers, women lawyers will continue to be significantly underrepresented in the upper echelon of all law practice.

1. *Lack of Important Mentoring Relationships.*—The importance of mentoring relationships cannot be overstated. While both men and women lawyers benefit from mentoring relationships, women who do not have informal mentoring networks are particularly disadvantaged because they rely on mentors to help secure better work assignments and greater client contact. Indeed, women lawyers have a greater chance of toiling away unnoticed, eventually leaving law firms in disproportionate percentages than their male counterparts.⁹⁸

Chief among the complaints of women lawyers employed at law firms is that they were never given the kind of work assignments that would allow them to showcase their talents and thereby come to the attention of the partners or other senior lawyers.⁹⁹ Their receipt of less rigorous professional responsibilities than their male counterparts also afforded them with fewer opportunities to gain the valuable experience in handling complex legal matters and sophisticated business transactions that could eventually lead to other high-profile work assignments.¹⁰⁰ Others complained that their work assignments also did not lend themselves to further business development opportunities—an important factor in becoming a partner.¹⁰¹ Even more frustrating, many women simply were not regularly invited to meetings with clients so that they could develop client-handling and rainmaking skills.¹⁰²

98. Anne Weisberg, *Advancing Women in Law Firms: A Blueprint for Success*, WOMEN LAW. J., Winter 2004, at 10. While law firms tend to attribute women's attrition rates to family obligations or other "personal choices," the primary institutional factor is the lack of adequate mentoring relationships that define how opportunities within the firm are allocated. *Id.*

99. *See id.* at 11 (arguing that, in addressing the institutional barriers holding women lawyers back, the systems and ways in which assignments are given need to be closely scrutinized).

100. *See* CATALYST INC., *supra* note 92, at 25 (noting that male CEOs generally believe that lack of general management or line experience holds women back); Browne & Giampetro-Meyer, *supra* note 96, at 81-82 (same).

101. Weisberg, *supra* note 98, at 11.

102. *See id.* (noting that the amount of business development events women are invited to and the amount of internal referrals given to women should be closely monitored).

Some partners' misperceptions about the legal aptitude and business acumen of women lawyers have caused some women to receive less demanding assignments.¹⁰³ Those who were lucky to receive adequate assignments complained that their work was more rigorously scrutinized than their male colleagues.¹⁰⁴ Similarly, other women lawyers have reported that once the law firm learns of their pregnancies, misperceptions about their ambitions and commitment to the practice also have impacted their ability to obtain choice work assignments.¹⁰⁵ Softball assignments were justified on the basis that the lawyers either will reduce their billable hours, or resign from practice, following the births of their children.¹⁰⁶

Some commentators note that many of the work assignment problems can be attributed to the fact that "male attorn[ies] may have an unconscious desire to work on stressful matters in the most comfortable environment—with others 'like' [them]."¹⁰⁷ Unfortunately, women lawyers seeking to measure up to that standard are caught in a double bind: if they act like "one of the guys" to make the partners feel more comfortable with them, they are often criticized for being too aggressive and unfeminine; but if they act like the stereotypical woman, they are criticized for being too weak.¹⁰⁸

Finally, women lawyers also are (unconsciously) excluded from informal networking opportunities as a result of not being one of the

103. See Browne & Giampetro-Meyer, *supra* note 96, at 73-74 (discussing stereotypes); Elizabeth A. Delfs, *Foul Play in the Courtroom: Persistence, Cause and Remedies*, 17 WOMEN'S RTS. L. REP. 309, 315 (1996) ("[W]omen attorneys . . . are presumed to be incompetent simply because they are not men and are therefore not qualified to practice law."); Janiak, *supra* note 1, at 322 ("[M]en are considered more competent and knowledgeable about business matters than women."); Elizabeth K. Ziewacz, *Can the Glass Ceiling Be Shattered?: The Decline of Women Partners in Large Law Firms*, 57 OHIO ST. L.J. 971, 984-85 (1996) (noting the lack of challenging assignments for women).

104. See Bradstreet, *supra* note 81, at 13 (citing studies by the ABA which show that "75% of women attorneys feel that they are being held to a higher standard than males").

105. Grace M. Giesel, *The Business Client Is a Woman: The Effect of Women as In-House Counsel on Women in Law Firms and the Legal Profession*, 72 NEB. L. REV. 760, 779-80 (1993).

106. *Id.*

107. *Id.* at 777. See generally WAYNE E. BAKER, NETWORKING SMART 41-42 (1994) (describing the similarity principle, which posits that similar people associate with each other); accord Janiak, *supra* note 1, at 325.

108. See Bradstreet, *supra* note 81, at 13 ("Women who are strong leaders are often seen as too aggressive . . . [and others] are perceived as too emotional or too weak."); see also Larry Lovoy, *A Historical Survey of the Glass Ceiling and the Double Bind Faced by Women in the Workplace: Options for Avoidance*, 25 LAW & PSYCHOL. REV. 179, 184-85 (2001) (observing that in a work setting, women who take on so-called male characteristics or who act in an effeminate manner are often depicted negatively). The Supreme Court even acknowledged this double-bind phenomenon in *Price Waterhouse v. Hopkins*, when it noted that female partnership candidates are expected to be strong managers without losing their femininity. 490 U.S. 228, 251 (1989).

“guys.”¹⁰⁹ The law firm “guys” typically tended to socialize among themselves—either by having lunch together or by going on outings together after work. In fact, many law firms unwittingly sanction this type of segregation by sponsoring league sports teams or firm golf and tennis outings, which typically convene in the evenings or on the weekends and are generally geared toward the men who participate.¹¹⁰ Women who do not participate in these events, unfortunately, miss out on the informal networking that occurs among the associates and partners who typically socialize afterwards. Unless women lawyers participate or act as event cheerleaders, they will miss the type of fraternization that can potentially lead to better assignments and opportunities to develop mentoring relationships.

While having a mentor cannot prevent all of these problems faced by women lawyers, the mentor can help establish the hardworking lawyer’s reputation as a strong problem-solver and strategist by helping to facilitate better work assignments, by providing legal-skills and client-handling training, and by protecting the lawyer from organizational politics. Specifically, a well-connected mentor can request that the lawyer work with the mentor on particular legal matters or business transactions, can direct that lawyer to those partners who work in practice areas that align with the young lawyer’s specific interests, or can make recommendations about what assignments that lawyer should receive. Mentors also can provide legal training as they informally supervise or review the lawyer’s work product and serve as a “sounding board” for ideas and strategies to help to ensure that the lawyer develops the requisite business acumen and interpersonal skills.

Because many women lawyers are unable to develop the social networks with male clients necessary to establish business relationships, they also rely on mentors to provide such assistance. In this regard, mentors can offer insights and strategies on how to deal with law firm clients generally and problem clients in particular. Similarly, a highly regarded mentor can assist women lawyers in their ability to bring in new business, as many are disproportionately disadvantaged because they possess fewer contacts than men, may have less time to devote to client development due to family obligations, and may not

109. Janiak, *supra* note 1, at 325.

110. Given that most of the sporting leagues are predominantly male, there is generally very little female involvement. Interestingly, where the leagues permit women to participate, their numbers are limited. In the extreme case, where women are allowed to participate, some leagues require that one of the men who had been participating sit out that session.

be part of the networks in which business is generated. Mentors also can share insights on how to negotiate the organizational systems and politics of firm life.

The mentor's most important asset is his or her ability to serve as a career advocate. Indeed, a good mentor can provide a forum to showcase an individual lawyer's work, will act to bolster the lawyer's reputation among her peers and senior lawyers, will advocate on her behalf when it is time for promotions, and will help direct that lawyer's long-range career path. That stated, however, locating a mentor is often quite problematic for women lawyers in particular.¹¹¹ Generally speaking, potential mentors do not consciously exclude women lawyers. People simply tend to mentor those people who are "like" themselves or with whom they are more comfortable.¹¹² Some men, as a result, do not mentor women lawyers because they worry about the appearance of impropriety in developing close personal relationships with subordinate women.

Although some may suggest that women lawyers should be mentored by other senior women lawyers to avoid such issues, that is not always a reasonable option. In some instances, "senior women" cannot or do not serve as mentors either because they too lack the political clout at the law firms, or they lack the time to be of great assistance due to their own limited availability. On the other hand, there are some senior women lawyers who simply are not interested in being mentors. They have the "I didn't have one, look how I turned out" mentality which may color their views of the apparent need for mentors.

Law firms that do not seek to create an environment where mentoring relationships can flourish, point to these women lawyers as examples of why they may be unnecessary. While, there are women lawyers who succeed without mentors, the road to success is not easy. In many instances, they have had to work harder than their male counterparts to prove themselves and to gain exposure. Having mentoring relationships would certainly help level the playing field.

2. *Lack of Adequate Work-Life Balance.*—Law practice at major law firms arguably has been transformed over the years from a genteel profession¹¹³ into an enterprise that more closely resembles a cut-

111. Ziewacz, *supra* note 103, at 983.

112. Janiak, *supra* note 1, at 325.

113. See Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 395-99 (2001) (noting that lawyers historically served as guardians of the public good,

throat business entity where the bottom line is measured by the growth in billable hours.¹¹⁴ In most large firms, a six-day workweek, billing sixty to seventy hours per week is standard. Seeking a better quality of life, numerous women lawyers move in-house to be relieved of such billing pressures and to have more flexibility in meeting the demands of practice.¹¹⁵ However, as will be discussed in greater detail in Section B, even those expectations may not be met. In-house legal positions vary tremendously in their ability to offer work-life balance with many in-house lawyers working long hours under stressful conditions. The average number of hours worked each week is continually rising.¹¹⁶

According to a 2003 study by the Project for Attorney Retention Corporate Counsel Project (PAR),¹¹⁷ while full-time in-house employment generally means a fifty-hour workweek, there are a growing number of lawyers employed in corporate legal departments who instead work "law firm hours."¹¹⁸ Indeed, the legal profession and its legal clients have come to expect total dedication of its practitioners.¹¹⁹ Such time demands, consequently, make balancing personal interests and familial responsibilities difficult for both men and wo-

but subsequently became captives of their clients with transactional lawyers acting more like business people and litigators becoming hired guns); David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1555-56 (2004) ("[F]ierce competition for both clients and talent . . . has transformed the world of corporate legal practice . . . to a hard-edge twenty-first-century global business."); Christina R. Salem, Note, *The New Mandate of the Corporate Lawyer After the Fall of Enron and the Enactment of the Sarbanes-Oxley Act*, 8 FORDHAM J. CORP. & FIN. L. 765, 769-72 (2003) (noting the legal profession's transformation into a mere business); Sofia Adrogué, *The State of Our Profession—Reflections of Decades of Practice and a View into the Third Millennium*, HOUS. LAW., Mar.-Apr. 2000, at 10, 12 ("The practice of law also has evolved into a business with lawyers concerned not only with client service but with profitability.").

114. Last year, lawyers (both partners and associates) reportedly billed more than 2.5% over the previous year according to a survey by Citigroup Private Bank, which collected data from nearly 100 large law firms. Jonathan D. Glater, *Partnerships More Elusive at Law Firms*, *Survey Shows*, N.Y. TIMES, Mar. 1, 2005, at C3.

115. As Epstein notes,

There have been great increases in the numbers of women who have joined the legal departments of large corporations. Although some lawyers claim the demands on them are as taxing in corporations as they are in law firms, many women join corporate legal departments because they expect the jobs to be more flexible and they don't have the same billing requirements that firms impose.

Twenty-First Century, *supra* note 2, at 748.

116. Williams et al., *supra* note 14, at 372.

117. PAR is an initiative of the Program on WorkLife Law at American University, Washington School of Law. The full study is available at <http://www.pardc.org/Publications/BetterOnBalance.pdf>.

118. Williams et al., *supra* note 14, at 369.

119. *The Glass Ceiling Study* found,

men lawyers. Even so, women lawyers typically are disproportionately impacted when there are familial responsibilities, as women typically shoulder the bulk of the child-rearing responsibilities.¹²⁰

Women lawyers' inability to manage an adequate work-life balance also presents an even greater challenge to advancement opportunities. They are forced to choose between using what limited "free time" that may exist as "quality family time" or as business development time. Whether employed at law firms or in corporate legal departments, women lawyers need to cultivate business relationships. As Sheila Wellington correctly noted, when women lawyers are not socializing with their male counterparts, they are not just missing the grape, they are missing the grapevine.¹²¹

To remedy the problem of women lawyers' seemingly trading upward mobility for the prospect of spending more time with their families, many law firms took a hard look at work-family issues. Numerous firms created alternative work arrangements, whereby women lawyers could take advantage of part-time or flex-time work arrangements, job sharing arrangements, employer-assisted child care, and extended maternity leave.¹²² Sadly, such arrangements have not been as successfully utilized by associates or received by others.

A key problem is that both corporate and litigation practices, by their very natures, are seemingly incompatible with part-time and flex-time arrangements. The demands of the global marketplace and rapid-paced technology make it hard to stick with pre-established schedules. Women lawyers who work on a part-time basis will likely find themselves receiving fewer and fewer "choice" work assignments. The excuse given is that clients want their lawyers to be available on an almost constant basis to service their needs. Similarly, telecommuting also may be difficult to navigate for these same reasons. Job-sharing arrangements may be most unworkable (which may explain why they are least used) in light of the fact that such arrangements can increase the costs associated with an individual employee. In terms of overhead costs (i.e., office space) and training expenses, for

For partners, the willingness to accommodate clients' needs is generally seen in terms of making personal accommodations and managing time effectively. From the perspective of associates, however, working late nights and weekends, as well as the impossibility of planning and taking a vacation, are often expressed in terms of the requirements imposed by partners.

1995 Report, *supra* note 16, at 387.

120. See *Twenty-First Century*, *supra* note 2, at 751 (noting that women typically assume the role of the primary parent).

121. SHEILA WELLINGTON & CATALYST, BE YOUR OWN MENTOR 11 (2001).

122. See *Twenty-First Century*, *supra* note 2, at 752.

example, there is the potential for overlapping and duplicate expenses.

Finally, alternative work arrangements have been routinely criticized by other law firm associates who do not take advantage of such arrangements, as well as stigmatized by some of the law firm's clients and partners. With respect to the associates, another lawyer's workload may be increased (albeit temporarily) to accommodate an assignment that comes in while the assigned lawyer is out of the office. To that end, both partners and clients may feel that they are unable to rely on the lawyer when working on a significant transaction or litigation.¹²³ This derision can effectively remove the lawyer from the partnership track.

B. *Is Legal Practice Better In-House?*

At the end of 2003, PAR issued a report, co-authored by Joan C. Williams, Cynthia Thomas Calvert, and Holly Cohen Cooper, finding that there was no guarantee that in-house legal practice was better than law firm legal practice.¹²⁴ Although many lawyers can find balanced work schedules, be a part of a strategic decision-making team, and have a proactive role in counseling clients, lawyers seeking such experiences must do their research before selecting in-house positions. The likelihood of obtaining these long-believed facets of in-house practice depends upon a host of variables, including the level at which one transitions into a corporate legal department; the size and organizational structure of that department, including its level of decentralization; and how the general counsel chooses to manage the department. Not only will these variables determine whether the in-house lawyer will be able to successfully provide legal services, but also whether she will be able to participate in the corporate culture and develop the trust and confidence of corporate management to be in a position to take advantage of future advancement opportunities.¹²⁵

The size and organizational structure of the corporate legal department can play a significant role in whether women lawyers will

123. Recently, PAR tested the assumption that clients would not work with part-time lawyers and found that it was not the case with respect to most corporate in-house counsel. Williams et al., *supra* note 14, at 371. Of course, they note that the key factor for them was that "outside counsel be accessible when they were needed, and responsive to client concerns." *Id.*

124. *Id.* at 369.

125. See generally Frederick J. Krebs, *The Inherent Advantage Is in Knowing the Client*, NAT'L L.J., Oct. 17, 1994, at C6, C8; see also Lloyd Johnson & Anastasia D. Kelly, *How to Position—and Prepare—Yourself to Rise to the Next In-House Position*, CORP. LEGAL TIMES, Feb. 2002, at 12, 12.

achieve the desired “in-house opportunities,” particularly with respect to getting to know their corporate client. In recent years, corporate legal departments have increased in size, running the gamut from employing as few as one in-house lawyer to as many as 2000.¹²⁶ Indeed, the top ten corporations employed, on average, 495 in-house lawyers in 2002.¹²⁷

Corporations may organize their legal departments in one of two ways, depending on their size. There might be a centralized legal department located at headquarters, where all in-house lawyers are employed. Conversely, the corporation may be organized with its in-house lawyers located both at its headquarters and throughout the corporate structure. In this instance, a newly employed in-house lawyer may be assigned either to the legal department located at headquarters or to the satellite legal departments located at the various business units. That lawyer’s reporting obligations may flow directly to the senior lawyers located at headquarters, to the senior lawyers located in the satellite legal department, or jointly to the business unit’s senior managers and the senior lawyers at headquarters.¹²⁸ Where the lawyer is assigned, and how the reporting lines are structured, will necessarily play a role in whether he or she will be able to gain the perspective and experience necessary for advancement. Women lawyers may have to work harder to achieve these goals.

A woman lawyer’s feelings of isolation can be exacerbated when assigned to a satellite located based on the relative size and significance of that business unit and its legal department vis-à-vis headquar-

126. The NLJ Client List: Who Defends Corporate America, NAT’L L.J., Oct. 2002, *available at* http://www.law.com/special/professionals/nlj/2002/nlj_client_list_who_defends_corporate_america.shtml. As of October 2002, according to the National Law Journal Client List, Citigroup Inc., General Electric Co., and Exxon Mobil Corp. had some of the largest legal departments with 2000, 900, and 537 lawyers respectively. Within the top 100 institutions, the smaller in-house counsel legal departments were found at Safeway Inc. with 23; Ingram Micro Inc. and the Kroger Co. with 18; Costco Wholesale Corp. and Lowe’s Cos. Inc. with 15; Kmart Corp. with 14; Aquila Inc. with 12; CVS Corp. with 11; Archer Daniels Midland Co. and Supervalu Inc. with 10; Sysco Corp. with 7; and TXU Corp. with 1. *Id.*

127. This figure includes the 2000 lawyers employed in-house at Citigroup Inc. *Id.* According to the National Law Journal Client List, the top ten institutions included in the survey were: Wal-Mart Stores, Inc. with 200 lawyers; Exxon Mobil Corp. with 537; General Motors Corp. with 248; Ford Motor Co. with 179; Enron Corp. with 90; General Electric Co. with 900; Citigroup Inc. with 2,000; Chevron Corp. with 250; International Business Machines Corp. with 308; and Philip Morris Cos. Inc. with 235. *Id.*

128. *See, e.g.,* Michele M. Hedges, *General Counsel and the Shifting Sea of Change*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 539, 545 (Nancy B. Rapoport & Bala G. Dharan eds., 2004) (noting that in-house lawyers generally are “supervised directly by the general counsel and, sometimes, have a dotted-line reporting to business units or other members of senior management”).

ters. She may have to work harder to become part of a strategic decision-making team, to gain exposure to high-profile business and legal transactions, and to come to the attention of the right personnel at headquarters when advancement opportunities arise because she may be unable to appreciate fully the client's overall business given her potential isolation from the center of corporate activity. She also may be excluded from certain types of projects or learning opportunities that are available to those lawyers practicing at headquarters who may obtain a more well-rounded perspective on the client's business due to the nature of their legal practice. The collegiality of her colleagues in the business unit also will be a factor in her advancement potential. Like her law firm counterparts, she may feel isolated if there are few other women employed where she is or if her male colleagues tend to exclude her when socializing either during lunch or after hours. Such exclusions may result from that lawyer being uninvited or being unable to participate fully due to familial or other personal obligations.¹²⁹

To be successful, the lawyer must be able to parlay her assignment to a satellite location to her advantage by becoming a specialist, accumulating extensive expertise about particularized corporate legal and business issues that come to her attention. She may, as a result, also be able to develop closer relationships with the business unit's corporate personnel who make key operating decisions. Their status, and their willingness to serve as mentors can enable her to gain exposure to more high-profile business and legal transactions that arise in that business unit, which similarly can be parlayed into greater advancement opportunities within the corporation in the future.

That stated, even where the in-house lawyer can navigate the organizational and reporting structures of the corporate legal department, there still is no guarantee that the lawyer will encounter, or be assigned, the type of high-profile business and legal transactions sought. That will ultimately depend on the general counsel. It is the general counsel's responsibility to decide whether a given legal matter should be staffed wholly or partially in-house, which outside law firms will be retained when necessary, and who within the legal department will either staff or supervise those legal assignments. His or her managerial style, informed by the law department's organizational structure and the staff's level of sophistication, will dictate the nature and amount of the legal work to be conducted in-house.

129. See generally Janiak, *supra* note 1, at 326 (observing that "because women tend to devote more time to family responsibilities than men," they are likely to have less time to spend on outside work activities).

All will depend on the type of managerial model adopted by the general counsel. When corporations began designing their legal departments, they relied on one of four basic organizational models (the "Full Service Organization," the "Traffic Cop," the "Monitor," and the "Integrated Corporate Law Department" model), which corresponded to the general counsel's managerial style and view of the type of legal work that should be performed in-house.¹³⁰ Corporations that adopted the Full Service Organization model created legal departments that provide "a full range of legal services for the corporate entity, including the litigation function."¹³¹ Under this model, in-house lawyers can be exposed to a variety of legal assignments and complex transactions since reliance on outside law firms is limited to the case-by-case basis. An alternative approach is the Traffic Cop model, where most of the corporation's legal work is directed to outside law firms by the general counsel, generally because of the small size of the legal department.¹³² Under this scenario, the corporation's legal staff typically will neither handle complex legal matters, nor be exposed to sophisticated business transactions. The general counsel will be the sole arbiter of information as he or she directs the legal work to outside firms.

The Monitor model lies closer to the Traffic Cop model, but allows the in-house legal staff to provide a number of routine legal services to the corporation, although the corporation will primarily rely on, and monitor, outside law firms who handle the more sophisticated legal work.¹³³ The Integrated Corporate Law Department model, the final model, acts as a hybrid law firm and corporate legal department where the "corporate" legal work tends to be handled in-house more than anything else.¹³⁴ Outside law firms are judiciously used for litigation matters, as well as those other matters on which the corporation's legal staff has limited expertise or where the workload does not permit completion of the project in-house. Lawyers who work in this type of department still have an opportunity to be assigned challenging work on sophisticated business transactions.

Lawyers who transition in-house in search of a more balanced work schedule also must be aware that in-house legal departments also

130. Liggio, *supra* note 25, at 629-30. While observing that there is no monolithic model for a single corporation, Carl Liggio noted that the legal department's structure depends on the general counsel's focus as the legal department will take on his or her personality and characteristics. *Id.* at 629 & n.23.

131. *Id.* at 629.

132. *Id.* at 630.

133. *Id.*

134. *Id.* at 629.

tend to conform to one of three different work models: (1) “law-firm model,” (2) “balance-supportive model,” and (3) “corporate model.”¹³⁵ As can be surmised, the law-firm model requires in-house counsel to be available for “frequent night and weekend work and [to work] unpredictable (usually long) hours.”¹³⁶ The corporate legal department that adopts a balance-supportive model, on the other hand, does not track the hours worked.¹³⁷ Instead, its lawyers are evaluated on their productivity and effectiveness.¹³⁸ As a result, those lawyers who choose alternative work arrangements generally are not stigmatized. Finally, lawyers who are employed in corporate-model-styled legal departments typically work ten-hour days (but not weekends).¹³⁹ They are, however, “embedded in the larger workplace culture” and “are able to anticipate workloads relatively well.”¹⁴⁰

In the end, lawyers who trade law firm practice for in-house practice (as well as those who start their careers in-house) must consider how the various reporting and organizational structures as well as the various management styles will affect their ability to gain access to challenging and sophisticated legal work, to be a part of a strategic decision-making team, and to have a better quality of life. The caveat, of course, is that while there may be increased opportunities to obtain better work assignments and increased responsibilities in those corporate legal departments that adopt either the Full Service Organization or Integrated Corporate Law Department models, the lawyers may find themselves working within the law-firm model—facing those same pathologies they sought to escape by eschewing law firm practice—but without the increased compensation.

C. *Developments That Have Contributed to the Changing In-House Legal Practice*

In-house legal practice, like that of law firms, has evolved over the last few decades from the staid practice of yesteryear¹⁴¹ and has cre-

135. Joan C. Williams, *Caveat Counselor: Going In-House Does Not Guarantee Work/Life Balance*, *WOMEN LAW. J.*, Winter 2004, at 23, 23.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. See Aibel, *supra* note 38, at 427 (“It was then the generally accepted wisdom that jobs in corporate law departments were for second raters, or lawyers who had failed to make partner at some of the better firms.”); Liggio, *supra* note 25, at 622 (“During the 1960s and 1970s corporate counsel were looked on with disdain by the outside bar. The corporate counsel role was deemed a parking place for those associates who couldn’t make partner.”).

ated a new paradigm for those practicing law in today's corporations. Now, legal practice in corporate legal departments rival those of outside law firms in both their ability and scope of operations. Since the late 1970s, corporate legal departments have gained prominence and prestige following the enactment of a plethora of governmental regulations and the rising costs of outside legal services at that time.¹⁴²

Corporations, in that new environment, found an inherent advantage in performing legal work in-house, which included the opportunity for increased relationships and knowledge their lawyers gained through day-to-day contact with the client; the decreased reliance on, and expense of, outside legal services; and the ability to offer both business and legal advice as a result of the lawyers' daily exchanges with corporate managers.¹⁴³ To that end, "[r]outine corporate activities such as contract negotiation, lease arrangements, and regulatory filings, which did not require extensive resources, were some of the first areas of work to move inside."¹⁴⁴ As corporations began attracting more and more highly skilled lawyers to work in-house by offering increased compensation and equally challenging work assignments, their legal departments began performing greater functions on-site, including general litigation.¹⁴⁵

Aided by the economic downturn of the early 1990s, corporations continued to increase the amount of legal work performed in-house.¹⁴⁶ This, in turn, has led to increased competition among outside law firms to provide legal services and resulted in creative billing strategies to generate revenues.¹⁴⁷ Often this meant requiring as-

142. See Williams, *supra* note 35, at 82,369 ("In recent years, the responsibility and prestige of inside corporate counsel has increased dramatically. This development is primarily due, I believe, to the increasingly complex [regulatory] environment in which business functions, and secondarily to skyrocketing cost of outside legal services.").

143. Liggio, *supra* note 25, at 625-26.

144. *Id.* at 626.

145. Liggio notes:

The pay of inside counsel was not only catching up with outside lawyers, but . . . the inside pay was better than what associates and partners were earning in law firms. Equally important, many general counsel were being paid on par with partners in major national law firms. This pay equalization, along with a perceived easier life and work style, attracted more and more lawyers to the inside bar.

Id. at 627-28; see also Giesel, *supra* note 105, at 791-92 ("In-house attorneys do much of the legal work once sent to outside counsel . . . and more frequently litigate or involve themselves substantially in litigation sent to outside counsel.").

146. See generally Dale H. Seamans, *In 1996, Big Firms Must Be "Lean and Mean,"* MASS. LAW., Mar. 11, 1996, at B3, B3 (noting how market changes have resulted in corporate clients becoming far more selective and grudgingly doling out legal work, causing financial problems for some law firms).

147. *Id.*

sociates and partners to bill in excess of 1800 or 2000 hours (or more) each year.¹⁴⁸ Failure to conform to the norms set by law firms made lawyers expendable as legal jobs began evaporating in what was then dubbed the “New Economic Era.”¹⁴⁹ This renewed emphasis on billing made corporate law departments even more attractive to women lawyers who desired a more manageable work-life balance than was available at the law firms.

Unfortunately for law firms (and the lawyers who moved in-house), corporations also began scrutinizing their bills from outside counsel.¹⁵⁰ As corporate managers came to realize that their legal departments are cost centers, these legal departments were made to justify their existence.¹⁵¹ Budgetary constraints and the slowing economy required corporate legal departments to operate with even greater efficiency. Consequently, where it was determined that it would be more cost effective for the corporation to perform legal matters in-house, such work no longer was sent to outside law firms.

These changes are increasingly affecting those in-house lawyers who provide legal services within this new paradigm. The increased workload has led to a more stress-laden atmosphere in-house, where the workday commitments continually increase. These pressures are further exacerbated by the fact that although more work is being performed in-house, economic pressures and the decentralized organizational structure of corporate legal departments have limited the number of in-house attorneys who are available either for consultations or to share the work apportioned among the lawyers.¹⁵²

148. This cost cutting continues today. See Glater, *supra* note 114, at C3 (“[A]s firms encounter stiffer resistance to rate increases from corporate clients, they will be forced to run leaner operations to sustain profits and growth. That may mean over time, lawyers will have to work more hours”); Sue Reisinger, *General Counsel Cutting the Fat*, NAT’L L.J., Mar. 10, 2003, at A18, A18 (“In these turbulent economic times, most corporate legal departments are taking steps to cut or hold down costs”).

149. *1995 Report*, *supra* note 16, at 295.

150. See *Blue Ribbon Panel*, *supra* note 77, at 70 (quoting panelist Richard A. Bailey, Kraft Foods Inc.’s general counsel, as suggesting that Kraft’s outside counsel billings were ten percent of what they were spending ten years ago as more legal work is performed in-house and further noting the “extensive system of tracking and costing the work done internally” and that “[i]f outside counsel cost more than what it costs us to do it in-house, then I start looking at changing the mix of work”); Glater, *supra* note 114, at C3 (quoting the chairman of a large San Francisco firm, who stated that “[w]ithout question, the cost of outside legal services is a big item in a client’s budget, and there have been increased efforts to manage that cost”).

151. See, e.g., *Blue Ribbon Panel*, *supra* note 77, at 71 (quoting panelist Heidi L. Rudolph, Arthur Andersen LP, as noting that no company’s legal department “is immune from corporatewide cost-cutting initiatives”).

152. Legal budgeting, with too much work for too little resources, was among the top five issues noted by in-house counsel surveyed by the American Corporate Counsel Associa-

Moreover, the recent debates about the causes of the Enron-type accounting scandals,¹⁵³ which focused on the inability of the gatekeepers (including lawyers) to constrain management misconduct and returned the spotlight to the lawyer's gatekeeper obligations,¹⁵⁴ have contributed to the additional pressures faced by in-house lawyers. In-house lawyers can no longer give reactive advice.¹⁵⁵ Today, corporate legal departments have increased ethical and accountability obligations in the wake of the scandals that gave rise to the 2003 amendments of the Model Rules of Professional Conduct,¹⁵⁶ and the adoption of attorney professional conduct rules¹⁵⁷ promulgated under the Sarbanes-Oxley Act.¹⁵⁸

tion in the Fall of 2002. AM. CORP. COUNSEL ASS'N/SERENGETI LAW, MANAGING OUTSIDE COUNSEL SURVEY: ASSESSING KEY ELEMENTS OF THE IN-HOUSE COUNSEL/OUTSIDE COUNSEL RELATIONSHIP (2002), available at <http://www.acca.com/Surveys/partner02/>.

153. Enron became the poster-child for dysfunctional corporate governance. See, e.g., O'Connor, *supra* note 52, at 1235 ("Enron serves as a 'perfect storm' metaphor that the checks and balances in the American system of corporate governance are not working the way they should.")

154. See Lisa H. Nicholson, *Sarbox 307's Impact on Subordinate In-House Counsel: Between a Rock and a Hard Place*, 2004 MICH. ST. L. REV. 559, 561 ("Many argued that the breakdown in corporate accountability at [Enron Corp., Global Crossing, Ltd., WorldCom, Inc. and Tyco International Ltd.] occurred when the [l]awyers, internal and external auditors, corporate boards, Wall Street securit[ies] analysts, [and] ratings agencies . . . all failed . . . to detect and blow the whistle on those who breached the level of trust essential to well-functioning markets.") (internal quotation marks and citation omitted).

155. This position is markedly different from that espoused fifteen years ago. At that time, Robert Gordon described the professional role of many in-house lawyers:

[T]heir advice is reactive, given only when asked for, accepting as the "client" whatever manager at whatever level consults it, and accepting the "problem" and the corporation's "interest" as defined by that manager; their advice is in the form of neutral risk-analysis; and they do not ask what happens when the "client" leaves their office—unless required to perform monitoring or auditing functions, in which case they will confine themselves to asking formal questions and receiving formal responses. Under attack by regulators or civil adversaries, they will view their function as simply minimizing liability in every case.

Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 281-82 (1990) (footnote omitted).

156. On August 12, 2003, the ABA voted to amend Rule 1.13 of the Model Rules to require in-house counsel to report fraud up the chain of command. See Memorandum from the 2003 Annual Meeting of the American Bar Association and Meeting of the House of Delegates 13 (Sept. 12, 2003), available at <http://www.abanet.org/leadership/2003/2003constituencies.pdf>. If company officers and the board of directors fail to appropriately address corporate wrongdoing, lawyers have the option but not the obligation to disclose the fraud to regulators and prosecutors. The ABA also amended Rule 1.6 of the Model Rules to allow, rather than mandate, lawyers to disclose their client's otherwise confidential information to prevent fraud. *Id.*

157. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296 (Feb. 6, 2003) (codified at 17 C.F.R. pt. 205).

158. See *Blue Ribbon Panel*, *supra* note 77, at 67 (quoting panelist Nancy E. Barton, GE Capital Corp., as noting that there was a "very strong sense in the organization that legal is,

This increased compliance responsibility also seemingly requires lawyers to be available for consultation on a continuous basis. Ostensibly, corporate managers will be more apt to seek out legal advice if they are able to consult with readily available legal counsel. To meet the challenge, more “face time” will be required of in-house lawyers.¹⁵⁹ While their increased availability may prove beneficial to the lawyers, if it provides greater opportunities to learn the client’s business or if it helps to establish better interpersonal relationships with the corporate managers, the lawyers’ availability also increases the time demands and pushes the work-life balance issue to the forefront once again.

IV. WHAT CAN BE DONE TO ADDRESS DIVERSITY CHALLENGES

Valuing diversity involves going beyond the golden rule of treating others as you wish to be treated. It involves receiver-centered behavior, rather than self-centered behavior, whereby one treats others as *they* wish to be treated.¹⁶⁰ Stated differently, corporations must take a two-fold approach to increase diversity in the upper ranks of their legal departments. Corporations must ensure that a genuine pipeline to available senior-level positions exists and that women lawyers seeking promotions are equipped to take advantage of future advancement opportunities. Such actions must include taking steps to provide greater awareness of the position’s availability (after assessing what competencies, skills, and experiences are needed to staff the legal department) by casting a wider net to capture qualified applicants. This requires using both informal and formal networks and databases, such as those available through Minority Corporate Counsel Association, and minority and women bar committees as well as law schools to target potential applicants.¹⁶¹ It also requires the general counsel or

in effect, the keeper of the company’s reputation for not just compliance but ethics and integrity in business conduct as well”); Ashby Jones, *Under the Scope*, CORP. COUNSEL, Dec. 2004, at 78, 78 (reporting that general counsel have a lot to do ensuring that their organizations are “Sarb-Ox—compliant” and that “the folks at the top are putting in longer hours than their underlings . . . [due to] increased scrutiny from regulators, board members, and shareholders”); Frederick J. Krebs & Roger W. Raber, *ACCA & NACD Join Forces to Benefit You: Corporate Governance Survey Results*, ACCA DOCKET, Sept. 2003, at 91, 95 (observing that the Sarbanes-Oxley Act requirements “will dictate that corporate directors and general counsel work together even more closely in the future”).

159. See Williams et al., *supra* note 14, at 392 (discussing the “face time cultures” prevalent in many legal departments, in which in-house lawyers are expected to work all of their hours in their offices).

160. CARNEVALE & STONE, *supra* note 12, at 90.

161. *The Color Barrier*, *supra* note 5, at 42.

chief executive officer to insist upon reviewing a diverse slate of candidates.

The corporation also must groom from within to ensure that subordinate in-house lawyers have the opportunity to obtain that level of legal skills, experience, management skills, and business perspective necessary to transition into those positions. Corporation-sponsored career development programs also will enhance the lawyer's ability to qualify for future advancement opportunities.¹⁶² Specifically, in-house programs that focus on the corporation's core business, customers, and competitors in the industry at large should be designed to teach in-house lawyers other aspects of the corporation beyond their legal practice area, division, or business unit.

To that end, corporations also must realize the import of mentoring relationships for women lawyers, in particular. The primary factor that leads to the great attrition rates of women lawyers is the lack of access to internal networks and informal mentoring relationships.¹⁶³ Guidance must be given to all program participants about what is expected, and how to go about achieving those ends. Strong leadership from the top will have a cascading effect to perhaps change the attitudes about the need to mentor women lawyers. Law department senior management also should solicit feedback from those who manage other lawyers to determine whether they are providing their subordinates with the appropriate tools for advancement with accountability measures created to reward good outcomes.

Merely implementing formal programs that match mentors with less experienced lawyers, however, will not lead to the desired goal. Mentoring relationships work when there is an interpersonal connection between the parties. Informal gatherings, much like those created for summer associates, can aid in creating these relationships. Where the supervising attorney has a personal relationship with the subordinate attorney, his or her support throughout their lives (both business and personal) can make their work lives more meaningful. To that end, women lawyers also must think strategically and seek out mentors who may potentially meet their needs and with whom they have a natural affinity.¹⁶⁴ The relationship will slowly blossom if begun with brief, focused questions.

162. See, e.g., Weisberg, *supra* note 98, at 11 (noting that senior partners in law firms should "explain how they develop clients—and show the range of styles and methods" to develop business).

163. *Id.* at 10.

164. WELLINGTON & CATALYST, *supra* note 121, at 160.

Corporations also have to do more to address work-life issues arising in-house by creating programs that are both individualized and fair and by changing the negative impression of alternative work arrangements.¹⁶⁵ Anyone who makes a business case for a flexible work schedule should be allowed to participate in such a program. However, care must be taken to balance the workload so that others who do not take advantage of such work schedules are not negatively impacted. To that end, a concerted effort is needed to dispel the notion that part-time work in-house will detrimentally impact the lawyer's status, assignments, and advancement opportunities. This statement must come down from top management. The value in retaining employees with institutional knowledge will be realized if corporations work to address work-life, mentoring, and networking issues of its lawyers.

Finally, a commitment to diversity in recruitment also requires the corporation to guide outside law firms to increase the level of diversity in their uppermost ranks and can be accomplished through face-to-face meetings, the amount of workload directed outside, and affirmative statements of the desire to see more diversity on client matters when retaining law firm services. In late 2004, Sara Lee Corp. General Counsel Roderick Palmore created *A Call to Action: Diversity in the Legal Profession*, a document that reaffirmed the corporation's commitment to diversity in the legal profession, which required action to be taken to ensure that corporate legal departments and law firms increase the numbers of women and minority attorneys hired and retained.¹⁶⁶ He sought to build upon a similar document (entitled *Diversity in the Workplace—A Statement of Principle*) that was created in 1999 and signed by the general counsel of approximately 500 major corporations.¹⁶⁷ This time, however, “[i]n an effort to realize a truly diverse profession and to promote diversity in law firms,” the signatories of the latest *Call to Action* also have to pledge to make decisions about whether to retain a particular outside law firm on the basis of its hiring practices.¹⁶⁸ As of December 1, 2004, there were seventy-two

165. Joan Williams, *Market Work and Family Work in the 21st Century*, 44 VILL. L. REV. 305, 336 (1999) (noting that family-friendly policies “improve employee retention, decrease training and recruiting costs, and boost employee productivity”).

166. Rick Palmore, *A Call to Action: Diversity in the Legal Profession*, ACCA.COM, Oct. 2004, <http://www.acca.com/public/accapolicy/diversity.pdf>.

167. *Id.*

168. *Id.*; Melanie Lasoff Levs, *Call to Action: Sara Lee's General Counsel: Making Diversity a Priority*, DIVERSITY & BAR, Jan. 2005, available at <http://www.mcca.com/site/data/magazine/2005-01/saralee0105.shtml>.

signatories to the 2004 *Call to Action*.¹⁶⁹ When all corporations commit to determining who is promoted within the legal department and how, as well as who is hired within their outside law firms, a new paradigm will be created—one that halts the underrepresentation of women and other similarly situated groups. Women will continue to experience the “highest risk of stereotypic appraisal” when they form less than fifteen to twenty-five percent of management.¹⁷⁰

V. CONCLUSION

Most corporations will at least pay lip service to the idea that gender diversity is a valuable corporate asset and that retaining talented employees is good for the bottom line. They may even try to address the underrepresentation of women by employing more in their legal departments. However, many corporations still fail to realize that in-house legal practice has begun to resemble the law firm practice (with its concomitant promotional barriers) that many women lawyers sought to escape. Recognition of their growing dissatisfaction could lead corporations to reevaluate their corporate legal departments and implement programs that better address those promotional barriers—especially the absence of mentoring relationships and the growing quality of work-life issues—that hinder women lawyers’ advancement opportunities within the legal department.

Correspondingly, women lawyers will continue to be underrepresented in the upper hierarchy of corporate legal departments until corporations work to ensure that qualified women lawyers are available to fill such positions when vacancies arise. Such work requires a two-fold effort on the part of corporations. First, they must undertake efforts to ensure that women in-house lawyers receive the necessary training and exposure that will enable them to obtain those skills needed to advance through the pipeline to senior-level, in-house positions. Second, corporations must push their outside law firms to do more to address the attrition rates of mid- and senior-level women associates. Signing the *Call to Action* is only a start. Of course, corporations will not be able to wholeheartedly push for diversity in outside law firms if the corporations fail to live up to such standards with regard to their own in-house legal departments.

169. Levs, *supra* note 168.

170. See Lovoy, *supra* note 108, at 201.