

A Century Later: An Examination of Women in the Law



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June marks a significant milestone for women in Michigan. A century ago, on June 10, 1919, Michigan ratified the Nineteenth Amendment to the U.S. Constitution, making it just the second state in the nation to do so.¹ However, women's suffrage did not become law until August 18, 1920, when the thirty-sixth state, Tennessee, ratified the amendment by a one-vote margin.²

Perhaps not surprisingly, women were practicing law in Michigan even before they could vote. Sarah Killgore Wertman was admitted to the Michigan Bar in 1871 and the Women Lawyers Association of Michigan was founded on March 24, 1919. However, until women could vote, they were precluded from holding public office, even if elected. Male voters elected Merrie Hoover Abbott as Ogemaw County prosecutor in 1898, but she was removed from the post by the Michigan Supreme Court in 1899. The Court held that because she was not herself an elector, she could not serve as the elected prosecutor.³

Today, women not only serve as elected prosecutors but lead the state at every level, including U.S. senator, governor, attorney general, secretary of state, and Michigan Supreme Court chief justice. A record number

of women have been elected to the U.S. House of Representatives and the Michigan legislature, demonstrating the voting public's trust of women in leadership.⁴

In Michigan, nearly 35 percent of active Michigan lawyers are women.⁵ We are fortunate to have many women in the judiciary and three women on the Michigan Supreme Court. Nationally, women make up approximately 27 percent of federal and state judgeships.⁶ Several states have celebrated the increase of women on their highest courts; the Nevada Supreme Court has a female majority for the first time in its history and six of the nine justices on the Washington State Supreme Court are women.⁷

Women have also led a record number of Michigan legal associations this past year, including the Michigan Judges Association, the Michigan Probate Judges Association, the Michigan District Judges Association, the Prosecuting Attorneys Association of Michigan, the Criminal Defense Attorneys Association of Michigan, the Michigan Association of Justice, and the Straker Bar Association. And a significant percentage of the state's local bar associations are led by women. As only the seventh woman to serve as SBM president, I am hopeful that these numbers signal that women will contribute equally to the leadership of our profession into the future. However, there is still

room for improvement for women's equality, specifically in law firms.

Progress still needed

Although women have made up 50 percent of law school graduating classes for almost 30 years, they account for only 19 percent of equity partners in law firms and only 5 percent of firm managing partners.⁸ *American Lawyer* has estimated that at this rate of progress, women will not reach equality in the senior ranks of the profession until 2181.⁹

This gender gap in law-firm management and equity ownership appears to be rooted in the fact that while women are entering the practice at the same rate as men, they are leaving the practice of law before the end of their careers.¹⁰ Research shows that 20 years after graduation, many women, having not reached the same levels of success as men, have left the profession altogether; only 25 percent of women who graduate law school are still practicing law at the age of 50.¹¹ This amounts to a "gushing hole" in the pipeline.¹²

Losing women in the profession, especially seasoned lawyers who should be at the height of their careers, deprives the profession of legal talent and impacts client relationships and how the profession is viewed

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by the public.¹³ In civil cases, men are three times more likely to appear as lead counsel and trial attorneys, and close to 80 percent of all lead counsel for businesses are male.¹⁴ The loss of women also affects the ability of law firms and employers to recruit and retain female lawyers given the lack of women as role models and mentors, further exacerbating the gushing hole.¹⁵

A look into the root causes

The American Bar Association has undertaken a comprehensive study to understand the disparity in graduating female lawyers and equity partners.¹⁶ The full report is due out this summer. Some of the initial findings reveal that women and their male counterparts have very different experiences in the practice of law. For example, women do not experience the same level of respect as their male counterparts.¹⁷ Women are more likely to be mistaken for nonlawyers, including court reporters or administrative assistants, even when they are seasoned lawyers.¹⁸ Female lawyers, including judges and even Supreme Court justices, are more likely to be interrupted in meetings or on the bench, and female attorneys are often tasked with “office housework” like scheduling meetings, planning parties, and post-meeting cleaning.¹⁹ A recent lawsuit made national news by highlighting the direction given to a general counsel with more than 20 years of experience, “as one of the ladies,” to serve cake to her fellow male employees, most of whom were her subordinates.²⁰ She was humiliated and later fired for being “emotional” after she complained about being subjected to this stereotypical role because of her gender.

There are also double standards that make success in the law more difficult for women. Research has demonstrated that female litigators are more likely to be viewed negatively when they are assertive or show anger. In a study of closing arguments given by men and women in a murder case, men who showed anger were viewed positively, but female litigators who demonstrated anger were viewed as less competent, shrill, and hysterical.²¹ This leaves women in the courtroom with the need to avoid being viewed as too soft or strident, or too aggres-

sive or not aggressive enough.²² Even outside the courtroom, women are criticized for not behaving in a “ladylike” fashion when they are too forceful but are said to be lacking confidence if they are not assertive.²³ This fine line of acting “appropriately feminine” so as not to be off-putting while going head-to-head with an opponent can be difficult, if not impossible, to maneuver. Men need not walk that fine line and, in fact, clients expect their male lawyers to be tough, but many unfairly assume that women are too soft to manage a client negotiation or complex litigation.²⁴

Added to the double standards and pressures of the profession is the reality that for most female attorneys who are also mothers, the responsibilities to leave the office for their children’s needs and the obligations at home still fall on their shoulders.²⁵ One survey found that 54 percent of women arrange child care, compared to 1 percent of men.²⁶ A higher percentage of female lawyers are still responsible for cooking for their family than their male colleagues.²⁷ As noted by one woman who left the law, “[w]omen have a seat at the table, but we’re still expected to set it first.”²⁸ The continued push for long working hours has made it difficult for both parents to be available to clients and partners as much as possible to stay competitive.²⁹ Overwhelmingly, it is the woman’s career that takes the back seat.

Professionalism and civility

In talking with lawyers about professionalism and civility, many women provided examples of treatment that one would categorize as demonstrating a lack of professionalism and civility, yet it was clear that these actions and comments were directed at them solely because of their gender, in violation of MRPC 6.5(a). The “hon,” “babe,” or “sweetheart” references and remarks regarding femininity or a woman’s appearance from judges and opposing counsel are rarely experienced by men during their workdays. Yet 70 percent of women surveyed by the Defense Research Institute reported experiencing this gender bias in the courtroom.³⁰ The comments were so prevalent that in 2016, the ABA adopted changes to the Model Rule of Professional Conduct 8.4 to bar lawyers from addressing

women with sexist or demeaning terms like “honey” or “darling” in the courtroom.³¹

At a recent program on diversity and inclusion hosted by the Oakland County Bar Association, many women in attendance shared experiences of suggestive and sexist comments made to them or about them in the courtroom or in professional meetings. All attendees acknowledged the comments were shockingly improper, unprofessional, and demeaning to women. Yet it is women who are often left in a no-win situation, forced to laugh off the comments or hold back responses for fear of negative reactions or professional repercussions from speaking out and seen as “difficult” or not a team player.³²

Regrettably, women in the law continue to experience unwanted advances and sexual harassment. In a recent survey, 68 percent of the female respondents indicated they had experienced sexual harassment, but only 30 percent reported the unwanted behavior.³³ The women who did not report the behavior either feared that it would ultimately hurt *their* careers or believed that such conduct by their male colleagues would be tolerated by the firm or organization; this may be in part because many male partners do not believe that sexual harassment policies apply to them because they are owners, not employees.³⁴ Of the women who reported the harassment, only 27 percent indicated that their complaints were taken seriously.³⁵

Each of these challenges adds to the difficulty women face when practicing in a profession that, by its very nature, is adversarial and competitive. Although men and women may be equally unsatisfied in the practice of law, statistics continue to reveal that women are paid less than their male counterparts.³⁶ That alone, or coupled with any of the challenges mentioned above, could result in a decision to prematurely leave the profession.

Implicit bias

A significant factor to a woman’s success is having the same access to quality assignments and networking opportunities as her male colleagues. It is not uncommon for women and minorities to have “thin files” because they have not been assigned

enough important cases or deals to justify a promotion or raise.³⁷ Without equal access to training, prime assignments, sponsorship, or client interaction, women struggle to compete for business generation and, ultimately, compensation.³⁸

Some of these hurdles are the result not of intentional discrimination, but inherent and unconscious (or implicit) bias. Unconscious biases are stereotypes about certain groups of people that form outside of our own conscious awareness.³⁹ It is a scientific fact—and human nature—that we all have unconscious biases, and these biases may not align with our conscious or stated values.⁴⁰ Nevertheless, unconscious bias can affect who is hired and who gets prominent work or networking opportunities; lawyers traditionally work with lawyers with whom they are familiar and comfortable, i.e., people like themselves.⁴¹

As a profession, we can accomplish a great deal just by recognizing the implicit or unconscious biases each of us has and focusing on how we can remove that implicit bias from the decisions made, not only in hiring, but in how prominent cases are assigned and networking opportunities are afforded to attorneys in law firms. The corporate sector has already started undertaking this initiative. Piper Jaffray, a 1,300-employee investment firm founded in 1895, recently had its leadership team participate in unconscious bias training and will roll out the training company-wide.⁴² Taking the lead in our profession, Kirkland & Ellis recently initiated a firm-wide leadership training series that includes unconscious bias training with the goal of creating a more inclusive and welcoming environment for its lawyers.⁴³

In compliance with our obligations under MRPC 6.5(a), implicit bias training can be valuable for all members of the profession responsible for ensuring equal justice under the law.⁴⁴ Both the Prosecuting Attorneys Association of Michigan and the Federal Bar Association recently hosted implicit bias training for their members.⁴⁵ The Washtenaw County Bar Association explored the impact of implicit bias on judges and juries.⁴⁶ The SBM Alternative Dispute Resolution Section is hosting a program this month focusing on biases (implicit or otherwise) that mediators carry into the

mediation room, and the SBM Board of Commissioners will engage in implicit bias training for bar association leaders. Although resources are easily accessible, any local or affinity bar association, law firm, or employer seeking more information about unconscious bias training should contact SBM Director of Diversity Greg Conyers at GConyers@michbar.org.⁴⁷

The case for inclusion

“Diverse organizations are more profitable, period. End of story.”⁴⁸

A recent study found that companies with above-average diversity in their leadership have 19 percent higher revenue, in part because of the impact of innovation generated from different points of view.⁴⁹ Several studies of corporate America—and specifically of law firms—demonstrate that organizations with higher diversity win and retain talent, make better decisions, and maintain customer and employee satisfaction, which promotes a cycle of increasing returns on investment and profitability.⁵⁰ Accordingly, working to preserve a diverse work environment that includes and retains women makes economic sense.

The conversation concerning how to increase the number of women who remain in the profession must include those currently in leadership of our law firms and our employers: men. Today, more than ever, there is an opportunity for both men and women in leadership roles to push for equality for women in the practice of law.

Last November, Masco Corporation hosted a forward-thinking panel discussion that included both men and women on gender equality and how legal employers can achieve diversity and inclusion goals.⁵¹ The conversation focused not only on advocacy and mentoring from male colleagues, but using metrics to track progress in assignments, promotions, and compensation. In a similar vein, the National Conference of Women's Bar Associations has created a “Good Guys” (Guys Overcoming Obstacles to Diversity) program and toolkit; among the offerings are panel discussions with male leaders who work to promote women and diverse lawyers, presentations on the value proposition for diversifying firms and corporations, and implicit bias training.⁵²

Both of these programs foster the dialogue necessary to create progress in retention and leadership.⁵³

It is time to take the next step forward, to work together and focus on the implicit bias that is preventing women and minorities from advancing. The profession should not have to wait another century for true equality. ■

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