

DISCRIMINATION AS ANTI-ETHICAL: ACHIEVING SYSTEMIC CHANGE IN LARGE LAW FIRMS

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ABSTRACT

As protests calling for racial justice erupted across the country in 2020, many large law firms issued compelling statements acknowledging systemic inequities and bias. During the preceding few decades, firms had already expressed their commitment to diversity, equity, and inclusion; some had launched well-publicized diversity initiatives. Still, breakthrough progress has been elusive. Women, and especially women of color, continue to be severely underrepresented in partnership ranks. The gender pay gap at law firms persists. An unrelenting pattern of heavy burden in the lived experiences of women and women of color at law firms continues.

This Article argues that an ethical reset is needed to drive true systemic change in large law firms. With the gender pay gap in law firm partnership compensation as a vehicle, this Article explains precisely how the design of the rules of professional conduct renders them largely symbolic on discrimination and ineffective against longstanding systemic barriers. It proposes a framework requiring (1) transparency of process and pay; (2) regular self-assessment addressing milestones; and (3) a financial incentive for compliance. The framework can be used as a springboard to address other consequences of systemic discrimination in law firms, like the abysmal underrepresentation of women of color. This Article takes leaders of large law firms at their word and extends an invitation to advocate for state supreme courts, state bars, the American Bar Association, and state legislatures to implement the proposed framework and finally bring about an ethical reset aimed squarely at eliminating systemic discrimination and bias in large law firms.

TABLE OF CONTENTS

INTRODUCTION	582
I. THE LAW FIRM PARTNER COMPENSATION PROBLEM	586

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A. <i>The Gender Gap in Partner Compensation</i>	587
B. <i>Attrition, Well-Being, and the Gender Pay Gap</i>	589
C. <i>How Compensation Decisions Are Made</i>	593
1. Lockstep	594
2. “Eat-What-You-Kill” Formula Plus Subjective Components.....	594
3. Corporate-Style Approach.....	596
4. Open or Closed Systems.....	596
D. <i>Systemic Bias and Discrimination</i>	597
1. A Preliminary Observation: Women of Color Left Out	599
2. Secret Criteria and Non-diverse Compensation Committees	599
3. Problematic Bureaucratic Structures of Large Law Firms	600
4. Flawed Criteria	601
E. <i>Diversity Initiatives and Gender-Bias Lawsuits</i>	603
II. HOW THE RULES OF PROFESSIONAL CONDUCT FAIL WOMEN	
LAW FIRM PARTNERS	606
A. <i>No Mention of Law Firm Compensation</i>	607
B. <i>No Widespread Adoption</i>	609
C. <i>Requirement of Tribunal Finding</i>	612
D. <i>Discipline Mainly Reaches Individual Attorneys, Not Law Firms</i>	617
III. A PROPOSAL.....	619
A. <i>Proposed Framework</i>	621
1. Transparency: Pay Gaps, Process, Decision-Makers	621
2. Milestones for Dismantling Systemic Bias and Discrimination, with Required Self-Assessment.	623
3. Financial Incentive for Law Firms	624
B. <i>Possible Barriers</i>	625
CONCLUSION.....	627

INTRODUCTION

In 2020, after police killed Breonna Taylor and George Floyd and as protests calling for racial justice erupted across the country, many BigLaw¹ firms reacted with compelling statements acknowledging systemic inequities and bias.² The firms affirmed their commitment to

1. The terms “BigLaw” and “large law firms” can be used quite loosely in the mainstream media. Where the term has not been defined by the study or survey being discussed, the term will be used in this Article to refer to law firms with 100 or more lawyers.

2. See *Collaborate for Change: Standing Against Racism*, PROSKAUER, <https://www.proskauer.com/diversity/collaborate-for-change> (last visited Mar. 26, 2021) (“Racism is a global issue that impacts society at large, but we know that change begins within our own institutions.”); Brad S. Karp, *George Floyd and the Quest for Racial Justice*, PAUL WEISS: FIRM NEWS (June 3, 2020), <https://www.paulweiss.com/about-the-firm/firm-news/george-floyd-and-the-quest-for-racial-justice?id=37191> (“We will continue to have open conversations about our different experiences, educating each other on the manifest impacts of institutional and structural racism”); Kim Koopersmith, *Heeding the Call: Our Commitment to Racial Justice*, AKIN GUMP,

diversity and inclusion, and to racial justice.³ They vowed to do more—inside and outside of their firms.⁴ However, following many diversity pledges and initiatives over the past few decades, law firms have made, at best, incremental progress.⁵ A breakthrough has been elusive. As a law firm equity partner active in the leadership of a local bar association, I saw firsthand how passion for achieving diversity and inclusion, and aspirational, heartfelt statements, can run into systemic barriers.

Systemic barriers perpetuate a severe underrepresentation of women and women of color in partnership ranks and a significant gender gap in partner compensation.⁶ Systemic racism, systemic gendered racism, and systemic sexism in large law firms reliably persist. They give rise to a pattern of invisible, heavy burdens in the lived experiences of women and women of color lawyers at law firms.⁷ The entrenchment of systemic issues has proven too stubborn and too big to overcome, even for the most well-meaning, driven managing partner or the most progressive local bar

<https://www.akingump.com/en/diversity-inclusion/heeding-the-call-our-commitment-to-racial-justice.html> (last visited Mar. 26, 2021) (“We start by acknowledging and recognizing the most basic reality that systemic racism is a blight on our country and around the world.”); *Kirkland Pledge to Support Equality, End Injustice: A Message From Our Chairman*, KIRKLAND & ELLIS (June 5, 2020), <https://www.kirkland.com/marquee-stories/social-commitment/kirkland-pledge-to-support-equality-end-injustice> (“Internally, we will remain steadfast in our commitment to advancing diversity and inclusion in our recruiting, mentorship and sponsorship, and we remain committed to having a partnership that reflects the diversity of our society. And externally, we are working closely together to deepen and expand our efforts to do our part to fight systemic inequities.”); Andrew Levander & Henry Nassau, *Black Lives Matter*, DECHERT LLP, <https://www.dechert.com/about/diversity-and-inclusion/black-lives-matter.html> (last visited Mar. 26, 2021) (“We will continue to do this work, and to support other organizations that have dedicated themselves to cleansing our legal systems of unlawful bias And we must continue to do the hard work of challenging our own biases and assumptions—on race, as well as ethnicity, gender and sexual orientation—and holding ourselves and our Firm accountable.”); *Firm Statement on Diversity - Channeling Energy into Meaningful Action*, SHOOK HARDY & BACON (June 15, 2020), <https://www.shb.com/news/2020/06/firm-statement-of-reflection-on-diversity> (“[N]ow more than ever we have a chance to redouble our efforts, seize the moment, and advance diversity and inclusion even more—both inside and outside the firm We believe that conscious and unconscious biases have harmed our institutions and our profession.”); *see also Law Firms Voice Support for Change—and a Pledge to Donate and Take Action*, THE AM. LAW. (June 18, 2020, 5:00 AM), <https://www.law.com/americanlawyer/2020/06/18/law-firms-voice-support-for-change-and-pledge-to-donate-and-take-action/>.

3. See sources cited *supra* note 2.

4. See sources cited *supra* note 2. Nearly 300 law firms eventually joined the newly formed Law Firm Antiracism Alliance. *Alliance Firms*, LAW FIRM ANTIRACISM ALL., https://www.skadden.com/-/media/files/about/lfaa_member_firm_list.pdf (last updated Mar. 31, 2021).

5. See discussion *infra* Sections II.A–B.

6. See discussion *infra* Section II.A. While a racial gap in compensation that affects male partners exists in law firms, this Article focuses on gender and, when data permits, intersectionality with race. See JEFFREY A. LOWE, MAJOR, LINDSEY & AFRICA, 2020 PARTNER COMPENSATION SURVEY 10 (2020) [hereinafter 2020 PARTNER SURVEY] (“The average total compensation for [partners] identifying with a non-[w]hite ethnicity [was] 20% lower than that of white . . . partners . . .”).

7. Tsedale M. Melaku’s research illuminates the impact of systemic gendered racism at law firms on the lived experiences of Black women lawyers. TSEDALE M. MELAKU, YOU DON’T LOOK LIKE A LAWYER: BLACK WOMAN AND SYSTEMIC GENDERED RACISM 16–18 (2019) (describing the “invisible labor” performed by Black women lawyers in “negotiat[ing] the ongoing meaning of their institutional role and presence” and the “inclusion tax” paid by them in the form of “time, money, and mental and emotional energy, just to be allowed in white spaces”).

association. Large law firms, especially in the partnership ranks, remain very white and very male.⁸

This Article offers an argument and extends an invitation to BigLaw. With the gender pay gap in law firm partnership compensation as a vehicle, I argue for the need for implementation of a framework that holds large law firms accountable for perpetuation of systemic discrimination and bias within their institutions. This framework can be implemented through a combination of state legislative action and modifications to states' rules of professional conduct, or solely through modifications to states' rules of professional conduct. Specifically, states should revisit their versions of Rule 8.4(g) of the ABA Model Rules of Professional Conduct, on discrimination and bias in the legal profession, and of Rule 5.1, on responsibilities of partners and supervisory lawyers.⁹ Implementation of this proposed framework will require creativity. It will also require the passion, involvement, and advocacy of BigLaw leaders. This Article takes BigLaw leaders at their word—that they wish to eradicate systemic discrimination within their own law firms—and invites large law firms to use their privilege and power to advocate for a partial rewriting of the rules governing the legal profession.

With a focus on gender disparities in partner compensation, this Article describes how rules of professional conduct fail to hold large law firms accountable for gender-based discrimination and bias in their institutional practices.¹⁰ It explains precisely how the design of the ethical rules allows large law firms to escape ethical scrutiny and repercussions for their practices of paying women law firm partners¹¹ far less than male law firm partners.¹²

8. *Id.* at 22. A section of Melaku's book describing the predominantly white and male nature of elite corporate law firms is titled "White Castle." *Id.*

9. See MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016); MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR ASS'N 2019).

10. While this Article focuses on the gender pay gap in law firm partner compensation, a significant racial pay gap exists. For example, in 2018, the average total compensation for non-white partners was \$738,000, 15% lower than that of non-Hispanic white partners, who had an average total compensation of \$864,000. JEFFREY A. LOWE, MAJOR, LINDSEY & AFRICA, 2018 PARTNER COMPENSATION SURVEY 11 (2018) [hereinafter 2018 PARTNER SURVEY]. As will be discussed, the data on the racial pay gap among partners is less developed and plentiful than the data on the gender pay gap; the data is harder to come by, given the underrepresentation of minority lawyers in BigLaw.

11. This Article focuses largely on gender-based discrimination in partner compensation, though the coverage of ABA Model Rule 8.4(g) and other state rules of professional conduct extend to sexual harassment. See, e.g., MODEL RULES OF PRO. CONDUCT r. 8.4(g) ("It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment . . . on the basis of . . . sex . . . in conduct related to the practice of law."). Others have written on the #MeToo movement and the ethical rules addressing sexual harassment. See, e.g., Ashley Badesch, *Lady Justice: The Ethical Considerations and Impacts of Gender-Bias and Sexual Harassment in the Legal Profession on Equal Access to Justice for Women*, 31 GEO. J. LEGAL ETHICS 497, 497–99 (2018); Wendy N. Hess, *Addressing Sexual Harassment in the Legal Profession: The Opportunity to Use Model Rule 8.4(g) to Protect Women from Harassment*, 96 U. DET. MERCY L. REV. 579, 579–80, 583 (2019).

12. See discussion *infra* Section II.A.

Against the backdrop of these shortcomings, this Article proposes a framework that confronts systemic discrimination and brings law firm partner compensation firmly within the purview of states' rules of professional conduct. The framework entails a redesign of state bar ethical rules—beginning with changes to the ABA Model Rules, and possibly accompanied by state legislative action.¹³ The proposed framework requires (1) transparency of process and pay for every law firm; (2) a self-assessment addressing milestones; and (3) a financial incentive for compliance. The framework necessitates that the largely symbolic ethical rule on discrimination in legal workplaces, ABA Model Rule 8.4(g), be replaced or supplemented with rules holding law firms directly accountable for taking meaningful steps to dismantle structural inequities. At present, the ABA Model Rules govern lawyers but not law firms. The extremely remote possibility of bar disciplinary action for law firms' discriminatory compensation practices and outcomes has dire implications for gender equity and inclusion at law firms.

Pay matters. More than 70% of women of color in a mid-2000s study “were the sole or primary wage earner in their household.”¹⁴ Retention and promotion are negatively affected. Although women make up more than half of law students, women make up only about 25% of law firm partners and 21% of law firm equity partners.¹⁵ Layer in race, and women of color account for only 3.79% of law firm partners, with Black women making up only 0.80% of law firm partners.¹⁶ Indeed, women of color partners are so severely underrepresented in large law firms that statistically significant empirical data about their law firm experiences is scarce.¹⁷

My intent is not to diminish the significance of the ABA, state bar associations, and city bar associations' efforts at developing programs and initiatives aimed at educating the legal community about and combating gender- and race-based bias, harassment, and discrimination. Rather, this Article is aimed at shining a light on an opportunity to accelerate systemic change in large law firms in this exceptional moment, following the statements issued by law firms in 2020 and, before that, the rise of the #BlackLivesMatter and #MeToo movements.

13. While this Article largely focuses on changes that can be made to state professional rules of conduct governing lawyers, some of the suggested changes can be accomplished through state legislative action. For example, state legislatures could pass a law requiring that all businesses employing 250 employees, or 100 lawyers, make disclosures about compensation and gender pay gaps. BigLaw could advocate to state legislators for those changes.

14. COMM'N ON WOMEN IN THE PRO., AM. BAR ASS'N, *VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS* 10 (2006).

15. See MIRANDA LI, PHILLIP YAO, & GOODWIN LIU, AM. BAR FOUND., *WHO'S GOING TO LAW SCHOOL? 1* (2020); NAT'L ASS'N FOR L. PLACEMENT, *2020 REPORT ON DIVERSITY IN U.S. LAW FIRMS* 7, 18 (2021) [hereinafter 2020 NALP REPORT].

16. 2020 NALP REPORT, *supra* note 15, at 17, 25.

17. DESTINY PEERY, PAULETTE BROWN, & EILEEN LETTS, AM. BAR ASS'N, *LEFT OUT AND LEFT BEHIND: THE HURDLES, HASSLES, AND HEARTACHES OF ACHIEVING LONG-TERM LEGAL CAREERS FOR WOMEN OF COLOR* iii (2020).

Part I provides an overview of the gender pay gap in law firm partner compensation and its destructive effect on the retention and well-being of women lawyers. Delving into how partnership compensation decisions are made, Part I describes the persistence of systemic bias and discrimination in large law firms, in the face of both diversity and inclusion initiatives and gender bias lawsuits. Part II discusses Rule 8.4(g) of the ABA Model Rules of Professional Conduct—which addresses discrimination and harassment in the practice of law—and the state rules of professional conduct concerning discrimination in the legal profession, to the extent the rules exist. Part II details how these rules fail to provide ways to discipline law firms when they engage in discriminatory pay practices. Part III proposes a framework focused on transparency and self-assessment that addresses systemic gender bias in law firm compensation and activates state bars from a reactive, slow-moving posture. This framework can be used as a springboard to address other consequences of systemic sexism and racism, including underrepresentation of women of color in the partnership ranks. Part IV concludes with a call to BigLaw to advocate for the state supreme courts, state bars, and the ABA to align professional conduct rules with the stated goals of large law firms to be truly equitable and inclusive.

I. THE LAW FIRM PARTNER COMPENSATION PROBLEM

The law firm Proskauer Rose has a gross annual revenue of more than \$1 billion.¹⁸ It is one of the top fifty highest-grossing firms in the world.¹⁹ In 2017, Jane Doe, an equity partner at Proskauer Rose, sued the firm for gender-based discrimination.²⁰ Jane Doe alleged the firm paid her “millions of dollars less than male partners who [were] similarly or less productive than she [was].”²¹ For three years, she had ranked sixth among the firm’s equity partners in billable hours and in the top twenty for client originations.²² She shared about suffering severe anxiety and hypertension from the law firm’s discriminatory treatment.²³ The firm and the equity partner settled; she eventually left for another firm.²⁴ That lawsuit, covered by the press, was part of a trend.²⁵ In recent years, other female BigLaw

18. *Proskauer Rose LLP*, THE AM. LAW., <https://www.law.com/americanlawyer/law-firm-profile/?id=247&name=Proskauer-Rose> (last visited Mar. 30, 2021).

19. *Id.*

20. Complaint at 3, *Bertram v. Proskauer Rose, LLP*, No. 17-cv-00901 (D.D.C. filed May 12, 2017).

21. *Id.* (emphasis omitted).

22. *Id.* at 5; Answer to First Amended Complaint at 8, *Bertram*, No. 17-cv-00901 (D.D.C. filed May 23, 2018).

23. First Amended Complaint at 12, *Bertram*, No. 17-cv-00901 (D.D.C. filed Apr. 25, 2018).

24. Stipulation of Dismissal with Prejudice at 43, *Bertram*, No. 17-00901 (D.D.C. filed Aug. 10, 2018); Brenda Sapino Jeffreys, *Lawyer Who Sued Proskauer for Gender Bias Launches Employment Boutique in DC*, THE NAT’L L.J. (Sept. 10, 2020, 10:49 AM), <https://www.law.com/nationallawjournal/2020/09/10/lawyer-who-sued-proskauer-for-gender-bias-launches-employment-boutique-in-dc/>.

25. See, e.g., Kathryn Rubino, *Proskauer Settles Gender Discrimination Lawsuit, but Details Remain Shrouded in Secrecy*, ABOVE THE L. (Aug. 13, 2018, 11:52 AM), <https://abovethelaw.com/08/proskauer-settles-gender-discrimination-lawsuit-but-details-remain->

partners have brought lawsuits alleging gender-based discrimination.²⁶ These lawsuits are symptomatic of the large, long-standing, and pervasive gender pay gap in law firm partner compensation in the United States.²⁷

This Part provides an overview of the problematic nature of law firm partner compensation determinations in large law firms and the consequences and implications that flow from it. It begins with Section I.A's description of the scope of the gender gap in partner compensation. Section I.B discusses the disheartening consequences of the gender pay gap, including the destructive effect on the retention and well-being of women lawyers at law firms. Section I.C gives context, reviewing the components of the law firm partnership compensation process, with the caveat that law firms generally do not publicly disclose details of their partner compensation processes. Section I.D explains how partner compensation determinations can be flawed and plagued by systemic bias and discrimination against women and women of color lawyers. Finally, Section I.E describes how law firm initiatives have failed to combat systemic bias and discrimination and how even BigLaw partners' lawsuits alleging gender-based discrimination in pay have fallen short in closing the pay gap.

A. *The Gender Gap in Partner Compensation*

The gender gap in partnership compensation in the United States is immense in sheer percentages and in absolute dollars. A slight gender pay gap begins at the associate level and then widens substantially at the partnership level.²⁸ The mean female associate's pay is 94% of that of the

shrouded-in-secrecy/; Meredith Mandell & Hilary Rosenthal, *Proskauer, Law Firm Known for Handling High-Profile Sex Harassment Cases, is Accused Itself*, NBC NEWS (May 15, 2018, 3:50 PM) <https://www.nbcnews.com/news/us-news/proskauer-law-firm-known-handling-high-profile-sex-harassment-cases-n874411>; Stephanie Francis Ward, *Amended Complaint Naming Plaintiff Filed in Proskauer Gender Discrimination Case*, A.B.A. J. (Apr. 26, 2018, 2:35 PM), https://www.abajournal.com/news/article/amended_complaint_naming_plaintiff_filed_in_proskauer_gender_discrimination.

26. See, e.g., Debra Cassens Weiss, *Suit Says Jones Day's 'Black Box' Compensation System Hides Pay Bias*, A.B.A. J. (June 20, 2018, 7:05 AM), https://www.abajournal.com/news/article/suit_says_jones_days_black_box_compensation_system_hides_pay_bias; Kathryn Rubino, *Biglaw Firm Hit with \$100 Million Class Action Gender Discrimination Lawsuit*, ABOVE THE L. (Aug. 31, 2016, 3:05 PM), <https://abovethelaw.com/2016/08/biglaw-firm-hit-with-100-million-class-action-gender-discrimination-lawsuit/>. It is not known how many additional lawsuits might have been brought because of the presence of mandatory arbitration agreements in some law firm practices.

27. See Debra Cassens Weiss, *Pay Gap has Widened for Male and Female Partners in Large Law Firms, New Report Says*, A.B.A. J. (Sept. 15, 2020, 11:30 AM), <https://www.abajournal.com/news/article/pay-gap-has-widened-for-male-and-female-partners-in-larger-law-firms-report-says>.

28. DESTINY PEERY, NAT'L ASS'N OF WOMEN LAWS., 2019 SURVEY REPORT ON THE PROMOTION AND RETENTION OF WOMEN IN LAW FIRMS 4, 6 (2019) [hereinafter 2019 NAWL SURVEY]. While this Article focuses on the gender pay gap in law firm partner compensation in the United States, a gender pay gap in partner compensation exists in the United Kingdom (U.K.) as well, based on publicly available data. Under the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, all businesses with 250 employees or more in the U.K. must report the difference in pay between men and women whose jobs are based in the U.K. See *Gender Pay Gap Reporting*, GOV.UK, <https://www.gov.uk/guidance/gender-pay-gap-reporting-overview> (last updated Feb. 23, 2021). Although not required by Equality Act 2010 to disclose the gender pay gap among equity partners, some

mean male associate's pay.²⁹ Then, on average, women law firm partners receive between 44% and 53% less in annual compensation than male law firm partners.³⁰ In one year, women law firm partners earn on average \$346,000 less than male law firm partners.³¹ So, if the gap holds for ten years, on average, women law firm partners would have earned \$3.46 million less than their male peers. With some ebb and flow, the gender pay gap in partner compensation has trended generally in a significantly upward direction during the past decade.³² In 2020, 2018, and 2016, the gender pay gap in partner compensation was 44%, 53%, and 44%, compared with a 32% gender pay gap in partner compensation in 2010.³³ Focusing on equity partners only results in a smaller, but still significant, gender pay gap.³⁴ In a 2019 report on equity partners, the mean pay for male partners was \$109,491 more than the mean pay for female partners (\$809,279

firms did so. *See, e.g.*, Rose Walker, *Linklaters Bows to Pressure and Restates Gender Pay Gap Figures with Partners Included*, UK LEGAL WEEK (Mar. 29, 2018, 11:10 AM), <https://www.law.com/international-edition/2018/03/29/linklaters-bows-to-pressure-and-restates-gender-pay-gap-figures-with-partners-included/>; CLIFFORD CHANCE, PAY GAP REPORT 2019, at 2 (2020) (reporting a 40.6% median gender pay gap among partners for 2019); NORTON ROSE FULBRIGHT, GENDER PAY GAP REPORT: UK 2019, at 6 (2020) (reporting an 31.5% mean gender pay gap among partners for 2019).

29. 2019 NAWL SURVEY, *supra* note 28, at 4. This gender gap in associate pay, although significantly smaller than the gap in partner pay, is still cause for alarm, especially given the well-publicized lockstep associate-salary tables leaked out or released by BigLaw firms. *See, e.g.*, Kathryn Rubino, *First Firm Matches the New and Improved Cravath Pay Scale*, ABOVE THE L. (June 12, 2018, 3:29 PM), <https://abovethelaw.com/2018/06/first-firm-matches-the-new-and-improved-cravath-pay-scale/>. Possible explanations might be found by exploring how associates on parental leave or who opt for a less-than-full-time track are compensated, or how associate bonuses are given out.

30. 2020 PARTNER SURVEY, *supra* note 6, at 10 (“[M]ale partners’ average compensation continues to significantly outpace that of female partners’ (\$1,130,000 vs. \$784,000), though female partners’ compensation rose at over twice the rate of male partners’ (+15% vs. +7%). The average male partner’s total compensation is 44% more than the average female partner’s, down from the 53% differential reported in our 2018 Survey and in line with the 44% differential reported in 2016.”); 2018 PARTNER SURVEY, *supra* note 10, at 11. While this Article focuses on law firm partner compensation, the law departments in companies also have a gender pay gap. *See* MAJOR, LINDSEY & AFRICA, 2020 IN-HOUSE COUNSEL COMPENSATION SURVEY 7 (2020) (“Within the United States, males made more than females in TAC [(total annual actual cash)] compensation in most positions.”). Before the COVID-19 pandemic in the United States, the gender pay gap in partner compensation even appeared to be growing. The pay gap was 53% in 2018, compared to 44% in 2016. 2018 PARTNER SURVEY, *supra* note 10, at 11; JEFFREY A. LOWE, MAJOR, LINDSEY & AFRICA, 2016 PARTNER COMPENSATION SURVEY 9 (2016) [hereinafter 2016 PARTNER SURVEY]. However, some decreases in the gap have been reported as well. Most recently, in 2020, the gap was 44%, down from the 53% gap in 2018. 2020 PARTNER SURVEY, *supra* note 6, at 10. A slight dip in the gender pay gap was also reflected between the 2014 and the 2016 partner compensation reports released by Major, Lindsey & Africa, but the gap was consistently in the 40-something-percent range. The 2016 Major, Lindsey & Africa Partner Compensation Survey reported a gender pay gap among partners at 44%, and the 2014 Major, Lindsey & Africa Partner Compensation Survey reported a gender pay gap among partners of 47%. 2016 PARTNER SURVEY, *supra*, at 9. This gender pay gap in large law firm partner compensation is larger than one found in a survey of solo and small-firm practitioners that found women lawyers make 36% less than male lawyers. Jason Tashea, *What Lawyers Earn in 2019*, A.B.A. J. (Sept. 1, 2019, 3:40 AM), <http://www.abajournal.com/magazine/article/what-lawyers-earn> (referencing Martindale-Avvo’s 2019 Attorney Compensation Report which “collect[ed] compensation data . . . from solo attorneys and attorneys at firms with less than 22 lawyers”).

31. *See* 2020 PARTNER SURVEY, *supra* note 6, at 10.

32. *See* Randi Lewis, *Gender Pay Gap Persists Among Big Law Partners*, MAJOR, LINDSEY & AFRICA (Feb. 12, 2019), <https://www.mlglobal.com/en/knowledge-library/articles/gender-pay-gap-persists-among-big-law-partners>.

33. 2020 PARTNER SURVEY, *supra* note 6, at 10; Lewis, *supra* note 32.

34. *See* 2019 NAWL SURVEY, *supra* note 28, at 6.

versus \$699,788, respectively).³⁵ So, on average, a female equity partner's pay was 86% of a male equity partner's pay.³⁶

In nearly all large firms, the partner with the highest compensation is a man.³⁷ At large firms, of the ten top-compensated partners, nine or ten of them are men.³⁸

The gender pay discrepancy is not explained by trends in hours billed. Women partners work as many hours as men, if not more, but women partners' billing rates and client billings are less than men's.³⁹ For example, in 2019, "for non-equity partners, the mean [hourly] billing rate for men was \$611 . . . compared to a mean for women of \$577 [A]n average premium of about 5.5% for male non-equity partners compared to female non-equity partners."⁴⁰ Also, the mean hourly billing rates for male and female equity partners were \$711 and \$671, respectively.⁴¹ This billing rate difference equated to "an average premium of about 5.6% for male equity partners compared to female equity partners."⁴²

B. Attrition, Well-Being, and the Gender Pay Gap

Against the backdrop of a significant gender pay gap in partner compensation, women leave their law firms in disproportionate numbers to men, resulting in heavy-majority male law firm partnerships.⁴³ Meanwhile, for decades, women have been attending law school and entering law firms in numbers equal to, if not greater than, men.⁴⁴ The numbers show that the gender pay gap in partner compensation and, relatedly, the lived experiences of women partners—rather than the law school pipeline of female graduates—are dominant reasons for unequal gender representation at the partner level of large law firms.⁴⁵

35. *Id.*

36. *Id.* This pay gap fairly closely approximates the gender pay gap in hourly earnings across the country and across fields. In an analysis of median hourly earnings, the Pew Research Center found women earned 85% of what men earned in 2018. Nikki Graf, Anna Brown & Eileen Patten, *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RSCH. CTR. (Mar. 22, 2019), <https://www.pewresearch.org/fact-tank/2019/03/22/gender-pay-gap-facts/>.

37. ROBERTA D. LIEBENBERG & STEPHANIE A. SCHARF, AM. BAR ASS'N, WALKING OUT THE DOOR: THE FACTS, FIGURES, AND FUTURE OF EXPERIENCED WOMEN LAWYERS IN PRIVATE PRACTICE 1 (2019) ("[M]en are overwhelmingly the top earners in large firms, with 93% of firms reporting that their most compensated partner is a man and of the 10 top earners in the firm, either one or none is a woman.").

38. *See id.*

39. 2019 NAWL SURVEY, *supra* note 28, at 2, 4 ("Among all lawyer types, including associates and partners, there were no significant differences in total or billable hours based on attorney gender.").

40. *Id.* at 5.

41. *Id.*

42. *Id.*

43. *See* LIEBENBERG & SCHARF, *supra* note 37, at 1–2.

44. *See* LI ET AL., *supra* note 15, at 1 fig.2; *see also* *Why Women Leave the Profession*, AM. BAR ASS'N (Dec. 2017), <https://www.americanbar.org/news/abanews/publications/youraba/2017/december-2017/aba-summit-searches-for-solutions-to-ensure-career-longevity-for/>.

45. *See* LIEBENBERG & SCHARF, *supra* note 37, at 5–6, 10–12.

The representation of women in law schools has hovered near 50% for a couple of decades.⁴⁶ In 2016, for the first time, female J.D. students outnumbered male J.D. students.⁴⁷ That trend continues. In 2019, women comprised 53.31% of all students at ABA-approved law schools.⁴⁸ The entering associate classes at law firms have been at 45% women for decades.⁴⁹ In 2019, women lawyers represented 46.77% of associates at law firms.⁵⁰

But decades of a law-school pipeline of female graduates has not materialized into proportionate representation in the partnership ranks.⁵¹ At the upper echelons of law firms, the percentage of women substantially declines, sliding well below 40%.⁵² Women make up 31% of law firm nonequity partners and 21% of equity partners.⁵³ Women of color account for a mere 13% of female equity partners.⁵⁴ The representation of women in management positions lags as well. Only a quarter of firms with firm-wide managing partners report having a woman in that role, and women comprise only 22% of practice group leaders.⁵⁵ Women hold only 25% of “executive-leadership positions,” including management

46. See Terry Carter, *It's not Just a 'Guy Thing' Anymore*, 85 A.B.A. J. 18, 18 (1999) (“[W]omen this past autumn represented 46 percent of law school enrollment Women account for 47 percent of this year’s first-year class . . .”).

47. *Law School Rankings by Female Enrollment (2019)*, EJURIS, <https://www.enjuris.com/students/law-school-female-enrollment-2019.html> (last visited Mar. 30, 2021).

48. *Id.*

49. LIEBENBERG & SCHARF, *supra* note 37, at i.

50. NAT’L ASS’N FOR L. PLACEMENT, 2019 REPORT ON DIVERSITY IN U.S. LAW FIRMS 5 (2019) [hereinafter 2019 NALP REPORT]. The 2019 NALP Report closely tracks the results of the National Association of Women Lawyers’ (NAWL) 2019 Survey Report on Promotion and Retention of Women in Law Firms. The 2019 NAWL Report found that “women are about 47% of all law firm associates.” 2019 NAWL SURVEY, *supra* note 28, at 3. This Article, however, does not explore the “leaky pipeline.” In 2016, Deborah Merritt and Kyle McEntee released a research summary discussing the leaky pipeline for women in the legal profession. DEBORAH JONES MERRITT & KYLE MCENTEE, *THE LEAKY PIPELINE FOR WOMEN ENTERING THE LEGAL PROFESSION 1* (2016). They found that, “[w]hen women are admitted to law school, they attend schools with significantly worse placement rates (and *US News* rank) than men.” *Id.* at 2.

51. ANNA JAFFE, GRACE CHEDIAK, ERIKA DOUGLAS, & MACKENZIE TUDOR, STANFORD L. SCH., *RETAINING AND ADVANCING WOMEN IN NATIONAL LAW FIRMS 4* (2016).

52. If recent new partner classes are any indication, this percentage will increase, at best, slowly and incrementally over the next several years. According to the 2019 Vault/MCCA Law Firm Diversity Survey, only 30% of new equity partners were women. VAULT & MCCA, 2019 VAULT/MCCA LAW FIRM DIVERSITY SURVEY 21 (2019). Also, in 2019, Bloomberg Law conducted an analysis of law firm partnership announcements, finding that on average 41.3% of the lawyers included in partnership announcements were women. Meghan Tribe, *More Women Lawyers Promoted to Partner in Past Year, Report Says*, BLOOMBERG L. (Nov. 8, 2019, 2:47 PM), <https://news.bloomberglaw.com/us-law-week/more-women-lawyers-promoted-to-partner-in-past-year-report-says>.

53. 2019 NAWL SURVEY, *supra* note 28, at 4–5. Similarly, NALP found that, in 2019, 20.3% of law firm equity partners were women. 2019 NALP REPORT, *supra* note 50, at 3. Also, a McKinsey survey of companies in North America found that, in 2017, 19% of law firm equity partners were women. MARC BRODHERSON, LAURA MCGEE & MARIANA PIRES DOS REIS, MCKINSEY & CO., *WOMEN IN LAW FIRMS 2* (2017). Nonequity describes partners who have no ownership stake in a firm, and equity describes partners who have an ownership stake in the firm and will share in any profit distribution at the end of the fiscal year. KATRINA LEE, *THE LEGAL CAREER: KNOWING THE BUSINESS, THRIVING IN PRACTICE 24* (2d ed. 2020).

54. 2019 NAWL SURVEY, *supra* note 28, at 5.

55. *Id.* at 7.

committee slots.⁵⁶ Also, as underwhelming as those numbers are, as Deborah Rhode notes, they are not precise and may underrepresent the underrepresentation of women; law firms have not been forthcoming with their data, and definitions of equity partner can vary depending on context.⁵⁷

Law firms continue to lose women at all stages in their careers, with a significant percentage of women leaving law firms in their forties.⁵⁸ Women make up only about 40% of lawyers over the age of forty in BigLaw firms.⁵⁹ Women make up only 27% of lawyers in BigLaw over the age of fifty.⁶⁰ At the equity-partner level, women are 43% more likely than men to leave a firm.⁶¹ The exodus of women from the legal profession just when their careers should be at their most productive became a primary research initiative for the ABA. Hilarie Bass, former ABA President and law firm partner, started the ABA initiative “Achieving Long-Term Careers for Women in Law” during her ABA presidency.⁶² She raised the alarm about the departure of women from the profession at what should be the height of their careers: “Twenty years after law school, when lawyers should be in their most productive years, far too many women have not reached the same success as men, and close to half have left the profession entirely.”⁶³

Research shows a link among the gender pay gap, perceived career advancement opportunities, and experienced women lawyers leaving large law firms. For the ABA report, *Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice*, researchers surveyed women and men who had practiced law for more than fifteen years and who worked at *National Law Journal* 500 law firms.⁶⁴ Women expressed less satisfaction and greater dissatisfaction than men in many areas, including recognition for work, actual compensation, methods by which compensation is determined, and opportunities for advancement.⁶⁵ Fifty percent of women were satisfied with recognition for their work, compared with 71% of men.⁶⁶ Twenty-eight percent of women were “extremely” or “somewhat” dissatisfied with their compensation, while only

56. BRODHERSON ET AL., *supra* note 53, at 2–3.

57. Deborah L. Rhode, *Diversity and Gender Equity in Legal Practice*, 82 U. CIN. L. REV. 871, 873 (2014).

58. See Roberta Liebenberg, *Too Many Senior Women are Leaving the Profession*, LAW PRAC. TODAY (Nov. 14, 2018), <https://www.lawpracticetoday.org/article/many-senior-women-leaving-profession/>.

59. *Id.*

60. *Id.*

61. BRODHERSON ET AL., *supra* note 53, at 4.

62. Hilarie Bass, *It was a Very Good Year: Research on Long-term Careers for Women Tops President Bass' Achievements*, A.B.A. J. (Aug. 1, 2018, 12:40 AM), http://www.abajournal.com/magazine/article/careers_for_women_president_bass/.

63. *Id.*

64. LIEBENBERG & SCHARF, *supra* note 37, at 3.

65. *Id.* at 5–6.

66. *Id.* at 5.

12% of men were similarly dissatisfied.⁶⁷ Thirty-eight percent of women were “extremely” or “somewhat” dissatisfied with the methods by which compensation was determined, while only 17% of men were similarly dissatisfied.⁶⁸ Forty-five percent of women, compared with 62% of men, were satisfied with opportunities for advancement.⁶⁹

Given those findings, unsurprisingly, 73% of men surveyed were satisfied with their firm’s leadership, compared with 53% of women.⁷⁰ Seven percent of men, compared with 53% of women, reported being denied or overlooked for promotion.⁷¹ Four percent of men, compared with 54% of women, reported being denied a salary increase or bonus.⁷²

Another survey’s findings similarly reflected women’s less rosy perception of the playing field at law firms. In a survey by McKinsey, more than 60% of women, compared with 14% of men, thought their gender would limit advancement opportunities.⁷³ Women were also “considerably less likely than men to” hold the view “that promotions and assignments at [the law] firm [were] based on fair and objective criteria.”⁷⁴

Dissatisfaction arising from discriminatory and uneven treatment inevitably takes its toll on lawyer well-being. As others have argued, well-being is an ethical issue for the legal profession.⁷⁵ It is well-documented that racism and sexism in the workplace lead to negative mental and physical health effects.⁷⁶ Many public health officials and government health departments have declared that racism and sexism in the United States are public health issues.⁷⁷ Public health researchers have argued, “structural

67. *Id.* at 6.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 8.

72. *Id.*

73. BRODHERSON ET AL., *supra* note 53, at 7.

74. *Id.*

75. See, e.g., NAT’L TASK FORCE ON LAW. WELL-BEING, THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE 9 (2017); Amanda Robert, *Ethical Dilemmas Emerge When Attorneys Keep Mental Health Struggles Private*, A.B.A. J. (Feb. 28, 2020, 3:09 PM), <https://www.abajournal.com/news/article/Ethical-dilemmas-emerge-when-attorneys-keep-mental-health-struggles-private>.

76. See Elizabeth A. Pascoe & Laura Smart Richman, *Perceived Discrimination and Health: A Meta-Analytic Review*, 135 PSYCH. BULL. 531, 531–32 (2009); Yin Paradies, *A Systematic Review of Empirical Research on Self-reported Racism and Health*, 35 INT’L J. EPIDEMIOLOGY 888, 888–89 (2006).

77. See, e.g., Christine Vestal, *Racism is a Public Health Crisis, Say Cities and Counties*, PEW (June 15, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/06/15/racism-is-a-public-health-crisis-say-cities-and-counties>; *HPRH Editorial: Racism is a Public Health Problem*, HARV. PUB. HEALTH REV., Winter 2015, at 1, 1–2; Press Release, Am. Pub. Health Ass’n, *Racism is an Ongoing Public Health Crisis that Needs Our Attention Now* (May 29, 2020), <https://www.apha.org/news-and-media/news-releases/apha-news-releases/2020/racism-is-a-public-health-crisis>; see also Patricia Homan, *Structural Sexism and Health in the United States: A New Perspective on Health Inequality and the Gender System*, 84 AM. SOC. REV. 486, 486 (2019).

racism is the most important way through which racism affects health.”⁷⁸ In a study of the impact of COVID-19 on law firms, 19% of women who responded said they were considering leaving the firm.⁷⁹ In a survey focused on mental health and substance abuse, women were much more likely than their male counterparts to make a comment or suggestion, especially with respect to work-life balance issues.⁸⁰ One female associate, in the twenty-five- to thirty-four-year-old range, connected sexism and lawyer well-being: “Discrimination is widespread, sexism is very common and there is very little regard for people’s wellbeing and mental health.”⁸¹

The gender gap in partner compensation thus only confirms women’s perspectives about the uneven playing field at law firms and a system “rigged” against their successful promotion and advancement. The result: women leave large law firms and, perhaps, the legal profession entirely.

C. How Compensation Decisions Are Made

For many years, partnership compensation was a secret.⁸² Then, in the 1980s, the *American Lawyer* started to publish profits per partner for large firms.⁸³ Everyone then knew the average profits per partner at various law firms. To this day, however, the partner compensation decision-making process at individual firms is largely kept private. What follows below is a description of common considerations and features of large law firm partner compensation systems, drawn from survey research, studies, court filings, and informed by the Author’s time as a law firm equity partner as well as conversations with equity partners. Equity partners—partners who are owners of the law firm—share in their law firm’s profits.⁸⁴ Law firms usually consult a number of criteria and mathematical formulations in the process of determining a partner’s profit share and salary (if any).⁸⁵ Generally, the partnership compensation system can be lock-step (based on seniority), or “eat-what-you-kill” (based on business brought in by that individual partner), or some combination of the two, with a subjective component.⁸⁶ Some firms using a combination model may assign “points” to each partner every year based on a variety of

78. David R. Williams, Jourdyn A. Lawrence, & Brigitte A. Davis, *Racism and Health: Evidence and Needed Research*, 40 ANN. REV. PUB. HEALTH 105, 107 (2019) (describing structural and institutional racism as “the processes of racism that are embedded in laws . . . policies, and practices of society . . . that provide advantages to racial groups deemed as superior, while differentially oppressing, disadvantaging, or otherwise neglecting racial groups viewed as inferior”).

79. LOEB LEADERSHIP, THE LEGAL INDUSTRY’S HANDLING OF THE DISRUPTION CAUSED BY COVID-19: THE FINDINGS REPORT 13 (2020).

80. See Lauren Henderson & Bill Henderson, *What Needs to Change to Improve Mental Health in the Legal Profession?* (171), LEGAL EVOLUTION (June 21, 2020), <https://www.legalevolution.org/2020/06/what-needs-to-change-to-improve-mental-health-in-the-legal-profession-171/#more-11970>.

81. ALM INTEL., 2019 MENTAL HEALTH & SUBSTANCE ABUSE SURVEY (2020) (on file with author).

82. LEE, *supra* note 53, at 17.

83. *Id.*

84. *Id.* at 24.

85. *Id.* at 17–18.

86. *Id.* at 17–18.

factors, like business generation and seniority.⁸⁷ Committee service, engagement in mentoring junior colleagues, and diversity of teams may be considered or assigned point values.⁸⁸ Finally, some firms outside the United States have employed a “corporate style” compensation system.⁸⁹

1. Lockstep

An objective lockstep model, not prevalent in the United States, is based on seniority; the longer a lawyer has been a partner at the firm, the more money that lawyer earns.⁹⁰ In one survey, less than 4% of U.S. law firms used a lockstep system for determining partner compensation.⁹¹ The lockstep system has predictability.⁹² It is straightforward and easy to understand. Political considerations and personal favorites are not part of the compensation equation.⁹³ So, as one former BigLaw managing partner put it, the lockstep system “theoretically enhances collegiality and solidarity among partners, who are not competing among themselves for higher compensation.”⁹⁴ Everyone shares in the profits and benefits from their peers’ work. It also may even give junior partners space and time to grow their practices.

2. “Eat-What-You-Kill” Formula Plus Subjective Components

The modern partner compensation system in the United States emphasizes the importance of business generation over all other considerations.⁹⁵ Under an eat-what-you-kill model, compensation is determined by the business brought in by the partner.⁹⁶ Some firms follow strict calculation formulas.⁹⁷ The numbers used in that calculation can vary. Some firms

87. *Id.*; see also Memorandum of Law in Support of Defendants’ Motion for Summary Judgment and Motion to Dismiss Class Allegations at *8, *Campbell v. Chadbourne & Parke LLP*, No. 16-cv-06832 (S.D.N.Y. filed Nov. 14, 2016) (“Individual partner compensation is expressed using a ‘points’ system.”).

88. LAUREN STILLER RIKLEEN, AM. BAR ASS’N PRESIDENTIAL TASK FORCE ON GENDER EQUITY & THE COMM’N ON WOMEN IN THE PRO., *CLOSING THE GAP: A ROADMAP FOR ACHIEVING GENDER PAY EQUITY IN LAW FIRM PARTNER COMPENSATION* 35–36 (2013).

89. See ED WESEMANN & NICK JARRETT KERR, *EDGE INT’L, 2015 GLOBAL PARTNER COMPENSATION SYSTEM SURVEY 4* (2015). A survey of law firm partner compensation at 134 large law firms in the United States, the U.K., Europe, Australia, New Zealand, and Canada revealed that law firms in the United States and Canada favor subjective compensation systems more than firms in other countries. *Id.* at 1.

90. LEE, *supra* note 53, at 17–18.

91. WESEMANN & KERR, *supra* note 89, at 3.

92. JOHN M. WESTCOTT, JR., *DIVIDING THE PIE: LAW FIRM COMPENSATION SYSTEMS* 22 (2015).

93. *Id.*

94. *Id.*

95. Joan C. Williams & Veta Richardson, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, 62 *HASTINGS L.J.* 597, 602 (2011) (describing “the current compensation system, which dramatically overvalues ‘finding,’ and dramatically undervalues ‘minding’ and ‘grinding’—that oddly dismissive term for doing high-quality legal work”).

96. See Jordan Furlong, *How Compensation Plans are Wrecking Law Firms*, *LAW21 BLOG* (Sept. 11, 2018), <https://www.law21.ca/2018/09/how-compensation-plans-are-wrecking-law-firms/>. Legal market analyst and consultant Jordan Furlong describes law firm compensation systems as rewarding partners mostly “for bringing client business into the firm and billing hours to the firm’s clients, and for hardly anything else.” *Id.*

97. WESEMANN & KERR, *supra* note 89, at 3.

will look at some combination of total originations, collections, and realization.⁹⁸ Originations refers to the amount of dollars on matters “originated” by the partner.⁹⁹ A partner originates a matter when they have a file opened on a new matter.¹⁰⁰ Law firms in the United States place a high emphasis on originations.¹⁰¹ Collections refers to the amount of dollars collected on matters worked on by a lawyer.¹⁰² A lawyer with an hourly rate of \$500 who bills 2,000 hours in a year would end up with \$1 million or less in collections.¹⁰³ Realization refers to the percentage of the hours worked that result in dollars being paid to the firm.¹⁰⁴

In addition to using strict formulas and having a range of technology tools available for examining a lawyer’s productivity and the size and value of the lawyer’s book of business, somewhat paradoxically, U.S. law firms are also known for deciding compensation on a subjective basis, usually through a compensation or management committee.¹⁰⁵ “Typically[,] the committee has access to” an array of “statistical performance information.”¹⁰⁶ Still, committees often consider other factors and make subjective calls on compensation when deciding the allocation of profits to each partner.¹⁰⁷ For example, the Proskauer law firm stated in its answer in the *Jane Doe* lawsuit that the determination of a partner’s compensation is based on the “totality of a partner’s contributions on a host of financial and nonfinancial criteria, and other factors, and does not rely on a metrics based formula.”¹⁰⁸ The Chadbourne Park firm disclosed in a summary judgment motion that its management committee considers “statistical data” as well as other factors including “efforts undertaken by partners to enhance revenues; instances of teamwork yielding new business or other positive results; . . . partners who have been of help to one another; [and] . . . efforts made by partners to attract lateral partners and other senior attorneys to the Firm”¹⁰⁹ This description aligns with a former BigLaw managing partner’s list of “partnership contributions” taken into account at his firm when determining compensation in 1991.¹¹⁰ The list included: “[l]eadership of the firm, professional departments, branch offices and committees,” “[p]articipation in public service activity,” “[r]esponsible use of firm resources and interaction with the non-lawyer support staff,”

98. LEE, *supra* note 53, at 17.

99. *Id.*

100. *Id.*

101. WESEMANN & KERR, *supra* note 89, at 4–5 (noting that 60% of law firms in the United States and Canada surveyed responded that origination was “extremely important”).

102. LEE, *supra* note 53, at 17.

103. *Id.*

104. *Id.*

105. WESEMANN & KERR, *supra* note 89, at 1–3.

106. *Id.* at 3.

107. *See id.*

108. Answer to First Amended Complaint, *supra* note 22, at 4.

109. Memorandum of Law in Support of Defendants’ Motion for Summary Judgment and Motion to Dismiss Class Allegations, *supra* note 87, at *6–8.

110. WESTCOTT, JR., *supra* note 92, at 17–18.

and “[c]ooperative and constructive participation in firm life.”¹¹¹ Many firms have formal lists containing similar components.¹¹²

This partner compensation approach—taking statistical information about a partner’s productivity and combining that information with a subjective component—is the most common.¹¹³ That subjective component, tellingly, was used by the defendant law firm in the *Chadbourne* lawsuit in defending *against* claims of discriminatory pay practices.¹¹⁴

3. Corporate-Style Approach

Some law firms outside of the United States use what has been described as a corporate-style compensation system. That type of system “pays a fixed base salary” and may also include “a bonus based on individual performance [and] a dividend based on the financial success of the [law] firm.”¹¹⁵ In contrast, U.S. law firm culture allows for compensation decisions to be based largely on the judgment of a committee of peers.¹¹⁶ U.S. and Canadian law firms will typically pay some type of bonus, ranging from less than 3% to more than a third of partner compensation.¹¹⁷

The partner compensation systems in the United States and Canada result in a far larger spread in compensation among partners than in other countries. At law firms in the U.K, continental Europe, New Zealand, and Australia, the overwhelming majority of firms had a partner compensation spread of three-to-one or less.¹¹⁸ In the United States and Canada, the overwhelming majority of firms had a spread of more than three-to-one, with 40% of firms with a spread of nine-to-one or ten-to-one.¹¹⁹

4. Open or Closed Systems

Partner compensation systems can be categorized as “open” or “closed.” Open does not mean public; open means every partner knows the compensation of all the other partners.¹²⁰ Most law firm compensation systems in the United States, although not publicly disclosed, are self-labeled as open, which can mean that only some partners, like practice group leaders, have access to the compensation of other partners, or that the compensation of other partners are available to partners upon request.¹²¹ In closed systems, generally, only the partners involved in determining

111. *Id.*

112. *Id.* at 17.

113. See WESEMANN & KERR, *supra* note 89, at 2–3.

114. See Memorandum of Law in Support of Defendants’ Motion for Summary Judgment and Motion to Dismiss Class Allegations, *supra* note 87, at *7–9.

115. WESEMANN & KERR, *supra* note 89, at 4.

116. See *id.* at 1–4.

117. See *id.* at 6–7.

118. *Id.* at 4.

119. See *id.*

120. LEE, *supra* note 53, at 17.

121. See WESEMANN & KERR, *supra* note 89, at 7–8.

everyone's compensation and the individual partner know that partner's compensation.¹²²

D. Systemic Bias and Discrimination

The 2019 ABA study about experienced women lawyers at law firms concluded that women do not need to “lean in” any more than they do now, and the fix needed is at the law-firm level, not the individual level: “What needs fixing is the structure and culture of law firms, so firms can better address the needs of the many women they recruit and seek to retain.”¹²³ This “structure and culture” problem has another name: systemic discrimination.

Systemic discrimination has long been recognized by scholars in the employment realm.¹²⁴ Pauline Kim described it as a “bias that is built into systems, originating in the way work is organized.”¹²⁵ Systemic discrimination in law firm partnership compensation fits that description well. Compensation decisions are based on criteria created by human actors at the law firm.¹²⁶ If those criteria or the decision-making process are biased and have the effect of producing inequities, then structural discrimination or bias has occurred.¹²⁷ For example, law firm partners, working with legal management consultants, might decide that criteria should consist of a partner's billable hours, originations, and collections during the past three years.¹²⁸ On its face, the criteria may seem “objective.” However, the compensation-setting process suffers from structural gender bias if, for example, the originations of a male junior partner flows from him “inheriting” several matters from a male senior partner after socializing on a golf-themed trip involving the male senior partner's vacation home, to which no women attorneys were invited.¹²⁹ Also, though women work

122. See *id.*

123. LIEBENBERG & SCHARF, *supra* note 37, at 17.

124. See Daniel P. Tokaji, *Denying Systemic Equality: The Last Words of the Kennedy Court*, 13 HARV. L. & POL'Y REV. 539, 540 n.2 (2019) (“[N]oting that systemic discrimination cases have been controversial and arguing that the EEOC is best positioned to litigate such cases.” (citing Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. REV. 1133, 1333–35 (2015))); Samuel R. Bagenstos, *The Structural Turn and the Limits of Anti-discrimination Law*, 94 CALIF. L. REV. 1, 1–3 (2006) (expressing support for the “institutional” or “structural” approach to employment discrimination” while acknowledging the difficulties of pursuing such an approach under accepted law).

125. Kim, *supra* note 124, at 1336.

126. Law firms largely make compensation decisions internally and sometimes with the input of consultants or other professionals under the supervision of law firm executives and lawyers. See Williams & Richardson, *supra* note 95, at 605–06, 616.

127. Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 837 (2019) (“Structural discrimination or bias occurs when an organization adopts particular structural policies and procedures that are not discriminatory on their face, but have the effect of producing inequities between groups. This would include ‘[s]tructures of decision making, patterns of interaction, and cultural norms[,’ which] often produce “second generation” inequalities that are not immediately discernible at the level of the individual.” (quoting Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 Wis. L. Rev. 277, 286 (2002))).

128. See Williams & Richardson, *supra* note 95, at 623, 647–48.

129. Based on a former law firm attorney's anecdote, shared with the Author.

similar hours as men, lawyers at a law firm may still perceive women as less committed to the law firm or working less.¹³⁰

The ABA and state bars acknowledge the unconscious and systemic bias surrounding the gender pay gap at law firms. In 2013, an ABA report described gender inequity in compensation as “pervasive and long-standing.”¹³¹ The report discussed unconscious bias and the “deep roots of pay inequity.”¹³² In 2017, a Florida State Bar report on gender bias concluded: “Gender bias is deeply embedded in our culture. Its impact has far reaching economic and social consequences and has continuously disadvantaged women in our profession.”¹³³ The Florida State Bar determined it could not eliminate “artificial barriers” to “bias-free” opportunities on its own and affirmed its commitment to the “implementation of sustained and multi-layered strategies.”¹³⁴

Systemic discrimination at law firms happens in a variety of forms. They include a lack of transparency,¹³⁵ lack of representation on powerful committees,¹³⁶ and lack of a process for transitioning matters and clients¹³⁷—all discussed below. Partner compensation decisions are generally flawed from the beginning due to nonpublication of clear criteria for partnership compensation decisions; the characteristics of the people serving on the compensation committee; bargains struck among partners about the percentage of credit they should receive for originating a given matter; and the culture and rules (or lack of rules) concerning reduced hours.¹³⁸ In most firms, a compensation or management committee group of peers is entrusted to make decisions in private meetings about partner compensation.¹³⁹ The committee receives a lot of statistical information and is also usually allowed to consider nonstatistical information.¹⁴⁰ They often reach decisions based on a consensus of the committee about what is fair.¹⁴¹

As well-meaning and committed to equity and inclusion as compensation committee members may be, the partner-compensation decisions they make inherently suffer from bias.

130. JAFFE ET AL., *supra* note 51, at 19–20 (tracing the misperception about women’s workload to (1) the assumption that the “ideal” lawyer is one who is committed to the law firm 24/7 and (2) to gender stereotypes).

131. RIKLEEN, *supra* note 88, at 9–11.

132. *Id.* at 13–14.

133. THE FL. BAR SPECIAL COMM. ON GENDER BIAS, REPORT OF THE FLORIDA BAR SPECIAL COMMITTEE ON GENDER BIAS 11 (2017).

134. *Id.*

135. *See infra* Section I.D.2.

136. *See infra* Section I.D.2.

137. *See infra* Section I.D.4.

138. *See infra* Section I.D.4.

139. *See infra* Section I.D.2.

140. *See supra* Section I.C.2.

141. *See infra* Section I.D.4.

1. A Preliminary Observation: Women of Color Left Out

The systemic bias in law firms against women as a group has been more thoroughly studied than the systemic bias in law firms against women of color as a group. Opportunities to gather data concerning women of color lawyers in large law firms is challenging because of scarcity.¹⁴² When the ABA set out to gather data about the experiences of women of color in law practice for twenty years or more, there was not enough data to gather.¹⁴³ Law firms did not have a sufficient number of women of color equity partners to “collect data that is statistically significant.”¹⁴⁴ The data gatherers sounded an alarm for the urgent need to address the representation of women of color in large law firms:

There is one statistic, however, that has not changed over the course of the past 20 years: women of color represent approximately 2 percent of all equity partners at large law firms. That 2020 statistic combined with anecdotal information collected in the study is cause for sufficient alarm as is the mere fact that there were not enough women of color to conduct a fulsome analysis [T]here is no luxury of incremental steps Firm culture must change to effectuate the change required.¹⁴⁵

The systemic barriers discussed below negatively impact the representation of women of color lawyers at large law firms, both at the junior levels and leadership levels, and their lived experiences at the firms.¹⁴⁶ The structures favoring and maintaining in-group bias likely have an outsized negative impact on women of color because they have very little, if any, representation in the management of the law firm and may have a weak support system at the firm.¹⁴⁷

2. Secret Criteria and Non-diverse Compensation Committees

To succeed anywhere, employees need to understand the criteria by which they are being judged. Large law firm compensation committees often do not clearly articulate the criteria used in making compensation decisions. So, different partners, depending on who they are friends with at the firm and the length of years they have worked there, can easily develop different impressions of what is considered and weighed by the committee in determining partner compensation.¹⁴⁸ This can lead to drastically different impressions among partners about how they might adjust their behaviors and work on their performance to earn more compensation in

142. PEERY ET AL., *supra* note 17, at iii.

143. *See id.*

144. *Id.*

145. *Id.* at iii–iv (“Change is necessary and there is an urgency of now Notwithstanding the bits of progress women have made overall, biases continue to exist, and women of color are more inclined to be subjected to both implicit and explicit bias.”).

146. *See* MELAKU, *supra* note 7, at 22.

147. JAFFE ET AL., *supra* note 51, at 15–16.

148. *See* RIKLEEN, *supra* note 88, at 17–19.

the future.¹⁴⁹ Secrecy about methods of compensation help maintain the status quo. The 2019 ABA report focused on experienced women lawyers at law firms concluded that law firms should do a “much better job” of ensuring that policies—compensation-determination methods being a prime example—are clear and well known.¹⁵⁰ The report condemned the secrecy of compensation systems:

Too many firms have their compensation systems shrouded in mystery, where unwritten rules and relationships determine equity shares, origination credit, salary, and bonuses. These unwritten rules help maintain the status quo, which directly impacts the ability of women (and lawyers of color) to break through into the top levels of compensation.¹⁵¹

Having compensation decisions shrouded in mystery leads to many experienced women lawyers’ perception that compensation systems are “rigged.”¹⁵²

The lack of clearly articulated criteria can be exacerbated by the non-diverse make-up of a compensation committee. Often, compensation committees have very few women, if any, and no racial minorities.¹⁵³ Large law firms at the very least should engage in a transparent selection process for the committee.¹⁵⁴

3. Problematic Bureaucratic Structures of Large Law Firms

In light of the subjective components at play in many partnership compensation systems, systemic barriers to ethical decision-making may also help maintain the status quo of the gender pay gap.¹⁵⁵ The problematically bureaucratic structures of large law firms disadvantage law firm partners and possibly compromise ethical decision-making. In one study, large-firm lawyers were interviewed about how they experienced and viewed their work.¹⁵⁶ The researcher concluded that law firm partners had “adopted the habits of mind of the large-firm lawyer” and “live by the organizational logic of their firms and that logic has changed their understandings of what it means to be ethical.”¹⁵⁷ So, “partners [did] not

149. *See id.* at 4–6, 17–19.

150. LIEBENBERG & SCHARF, *supra* note 37, at 7.

151. *Id.* (emphasis omitted). Also, the type of work assigned to women partners at law firms may put them at a disadvantage in compensation determinations. For example, male lawyers are, more often than women lawyers, oral advocates before the U.S. Supreme Court. *See* Mark Walsh, *Number of Women Arguing Before the Supreme Court has Fallen off Steeply*, A.B.A. J. (Aug. 1, 2018, 2:30 AM), https://www.abajournal.com/magazine/article/women_supreme_court_bar. Lawyers giving oral argument have a greater spotlight on them than those who wrote the briefs; they can use the spotlight to further their business development and gain more clients and, therefore, more originations.

152. LIEBENBERG & SCHARF, *supra* note 37, at 7.

153. *Id.*

154. *See* RIKLEEN, *supra* note 88, at 17–18.

155. *See* discussion *supra* Section I.C.

156. Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 662 (2005).

157. *Id.* at 726.

measure their conduct against internal or fixed principles” and thus missed “moral questions” that associates perceived.¹⁵⁸ Partners’ “habit of mind,” encouraged by the “structures and incentives of large firms,” was to “equate etiquette with ethics.”¹⁵⁹ This finding about habits of mind point to the need for ethical regulation to require transparency of the compensation-determination process and avoid discriminatory systems and behaviors. It may also call for the participation in the compensation-setting process of law firm employees who are not partners. Imagine, for example, if a law firm compensation committee included the voice of this female associate, in the twenty-five- to thirty-four-years-old range, who noted: “[D]iscrimination and prejudice is still there, and there is very little done to try and keep senior female lawyers in the profession.”¹⁶⁰

4. Flawed Criteria

The committee’s decision-making process can be only as good as the information provided. Many metrics used in this process can have a troubled origin. For example, allocation of origination credit can be highly contentious, but allocation is usually final by the time it reaches the compensation committee.¹⁶¹ Elements of structural discrimination underlie a law firm’s focus on the seemingly objective measure of origination credit.¹⁶² Flawed criteria and a flawed process will result in women partners having less origination credit and, thus, lower compensation than their male partner colleagues.¹⁶³ In some firms, when multiple partners are involved in bringing in a new client, they self-allocate the origination credit.¹⁶⁴ This method of allocation can be fraught with power dynamics.¹⁶⁵ An ABA report has recommended that law firms put in place a committee specifically tasked with resolving allocation of credit disputes.¹⁶⁶

Originations-credit allocation is also problematic if a gender gap exists in the amount of work that partners put in to bring in a new matter. For example, if male partners at the firm, more often than women partners at the firm, originated matters by inheriting matters from retired partners, the male partners had to work less than women to obtain that origination credit.¹⁶⁷ If women partners’ origination credit usually flowed from bringing in matters to the firm fresh from the outside, and not through an internal mentorship or collegial network like the male partners, they had to invest considerably more resources to bring in each origination dollar.¹⁶⁸ Compensation committees are not usually involved in monitoring

158. *Id.*

159. *Id.*

160. ALM INTEL., *supra* note 81.

161. *See* RIKLEEN, *supra* note 88, at 15, 34.

162. *See* Martinez, *supra* note 127, at 838.

163. *Id.*

164. RIKLEEN, *supra* note 88, at 14–16.

165. *Id.*

166. *Id.* at 39–40.

167. Martinez, *supra* note 127, at 838.

168. *Id.*

succession in the lead partner on matters.¹⁶⁹ They are not investigating how one partner, rather than another, inherited a client's business following a partner's death or retirement.¹⁷⁰

One study found that the wage gap among junior lawyers on partnership track did not result primarily from childbirth and childrearing responsibilities but from a narrowing of women lawyers' "opportunity paths," including networking opportunities and working on higher-career-impact assignments.¹⁷¹ In-group favoritism is abundantly apparent in law firms and in the legal profession generally.¹⁷² In many firms, client succession takes place informally, allowing soon-to-retire partners to transition clients to the associates or partners they are most comfortable working with or with whom they have worked the longest.¹⁷³ In law firms where work assignments are given by senior lawyers to junior lawyers, socializing with more senior lawyers can thus directly affect money earned.¹⁷⁴ As discussed earlier, this informal process of inheriting matters maintains structural gender bias, especially where women attorneys are excluded from socializing opportunities like a golf-themed trip away at a male senior partner's vacation home.¹⁷⁵ And so, "relationship partners" are overwhelming male. Of a typical firm's relationship partners for its top twenty clients, 80% are men.¹⁷⁶ An NAWL survey report found that, of a typical firm's relationship partners for its top-thirty clients, on average 23% were women and 8% were racial or ethnic minorities.¹⁷⁷ Answering a 2019 survey, a female nonequity partner, in the age range of fifty-five- to sixty-four-years-old, advised eliminating origination credits and "as much as possible the antiquated white male fraternity system."¹⁷⁸

Female law firm partners may also face the prospect or the reality—or both—of stigma resulting from working reduced hours temporarily after having children.¹⁷⁹ This stigma can negatively impact a partner for years after the partner has resumed full-time hours.¹⁸⁰ If the firm does not institute a process to make sure the equity partner working reduced hours

169. RIKLEEN, *supra* note 88, at 29.

170. *Id.* at 38.

171. See Ronit Dinovitzer, Nancy Reichman, & Joyce Sterling, *The Differential Valuation of Women's Work: A New Look at the Gender Gap in Lawyers' Incomes*, 88 SOC. FORCES 819, 847–48 (2009).

172. See Deborah L. Rhode, *Leadership in Law*, 69 STAN. L. REV. 1603, 1652–55 (2017).

173. See Martinez, *supra* note 127, at 838.

174. See Dinovitzer et al., *supra* note 171, at 843, 847–48.

175. See discussion *supra* Section I.D.4.

176. LIEBENBERG & SCHARF, *supra* note 37, at 1.

177. 2019 NAWL SURVEY, *supra* note 28, at 9.

178. Henderson & Henderson, *supra* note 80.

179. LIEBENBERG & SCHARF, *supra* note 37, at 13.

180. *Id.*

is still involved in marketing and business development efforts, the equity partner's compensation may lag for years.¹⁸¹

Stereotypes can impact committee decision-making. For example, committees may penalize women for self-promotion.¹⁸² They may also award men more compensation because some on the committee view men as the main source of financial support in their family, and they may pay women less because they feel women lawyers are already being supported by another earner in the family.¹⁸³ One study emphasized the “subjective assessments and interactions that underlie differences in pay and account for significant within-occupation wage gaps” among lawyers.¹⁸⁴

E. Diversity Initiatives and Gender-Bias Lawsuits

The past few decades have seen many publicized initiatives to increase diversity and inclusion and address systemic bias at law firms.¹⁸⁵ And individual plaintiffs, like Jane Doe in the Proskauer Rose suit, have brought lawsuits.¹⁸⁶ Both the initiatives and lawsuits have not implicated discipline and have so far resulted in little progress for gender pay equity in partnership ranks or equal representation in leadership. Perhaps ironically, however, these initiatives and lawsuits, in different ways, have shed light on just how embedded the practices and structures that have resulted in disparate outcomes are in law firm culture and the legal profession.

Diversity and inclusion initiatives launched by law firms have failed to move the needle in a significant way on the representation of women

181. See RIKLEEN, *supra* note 88, at 43; see also Marianne Bertrand, Claudia Goldin, & Lawrence F. Katz, *Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sectors*, 2 AM. ECON. J. APPLIED ECON. 228, 230 (2010) (researchers focusing on MBA graduates) (“Any career interruption—a period of 6 months or more out of work—is costly in terms of future earnings, and at 10 years out, women are 22 percentage points more likely than men to have had at least one career interruption.”).

182. RIKLEEN, *supra* note 88, at 41. In their white paper, *Retaining and Advancing Women at National Law Firms*, the researchers discussed the double bind of gender stereotypes for women: “[I]f a woman lawyer is assertive, a coworker or supervisor would either still not perceive her as assertive (due to the persistent nature of stereotypes) or would see assertiveness as a negative quality for a woman.” JAFFE ET AL., *supra* note 51, at 12 (citing Elizabeth H. Gorman, *Gender Stereotypes, Same-Gender Preferences, and Organizational Variation in the Hiring of Women: Evidence from Law Firms*, 70 AM. SOC. REV. 702, 722 (2005)).

183. RIKLEEN, *supra* note 88, at 41.

184. Dinovitzer et al., *supra* note 171, at 847–48.

185. See JAFFE ET AL., *supra* note 51, at 5 (“For the past thirty years, most firms have expressed a strong commitment to equity and inclusion of all minorities, including women. This commitment has been backed up through a number of institutional strategies directed at recruiting and retaining diverse attorneys, including diversity committees, affiliation networks, formal mentoring programs, and part-time models.”).

186. See, e.g., First Amended Complaint, *supra* note 23, at 1; *Gender Pay Disparity in the Legal Profession: Trends and Developments*, MINORITY CORP. COUNS. ASS’N [hereinafter *Gender Pay Disparity in the Legal Profession*], <https://www.mcca.com/wp-content/uploads/2018/10/Gender-Pay-Disparity-Materials.pdf> (last visited Mar. 31, 2021). The Sanford Heisler law firm, in 2020, reported their law firm alone in the previous five years had brought more than forty gender-disparity cases against thirty BigLaw firms. Cynthia L. Cooper, *Broken Rungs on the Career Ladder: A New Analysis of Problems Encountered by Women Lawyers in Private Practice*, AM. BAR ASS’N (Jan. 21, 2020), <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2020/january/broken-rungs-the-career-ladder-new-analysis-problems-encountered-women-lawyers-private-practice/>.

and women of color in the partnership ranks or the gender pay gap among partners.¹⁸⁷ And there is no shortage of law firm women’s initiatives.¹⁸⁸ These initiatives may include connecting women lawyers with potential clients, coaching women lawyers on pursuing marketing opportunities, mentoring, leadership training, and developing and reviewing the law firm’s gender-related data.¹⁸⁹ When the ABA undertook research in 2016 on the issue of women leaving law firms, managing partners reached out “to describe their surprise that their well-intentioned efforts over the last 20 years, whether through the creation of Women’s Initiatives and Diversity Committees, implicit bias training, or focusing on diverse pipelines of incoming attorneys, had not done more to even the playing field for women attorneys in their firms.”¹⁹⁰ The ABA researchers concluded from the data: “[S]imply putting policies into place and giving lip service to the goal of diversity appears to have little impact on closing the gap at mid-levels and senior levels of experience. Enacting policies is a basic first step, but it is not enough.”¹⁹¹

The 2019 NAWL Survey Report similarly found:

All responding firms reported having a women’s initiative program of some kind, and they reported that their initiatives had been in place for an average of 13 years, with a range from two years to a few decades.

....

187. See Cooper, *supra* note 186.

188. See, e.g., *Women’s Initiatives*, PROSKAUER, <https://www.proskauer.com/diversity/womens-initiatives> (last visited Mar. 31, 2021) (“Proskauer has long championed the professional development and career advancement of women.”); *Women Enriching Business*, LATHAM & WATKINS LLP, <https://www.lw.com/AboutUs/WomenEnrichingBusiness> (last visited Mar. 31, 2021) (“For over a decade the firm’s Women Enriching Business (WEB) committee has focused on addressing the business challenges and opportunities unique to women lawyers”); *Women’s Initiative*, FOX ROTHSCHILD LLP, <https://www.foxrothschild.com/our-firm/womens-initiative/> (last visited Mar. 31, 2021) (“[D]edicated to promoting women attorneys within the firm as well as advancing Fox’s women attorneys in the legal community.”); see also *The 2019 Working Mother 60 Best Law Firms for Women*, WORKING MOTHER (July 3, 2019), <https://www.workingmother.com/best-law-firms-for-women-2019>; *Women’s Initiative*, BAKER DONELSON, <https://www.bakerdonelson.com/womens-initiative> (last visited Mar. 31, 2021); *Diversity, Equity and Inclusion*, COOLEY, <https://www.cooley.com/about/diversity> (last visited Mar. 31, 2021); *Women’s Initiative*, FROST BROWN TODD LLC, <https://frostbrowntodd.com/about/diversity-inclusion/womens-initiative/> (last visited Mar. 31, 2021); *Women’s Initiatives*, KING & SPALDING, <https://www.kslaw.com/pages/womens-initiatives> (last visited Mar. 31, 2021); *Gender Equity*, KIRKLAND & ELLIS, <https://www.kirkland.com/social-commitment/diversity-and-inclusion/gender-equity> (last visited Mar. 31, 2021); *Women’s Initiative Network*, LATHROP GPM, <https://www.lathropgpm.com/diversity-women.html> (last visited Mar. 31, 2021); *Women’s Initiative Network*, REED SMITH, <https://www.reedsmith.com/en/winrs> (last visited Mar. 31, 2021); *Committee on Retention and Promotion of Women*, SIDLEY, <https://www.sidley.com/en/diversity/committee-on-retention-and-promotion-of-women> (last visited Mar. 31, 2021); *Women’s Initiative Committee*, SULLIVAN & CROMWELL LLP, <https://careers.sullcrom.com/womens-initiative-committee> (last visited Mar. 31, 2021).

189. See sources cited *supra* note 188.

190. LIEBENBERG & SCHARF, *supra* note 37, at iii.

191. *Id.* at 17 (“[W]hile large firms have developed policies designed to address the gender gap, there is significant variation in the nature of these policies, how well they work in practice, and whether the policies are implemented consistently and equitably over time.”).

Despite the now universal adoption of women's initiatives, there is little evidence that these initiatives have led to substantial increases in the representation of women at the highest levels of the law firm."¹⁹²

Also, final judgments against law firms for discrimination, over roughly the past half century, have been nearly nonexistent.¹⁹³ In recent years, a number of BigLaw firm partners brought gender-discrimination lawsuits against their law firms.¹⁹⁴ In litigation covered by legal media, law firms have denied the existence of bias and discrimination and refused to submit to discovery without a court order compelling it.¹⁹⁵

Through the litigation process, however, law firms have revealed information about their compensation decision-making process. For example, the Proskauer Rose law firm, in its answer, argued its "allocation system, which rewards each partner's overall contribution to the Firm's success and incentivizes Firm-minded behavior, has resulted in fair and equitable allocations for male and female equity partners."¹⁹⁶ The answer vaguely characterized the partner compensation system as an "intensive process" that considered the "totality of a partner's contributions on a host of financial and non-financial criteria, and other factors, and does not rely on a metrics based formula."¹⁹⁷ Still, although it claimed it does not rely on a metrics-based formula, the law firm alleged the female equity partner's comparably low rankings among equity partners on metrics like realization rate and collection rate.¹⁹⁸

Similarly, in a motion for summary judgment, the Chadbourne Parke firm disclosed that its management committee, in determining partner compensation, considered "financial data" on the "performance of its partners individually" and a host of other factors, including partners' efforts to "enhance revenues"; "instances of teamwork" that yielded new business; referral of work to another office in the firm; partners who "have been of help to one another; client-related activities "deemed noteworthy"; participation in firm activities and "assumption" of firm responsibilities; efforts to attract lateral partners and other senior attorneys; and pro bono activities.¹⁹⁹ The lengthy list of factors, other than financial data, ended

192. 2019 NAWL SURVEY, *supra* note 28, at 14–15.

193. Rhode, *supra* note 57, at 888.

194. See, e.g., First Amended Complaint, *supra* note 23, at 1; *Gender Pay Disparity in the Legal Profession*, *supra* note 186. In 2020, the Sanford Heisler law firm reported that their law firm alone in the previous five years had brought more than forty gender disparity cases against thirty BigLaw firms. Cooper, *supra* note 186. Associates have also brought lawsuits against their law firms alleging discrimination. See, e.g., Debra Cassens Weiss, *Firm Uses Minorities as 'Diversity Props' to Impress Clients, Suit Alleges*, A.B.A. J. (Mar. 6, 2019, 11:35 AM), <https://www.abajournal.com/news/article/law-firm-violated-fraud-laws-by-misrepresenting-inclusiveness-to-would-be-associates-suit-alleges>.

195. See, e.g., Chadbourne v. Campbell, Case No. 1:16-cv-06832, at *4 (S.D.N.Y. June 14, 2017).

196. Answer to First Amended Complaint, *supra* note 22, at *3.

197. *Id.* at *4.

198. *Id.* at *5.

199. Memorandum of Law in Support of Defendants' Motion for Summary Judgment and Motion to Dismiss Class Allegations, *supra* note 87, at *7–9.

with this subjective catchall: “activities outside the Firm that serve to enhance the reputation of the Firm and its partners.”²⁰⁰

Some law firm lawyers reading this Article may point to recent progress in diversifying their firm’s partnership ranks. For example, Cravath, Swaine & Moore’s partnership class for 2021 included, for the first time in the firm’s history, two black women.²⁰¹ This type of incremental progress, however, will not be sufficient to transform firms into places where women are not drastically underrepresented in the partnership ranks and where the lived experiences of women and women of color at law firms are not beset with the type of inclusion burdens that have been captured in surveys and research.²⁰² Without ethical accountability, law firms have proven to be hardly inclusion-proof and appear to contain a structural resistance to the intentions and objectives of diversity and inclusion initiatives and of plaintiff law firm partners.

II. HOW THE RULES OF PROFESSIONAL CONDUCT FAIL WOMEN LAW FIRM PARTNERS

The history of ABA Rule 8.4(g) has been told many times.²⁰³ Rule 8.4(g) is the ABA model rule on discrimination and harassment in the practice of law.²⁰⁴ Under Rule 8.4(g), a lawyer commits professional misconduct when the lawyer “engage[s] in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”²⁰⁵ Comment 4 to Rule 8.4(g) clarifies that the practice of law encompasses “operating or managing a law firm.”²⁰⁶

Added with much fanfare in 2016, Rule 8.4(g) held promise, but it remains largely symbolic.²⁰⁷ This Part explains ways in which Rule 8.4(g)

200. *Id.* at *8.

201. Dylan Jackson, *Cravath Promotes 11 to Partner, Including 2 Black Attorneys*, THE AM. LAW. (Oct. 29, 2020, 6:31 PM), <https://www.law.com/americanlawyer/2020/10/29/cravath-promotes-11-to-partner-including-two-black-attorneys/>.

202. *See, e.g.*, MELAKU, *supra* note 7, at 22–23.

203. *See, e.g.*, Ann Ching & Lisa M. Panahi, *Rooting Out Bias in the Legal Profession: The Path to ABA Model Rule 8.4(g)*, 53-JAN ARIZ. ATT’Y 34, 35–37 (2017); Claudia E. Haupt, *Antidiscrimination in the Legal Profession and the First Amendment: A Partial Defense of Model Rule 8.4(g)*, 19 U. PA. J. CONST. L. ONLINE 1, 4–5 (2017).

204. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016).

205. *Id.*

206. *Id.* at 8.4(g) cmt. 4.

207. *Id.* at 8.4(g); *see also* Kristine A. Kubes, Cara D. Davis, & Mary E. Schwind, *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, AM. BAR ASS’N (Mar. 12, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/; Elizabeth Olson, *Goodbye to ‘Honeys’ in Court, by Vote of American Bar Association*, N.Y. TIMES (Aug. 9, 2016), <https://www.nytimes.com/2016/08/10/business/dealbook/aba-prohibits-sexual-harassment-joining-many-state-bars.html>; Ashley May, *Lawyers, Stop Saying ‘Honey,’ ‘Sweetheart’ in Court*, USA TODAY (Aug. 10, 2016, 5:14 PM), <https://www.usatoday.com/story/news/nation-now/2016/08/10/lawyers-stop-saying-honey-sweetheart-court/88510246/>. By 2016, some states had already adopted their own antidiscrimination and antiharassment rules. *See* Martinez, *supra* note 127, at 810–12.

fails to address gender-based discrimination and specifically the gender gap in partner compensation. First, Rule 8.4(g) and the comments to the rule do not mention compensation.²⁰⁸ Second, Rule 8.4(g) has by and large not been adopted by the states.²⁰⁹

Third, when some precursor to or modified version of Rule 8.4(g) has been adopted by the states, they suffer from one or more shortcomings. Some contemplate a discipline for professional misconduct only where there has been a finding of discrimination by the U.S. Equal Employment Opportunity Commission (EEOC) or a court.²¹⁰ By requiring a finding or at least an “unlawful” act of discrimination, the state bars are viewing discrimination and bias narrowly—that is, they are ignoring well-studied structural determinants that lead to unequal compensation and over which law firms have much control and can act to change. Failing to do so fails women attorneys at the firm. Like Rule 8.4(g) and its Comment 4, professional conduct rules largely do not even mention operation or management of a firm as conduct subject to antiharassment and antidiscrimination rules, much less inequity in compensation. Finally, law firms cannot be disciplined under the model rules of professional conduct.²¹¹ So, even if a state’s ethical rules reach discriminatory conduct in the operation or management of a law firm and reference compensation, they would disproportionately or exclusively affect solo practitioners and small-firm owners. Decision-makers at large law firms, who operate largely by committee, are essentially immune to discipline.

This Part highlights how the design of the professional conduct rules concerning discrimination has the window-dressing of addressing gender-based discrimination but carries virtually no disciplinary force. The professional rules of conduct largely fail women law firm partners seeking to complain to their bar—a body that exists to govern the legal profession in that state—about discriminatory decision-making in compensation-setting at law firms.

A. No Mention of Law Firm Compensation

Rule 8.4(g) states “it is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . gender.”²¹² The rule’s new Comment 4, adopted along with Rule 8.4(g), contains an inclusion definition: “Conduct related to the practice of law includes . . . operating or managing a law firm or law practice”²¹³

208. See MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016).

209. See *Martinez*, *supra* note 127, at 810–12.

210. Alex B. Long, *Employment Discrimination in the Legal Profession: A Question of Ethics?*, 2016 U. ILL. L. REV. 445, 482 (2016).

211. See MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS’N 1983) (referencing only “a lawyer’s responsibilities”).

212. *Id.* at r. 8.4(g).

213. *Id.* at r. 8.4 cmt. 4.

The words “operating or managing a law firm or law practice” are not defined or elaborated on.²¹⁴ Compensation does not appear in Rule 8.4(g).²¹⁵

Veronica Root Martinez discusses how professional rules can “serve[] an expressive function.”²¹⁶ A school of thought holds that “[t]he lawyer disciplinary process serves multiple functions, including the dissemination of the profession’s values both within the profession and to the public.”²¹⁷ A rule whose function is largely expressive may rarely be enforced.²¹⁸

Model Rule 8.4(g) appears designed to serve an expressive function.²¹⁹ Its text is vague—so vague that no one can look at Model Rule 8.4(g) and accompanying Comment 4 and be sure that the rule applies to compensation-setting at law firms. Model Rule 8.4(g), vaguely defining “related to the practice of law” as including “operating or managing a law firm or practice,” is at best ambiguous on the issue of compensation.²²⁰

Even if the Comment 4 language, “operating or managing a law firm,” could possibly bring into ethical play decision-making related to compensation of law firm partners, that language only lies in the Comment and is nowhere in the Rule itself.²²¹ Also, comments are not binding, so any comment, including the new Comment on Rule 8.4(g), did not impose an obligation to refrain from discriminatory conduct in “operating or managing a law firm or practice.”²²²

Moreover, language proposed during the comment period for Rule 8.4(g) would have clarified the rule encompasses the terms and conditions of employment, including compensation. That language was not adopted. In 2014, the ABA Ethics Committee tasked a working group to consider drafting the rule that would become Rule 8.4(g).²²³ In 2015, the Committee

214. *See id.*

215. *See id.* at r. 8.4(g).

216. Martinez, *supra* note 127, at 855.

217. *Id.* (internal quotations omitted) (quoting Long, *supra* note 210, at 472.)

218. *See id.* at 854–58. Martinez has argued that Rule 8.4(g) “appears vulnerable to a variety of constitutional critiques” and that “[c]onverting the rule to a more aspirational form would allow the ABA to . . . neutralize[] the constitutional debates surrounding the rule.” *Id.* at 857–58. Martinez argues this is preferable to eliminating the rule. *Id.* at 858.

219. This Article does not seek to discount the beneficial impacts of the expressive function of an aspirational rule. Martinez explains how a rule can have “real legitimacy” in “aspirational form” even where it lacks “a concrete, practical effect on controlling behavior.” *Id.* at 857.

220. *See* Ching & Panahi, *supra* note 203, at 35–36, 38.

221. *See* MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 4. (AM. BAR ASS’N 2016).

222. *Id.* at pmb. ¶ 14 (“Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”); *id.* at pmb. ¶ 21 (“The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”); *id.* at r. 8.4 cmt. 4.

223. Louraine C. Arkfeld, *Amending Rule 8.4 of the Model Rules of Professional Conduct*, AM. BAR ASS’N (July 26, 2016), https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/20160/july-2016/amending-rule-8-4-of-the-model-rules-of-professional-conduct/. The ABA Ethics Committee formed this working group at the request of the ABA Goal III Commissions and referred to Goal III of the ABA’s Association Goals as: “Eliminate Bias and Enhance Diversity.” *Goal III*, AM. BAR ASS’N, https://www.americanbar.org/groups/diversity/disabilityrights/initiatives_awards/goal_3/ (last visited Mar. 31, 2021).

issued a proposed rule and memorandum.²²⁴ Leading up to the adoption of Rule 8.4(g), comments were submitted noting that areas of legal professional activity were left out, including “employer-employee relationships within law firms.”²²⁵ The Commission on Women in the Profession requested that the proposed comment concerning “the operation and management of a law firm or law practice” be expanded to clarify that the “rule reaches the terms and conditions of a lawyer’s employment or partnership that may be affected by discrimination or harassment, e.g., the failure to promote, the inequity of compensation, the inequitable distribution of client and litigation matters.”²²⁶ That did not happen. Inequity of compensation does not appear in Rule 8.4(g).²²⁷

While Rule 8.4(g) and its Comment 4 signify progress and serve an expressive function, it is vague and notably silent on the issue of compensation.

B. No Widespread Adoption

Rule 8.4(g) is a model rule. In the years since its passage, states have not hurried to adopt it.²²⁸ Only New Mexico and Vermont have adopted Rule 8.4(g) and its Comment 4.²²⁹ Although about twenty other states have adopted some type of antidiscrimination rule, except for California, they do not address law firm management and operation.²³⁰ A few state attorneys general have even issued opinions declaring that Model Rule 8.4(g) is an unconstitutional violation of attorneys’ rights to freedom of speech, association, and religion.²³¹ In December 2020, a federal district court judge issued a preliminary injunction blocking the enforcement of Pennsylvania’s version of Model Rule 8.4(g) on First Amendment grounds.²³²

224. Memorandum from Standing Comm. on Ethics & Prof. Resp., Draft Proposal to Amend Model Rule 8.4, at 1–3 (Dec. 22, 2015) (on file with American Bar Association).

225. MYLES V. LYNK, STANDING COMM. ON ETHICS & PROF. RESP., REPORT TO THE HOUSE OF DELEGATES: REVISED RESOLUTION 109, at 2–5 (2016) (discussing the need for an amendment to Model Rule 8.4 to include an antidiscrimination provision in black letter law, not just the comments).

226. Letter from Michelle Coleman Mayes, Chair, Comm. on Women in the Pro., to Myles V. Lynk, Chair, Standing Comm. on Ethics & Prof. Resp. (Mar. 10, 2016) (on file with American Bar Association).

227. See MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016).

228. See CPR POL’Y IMPLEMENTATION COMM., AM. BAR ASS’N, VARIATIONS ON THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 8.4: MISCONDUCT 1–27 (2020) [hereinafter CPR REPORT ON RULE 8.4].

229. N.M. RULES OF PRO. CONDUCT r. 16-804(g) (2019); *id.* at r. 16-804 cmt. 4; VT. RULES OF PRO. CONDUCT r. 8.4(g) (2019); *id.* at r. 8.4 cmt. 4; see also Melissa Heelan Stanzione, *N.M. Adopts Anti-Bias Rule Based on Controversial ABA Standard*, BLOOMBERG L. (Oct. 18, 2019), <https://news.bloomberglaw.com/us-law-week/new-mexico-adopts-anti-bias-rule-based-on-controversial-aba-rule> (noting that Colorado, Maine, and Missouri have adopted their rules “to embrace a version” of Model Rule 8.4(g)).

230. See Stanzione, *supra* note 229.

231. See, e.g., Tex. Att’y Gen. Op. KP-0123 (Dec. 20, 2016); S.C. Att’y Gen. Op. Letter (May 1, 2017); see also Martinez, *supra* note 127, at 823.

232. Greenberg v. Haggerty, No. 20-3822, 2020 WL 7227251, at *15–16 (E.D. Pa., Dec. 8, 2020); see also Debra Cassens Weiss, *Judge Blocks Ethics Rule Banning Bias By Lawyers, Warns of Arbiters Deciding ‘Who and What Offends’*, A.B.A. J. (Dec. 9, 2020, 12:09 PM),

The states' response to Model Rule 8.4(g) has been, at best, lukewarm. Even where states have adopted an antidiscrimination rule modeled after Model Rule 8.4(g), fewer than a handful have adopted the language of Comment 4 defining "related to the practice of law" as including "operating or managing a law firm or practice."²³³ States with antidiscrimination rules that preceded or post-dated Model Rule 8.4(g) have instead largely opted to adopt an antidiscrimination rule that lacks any specific references to employment, law firm operation, or law firm management practices, much less compensation.²³⁴ Missouri has adopted a version of Rule 8.4(g) that focuses on client interactions.²³⁵ Colorado's version of Rule 8.4(g) focuses on client interactions and includes in its Rule 8.4(i) a prohibition against sexual harassment.²³⁶ Missouri and Colorado's versions of Rule 8.4(g) do not contain, in the rule or in the Comments, reference to law firm operation or management.²³⁷

The exceptions give some cause for hope. California has adopted a more robust version of Rule 8.4(g); Maine, New Mexico, and Vermont have adopted Rule 8.4(g) and Comment 4 in their entirety or a rule closely

<https://www.abajournal.com/news/article/judge-blocks-ethics-rule-banning-bias-by-lawyers-warns-of-arbiters-deciding-who-and-what-offends>.

233. Martinez, *supra* note 127, at 826. The failure of states to adopt Model Rule 8.4(g) and the new language of Comment 3 to that Rule contrasts sharply with the states' embrace of a revised Comment 8 to Rule 1.1 of the Model Rules of Professional Conduct. Comment 8 to Rule 1.1 now clarifies that lawyers have a duty of technological competence: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2016) (emphasis added). At least thirty-nine states have adopted the new language concerning technology competence. Robert Ambrogi, *Tech Competence*, LAWSITES, <https://www.lawsitesblog.com/tech-competence> (last visited Mar. 31, 2021).

234. Although this Article focuses on the gender-based pay gap in compensation, because that is arguably more easily quantified and has been quantified, gender-based discrimination in promotion practices have also been a source of discrimination allegations in gender-based discrimination lawsuits brought by women law firms against large law firms. See, e.g., Third Amended Class & Collective Action Complaint at 6, *Tolton v. Jones Day*, No. 19-945, 2019 WL 7547170 (D.D.C. filed Aug. 16, 2019) ("Perhaps unsurprisingly in a Firm where pay and promotion decisions are made by a single Managing Partner, these evaluations are easily marshaled to justify any given course of action. Whether inadvertently or by design, this review system discriminates against female associates, including in pay and opportunities for promotion to partnership.").

235. MO. RULES OF PRO. CONDUCT r. 4-8.4(g) (amended 2019) (noting that professional misconduct for a lawyer can "manifest by words or conduct, in representing a client, bias or prejudice, or engag[ing] in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, [or] marital status").

236. COLO. RULES OF PRO. CONDUCT r. 8.4(g), (i) (amended 2018) (noting that it is deemed professional misconduct for a lawyer to "engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process" and to "engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment where the conduct occurs in connection with the lawyer's professional activities").

237. See MO. RULES OF PRO. CONDUCT r. 4-8.4(g); COLO. RULES OF PRO. CONDUCT r. 8.4(g), (i).

reflecting them.²³⁸ When Maine added a Rule 8.4(g) to its Rules of Professional Conduct, it went a step further than the ABA in defining “related to the practice of law.”²³⁹ Maine Rule 8.4(g) does not leave the definition of the term “related to the practice of law” to a comment.²⁴⁰ So, the language “operating or managing a law firm or law practice” appears in Maine Rule 8.4(g).²⁴¹ ABA’s Model Rules include the definition of “related to the practice of law” in the Comment to Rule 8.4(g) and not in the rule itself.²⁴² New Mexico and Vermont, precisely mirroring the ABA, adopted the language of ABA Model Rule 8.4(g) and included the same Comment to 8.4(g) as the ABA, defining “related to the practice of law” as including “operating or managing a law firm or law practice.”²⁴³

California’s Rule 8.4.1(b) goes further.²⁴⁴ It explicitly calls out conditions of employment and specifies compensation in the language of the rule:

In relation to a law firm’s operations, a lawyer shall not . . . unlawfully refuse to hire or employ a person, or refuse to select a person for a training program leading to employment, or bar or discharge a person from employment or from a training program leading to employment, or discriminate against a person in compensation or in terms, conditions, or privileges of employment²⁴⁵

Given that compensation is determined by lawyers in their roles as members of compensation or managerial committees at large law firms, this California rule arguably works hand in hand with California Rule of Professional Conduct 5.1. Drawing from ABA Model Rule 5.1, adopted by most states, California Rule 5.1 provides:

A lawyer who individually or together with other lawyers possesses managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance

238. ME. RULES OF PRO. CONDUCT r. 8.4(g) (amended 2019); N.M. RULES OF PRO. CONDUCT r. 16-804(g) (amended 2019); *id.* at r. 16-804 cmt. 4; VT. RULES OF PRO. CONDUCT r. 8.4(g) (amended 2017); *id.* at r. 8.4 cmt. 4; *see also* CPR REPORT ON RULE 8.4, *supra* note 228, at 1–27; Stanzione, *supra* note 229 (noting that Colorado, Maine, and Missouri have adopted their rules “to embrace a version” of Model Rule 8.4(g)).

239. ME. RULES OF PRO. CONDUCT r. 8.4 (amended 2019).

240. *Id.*

241. *Id.*

242. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016); *id.* at r. 8.4 cmt. 4.

243. N.M. RULES OF PRO. CONDUCT r. 16-804 cmt. 4 (amended 2019); VT. RULES OF PRO. CONDUCT r. 8.4 cmt. 4 (amended 2017).

244. Washington, D.C.’s Rules of Professional Conduct also address employment discrimination practices in a rule that is modeled after D.C.’s Human Rights Act, rather than Model Rule 8.4(g). D.C. RULES OF PRO. CONDUCT r. 9.1 cmt. 1 (2007). Washington, D.C.’s Rule 9.1 is titled “Discrimination in Employment” and contains the phrase “conditions of employment,” which presumably would include compensation. *Id.* at r. 9.1. It states, “[a] lawyer shall not discriminate against any individual in conditions of employment because of the individual’s race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap.” *Id.*

245. CAL. RULES OF PRO. CONDUCT r. 8.4.1(b)(1)(iii) (2018).

that all lawyers in the firm comply with these rules and the State Bar Act.²⁴⁶

As discussed in Part III, states' versions of Rule 5.1 can be used or modified creatively to ensure greater accountability by law firms and their individual partners involved in compensation decisions.

Thus, the ABA and states other than California have refrained from including compensation in their antidiscrimination rule of professional conduct. Most have not even referenced behavior related to owning or managing a firm as falling within the scope of the antidiscrimination rule.

C. Requirement of Tribunal Finding

By default or by explicit expression in the rules, women partners in law firms who wish to complain of an ethics violation based on discrimination in compensation must first file a lawsuit in court or a formal charge with the EEOC.²⁴⁷ A number of states' rules require that a finding of discrimination by another legal tribunal happen before an ethical claim based on discrimination can be considered by the state bar disciplinary body.²⁴⁸ Others have merely remained silent, in keeping with the muted nature of Rule 8.4(g).²⁴⁹ All of this runs counter to the ABA being a self-governing body with state bar disciplinary bodies that run on a separate track from the common law system in the United States.²⁵⁰

The ABA Standing Committee on Ethics and Professional Responsibility (SCEPR), in considering comments for Rule 8.4(g) before it was approved, noted the importance of the ABA being self-governing.²⁵¹ It urged that ethical violations under professional conduct rules not require a finding of guilt:

[S]ome commentators suggested that because legal remedies are available for discrimination and harassment in other forums, the bar should not permit an ethics claim to be brought on that basis until the claim has first been presented to a legal tribunal and the tribunal has found the lawyer guilty of or liable for harassment or discrimination. SCEPR has considered and rejected this approach for a number of reasons. Such a requirement is without precedent in the Model Rules Legal ethics rules are not dependent upon or limited by statutory or common law claims.²⁵²

246. *Id.* at r. 5.1(a). However, Rule 5.1 does not mention compensation. *See id.* at r. 5.1. An amendment to Comments 2 and 3 to Rule 5.1 to reference compensation specifically would help cement the connection between Rule 8.4 and Rule 5.1.

247. *See infra* note 257 and accompanying text.

248. *See, e.g.,* ILL. RULES OF PRO. CONDUCT r. 8.4 (amended 2010); N.J. RULES OF PRO. CONDUCT r. 8.4 (1994).

249. *See, e.g.,* WASH. RULES OF PRO. CONDUCT r. 8.4 (amended 2018); N.H. RULES OF PRO. CONDUCT r. 8.4 (2004).

250. *See* LYNK, *supra* note 225, at 11.

251. *Id.*

252. *Id.*

The SCEPR further commented that “a lawyer’s failure to comply with an obligation or prohibition imposed by a rule”—“not the civil legal system”—“is a basis for invoking the disciplinary process.”²⁵³ “The two systems run on separate tracks.”²⁵⁴

The sentiment set out by SCEPR cannot be found in Rule 8.4(g). Rule 8.4(g) does not clarify, in the Rule or in the comments, that a finding of guilt or liability by a legal tribunal is not required for an ethical claim to proceed.²⁵⁵ So, unsurprisingly, to the extent states have adopted an anti-discrimination rule akin to Rule 8.4(g), with one exception, they have remained silent on the issue or explicitly required a finding of discrimination first by another governing body.²⁵⁶

The states that require a finding of discrimination before any disciplinary charges can be brought by the state bar include Illinois, New Jersey, and New York—home to many BigLaw firms.²⁵⁷ In Illinois, Rule 8.4(j) provides that there can be no charge of professional misconduct for discrimination unless a court or administrative agency has found “the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.”²⁵⁸ In New York, Rule 8.4(g) requires that a complaint based on “unlawful discrimination” must first be brought before “a tribunal with jurisdiction to hear a complaint.”²⁵⁹ Then, a “final and enforceable” tribunal determination of a lawyer’s engagement in unlawful discrimination “shall [be] prima facie evidence of professional misconduct in a disciplinary proceeding.”²⁶⁰ In New Jersey, Rule 8.4(g) of its Rules of Professional Conduct explicitly carves out employment discrimination.²⁶¹ Rule 8.4(g) in New Jersey deems it professional misconduct for a lawyer to engage in discrimination “except employment discrimination unless resulting in a final agency or judicial determination.”²⁶²

253. *Id.*

254. *Id.*

255. See MODEL RULES OF PRO. CONDUCT r. 8.4(g) (Am. Bar Ass’n 2016); *id.* at r. 8.4 cmt. 3.

256. See CPR REPORT ON RULE 8.4, *supra* note 228, at 1–27. California’s Rule 8.4.1 is the exception from staying silent on the issue or outright requiring another legal governing body finding discrimination. CAL. RULES OF PRO. CONDUCT r. 8.4.1 (amended 2018).

257. Washington, D.C.’s Professional Rules of Conduct also include this limitation. Comment 2 to Washington, D.C.’s Rule 9.1 states, “[t]he investigation and adjudication of discrimination claims may involve particular expertise of the kind found within the D.C. Office of Human Rights and the federal Equal Employment Opportunity Commission.” D.C. RULES OF PRO. CONDUCT r. 9.1 cmt. 2 (amended 2007). Comment 3 to D.C.’s Rule 9.1 states, “[i]f proceedings are pending before other organizations, such as the D.C. Office of Human Rights or the Equal Employment Opportunity Commission, the processing of complaints by Disciplinary Counsel may be deferred or abated.” *Id.* at r. 9.1 cmt. 3.

258. ILL. RULES OF PRO. CONDUCT r. 8.4(j) (amended 2010).

259. N.Y. RULES OF PRO. CONDUCT r. 8.4(g) (amended 2020).

260. *Id.*

261. N.J. RULES OF PRO. CONDUCT r. 8.4(g) (1994).

262. *Id.* In a comment, the New Jersey Supreme Court explains the omission of employment discrimination from Rule 8.4(g) as a deliberate omission arising from its belief that courts and agencies are better able to deal with those matters:

In explaining this carve-out, the New Jersey Supreme Court discussed balancing available resources, reasoning that “disciplinary resources required to investigate and prosecute discrimination in the employment area would be disproportionate to the benefits to the system given remedies elsewhere.”²⁶³

California has taken a different, more controversial, approach with its antidiscrimination rule of professional conduct.²⁶⁴ California’s Rule 8.4.1 provides an example of what is possible.²⁶⁵ Comment 8 to California’s Rule 8.4.1 unequivocally envisions a situation where discipline is imposed for conduct that has not been the subject of another civil or administrative proceeding: “This rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.”²⁶⁶

The California state bar considered the pros and cons of making this change. Under pros, the California state bar noted that no other rule in the rules of professional conduct contained a similar limitation on the state bar’s “original jurisdiction.”²⁶⁷ The state bar commented that leaving in the limitation could be viewed “as inappropriately detracting from the intended message of the proposed rule that unlawful discriminatory conduct should provide a basis for discipline.”²⁶⁸ The con arguments concerned due process, the lack of resources and expertise to prosecute effectively, and the potential that disciplinary proceedings would be used as a “testing ground for new theories of discrimination” or as leverage in unrelated civil

[P]urely private activities are not intended to be covered by this rule amendment . . . Nor is employment discrimination in hiring, firing, promotion, or partnership status intended to be covered unless it has resulted in either an agency or judicial determination of discriminatory conduct. The Supreme Court believes that existing agencies and courts are better able to deal with such matters, that the disciplinary resources required to investigate and prosecute discrimination in the employment area would be disproportionate to the benefits to the system given remedies available elsewhere, and that limiting ethics proceedings in this area to cases where there has been an adjudication represents a practical resolution of conflicting needs.

Id. at r. 8.4 cmt.

263. *Id.* at r. 8.4 cmt.

264. See Lorelei Laird, *California Approves Major Revision to Attorney Ethics Rules, Hewing Closer to ABA Model Rules*, A.B.A. J. (Oct. 2, 2018, 2:20 PM), http://www.abajournal.com/news/article/california_approves_major_revision_to_attorney_ethics_rules_hewing_closer_t (“Among California’s new rules is a controversial one: Rule 8.4.1 prohibiting discrimination, harassment and retaliation by attorneys. It gives lawyers at law firms the responsibility to advocate for corrective action if they know of harassing or discriminatory conduct by the firm or its personnel. This permits the State Bar of California to open an investigation into the prohibited behavior without a finding from another agency. The rule was ‘the subject of intense debate during drafting,’ the Recorder said.”).

265. CAL. RULES OF PRO. CONDUCT r. 8.4.1 (2018).

266. *Id.* at r. 8.4.1 cmt. 8.

267. CAL. STATE BAR COMM’N, COMMISSION REPORT AND RECOMMENDATION: RULE 8.4.1 [2-400], at 19 (2017) (“Pros: No other rule in the California Rules of Professional Conduct contains a similar limitation on State Bar original jurisdiction. It is not clear why such a limitation should be placed on a rule that is intended to prevent discrimination in the legal profession. In fact, including any such limitation may be viewed as inappropriately detracting from the intended message of the proposed rule that unlawful discriminatory conduct should provide a basis for discipline.”).

268. *Id.*

disputes between lawyers and former clients.²⁶⁹ Nevertheless, Rule 8.4.1 was adopted with the prerequisite of a final decision from another legal tribunal for pursuing a disciplinary claim stricken.²⁷⁰

So, save possibly in California, the message to BigLaw is clear: law firm compensation decision-makers need not worry about committing ethical violations based on discriminatory partner-compensation practices. A woman law firm partner would likely have to engage in years of costly, reputation-straining litigation to ever bring a claim before the state bar disciplinary body.²⁷¹ The state bar is not a place a woman partner can go to first for recourse.

Requiring an initial finding of guilt or liability by a legal tribunal before a state bar can even consider a claim of gender-based discrimination is problematic. First, the state bar disciplinary boards are reacting to and trailing other legal tribunals, unwilling to take action to address discriminatory practices. This slow-moving, reactive posture is precisely contrary to former ABA President Paulette Brown's call to lawyers: "Our rules of professional conduct require more than mere compliance with the law. Because of our unique position as licensed professionals and the power that it brings, we are the standard by which all should aspire."²⁷²

Second, the requirement of a legal-tribunal finding of discrimination almost certainly requires an underpaid woman law firm partner to bring a lawsuit against a law firm and to litigate that lawsuit all the way to a judgment favoring the plaintiff. Lawsuits bring with them the possibility of great risk to personal resources and to professional reputation.

Even when a woman equity partner has a meritorious claim, favorable judgment is far from guaranteed.²⁷³ A woman law firm partner does not necessarily qualify as an "employee" for purposes of pursuing federal

269. *Id.* ("Cons: Eliminating current rule 2-400's threshold requirement that a court of competent jurisdiction has found that the alleged unlawful conduct had occurred raises substantial concerns, including due process, (see comment from State Bar Court, above), lack of [Office of Chief Trial Counsel] resources and expertise to prosecute the charge effectively, and the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination, or as leverage in otherwise unrelated civil disputes between lawyers and former clients.").

270. See CAL. RULES OF PRO. CONDUCT r. 8.4.1 (2018).

271. And women law firm partners are bringing lawsuits alleging discrimination in compensation and promotion and making headlines while doing it. See, e.g., Stephanie Russell-Kraft, *Sanford Heisler, the Firm Helping Female Lawyers Sue Big Law*, BLOOMBERG L. (Apr. 12, 2019, 2:51 AM), <https://news.bloomberglaw.com/us-law-week/sanford-heisler-the-firm-helping-female-lawyers-sue-big-law> ("In 2016, Sanford Heisler had about five law firm discrimination cases, and today it has almost 30."); Lauren Stiller Rikleen, *Gender-Discrimination Suits Against Law Firms Offer Plaintiffs a Voice*, LAW.COM (June 12, 2019, 2:45 PM), <https://www.law.com/americanlawyer/2019/06/12/gender-discrimination-suits-against-law-firms-offer-plaintiffs-a-voice/> ("A number of lawsuits have been filed by women that allege gender discrimination in their law firm's compensation and promotion practices. The specific allegations in these suits generally reveal more than examples of disparate pay and a failure to promote. They often provide a glimpse into other negative behaviors . . .").

272. LYNK, *supra* note 225, at 1.

273. The Author does not wish to discourage litigation by women law firm partners but merely point out possible obstacles, however misguided those obstacles may be. Even lawsuits that do not result in a final judgment of discrimination can be beneficial to the plaintiff and to the legal profession.

civil rights claims and often faces an initial challenge to the lawsuit based on that issue.²⁷⁴ Plaintiff law firm partners may have to make a fact-intensive argument that they are an employee under Title VII and the Equal Pay Act.²⁷⁵

Inequity in compensation at law firms is rooted in elements of structural discrimination, so requiring a legal tribunal finding before a disciplinary action can be initiated raises, in a practical sense, an insurmountable barrier.²⁷⁶ Research has revealed many root elements of discrimination in hiring and employment practices.²⁷⁷ These root elements can be better addressed by state bars than by courts. Courts tend to defer to law firms on promotion practices.²⁷⁸ Deborah Rhode captured the uphill battle faced by women in law firms bringing gender-based discrimination lawsuits in light of the “social patterns” that produce discrimination:

Close to fifty years’ experience with civil rights legislation reveals almost no final judgments of sex or race discrimination involving law firms. Potential plaintiffs face multiple obstacles. Part of the problem is the mismatch between legal definitions of discrimination and the social patterns that produce it.²⁷⁹

Levit argued that “extraordinarily few disparate impact cases” are brought by lawyers against their firms because the employer’s subjective decision-making process renders proof “virtually impossible.”²⁸⁰ Kim also explored and discussed the significant constraints on the EEOC’s ability to successfully pursue litigation on systemic discrimination.²⁸¹

274. See Badesch, *supra* note 11, at 509; Thomas F. Cochrane, *Partners are Individuals: Applying Title VII to Female Partners in Large Law Firms*, 65 UCLA L. REV. 488, 505 (2018); Erin Mulvaney, *Law Firm Bias Cases Hinge on Meaning of Partner*, BLOOMBERG L. (April 26, 2019, 4:16 AM), <https://news.bloomberglaw.com/daily-labor-report/law-firm-bias-cases-hinge-on-meaning-of-partner>.

275. See *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448–51 (2003); see also *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, No. 06cv1495, 2009 U.S. Dist. LEXIS 100326, *2 (W.D. Pa. 2009) (favoring defendant law firm on “employee” issue); *Campbell v. Chadbourne & Parke LLP*, No. 16-CV-6832, 2017 U.S. Dist. LEXIS 91289, *2 (S.D.N.Y. June 14, 2017) (denying dispositive motion by defendant law firm so that further discovery could proceed).

276. See Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1041 (2011).

277. See *id.* at 1056–57.

278. See, e.g., *Hishon v. King & Spalding*, 467 U.S. 69, 79–80 (1984); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 512–13 (3d Cir. 1992) (“The district court . . . impermissibly substituted its own subjective judgment for that of Wolf in determining that Ezold met the firm’s partnership standards.”).

279. Rhode, *supra* note 276, at 1065.

280. Nancy Levit, *Lawyers Suing Law Firms: The Limits on Attorney Employment Discrimination Claims and the Prospects for Creating Happy Lawyers*, 73 U. PITT. L. REV. 65, 81 (2011). Long noted that state disciplinary authorities would face similar issues: “Disciplinary authorities proceeding under a systemic disparate treatment theory would face similar statistical problems, as well as the host of problems presented in individual disparate treatment cases.” Long, *supra* note 210, at 471. However, a focus simply on the statistical problems that can arise in systemic disparate-treatment cases disregards the ability of ethical rules to develop their own “track” in determining what is professional misconduct in the context of bias and discrimination. *Id.*

281. Kim, *supra* note 124, 1143–46 (describing resource constraints and constraints imposed by Congress and the judiciary).

And still, year after year, plaintiffs have sued BigLaw firms, alleging discriminatory gender pay disparities.²⁸² In one lawsuit, plaintiffs—all women partners—brought a lawsuit to “redress the firm’s systematic gender discrimination.”²⁸³

Law firm leaders who create or maintain the law firm structures that underlie compensation and advancement decisions are increasingly aware of structural inequities and bias issues. With the gender pay disparity lawsuits, and all the literature and research disseminated on these issues, law firm leaders can no longer throw their hands up and claim they had no idea that bias and structural systemic biases led to the gender pay gap and underrepresentation of women and women of color in partnership ranks. A professional rule of conduct that ignores the role of law firm leaders and compensation committees’ behavior and actions in this area does the legal profession—and women and women of color in the legal profession—a disservice. Women and women of color partners in law firms suffering compensation discrimination at their workplaces have no good options and must resort to seeking recourse at the EEOC or the courts, with, at best, an exceedingly slim promise of a finding of discrimination.

D. Discipline Mainly Reaches Individual Attorneys, Not Law Firms

Law firms cannot be disciplined under the ABA Model Rules of Professional Conduct or the rules of professional conduct in nearly all states.²⁸⁴ Except for a few states, any disciplinary action must be taken against an individual attorney and cannot be taken against a firm.²⁸⁵ Law firms, under the professional rules of conduct in nearly all states, cannot be penalized, financially or otherwise, by state bar disciplinary bodies.²⁸⁶ Unfortunately, this disciplinary approach does not reflect the evolving realities of the large law firm today.

282. Elizabeth Olson, ‘A Bleak Picture’ for Women Trying to Rise at Law Firms, N.Y. TIMES (July 24, 2017), <https://www.nytimes.com/2017/07/24/business/dealbook/women-law-firm-partners.html> (“Last month, Steptoe & Johnson became the latest major law firm to be named in a lawsuit alleging gender pay disparity for either associates or partners. The others are the former Chadbourne & Parke, which is now merged with Norton Rose Fulbright; Proskauer Rose; LeClairRyan; and Sedgwick. With a claim for \$100 million, the Chadbourne case, brought by three female former partners, has drawn the most attention. Chadbourne is contesting the claim. A second case, filed in May against Proskauer Rose and brought by a female partner in its Washington office, is seeking \$50 million for ‘substantial gender disparities’ in the firm’s compensation practices.”).

283. Second Amended Class Action, Collective Action, and Individual Complaint at 1, Campbell v. Norton Rose Fulbright US LLP, No. 1:16-cv-06832 (S.D.N.Y. 2017).

284. Long, *supra* note 210, at 466–67 (“Another structural limitation on the ability of ethical rules to address employment discrimination is the absence of a rule permitting the imposition of discipline against a law firm. The rules of professional conduct in nearly every jurisdiction only permit authorities to impose discipline on individual lawyers. A lawyer who orders or ratifies another lawyer’s misconduct may be subject to discipline, and a law firm partner or supervisory lawyer may be subject to discipline where the lawyer knows of another lawyer’s misconduct and fails to take prompt remedial action. But as a rule, law firms are not subject to discipline for their own misconduct, nor are they vicariously subject to discipline for the misconduct of a firm lawyer.”).

285. *Id.*

286. *Id.* at 466.

The Model Rules of Professional Conduct were formulated “based on an individualistic paradigm” that arose in an era when most lawyers practiced solo or in two-person partnerships.²⁸⁷ Ted Schneyer, writing in the late 1990s, identified a mismatch between the individualistic paradigm of the ethical rules and the large law firm infrastructure: “[T]he disciplinary system cannot significantly influence the ethical infrastructure of any sizable firm without the power to proceed directly or vicariously against firms and to impose fines or other sanctions suitable for ‘organizational offenders,’ as disbarment and suspension are not.”²⁸⁸ At around that time, only two states, New York and New Jersey, had amended their rules of professional conduct to include the regulation of law firms as entities.²⁸⁹

Alex Long, exploring the limitation of the ethical rules, argued that while the “general rule of individual liability makes sense in the case of solo practitioners . . . in the case of law firm discrimination, it makes considerably less sense.”²⁹⁰ Long observed that, although some cases involving sexual harassment may involve a sole wrongdoer, “discrimination on the part of an organization often involves multiple actors and bias embedded within the structure of the organization.”²⁹¹ Multiple decision-makers basing their decisions on subjective criteria “may result in decisions being made on the basis of implicit biases that are difficult to pinpoint or confine to one decision maker.”²⁹²

The inability of disciplinary bodies in the legal profession to take action against law firms thus does not take into account the realities of law practice. Law firm mergers are common.²⁹³ The largest U.S.-centric law firms in the United States employ thousands of lawyers.²⁹⁴ Baker McKenzie has a headcount of 4,809 lawyers and DLA Piper 3,894 lawyers.²⁹⁵ Large law firms employ committees to help run the firm and make decisions.²⁹⁶ A federal district court in Pennsylvania acknowledged that the “economic and political realities” of a large law firm practice may

287. Elizabeth Chambliss, *Professional Responsibility: Lawyers, a Case Study*, 69 *FORDHAM L. REV.* 817, 846 (2000).

288. Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the “Ethical Infrastructure” of Law Firms*, 39 *S. TEX. L. REV.* 245, 253 (1998).

289. *Id.*

290. Long, *supra* note 210, at 467.

291. *Id.*

292. *Id.*

293. *106 Law Firm Mergers and Acquisitions in 2018*, ALTMAN WEIL, INC. (Jan. 7, 2019), http://www.altmanweil.com/index.cfm/fa/r.resource_detail/oid/550403E6-EC86-49E8-B2CD-9910A5C384F2/resource/106_US_Law_Firm_Mergers_Acquisitions_in_2018 (“There were 106 law firm combinations announced in the United States in 2018 according to Altman Weil MergerLine. This is the highest annual total recorded since 2007 when MergerLine began compiling data, exceeding the record of 102 set in 2017.”).

294. See *The NLJ 500: Main Chart*, NAT’L L.J. (June 23, 2020), <https://www.law.com/national-lawjournal/2020/06/23/the-nlj-500-main-chart-2/>.

295. *Id.*

296. See, e.g., Veronica Root, *Retaining Color*, 47 *U. MICH. J.L. REFORM* 575, 577 (2014).

necessarily entail a division of labor and the dominance of “autocratic” partners.²⁹⁷

Some might argue that Rule 5.1(a) of the Model Rules, adopted by nearly all states, ensures that law firms will take reasonable steps aimed at compliance with rules like Rule 8.4(g) should a state supreme court adopt Rule 8.4(g). Rule 5.1(a) requires a law firm partner to make “reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance” that the firm’s lawyers “conform to the rules of professional conduct.”²⁹⁸ However, Rule 5.1(a) is rarely invoked as a basis for discipline of a lawyer not directly involved in an instance of wrongdoing.²⁹⁹ What constitutes “reasonable efforts” has not been definitively litigated and so Rule 5.1(a) provides, at best, vague guidance for law firm partners.³⁰⁰ Schneyer discusses the possibility that accountability at a law firm may be too “diffuse” for enforcement of states’ Rule 5.1 to happen as a practical matter.³⁰¹

III. A PROPOSAL

The rules of professional conduct in every state and the model rules set out by the ABA inform that lawyers are held to a higher standard than people who are not licensed to practice law. If lawyers only had to follow the laws everyone else is required to follow, the rules of professional conduct would not be needed. The rules of professional conduct, however, do not reach BigLaw firms engaging in discriminatory partner-compensation and promotion practices. This cannot stand. As ABA President Paulette Brown stated in 2016, in discussing the need for a revised Rule 8.4(g), the rules require “more than mere compliance with the law,” and “we are the standard by which all should aspire.”³⁰² Brown spoke of lawyers’ “unique position” as “licensed professionals” and “the power that it brings.”³⁰³ Brown, elaborating on the need for a revised Rule 8.4(g), explained, “Existing steps have not been enough to end such discrimination and harassment.”³⁰⁴ Brown’s words are as applicable today as they were then. Rule 8.4(g), by design, has been ineffective.

This Part outlines a framework to hold large law firms accountable for perpetuation of systemic discrimination and bias within their institutions. This framework can be implemented through a combination of state legislative action and modifications to states’ versions of Model Rules 8.4(g) and 5.1 and the comments accompanying them, or solely through

297. *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, No. 06cv1495, 2009 U.S. Dist. LEXIS 100326, *41 (W.D. Pa. 2009).

298. MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR ASS’N 2016).

299. Ted Schneyer, *On Further Reflection: How Professional Self-Regulation Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 584 (2011).

300. *Id.* at 602–03.

301. *Id.* at 594.

302. LYNK, *supra* note 225, at 1.

303. *Id.*

304. *Id.*

modifications to states' versions of Model Rules 8.4(g) and 5.1 and the comments accompanying them. Implementation of this proposed framework will require creativity and flexibility. For example, as an initial step, Model Rule 5.1, on Responsibilities of Partners, Managers, and Supervisory Lawyers, in the Comments, could be revised to specify policies and procedures related to compensation.³⁰⁵ That revision could be an effective way of actualizing Rule 8.4(g)'s prohibition against discrimination, at least in the area of compensation, and bring professional conduct rules one step closer to addressing law firm committee decision-making on compensation.

The proposed framework has three parts: transparency, self-assessment milestones, and financial incentive. This framework would require law firms to disclose partner compensation, including capturing gender and racial pay gaps, and the partner-compensation determination process.³⁰⁶ This will ensure important data is gathered and known, rather than leaving data collection to the whims of litigation, when a law firm might be compelled to disclose it in a suit, or to the law firms' volunteering to disclose the data in various surveys and legal media rankings. Data and process transparency will also help address unevenness of knowledge across race and gender in BigLaw and help fix the "in-group bias" phenomenon in BigLaw. If the information is publicly disclosed by the firm or if the state bar processes the data and releases anonymized summaries of aggregated data, transparency may have a "shaming" component—compelling BigLaw firms to take more aggressive measures to address gaps in promotion and pay if they compare unfavorably to their peer firms. Transparency might also have a significant effect on recruitment of top associate candidates to law firms that have taken those measures. The second part, self-assessment milestones, builds from transparency and compels BigLaw to engage in robust institutional reflection and eventually act to eradicate structural biases and inequities. The final part of the framework, financial incentive, is just that: an incentive step adopted to help ensure compliance with the first two parts of the framework.

305. The Author is grateful to Elizabeth Chambliss for sharing this insight concerning Rule 5.1.

306. This data could be disclosed publicly and made available to all or to the state bar in confidence; the choice should be researched and explored further. The suggestion of having state bars require reporting by large law firms is not novel. *See, e.g.*, Elizabeth Chambliss & David Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691, 716 (2002) ("Most ambitiously, the bar could require firms to report on their ethical infrastructure and publish the aggregated results. Professor Irwin Miller argues for such a requirement under Model Rule 5.1(a). Or the bar could simply encourage voluntary reporting, and publish a list of firms that participate.").

A. Proposed Framework

1. Transparency: Pay Gaps, Process, Decision-Makers³⁰⁷

Large law firms, with more than 100 lawyers or 250 employees, should be required to report mean and median pay data across the law firm, including for associates and law firm partners. The pay data should include the gender gaps in compensation for both the mean and median calculations. The method of compensation for each position should be reported, including the factors considered and the formulas and rubrics employed to determine partner compensation. Law firms should also report the gender and racial make-up of the law firm committee that determines partner compensation.

Many firms do not report their compensation processes, even when the information is requested in anonymous surveys.³⁰⁸ Many also refuse to provide information about their partnership structures and the breakdown between nonequity and equity partners.³⁰⁹ Data that exists in the public sphere on large law firms is mainly retrieved from voluntary responses by law firms and individual lawyers to surveys. Large law firms currently have little-to-no incentive to share data, especially when the data might show inequitable treatment of women lawyers or women of color lawyers; they are even arguably incentivized in the opposite direction, to encourage women to leave and then characterize the departures as voluntary rather than have a record or reputation of firing or not promoting women lawyers at the same rate as male lawyers.³¹⁰

Transparency helps. In open compensation systems, partners report higher average compensation and higher average origination and are more likely to classify themselves as very satisfied than compared to partners in partially open or closed compensation systems.³¹¹

At a minimum, large law firms should be required to disclose their lawyer pay data and information about their compensation process. The

307. This transparency part of this proposed framework could arguably fit under the next part—timelines for structural change development and implementation—but the Author has separated it out as an administratively straightforward first step.

308. 2019 NAWL SURVEY, *supra* note 28, at 12.

309. Debra Cassens Weiss, *NALP Dropped Quest for Nonequity Partner Data After Law Firms Resisted*, A.B.A. J. (Feb. 25, 2010, 2:13 PM), https://www.abajournal.com/news/article/nalp_dropped_quest_for_nonequity_partner_data_after_law_firms_resisted/; *see also* Vivian Chen, *What Women Want: Law Firm Partnership Details*, AM. L. DAILY (Feb. 24, 2010, 9:06 AM), <https://amlawdaily.typepad.com/amlawdaily/2010/02/what-women-want.html> (raising possibility that large law firms may not wish to share about nonequity partner tracks because they are concerned about the perception that women are not treated equitably in consideration for equity partnership).

310. Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2262–63 (2010) (“Large law firms, mindful of the political implications of treating, or even being perceived as treating, minority lawyers inequitably, have a strong incentive not to leave behind a paper trail of, for example, firing or failing to promote women lawyers disproportionately. Instead, large law firms, if they were to treat women lawyers inequitably would likely encourage these lawyers to leave and later characterize their departure as voluntary.”).

311. LIEBENBERG & SCHARF, *supra* note 37, at 7.

ABA, state supreme courts, and state legislatures can begin by looking to the U.K. and California's efforts in this area for possible models. In the U.K., any organization with 250 or more employees must publish and report "specific figures" about the gender pay gap among employees.³¹² Large law firms must comply with this requirement, and their reports have revealed gender pay disparities.³¹³ The gender pay gap data must be published on the organization's public-facing website.³¹⁴ The organization must also submit their gender pay gap data directly to the government through an online portal.³¹⁵

In California, the state legislature passed a bill in 2017 that required any employer with 500 or more employees to biennially file a "statement of information" about "gender wage differentials" with the Secretary of State.³¹⁶ This bill, the Gender Pay Gap Transparency Act, vetoed by California's then-governor, would have applied to large law firms in California.³¹⁷ The statement of information was to include the difference between the mean wages of male exempt employees and female exempt employees; the difference between the median wages of male exempt employees and female exempt employees; and the same information for male and female board members.³¹⁸

A transparency requirement for some disclosure can lead to further voluntary disclosure. Some law firms in the U.K., when submitting their gender pay gap report, have made voluntary disclosures about partner compensation, race and ethnicity pay gaps, and sexual orientation pay gaps. Hogan Lovells, for 2019, reported an 8.7% gender gap in partner compensation.³¹⁹ Kirkland & Ellis, for 2018, reported a mean gender pay gap of 36.5% for its "share partners."³²⁰ Latham & Watkins, for 2019, reported a mean gender pay gap of 24.1% for its partners.³²¹ The disclosure requirements have not been ongoing long enough to see if the transparency requirement leads to further voluntary disclosure and positive change in partner compensation gender pay equity. These reports show that gender pay equity among partners is possible. For example, the law firm Reed Smith, sharing a -13.5% mean gender pay gap for its London office in 2018, stated, "we have a negative mean gender pay gap, meaning that, on

312. *Gender Pay Gap Reporting*, *supra* note 28.

313. See Kathryn Rubino, *More Biglaw Firms Reveal Their Own Gender Pay Gap*, ABOVE THE L. (Mar. 30, 2018, 4:00 PM), <https://abovethelaw.com/2018/03/more-biglaw-firms-reveal-their-own-gender-pay-gap/>.

314. *Id.*

315. *Id.*

316. A.B. 1209, 2017–18 Assemb. Bill, Reg. Sess. (Cal. 2017).

317. *AB-1209 Employers: Gender Pay Differentials*, CA. LEGIS. INFO. (Sept. 13, 2017), https://leginfo.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180AB1209 (showing veto in 2017); see Scott Rodd, *Gov. Brown Vetoes Wage-Gap Data Collection Bill*, SACRAMENTO BUS. J. (Oct. 16, 2017 5:45 PM), <https://www.bizjournals.com/sacramento/news/2017/10/16/gov-brown-vetoes-wage-gap-data-collection-bill.html>.

318. Rodd, *supra* note 317.

319. HOGAN LOVELLS, 2019 UK PAY GAP REPORT 4–6 (2019).

320. KIRKLAND & ELLIS INT'L LLP, UK GENDER PAY GAP REPORT 3 (2018).

321. LATHAM & WATKINS, LATHAM & WATKINS' GENDER PAY GAP REPORT 2019, at 1 (2020).

average, our female partners earn more than their male counterparts.”³²² However, leaving partner data to the unpredictability of voluntary disclosure means law firms can make their own decisions about the elements of compensation disclosed and how to define equity or share partner as compared to an employee or associate.

2. Milestones for Dismantling Systemic Bias and Discrimination, with Required Self-Assessment.

Law firms should be required to engage in self-assessment and reporting of their progress towards achieving stated milestones for dismantling structures that, exacerbated by law firm practices and partner behaviors, keep in place systemic bias and discrimination. Those milestones can be discussed and decided by a task force appointed by the state supreme court or established by the ABA in its model rules and then adopted by all of the states.

Those determining the milestones could begin with the 2019 ABA Resolution 106 urging “all employers of lawyers in the legal profession to implement and maintain policies and practices to address and close the compensation gap between similarly situated men and women lawyers.”³²³ In the report on the gender pay equality resolution, the ABA referenced surveys and reports documenting the gender pay gap in the legal profession.³²⁴ In keeping with the policies and practices recommended in this Resolution 106, milestones could include rigorous and regular implicit bias training for all partners; gender and race representation requirements on the compensation committee; and transparent written systems for legacy origination opportunities and assignments.³²⁵ Implicit bias training, while necessary, is not by itself close to sufficient. It must be paired with other milestones. The ABA report, *You Can't Change What You Can't See*, includes a section on interrupting bias in partner compensation.³²⁶ These bias-interrupting suggestions include instituting a formal succession planning process; annualizing billables based on the average of months the attorney was at work; and accounting for a ramp-up and ramp-down period.³²⁷ The experiences of women and people of color at law firms show that, while others have persuasively argued for the importance of bias

322. REED SMITH, 2018 GENDER PAY GAP REPORT 6 (2018).

323. Am. Bar Ass'n, House of Delegates, Res. 106, at 1 (2019).

324. *Id.* at 2–4.

325. *See id.*

326. *See* JOAN C. WILLIAMS, MARINA MULTHAUP, SU LI, & RACHEL KORN, COMM'N ON WOMEN IN THE PRO. & MINORITY CORP. COUNS. ASS'N, YOU CAN'T CHANGE WHAT YOU CAN'T SEE: INTERRUPTING RACIAL & GENDER BIAS IN THE LEGAL PROFESSION 101 (2018).

327. *Id.* at 103 (“Counting billables and other metrics as ‘zero’ for the months women (or men) are on parental leave is a violation of the Family and Medical Leave Act, where applicable, and is unfair even where it is not illegal. Instead, annualize based on the average of the months the attorney was at work, allowing for a ramp-up and ramp-down period.”).

training, it is not enough.³²⁸ Also, anyone who has undergone bias training quickly learns that is not enough.³²⁹

Law firms should also be required to engage in periodic self-assessments related to working towards the milestones. The regulatory system for lawyers and law firms in New South Wales, Australia, provides an instructive model.³³⁰ There, a representative of the firm fills out a self-assessment instrument developed by the regulatory body.³³¹ Law firms must fill out the self-assessment, but a self-assessment that is only partially compliant or even noncompliant with a program objective is not alone a disciplinable offense.³³² The “self-assessment process is primarily intended as a tool for educating firms toward compliance.”³³³ It appears to have succeeded on that front in New South Wales. The number of complaints received about a law firm corresponds not with whether or not the firm self-assessed as noncompliant but instead as to whether or not it had completed an assessment at all.³³⁴

Self-assessment, coupled with reporting on milestones, would be a critical part of any new ethical framework.³³⁵ This combination provides a constructive opportunity for reflection amidst action.

3. Financial Incentive for Law Firms

All of the initiatives, speeches, diversity consultants, and diversity committees in BigLaw have made barely a dent, if any at all, in the systemic bias and discrimination that plague private law firm practice. The gender gap in partner compensation is an egregious symptom of the dismal failure of most BigLaw efforts at achieving equity and inclusion. The ABA and state supreme courts, with equity and inclusion as their goal, should consider a financial incentive for large law firms that do not comply with transparency requirements or meet the milestones for dismantling the

328. See Kristy D’Angelo-Corker, *Don’t Call Me Sweetheart! Why the ABA’s New Rule Addressing Harassment and Discrimination is so Important for Women Working in the Legal Profession Today*, 23 LEWIS & CLARK L. REV. 263, 286 (2019).

329. In twelve years of law practice and nearly ten years in academia, the Author has undergone many hours of bias training.

330. See Christine Parker, Tahlia Gordon, & Steve Mark, *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Service Profession in New South Wales*, 37 J.L. & SOC’Y 466, 466 (2010); see also Schneyer, *supra* note 299, 622–23; Annie Simkus, *Preventing Data Breaches at Law Firms: Adapting Proactive, Management-Based Regulation To Law-Firm Technology*, 59 ARIZ. L. REV. 1111, 1133 (2017) (“After a lifetime of scholarship and research, Professor Schneyer proposed the adoption of the proactive, management-based regulation (“PMBR”) system. The system has two primary elements: (1) firm-designated lawyer-managers, and (2) proactive collaboration.”).

331. Parker et al., *supra* note 330, at 473.

332. *Id.*

333. Schneyer, *supra* note 299, at 623.

334. Parker et al., *supra* note 330, at 485.

335. Internal self-assessment focused on diversity is not a new concept in corporate America; companies have implemented diversity initiatives that involve conducting audits of various components of workplace diversity that can reveal disparities in promotions and compensation. Pam Jenoff, *Application of the Self-Critical Analysis Privilege to Corporate Diversity Initiatives*, 76 BROOK. L. REV. 569, 574–76 (2011); see also Ellen Deason, *The Self-Critical Analysis Privilege and Discovery of Affirmative Action Plans in Title VII Suits*, 83 MICH. L. REV. 405, 405–07 (1984).

structures that keep the inequities in place. This incentive could take many forms. For example, BigLaw firms could pay an administrative fee, a percentage of which could be refunded if milestones are met. Or, the state bar disciplinary body could be empowered to, as a last-resort action following repeated failures to comply, punish a large law firm with a “donation” financial penalty, requiring the law firm to pay a sum that would be used to support state bar efforts to dismantle law firm structures and policies perpetuating discrimination and bias. The financial penalty, whether severe or nominal, should be public. Further research would be needed to identify the most effective and feasible form of a financial incentive.

B. Possible Barriers

Resources and expertise are always an issue. State bar disciplinary boards may lack the needed expertise in law firm infrastructure and the budgetary resources.³³⁶ If empowered to discipline law firms, disciplinary agencies with stretched resources understandably would focus on “first-order transgressions” like misappropriating client funds and failing to communicate with clients, rather than transgressions arising from a partner’s failure to make reasonable efforts to ensure compliance by the “first-order” transgressor.³³⁷ However, a focus on self-assessment and reporting should put much of the resources onus on large law firms and not on the state courts or state bars. Also, if an administrative fee is charged, akin to a fee for state bar individual membership, that may allay much of the financial resources concern.

An objection based on infringement on law firm autonomy could be raised.³³⁸ The argument might be: every law firm is different and should be allowed to run its law firm given their practice area, region, firm culture, and other factors. But, these arguments largely boil down to magical thinking about law firms being collegial places requiring little or no regulation. As Elizabeth Chambliss argued, arguments against law firm discipline are not grounded in reality and reflect a misguided nostalgia for something that hardly exists, or at least cannot be safely assumed to be the norm.³³⁹

Another objection, requiring further exploration, might be that formalizing ethical requirements and possible penalties around diversity and equity milestones aimed at dismantling systemic barriers would have the unintended consequence of hurting, not helping, lawyers in underrepresented groups. For example, some law firms may advance fewer attorneys to partnership. Or any financial penalty may have a more negative impact on the lower-paid partners’ financial situations more than the higher-paid partners; any negative impact at all on lower-paid partners may contravene

336. Schneyer, *supra* note 288, at 253–54.

337. Schneyer, *supra* note 299, at 604.

338. See Schneyer, *supra* note 288, at 254.

339. Elizabeth Chambliss, *The Nirvana Fallacy in Law Firm Regulation Debates*, 33 *FORDHAM URB. L.J.* 119, 150 (2005).

the goals of inclusion and equity. Further research should be done to address and mitigate or eliminate the possibility of doing more harm than good.

Finally, perhaps the most well-grounded objection may come from those who have tried to bring BigLaw into the realm of discipline in a self-regulated profession but seen the efforts fail. The objection, in essence, would be that it has been tried, and it does not work. New York and New Jersey have for more than two decades permitted law firm discipline, but very few firms have ever been publicly disciplined.³⁴⁰ In total, between New York and New Jersey, there have been a mere seven instances of law firms being disciplined in over twenty years.³⁴¹ Schneyer described the use of law firm discipline in those two states as “quantitatively and qualitatively disappointing.”³⁴² And, those very few disciplinary actions against law firms were not for discrimination.³⁴³ Since California adopted its antidiscrimination Rule 8.4.1, no disciplinary action has been taken against a lawyer based on discrimination.³⁴⁴

The proposed framework for new rules of professional conduct in this Article, however, accounts for the failed opportunities to discipline law firms by instituting an affirmative obligation for law firms to be transparent and engage in continuous and rigorous self-assessment. It also will operate hand-in-hand with other incentives law firms will still have to move more aggressively to combat systemic bias and inequities, including increasing client and societal pressures.³⁴⁵

Relatedly, one potentially intractable barrier to the implementation of this Article’s proposed framework, as seen with Model Rule 8.4(g), could be states’ refusal to implement rules aimed at addressing discrimination and bias in the management and operation of a law firm. So, this Article is an argument and an invitation. It takes large law firms at their word and urges them to put their resources and power behind advocating for the proposed framework discussed in this Article. Giving state bar disciplinary bodies the power to discipline law firms for lack of transparency and failure to engage in self-assessment on disparities in compensation and promotions will perhaps help law firm leaders to overcome objections within their law firms so they can finally deliver on their heartfelt, determined

340. Schneyer, *supra* note 299, at 612.

341. *See id.* at 604; ROY D. SIMON, JR., SIMON’S NEW YORK RULES OF PROFESSIONAL CONDUCT § 8.4:3 (2020–2021 ed. 2020); *In re* Cohen & Slamowitz, LLP, 981 N.Y.S.2d 100, 107 (N.Y. App. Div. 2014); *In re* Law Firm of Bolden & Coker, P.C., 839 A.2d 886 (N.J. 2004) (mem.).

342. Schneyer, *supra* note 299, at 614.

343. Based on Author’s review.

344. Schneyer, *supra* note 299, at 614.

345. Rhode, *supra* note 57, at 891–95 (discussing the “business case” for increased diversity); *see also* Christine Simmons, *170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business*, THE AM. LAW. (January 27, 2019, 3:00 PM), <https://www.law.com/americanlawyer/2019/01/27/170-gcs-pen-open-letter-to-law-firms-improve-on-diversity-or-lose-our-business/> (“[L]amenting new partner classes that ‘remain largely male and largely white.’”).

statements in support of diversity, equity, and inclusion issued in the summer of 2020.

CONCLUSION

The year 2020 was different than any other year in this nation's history. That year, in response to the police killings of Breonna Taylor and George Floyd, protestors across the United States called for racial justice.³⁴⁶ Large law firms in the United States issued statements condemning police killings of Black people and expressing commitment to addressing social inequities and to diversity, equity, and inclusion.³⁴⁷ By 2020, the world had already seen the rise of the #BlackLivesMatter and #MeToo movements.³⁴⁸ The events of 2020, and law firms' responses, gave cause for hope that issues like the gender gap in partner compensation and underrepresentation of women and women of color in BigLaw leadership and throughout BigLaw could finally be fixed.

What has become abundantly clear is that large law firms, on their own, are not sufficiently incentivized to dismantle systemic discrimination and bias. And yet, they are allowed and trusted to proceed with barely any ethical oversight on issues of discrimination and bias in pay and promotion in a self-regulated profession. For sustained, pervasive change to happen in large law firms, the ethical rules must be aligned with firms' stated goals of addressing systemic inequities and achieving true inclusion and diversity. Absent that alignment, women, and women of color, will continue to be abysmally underrepresented, compensated unfairly, and discriminated against. This Article calls on BigLaw leaders to advocate for state supreme courts, state bars, the ABA, and state legislatures to move quickly on implementing the proposed framework of transparency, milestones, self-assessment, and incentives and finally bring about an ethical reset to eliminate systemic bias and discrimination in large law firms.

346. Khaleda Rahman, *From George Floyd to Breonna Taylor, Remembering the Black People Killed by Police in 2020*, NEWSWEEK (Dec. 29, 2020, 12:14 PM), <https://www.newsweek.com/george-floyd-breonna-taylor-black-people-police-killed-1556285>.

347. Kathryn Rubino, *What Biglaw is Saying About the Unrest Sweeping the Nation*, ABOVE THE L. (June 2, 2020, 12:12 PM), <https://abovethelaw.com/2020/06/biglaw-george-floyd/>.

348. See *Herstory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/herstory/> (last visited Apr. 1, 2021) (showing the BLM movement began in 2013); Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.ny-times.com/2017/10/20/us/me-too-movement-tarana-burke.html>.