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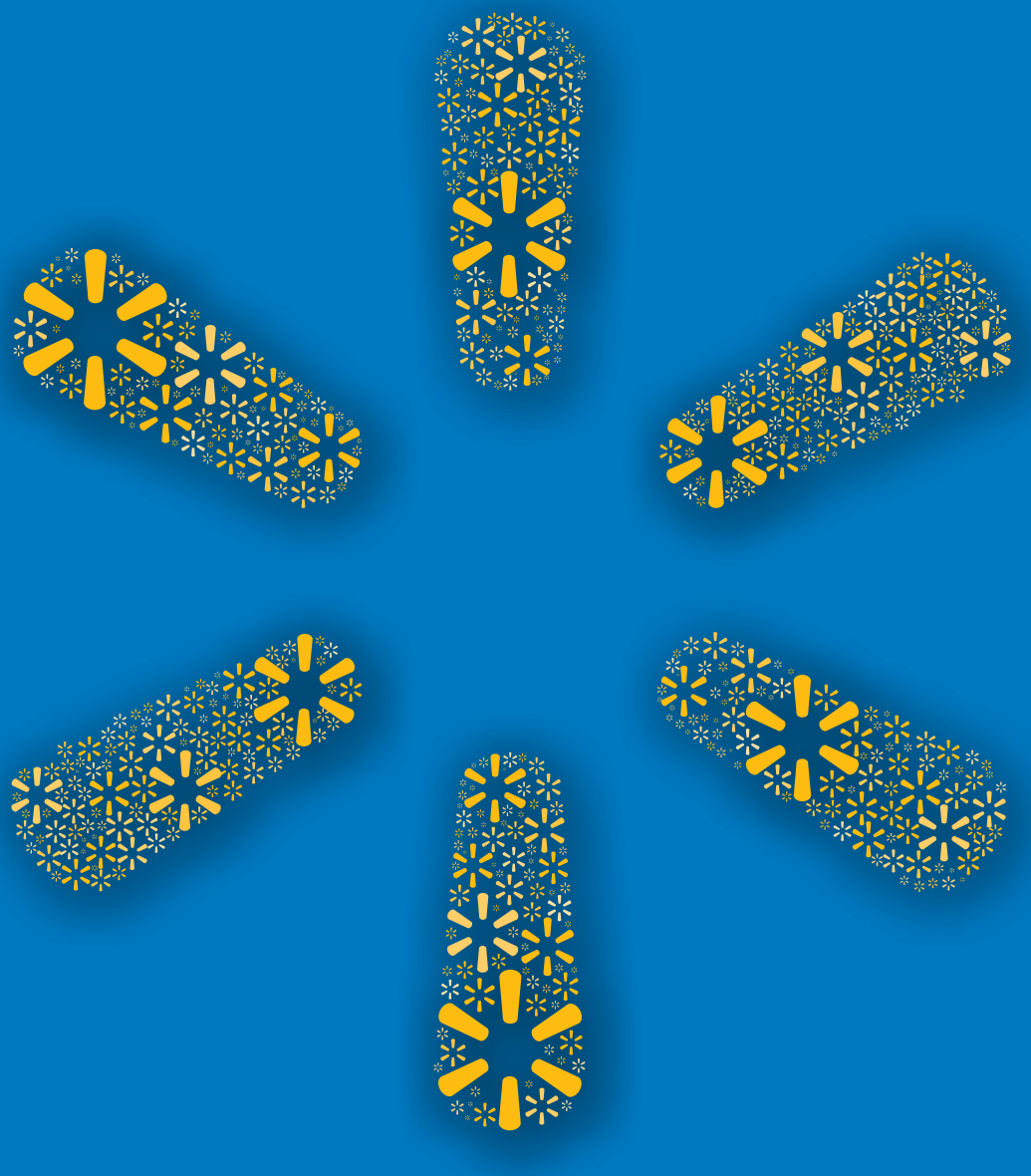

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Staying strong

Our clients and our staff are relying upon us to win their case and their next paycheck

By Jennifer M. Guenther

THE LIFE OF A LAWYER IS BUSY. Regardless of whether you are a litigator or transactional, in-house or in private practice. There are always deadlines, client needs, billing requirements and job pressures. Add in a significant other, pets, kids, aging parents or a household and the amount of energy needed to get through each day increases. High stress levels become a part of normal life. There is no sympathy in the law for being tired – only the response of a monotonous "Me too."

'The most important person to take care of is also our self. Otherwise we can't be there to service our clients, serve on boards and take care of our families.'

As a female associate on the rise, or a senior attorney looking for a promotion, or a partner or general counsel in charge of a department there is no room for "tired." The need to be seen as strong and capable is ever-present. Our clients and our staff are relying upon us to win their case and their next paycheck. And there is the desire to avoid the quick judgment of a less supportive peer or boss who just might think "she can't handle it."

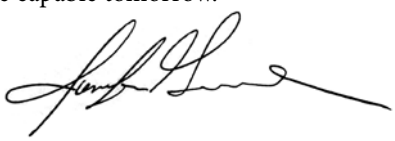
It is entirely possible to be a fully functioning person and a good attorney on very little sleep. I felt I thrived at times and bragged about how much I could do in a day. And when I changed jobs, moving from a litigation practice as a partner in a private firm to a general counsel role doing more transactional work, I still worked hard to prove I was capable in my new position.

And then, my ability to thrive while pretending to be fully awake became pretending to thrive while barely staying awake. My long preference to make to-do lists for myself to stay on task and prioritize became a necessity. Getting out of bed became harder and harder. My body ached. My head ached. "I just need a few days of good sleep," I kept telling myself. I told myself this for almost a year but a few good nights of sleep were never enough. "I just need a vacation," I told myself for another six months. "I am still sleep deprived from being a mom!" I swore, even though my oldest was 12 and my youngest nearly 8. And I did feel a little better with some relaxation.

And then I finally went to see my new doctor. I hadn't been to a doctor for nearly five years because the last time I had complained I wasn't feeling great my old doctor told me "You are just getting older." I didn't feel like being patronized. I know I am getting older. I know I should probably get reading glasses instead of complaining that my computer screen is too small. I know a few aches aren't uncommon. Given how busy days were, adding in a doctor's appointment would just mean a late night catching up on whatever emergency came up that day. And I was already tired. But my new doctor was a professional woman with kids. I thought she might at least be sympathetic.

And I found out that sometimes being tired is not due to just a lack of sleep. Sometimes it is Vitamin D deficiency from sitting in an office too long, or adrenal gland fatigue from years of stressful trial work. Sometimes it is a thyroid gland over or under functioning, or an autoimmune disease like Hashimoto's that zaps your strength and makes your mind fuzzy. Allergies to gluten or environmental factors can cause fatigue as can low iron and high sugars and a multitude of other factors.

As attorneys, it is our job to service and provide for our client. We bill hours to ensure our staff can feed their families. We volunteer in the community and on boards to share our expertise, and then we go home and take care of our families, help with schoolwork and arrange for the car to get its oil changed. The last person we take care of is our self. The most important person to take care of is also our self. Otherwise we can't be there to service our clients, serve on boards and take care of our families. Sometimes being strong means understanding our limits, asking for help and making a new list of "to-dos" every day. Being strong means sometimes shouting out "I am tired. I am going home now but will continue to be capable tomorrow."



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Why not raise the bar?

At NAWL, we are working to form alliances with many other like-minded organizations so that we can help to empower and raise each other up

By Lisa M. Passante

IT SEEMS TO ME A CLEAR THEME OF THIS ISSUE of the WLJ is the power of numbers, and the power of inclusion. There has been much written about the Queen Bee syndrome, but I'd like to think that is a phenomenon whose time is over. We know better now. We know that we stand on the shoulders of the strong women who came before us, and we know we need to pass the keys to success to the coming generations. We know from numerous studies that when there are more women in leadership, women are more likely to thrive — and in fact the business they are in is more likely to thrive. One of us, alone, can do very little.

'We should by all rights represent 50 percent of the population at every level of the legal profession.'

The NAWL Challenge, issued in 2006, focused on 30 percent — women would represent 30 percent of equity partners, 30 percent of Fortune 500 General Counsel and 30 of tenured law school professors by 2015. The profession sadly hasn't reached that goal, particularly as to equity partners. But I say why stop there? Why not raise the bar? We are 50 percent of the population, have been at or close to 50 percent of law school graduating classes for many years, and we should by all rights represent 50 percent of the population at every level of the legal profession.

We know we have a long climb ahead of us. But we will get there. Which leads me to a related subject, and that is collaboration. I had the privilege of speaking on a panel at the Black Women Lawyers Association National Summit in Chicago in April. The topic was black women and white women working together for our mutual success. At NAWL, we are working to form alliances with many other like-minded organizations so that we can help to empower and raise each other up. I look forward to continuing to collaborate and work together with the BWLA and other bar associations and organizations committed to the equality of women in this exciting journey.

Lisa M. Passante is vice-president and associate general counsel at Thomson Reuters, where she serves as the senior U.S.-based legal adviser to the Intellectual Property & Science business unit. She can be reached at lisa.passante@thomsonreuters.com.

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Call Me 'Queen Bee'

Recognizing Title VII liability for female-to-female, non-sexualized harassment resulting from the Queen Bee Syndrome

By Emily C. Wilson

THE TERM "QUEEN BEE SYNDROME" WAS COINED IN 1973 by psychologists studying the effect of the women's movement on the workplace.[1] The psychologists used the term to describe the stereotype of a woman who "has sacrificed everything to get where she is, worked harder than any man and expects everyone else to do the same."[2] The term gained popularity after the publication of the 2002 book, *Queen Bees and WannaBes: Helping Your Daughter Survive Cliques, Gossip, Boyfriends, and Other Realities of Adolescence*.[3] Today, it has reentered popular parlance to describe professional women who bully, undermine or sabotage other women in the workplace because they are jealous, feel threatened by the presence of other women or are seeking to maintain their authority by denigrating others.[4]

Conduct stemming from Queen Bee Syndrome ("Queen Bee harassment") can create a hostile work environment that constitutes severe or pervasive harassment. This article will show that such conduct, where it is "because of sex" and severe or pervasive, is sexual harassment and violates Title VII. Although sexual harassment has traditionally been conceptualized as necessarily involving sexual desire,[5] the Supreme Court has explicitly held that sexual harassment need not involve sexual desire or sexualized conduct.[6] Rather, the critical test for sexual harassment under Title VII is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.[7] Moreover, the Court has held that same-sex sexual harassment is actionable under Title VII.[8]

Few cases of Queen Bee harassment have been brought, likely because courts have struggled to accept same-sex harassment that is nonsexual in nature as being "because of sex," sufficiently severe or pervasive, and, therefore, in violation of Title VII.[9] This article will explore situations in which courts should recognize Queen Bee harassment as a violation of Title VII. It will conclude with recommendations to aid courts in more accurately assessing Queen Bee harassment to determine whether Title VII has been violated.

I. THE EVOLUTION OF SEXUAL HARASSMENT AND THE SEXUAL DESIRE-DOMINANCE PARADIGM

That sexual harassment is prohibited under Title VII is not manifestly apparent from Title VII's original intent or even its early application. In fact, "sex" was only added to the list of protected traits in the Civil Rights Act as a last-ditch effort by a member of Congress to prevent the bill from passing.[10] Although courts immediately recognized that Title VII prohibited harassment based on national origin, race and religion, sexual harassment was not considered to be within the purview of Title VII for over a decade after it was enacted.[11] In the mid-1970s, feminist activists and scholars began to challenge the view that sexual harassment was not sex discrimination prohibited by Title VII.[12]

In 1975, activists formed Working Women United and held the first "Speak-Out on Sexual Harassment" rally.[13] The group clearly conceptualized sexual harassment in terms of sexual desire and sexual advances made by men toward women.[14] For example, a founder of the group defined sexual harassment as "the treatment of women workers as sexual objects."[15] In 1979, Catherine MacKinnon cemented this sexual desire-based conception of sexual harassment in her influential book *Sexual Harassment of Working Women*: A *Case of Sex Discrimination*,[16] which defined sexual harassment as "[t]he unwanted imposition of sexual requirements in the context of a relationship of unequal power."[17] Professor Vicki Schultz calls this definition of sexual harassment the "sexual dominance-desire paradigm."[18]

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The legal community – both commentators and courts – also embraced the sexual desire-dominance paradigm. In one of the first law review articles arguing that Title VII prohibited sexual harassment, feminist Kerry Weisel contended that sexual harassment was discrimination based on gender "based either on the presumption that the supervisor is heterosexual, or [on] the belief that sexual harassment reflects a general

Emily C. Wilson graduated from William & Mary Law School, cum laude, in May 2014. This article is an adaptation of a paper she submitted for an independent writing course at William & Mary Law School under the supervision of Susan S. Grover. Wilson would like to thank Grover for her guidance and support. Wilson is an attorney at the Government Accountability Office (GAO). The views expressed in this article are solely those of the author and should not be attributed to the GAO.

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stereotyped view of women, or both."[19] Ultimately, Weisel, like most feminists of that time, assumed that "heterosexual male advances were the core of sexual harassment, that such advances were driven by sexual motivations, and that such motivations supplied an inference of gender discrimination."[20]

Courts soon adopted this line of reasoning, too.[21] In *Barnes v. Costle*, for example, a district court rejected the plaintiff's sexual harassment claim when she was terminated for refusing sexual advances by her superior, reasoning that she was discriminated against "not because she was a woman, but because she refused to engage in a sexual affair with her supervisor."[22] The Court of Appeals for the D.C. Circuit reversed and concluded that the plaintiff's termination had occurred "because of sex" within the meaning of Title VII because her "job was conditioned upon submission to sexual relations – an exaction which the supervisor would not have sought from any male."[23] In effect, the D.C. Circuit's opinion "equated the pursuit of heterosexual sexual relations with gender discrimination."[24] The EEOC's 1980 guidelines recognizing quid pro quo and hostile environment sexual harassment similarly defined sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature."[25]

This sexualization of sexual harassment established a new paradigm for understanding workplace harassment.[26] To the degree that this conceptualization of sexual harassment acknowledged the existence of some gender discrimination in the workplace (i.e., gender discrimination in the form of sexual advances and exploitation), it represented important progress.[27] At the same time, however, using the sexual desire-dominance paradigm to define and litigate sexual harassment "exclude[d] from legal understanding many of the most common and debilitating forms of harassment faced by women (and many men) at work each day."[28] As a result, gender-based harassment that should have been prohibited by Title VII remained outside of the purview of legal action because the conduct at issue was not sexual in nature.[29]

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II. THE SUPREME COURT SPEAKS: *ONCALE V. SUNDOWNER OFFSHORE SERVICES*

Joseph Oncale was part of an eight-man crew working on an oil platform in the Gulf of Mexico.[30] On several occasions, he was forcibly subjected to humiliating, sex-related actions by several crewmembers.[31] Two crewmembers physically assaulted Oncale in a sexual manner, and one threatened to rape him.[32] After fruitlessly filing a complaint with his supervisor and eventually quitting his job, Oncale filed suit against Sundowner in in the United States District Court for the Eastern District of Louisiana, alleging employment discrimination based on his sex.[33] Relying on a Fifth Circuit decision,[34] the district court held that "Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers."[35] A panel of the Fifth Circuit affirmed, and the Supreme Court granted certiorari.[36]

The Court unanimously held that nothing in Title VII bars a claim of harassment merely because the complainant and harasser are of the same sex.[37] In his opinion, Justice Scalia looked to race discrimination cases in which the Court rejected any conclusive presumption that an employer would not discriminate against members of his own race.[38] Referring to race, but presumably applicable to all protected traits under Title VII, the Court had held 20 years earlier that "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group."[39]

The Court could have stopped there and simply held that same-sex claims of sexual harassment are actionable under Title VII. Instead, the Court further expounded on the purposes of Title VII, the importance of context in assessing hostile environment claims, and – for the first time – the fact that nonsexual conduct could, in certain circumstances, constitute sexual harassment.[40] Although the Court conceded that male-on-male sexual harassment was certainly not the misconduct that Congress was concerned with when it enacted Title VII, it concluded that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is

ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." [41]

Next, Scalia addressed the respondents' argument that recognizing liability for same-sex harassment would transform Title VII into a "general civility code."[42] First, he concluded, that risk is no greater for same-sex harassment than for opposite-sex harassment.[43] For both, the critical test for Title VII liability is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[44] Certainly, courts and judges find it easiest to infer discrimination in male-female sexual harassment situations, "because most challenged conduct typically involves explicit or implicit proposals of sexual activity [and] it is reasonable to assume that those proposals would not have been made to someone of the same sex."[45] But, the Court concluded, "*harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex*."[46]

The Court supported this conclusion with an example that is critical to this paper's premise: the Court stated that a trier of fact may reasonably find discrimination where "a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace."[47] Most importantly, a sexual harassment plaintiff must prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimination* … because of … sex.'"[48]

Like all hostile environment harassment, same-sex sexual harassment must be *severe* or *pervasive* enough to create "an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive."[49] The Court cautioned that this inquiry must carefully consider the social context in which the conduct at issue occurs and is experienced by its target.[50] Whereas a professional football coach smacking a player on the buttocks as he heads onto the field is not severe or pervasive in that context, Scalia posited, the same behavior would be reasonably considered abusive by the coach's secretary – male or female – back at the office.[51] For this reason, the Court urged sensitivity to social context in determining the severity or pervasiveness of alleged harassment: "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."[52] This suggests that, in assessing whether female-to-female hostility in the workplace is severe or pervasive, courts should consider office culture, sex segregation and other social science phenomena explaining the Queen Bee Syndrome.

III. COURTS' TREATMENT OF SAME-SEX CASES AND NONSEXUAL CONDUCT AFTER *ONCALE*

Despite the Court's explicit holdings regarding same-sex harassment and nonsexual conduct, courts have continued to struggle in addressing such cases. After analyzing every federal same-sex sexual harassment case from 1998-2006, author Clare Diefenbach found that "the reality is that plaintiffs who cannot show sexual desire on the part of their harasser typically lose."[53] In fact, she found *no* record of a plaintiff reaching trial for a same-sex sexual harassment claim involving nonsexual conduct and alleging gender hostility.[54]

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In 2006, eight years after her original article on the topic,[55] Professor Schultz examined the treatment of nonsexual conduct in sexual harassment cases post-*Oncale*.[56] Like Diefenbach, she concluded that "old habits die hard."[57] Some courts of appeals continued to require sexual conduct as an element of a hostile work environment claim.[58] While a few appellate courts explicitly reiterated that conduct need not be sexual in order to constitute sexual harassment,[59] those statements were made in cases about male-to-female harassment that also included sexualized conduct. Therefore, it is conceivable – and perhaps likely – that these comments and their recognition of nonsexual conduct as actionable were possible only because of the sexualized, male-to-female contexts in which they

The Court concluded, 'harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex'[46]

occurred. Professor Schultz similarly observed that "many judges continue to privilege sexual forms of harassment at the expense of nonsexual forms in deciding whether the complained-of conduct satisfies the causation and severity elements of hostile work environment under Title VII."[60]

Although absent from Professor Schultz's analysis, the Seventh Circuit's decision in *Haugerud v. Amery School District* represents some progress in the recognition of nonsexual conduct as sexual harassment.[61] Reversing the district court's grant of summary judgment in favor of the school district, the court recognized as valid a claim where the harassment was "not of a sexual nature but rather it was directed at the terms and conditions of [the plaintiff's] employment: questioning her abilities and the ability of women to do her job in general, plotting to give her job to a male custodian, increasing her duties in an attempt to make her quit, withholding necessary assistance, hiding the tools necessary to do her job, making discriminatory comments and so forth."[62] In its determination that this conduct constituted sex-based discrimination, the court noted that male custodians had not been exposed to this kind of treatment.[63] Although the court "struggle[d] to see the sex-based character of the actions to which [the plaintiff] had been exposed,"[64] the court's ultimate holding provides support for a broader, more context-driven use of nonsexual conduct to establish a hostile work environment.

Two district court cases recognized potential Title VII liability where female-to-female harassment was based on one female's jealousy of the sexual attention another female received from a male. In *Vargas-Cabán v. Caribbean Transportation Services*, the plaintiff alleged that the company's female vice-president "belittled, denigrated and overworked" her because she was jealous of the (unwanted) sexual attention the plaintiff received from the company's male president.[65] The court denied the defendant's motion for summary judgment and held that the plaintiff would prevail in her claim if she could show that the defendant's actions were motivated by jealousy related to the president's attentions and that women were the main target of the defendant's jealousy because the president was only attracted to women.[66] The court cited *Lee v. Gecewicz*, a 1999 Pennsylvania district court decision holding that the plaintiff had stated a valid hostile work environment claim when she alleged that her female supervisor, motivated by jealousy of the plaintiff's close working relationship with the company's assistant vice-president, taunted her, spread false rumors that the plaintiff and vice-president were engaging in a sexual relationship and gave her an unfavorable performance evaluation.[67]

An initial obstacle to the appropriate recognition and prohibition of Queen Bee harassment is the tendency—of courts, employers and society generally—to minimize the gravity of such conduct by dismissing it as mean-spirited gossiping or typical female drama.[82]

IV. APPLYING TITLE VII TO QUEEN BEE HARASSMENT

a. Examples of Queen Bee harassment prohibited by Title VII

Although not often litigated, examples of Queen Bee behavior abound in the popular media articles devoted to the issue. The Wall Street Journal recounts the experiences of Erin, whose boss demoralized and sabotaged her by playing hot and cold: one day, the boss would pull Erin into her office, share office gossip, and chat with her like a friend; the next, the boss would scream at Erin for not following through on a task Erin did not know she was expected to perform.[68] Erin eventually learned that her boss was bad-mouthing her to mutual contacts in their industry, including spreading a false rumor that Erin was sleeping with a married man.[69]

The same article also describes the experiences of Kelly, who worked for one of the few female partners in a large consulting company.[70] In meetings, her boss would cut her off mid-sentence and dismiss her ideas. Eventually, her boss stopped including her in important meetings altogether.[71] Although Kelly was respected and supported by other senior partners, her boss' sabotage took a toll on her both professionally and emotionally.[72] One male partner pulled her aside and told her that Kelly's boss had been telling the other partners that Kelly would be better off in another job.[73] Even mundane, everyday

Same-sex sexual harassment must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive[49]

jabs from her boss undermined and bullied Kelly. Kelly's boss would comment on her outfit: "Who are you trying to impress today?"[74] Or not-so-gently condescend: "Did you take your smart pill today, sweetie?"[75]

Harassment need not be top-down: a lower-ranking woman can sabotage her boss in numerous ways. She can spread rumors about her or undermine her reputation. She can make the female boss' work a lower priority, take longer to complete it or be intentionally laxer with its quality.[76] For example, one female attorney, who shared a female secretary with a man and another woman, said the secretary consistently did the male attorney's work first, regardless of urgency.[77] A female physician complained that her biggest challenge at work "was a secretary who could not accept the fact that she was the surgeon" and would not obey her orders or complete her work.[78] Another woman, the only female project manager at a large construction company, explained her issue: "The female receptionist will not give me phone messages from anyone except my 9-year-old. She has told me that I act too 'manly.' My manager will not intervene because he thinks we 'girls should just work it out!'"[79]

Harassment need not be top-down: a lower-ranking woman can sabotage her boss in numerous ways. She can spread rumors about her or undermine her reputation.

Harassment can also occur horizontally between peer co-workers. Professor Susan Porter Benson reported on the workplace hostility among saleswomen in American department stores.[80] She found that saleswomen kept their peers in line by implementing unspoken rules, the penalties for which included "messing up the offender's assigned section of stock, bumping into her, banging her shins with drawers, ridiculing or humiliating her in front of her peers, bosses, or customers, and, in the final extremity, complete ostracism."[81]

b. Guidance for Courts in addressing Queen Bee harassment Under Title VII

i. Challenge: Proving that harassment was severe or pervasive

An initial obstacle to the appropriate recognition and prohibition of Queen Bee harassment is the tendency – of courts, employers, and society generally – to minimize the gravity of such conduct by dismissing it as mean-spirited gossiping or stereotypical female drama.[82] Just as the quintessential male-to-female, sexual-dominance harassment used to be dismissed with the adage "boys will be boys," so, too, do some people dismiss Queen Bee harassment because "women will be women," or worse, "women will be bitches." This minimization of harassment is based on stereotypes and denies women the opportunity to seek rightful recourse for harms that they suffer.

Even if society recognizes that Queen Bee harassment is significant and unacceptable, the nature of conduct at issue can make it hard for a plaintiff to prove that the harassment was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[83] This is largely due to the manner in which females typically harass other females and how different it is from the physical and/or explicitly verbal, sexual desire-based sexual harassment initially recognized under Title VII. As one workplace-bullying researcher noted, "women tend to use relational aggression. It's verbal, psychological, emotional bullying. People don't recognize it – it's covert, harder to pin down and to prove."[84] Whereas harassment in the sexual-desire dominance paradigm usually consists of unwanted touching, lewd sexual comments or requests for sex, Queen Bee harassment often involves more abstract or intangible behavior, such as undermining the target's competency, spreading rumors

about the target or making it harder for the target to complete her work.[85]

Consequently, these nonsexual forms of harassment may escape legal scrutiny altogether.[86] As Professor Schultz notes, the legal system is thus "underinclusive: it obscures *equally debilitating* forms of sex-based harassment and discrimination that are not primarily 'sexual' in content or design."[87] Some studies have found that nonsexual forms of harassment are even more prevalent than harassment that is explicitly sexual in nature.[88] Therefore, this phenomenon not only prevents targets of Queen Bee harassment from seeking legal recourse, it contravenes the purpose of Title VII: to break down the barriers that disadvantage workers because of their sex.

Some people dismiss Queen Bee harassment because 'women will be women,' or worse, 'women will be bitches.'

ii. Recommendation: Courts Should Focus on the Context in Which Harassment Occurs

Whereas courts can, without much investigation into the surrounding circumstances, easily conclude that daily, graphic requests for sex are pervasive or that sexual assault at the workplace is severe, Queen Bee harassment requires courts to analyze the context in which the harassment occurs to determine if it was sufficiently severe or pervasive. Indeed, *Oncale* has been considered "a remarkable call for contextualization."[89] Justice Scalia noted that while "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, [courts must] consider 'all the circumstances.'"[90] This requires "careful consideration of the social context in which particular behavior occurs and is experienced by its target," because "[t]he real social impact of workplace behavior often depends on *a constellation of surrounding circumstances, expectations and relationships* which are not fully captured by a simple recitation of the words used or the physical acts performed."[91]

Attention to "surrounding circumstances, expectations and relationships" is particularly important for Queen Bee harassment, which often consists of relational aggression.[92] For example, a female supervisor's near-daily harassment of a subordinate that undermines the subordinate's competency and significantly impedes her work product could – when taken in the context of particular office expectations and circumstances – be just as pervasive or severe as a supervisor's near-daily sexual remarks about a subordinate. Similarly, some of the harassment Erin and Kelly experienced,[93] such as hot-and-cold treatment, rumor-spreading and daily belittlement, could – in the context of their relationships with their harassers, the nature of their industries and the dynamics of their offices – be considered sufficiently severe or pervasive to create a hostile work environment.

Certainly, general meanness or maltreatment is not prohibited by Title VII, and Title VII is not "a general civility code for the American workplace."[94] However, this concern applies equally to male-to-female harassment based on sexual desire,[95] and should not preclude the rightful prohibition of same-sex harassment that is nonsexual in nature under Title VII. Rather, the Court is confident – and we should be, too – that "[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."[96]

iii. Challenge: Proving that harassment was because of sex

The other major obstacle to recognizing Queen Bee harassment under Title VII is proving that the harassment is "because of … sex."[97] *Oncale* held that "general hostility to the presence of [other] women"[98] could meet this requirement, but the opinion did not explain what this hostility would look like or what a plaintiff alleging such harassment must prove.[99] For harassment that fits in the sexual desire-dominance paradigm, courts often easily conclude that harassment is based on sex by assuming that a heterosexual male who made sexual advances toward a female would not make similar sexual advances toward a man.[100] On the other hand, same-sex harassment that is nonsexual in nature requires contextualization and deeper analysis to prove that it is based on sex. Rather than engage in this inquiry, some courts simply dismiss the case or grant summary judgment for the defendant.[101]

iv. Recommendation: Courts should engage in a broader inquiry to determine whether harassment occurred because of sex

To more fairly and accurately determine when Queen Bee harassment is "because of sex," courts should expand the evidence and factors they consider in that determination. Ramit Mizrahi provides three areas that courts should explore in their analyses: (1) contextual factors, including workplace

Clare Diefenbach found no record of a plaintiff reaching trial for a same-sex sexual harassment claim involving nonsexual conduct and alleging gender hostility[54]

segregation; (2) the relationships among women in the workplace at issue, including the relationship(s) between the harassed and the alleged harasser(s); and (3) the content of the harassment, including whether it was female-specific.[102]

Analysis of contextual factors and sex segregation recognizes that women may harass other women for numerous

Queen Bee harassment often involves more abstract or intangible behavior, such as undermining the target's competency, spreading rumors about the target or making it harder for the target to complete her work.[85]

circumstantial reasons, particularly in male-dominated jobs. Although men may be more likely to stereotype women who perform jobs typically performed by men, "gendered job expectations also influence how women perceive themselves and other women who hold traditionally male jobs."[103] Relatedly, women in male-dominated fields may experience "tokenism," which leads women to "accept their exceptional status, dissociate themselves from others of their category and turn against them."[104] In determining whether harassment was sex-based, therefore, courts should inquire into the degree of sex segregation in the workplace at issue.[105] Courts should examine the division of authority and consider whether there are women at the top of the organizational hierarchy.[106] By exploring the level of sex segregation and distribution of authority between sexes, courts may be able to infer whether the dynamics of tokenism – or other segregation-related conditions[107] – are at work.[108]

Mizrahi's second recommendation, that courts consider the relationships among the women in the workplace and particularly between the target and alleged harasser,[109] echoes Justice Scalia's call for courts to consider relationships in context.[110] Part of this inquiry will also look to the level of sex segregation and how it affects relationships among women in the workplace. Is the office structured in a way that exacerbates hostility and unnecessary competition among women? Are there few women in positions of authority, and are they displaying group dissociation by being tougher on their female subordinates? If women are in direct competition with each other for a token position, or if female supervisors are harder on female subordinates due to tokenism, this cuts towards a conclusion that harassment was sex-based.[111]

Finally, Mizrahi calls for courts to consider whether the content of the harassment is sex-specific.[112] For instance, a supervisor forcing her employee to bleed through her clothing by denying her a bathroom break is clearly sex-specific behavior.[113] Additionally, Mizrahi posits that some language, such as strong sexual epithets like "cunt" and "whore," "indicate that hostility is being expressed in a gendered manner that incorporates hostility toward women."[114] While this recommendation may not be as helpful in analyzing Queen Bee behavior that is not sex-specific (e.g., exclusion from a meeting, stealing files from a desk, spreading gender-neutral rumors), any evidence that the harassment would not have occurred if the target was a male is important in proving that the conduct was sexual harassment in violation of Title VII.

V. CONCLUSION

The Queen Bee Syndrome is once again in the headlines. Unfortunately, much of the popular media portrays Queen Bee harassment as "personality differences" or bullying that lacks a legal remedy. A *Forbes* article describing hostile work environments created by women that harass other women stated that "the problem persists, as there are no bullying ethics or law in practice, unlike the legal protection against sexual harassment or racial discrimination."[115] This minimization of the potential gravity of Queen Bee harassment and the availability of legal recourse does victims of such harassment a significant disservice. Queen Bee harassment is, by definition, based on sex. Where it is severe or pervasive, therefore, it is prohibited by Title VII. Compared to the relatively scant analysis required under the sexual desire-dominance paradigm, courts may find it harder to determine that Queen Bee harassment is based on sex and severe or pervasive. Nevertheless, to fulfill the purpose of Title VII, courts must engage in the additional inquiries and contextualization necessary to root out sexual harassment where it exists – no matter its form or content. ■

ENDNOTES

1 Brigid Schulte, *'Queen Bee' CEOs Get Scrutiny and Flak While 'King Wasps' Get a Free Pass*, Wash. Post (April 11, 2013), http://www.washingtonpost.com/lifestyle/style/queen-bee-ceos-get-scrutiny-and-flak-while-king-wasps-get-a-free-pass/2013/04/11/89d40d76-9acc-11e2-9a79-eb5280c81c63_story.html?wpmk=MK0000200.

2 *Id.*

3 Kerri Lynn Stone, *From Queen Bees and WannaBes to Worker Bees: Why Gender Considerations Should Inform the Emerging Law of Workplace Bullying*, 65 N.Y.U. Ann. Surv. Am. L. 35, 40 (2009). *See also* Rosalind Wiseman, Queen Bees and WannaBes: Helping Your Daughter Survive Cliques, Gossip, Boyfriends, and Other Realities of Adolescence (2002).

4 Peggy Drexler, *The Tyranny of the Queen Bee*, Wall St. J. (March 6, 2013), http://online.wsj.com/news/articles/SB10001424127887323884304578328271526080496.

5 *See infra* notes 13-29 and accompanying text.

6 Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998).

7 *Id.* at 79.

8 *See, e.g., infra* notes 73-90 and accompanying text.

9 *Id.* at 80 (citing Harris v. Forklift Sys., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

10 Ronald Turner, *The Unenvisaged Case, Interpretive Progression, and the Justiciability of Title VII Same-Sex Sexual Harassment Claims*, 7 Duke J. Gender L. & Pol'y 57, 57-58 (2000). The effort failed, of course, and "sex discrimination was thus added to the prohibitions against employment discrimination on the basis of race, color, religion, and national origin and was made part of Title VII of the Civil Rights Act ("Title VII") signed into law by President Lyndon Johnson on July 2, 1964." *Id.* at 58.

11 *Id.* at 62.

12 *Id.* at 64-65.

13 Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1699 (1998) [hereinafter *Reconceptualizing*].

14 *Id.*

15 Turner, *supra* note 10, at 64-65 (quoting Deidre Silverman, *Sexual Harassment: Working Women's Dilemma*, Quest: Feminist Q. 15, 15 (Winter 1976-77)). Another founder began her book on sexual harassment with two stories as examples: in one, a male boss attempted to rape his female employee, and in the other, a male manager tried to extort sex from teenage girls who applied for jobs. Schultz, *Reconceptualizing*, *supra* note 13, at 1699 (citing Lin Farley, Sexual Shakedown: The Sexual Harassment of Women on the Job (1978)).

16 Legal commentator Jeffrey Toobin wrote that MacKinnon's book on sexual harassment "surely ranks as one of the most influential law books of the late twentieth century." Jeffrey Toobin, A Vast Conspiracy: The Real Story of the Sex Scandal that Nearly Brought Down a President 173 (1999).

17 Turner, *supra* note 10, at 65 (citing Catherine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979)). Although MacKinnon's sexual desire-dominance paradigm ultimately won the day and defined sexual harassment litigation for another twenty years, other scholars and activists in the 1970s were conceptualizing sexual harassment in a broader and more inclusive way. Schultz, *Reconceptualizing*, *supra* note 13, at 1699-1700. In her 1976 book, "The Harassed Worker," Carroll Brodsky defined sexual harassment as behavior involving "repeated and persistent attempts… to torment, wear down, frustrate, or get a reaction from another. It is treatment that persistently provokes, pressures, frightens, intimidates, or otherwise discomforts another person." Turner, *supra* note 10, at 65 (quoting Carroll Brodsky, The Harassed Worker 2 (1976)). Brodsky did not see sexual harassment as rooted in sexual desire or sexual domination; rather, it had the same motives – "achieving exclusion and protection of privilege" – as all other forms of nonsexual harassment. Schultz, *Reconceptualizing*, *supra* note 13, at 1700-01 (citing Brodsky, *supra* note 17, at 2-4).

18 Schultz, Reconceptualizing, *supra* note 13, at 1686.

19 Kerry Weisel, Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 Wash. L. Rev. 123, 133 (1977).

20 Schultz, *Reconceptualizing*, *supra* note 13, at 1703.

21 *Id.*

22 *Id.* (citing Barnes v. Train, 13 Fair Emp. Prac. Cas. (BNA) 123, 124 (D.D.C. 1974)).

23 *Id.* (citing Barnes v. Costle, 561 F.3d 983, 989 (D.C. Cir. 1977)).

24 *Id.* at 1704.

25 Turner, *supra* note 10, at 67 (citing 29 C.F.R. 1604.11(a) (1980)). Professor Schultz confirms that this EEOC definition "could be read to limit the universe of gender-based harassment to sexual conduct" – and indeed was. Schultz, *Reconceptualizing*, *supra* note 13, at 1704, n.97.

26 Schultz, *Reconceptualizing*, *supra* note 13, at 1704.

27 *Id.*

28 *Id.* at 1686.

29 Vicki Schultz, *Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What We Can Do*

About It, 29 T. Jefferson L. Rev. 1, 11 (2006) [hereinafter *Understanding*]. In 1985, for example, a court dismissed the harassment claim of a woman who alleged that her foreman "picked on [her] all the time" and treated her much worse than male employees. The judge concluded: "There are no facts which would support a finding of sexual harassment as that term has come to be used in employment discrimination law… Plaintiff was not subjected to harassment of a sexual nature. The foreman did not demand sexual relations, he did not touch her or make sexual jokes." *Id.* at 11-12 (citing Turley v. Union Carbide, 618 F. Supp. 1438, 1442 (S.D.W. Va. 1985)). For support, the court cited the 1980 EEOC guidelines that define sexual harassment as sexual advances and conduct of a sexual nature. *Id.*; *see supra* note 26 and accompanying text.

30 Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 77 (1998).

31 *Id.*

32 *Id.*

33 *Id.*

34 Garcia v. Elf Atochem North America, 28 F.3d 446, 451-52 (CA5 1994).

35 *Oncale*, 523 U.S. at 77.

36 *Id.*

37 *Id.* at 79. In doing so, the Court resolved a substantial circuit split. *See* Ramit Mizrahi, *"Hostility to the Presence of Women": Why Women Undermine Each Other in the Workplace and the Consequences for Title VII*, 113 Yale L.J. 1579, 1583 n.28 (2004). While some courts, like the Fifth Circuit in *Oncale*, had held that same-sex sexual harassment claims were never cognizable, other courts allowed same-sex sexual harassment if the plaintiff could prove that the harasser was homosexual and therefore presumably motivated by sexual desire. *Oncale*, 523 U.S. at 79 (citing Goluszek v. H.P. Smith 697 F. Supp. 1452 (ND Ill. 1988); McWilliams v. Fairfax County Board of Supervisors, 72 F.3d 1191 (CA4 1996); Wrightson v. Pizza Hut of America, 99 F.3d 138 (CA4 1996)). Still others concluded that workplace harassment that was sexual in content was always actionable, regardless of the harasser's sex or sexual orientation. *Id.* at 79 (citing Doe v. Belleville, 119 F.3d 563 (CA7 1997)).

38 *Id.* at 78.

39 *Id.* (citing Castaneda v. Partida, 430 U.S. 482, 499 (1977)).

40 *Id.* at 79-82.

41 *Id.* at 79.

42 *Id.* at 80.

43 *Id.*

44 *Id.* (citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

45 *Id.* The same inference would support a plaintiff alleging same-sex sexual harassment if there were credible evidence that the harasser was gay. *Id.*

46 *Id.*

47 *Id.* A same-sex sexual harassment plaintiff could also offer direct comparative evidence of the alleged harasser's treatment of both sexes in a mixed-sex environment. *Id.*

48 *Id.* at 81.

49 *Id.* (citing Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 67 (1986)). "We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace … for discriminatory 'conditions of employment.'" *Id.*

50 *Id.*

51 *Id.*

52 *Id.* at 82.

53 Clare Diefenbach, *Same-Sex Sexual Harassment After* Oncale*: Meeting the "Because of … Sex" Requirement*, 22 Berkeley J. Gender L. & Just., 42, 74 (2007). *See also* L. Camille Hebert, *Sexual Harassment as Discrimination "Because of… Sex": Have We Come Full Circle?*, 27 Ohio N.U. L. Rev. 439, 458 (2001) ("[C]ourts have been much less likely to recognize same-sex harassment as actionable sex discrimination in situations in which the conduct cannot be attributed to sexual interest on the part of the harasser.").

54 Diefenbach, *supra* note 53, at 70.

55 *See* Schultz, *Reconceptualizing*, *supra* note 13.

56 Schultz, *Understanding*, *supra* note 29, at 17-22.

57 *Id.* at 18.

58 *See, e.g.*, Freitag v. Ayers, 463 F.3d 838, 849 (9th Cir. 2006) (stating that to establish a hostile work environment, "a plaintiff must prove that … she was subject to verbal or physical conduct of a sexual nature"); Romaniszak-Sanchez v. Int'l Union of Operating Engineers, 121 Fed. Appx. 140, 144 (7th Cir. 2005) (stating that a hostile work environment plaintiff must prove "that she was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature").

59 *See, e.g.*, O'Rourke v. City of Providence, 235 F.3d 713, 729-30 (1st Cir. 2001) (holding that "sex-based harassment that is not overtly sexual is … actionable under Title VII," and stressing that "courts should avoid disaggregating a hostile work environment claim … into instances of sexually oriented conduct and instances of unequal treatment, then discounting the latter category"); Durham Life Ins. Co. v. Evans, 166 F.3d 139, 148 (3d Cir. 1999) (rejecting an argument that the district court erred in aggregating "events [that] were apparently triggered by sexual desire, some [that] were sexually hostile, some [that] were non-sexual but gender-based, and others [that] were sexually neutral," and holding that the district court properly analyzed whether the entire pattern of conduct, taken together, was based on the plaintiff's sex); Williams v. Gen. Motors Corp., 187 F.3d 553, 565 (6th Cir. 1999) (concluding that the district court erred in reasoning

that harassment must consist of conduct that is sexual in nature, and instead holding that "harassing behavior that is not sexually explicit but is directed at women and motivated by discriminatory animus against women satisfies the 'based on sex' requirement").

60 Schultz, *Understanding*, *supra* note 29, at 18. *See, e.g.*, *Romaniszak-Sanchez*, 121 Fed. Appx. at 144 (affirming the district court's conclusion that harassment was not severe and pervasive because "the bulk of [the] complaints … did not involve specific sexual comments, but more generalized complaints of rampant profanity"); Starnes v. Barrett & McNagny, LLP, 2005 U.S. Dist. LEXIS 8391, at 8-9 (N.D. Ind. May 5, 2005) (finding persuasive, in granting summary judgment against a plaintiff who alleged a pattern of offensive and frightening comments by a co-worker, that "only two of [the harasser's] comments were explicitly sexual" and thus "a reasonable person … would not [have found the work environment] "hostile and abusive"); Buttron v. Sheehan, 2003 U.S. Dist. LEXIS 13496, at 47 (N.D. Ill. Aug. 4, 2003) (finding persuasive, in granting summary judgment against corrections department workers who alleged a broad pattern of incidents by their supervisors and co-workers that excluded and undermined them on the job, that "none of the [complained of] conduct … was sexual in nature" and thus the conduct was not gender-related and not objectively hostile).

61 Haugerud v. Amery Sch. Dist., 259 F.3d 678 (7th Cir. 2001).

62 *Id*. at 694.

63 *Id*. at 695. The court saw as a "final blow" the school district's directive that male workers should not assist female workers. It reasoned that "it would be one thing to hold all employees accountable for their job duties, and to prohibit any employee from helping another, but a simple decree that the male workers not help the female workers would evidence intent to treat custodians differently on the basis of sex." *Id*. at 696.

64 Sandra M. Tomkowicz, *Hostile Work Environments: It's About the Discrimination, Not "The Sex,"* 55 Lab. L.J. 1, 8 (2004).

65 Vargas-Cabán v. Caribbean Transp. Servs., 279 F. Supp. 2d 107, 110 (D.P.R. 2003).

66 *Id*.

67 *Id*. (citing Lee v. Gecewicz, 1999 WL 320918 (E.D. Pa. May 20, 1999)). The harassment in these cases was not textbook Queen Bee behavior, as it was motivated by jealousy over sexual attention paid to another female employee by a male, rather than, for example, feeling threatened by another woman's presence or success in the workplace. However, a significant amount of Queen Bee behavior is likely based on jealousy of other women. Therefore, these courts' recognition that female-to-female, jealousy-based harassment – where it (i) would not have occurred but for the target's sex and (ii) is severe or pervasive – constitutes sexual harassment strongly supports this article's argument that severe or pervasive Queen Bee harassment violates Title VII.

68 Drexler, *supra* note 4, at 1.

69 *Id*.

70 *Id*.

71 *Id*.

72 *Id*.

73 *Id*.

74 *Id*.

75 *Id*. The experiences of Erin and Kelly are not per se Title VII violations, of course. Each would have to prove that their bosses acted based on their sex and that the harassment they endured was severe or pervasive. *See infra* notes 124 and 139 and accompanying text.

76 *See* Mizrahi, *supra* note 37, at 1604-05.

77 *Id*. at 1605.

78 Pat Heim & Susan Murphy, In the Company of Women: Turning Workplace Conflict into Powerful Alliances 12 (2001).

79 *Id*. at 7.

80 Mizrahi, *supra* note 37, at 1591 (citing Susan Porter Benson, Counter Cultures: Saleswomen, Managers, and Customers in American Department Stores 1890-1940 249 (1988)).

81 *Id*.

82 *See, e.g.*, Alexandra Lopez-Pacheco, *No Sisterhood at Work*, Financial Post (Canada) (Aug. 20, 2008), http://www2.canada.com/money/story.html?id=737463&p=1 ("While a number of women bullied by male bosses have successfully sued in recent years, woman-to-woman bullying is perceived by many as a 'personality' issue."); Mizrahi, *supra* note 37, at 1591 ("Popular explanations for hostility and competitiveness among women in the workplace usually contain two main themes: that women are biologically predisposed to compete with each other, and that sex-role socialization creates and exacerbates any such tendencies.").

83 Meritor Sav. Bank FSB v. Vinson, 477 U.S. 57, 67 (1986) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)) (alteration in original). *See also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

84 Sarah Boesveld, *Beware of the Office Bully – She's Baring Her Claws*, The Globe & Mail (Toronto) (May 17, 2009, 7:08 PM), http://www.theglobeandmail.com/life/work/beware-the-office-bully-shes-baring-her-claws/article1140886/.

85 Lopez-Pacheco, *supra* note 82, at 2. *See also* Schultz, *Understanding*, *supra* note 29, at 19 ("In contrast to a supervisor's formal decision to fire someone or not promote her, supervisors and coworkers ay get away with less formal acts of exclusion – such as failing to invite a

woman to informal events where crucial information is shared or refusing to mentor her equally – because such acts are not sufficiently 'sexual' to count as hostile work environment harassment and yet seem too remote from a material change in work status to count as disparate treatment.").

86 Schultz, *Understanding*, *supra* note 29, at 19.

87 *Id.* (emphasis added).

88 *See, e.g.*, Phyllis L. Carr et al., *Faculty Perceptions of Gender Discrimination and Sexual Harassment in Academic Medicine*, 132 Ann. Intern. Med. 889, 893 (2000) (reporting that, in a sample of over 3,000 full-time medical school faculty, 48% reported experiencing sexist remarks and behavior, while 30% reported unwanted sexual advances and other coercive sexual behavior); Erika Frank et al., *Health-Related Behaviors of Women Physicians vs. Other Women in the United States*, 158 Arch. Intern. Med. 342, 342-43, 344 tbl. 1 (1998) (reporting that in a large national sample of female physicians, 36.9% had experienced harassment that was explicitly sexual in nature, whereas 47.7% had experienced "gender-based harassment with no sexual component" that was "simply related to their being female in a traditionally male environment"); Louise F. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. Vocational Behav. 152, 160 tbl. 1, 166 tbl. 2 (1988) (reporting that, in a large sample of university faculty, students, and staff, women in all groups were much more likely to experience forms of nonsexual gender harassment—including being "treated differently due to gender" and being subjected to "sexist remarks about career options"—than sexual forms of harassment). While these studies primarily describe male-to-female harassment, the increasing number of women in the workplace and the evidence that women are most likely to bully and harass other women arguably mean that the studies' conclusion—that nonsexual harassment occurs more frequently than harassment that is explicitly sexual in nature—arguably rings true for female-to-female harassment also. *See, e.g.*, Drexler, *supra* note 4, at 1 (stating that a 2010 Workplace Bullying Institute study revealed that 80% of female workplace bullies' victims are other females, whereas male workplace bullies harass males and females equally).

89 Diefenbach, *supra* note 53, at 46 (citing Kathryn Abrams, Postscript, *A Response to Professors Bernstein and Franke*, 83 Cornell L. Rev. 1257, 1258 (1998)).

90 Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)).

91 *Id.* at 81-82 (emphasis added).

92 *See supra* note 84 and accompanying text.

93 *See supra* notes 68-75 and accompanying text.

94 *Oncale*, 523 U.S. at 80.

95 *Id.* ("Respondents and their *amici* contend that recognizing liability for same-sex harassment will transform Title VII into a general civility code… But that risk is no greater for same-sex than for opposite-sex harassment, and is adequately met by careful attention to the requirements of the statute.").

96 *Id.* at 82.

97 *Id.* at 78 (citing 42 U.S.C. § 2000e-2(a)(1)).

98 *Id.* at 81.

99 Mizrahi, *supra* note 37, at 1585.

100 Schultz, *Reconceptualizing*, *supra* note 13, at 1689.

101 *See supra* notes 53-54 and accompanying text.

102 Mizrahi, *supra* note 37, at 1585, 1608.

103 *Id.* at 1595.

104 Rosabeth Moss Kanter, Men and Women of the Corporation 239 (2d ed. 1993). *See also* Mizrahi, *supra* note 37, at 1597-99.

105 Mizrahi, *supra* note 37, at 1609.

106 *Id.*

107 *See id.* at 1599-1607.

108 *Id.* at 1610. Mizrahi suggests that perhaps, "by showing that she works in a highly segregated environment, a plaintiff could create a rebuttable presumption that the harassment was 'because of sex' within the meaning of Title VII." *Id.*

109 *Id.* at 1611-15.

110 Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81-82 (1998)

111 Mizrahi, *supra* note 37, at 1611. Mizrahi also calls for an inquiry into the role of men in directly or indirectly encouraging the female-to-female harassment. *See id.*

112 *Id.* at 1615.

113 *Id.* (citing Wieland v. Dept. of Transp., 98 F. Supp. 2d 1010, 1019 (N.D. Ind. 2000)).

114 *Id.* Mizrahi rightly cautions that some terms are gender-identifiers, rather than necessarily indicative of gender-related animus (e.g., "bitch" is often used to express hostility toward a woman, whereas "dick" and "bastard" are often used similarly toward men). *Id.* When used generically, those terms are not probative. But "when the terms are used in certain manners and contexts, as when a woman is called a 'black bitch' or when reserved for successful or powerful women, they do take on an animus-based connotation." *Id.* at 1615-16.

115 Ruchika Tulshyan, *Why Women Are The Worst Kind of Bullies*, Forbes (Apr. 30, 2012), http://www.forbes.com/sites/worldviews/2012/04/30/why-women-are-the-worst-kind-of-bullies/.

MORE WOMEN MEANS MORE SUCCESS

Clearly stating the economic reasons for diversity at the management level

By Scott Westfahl

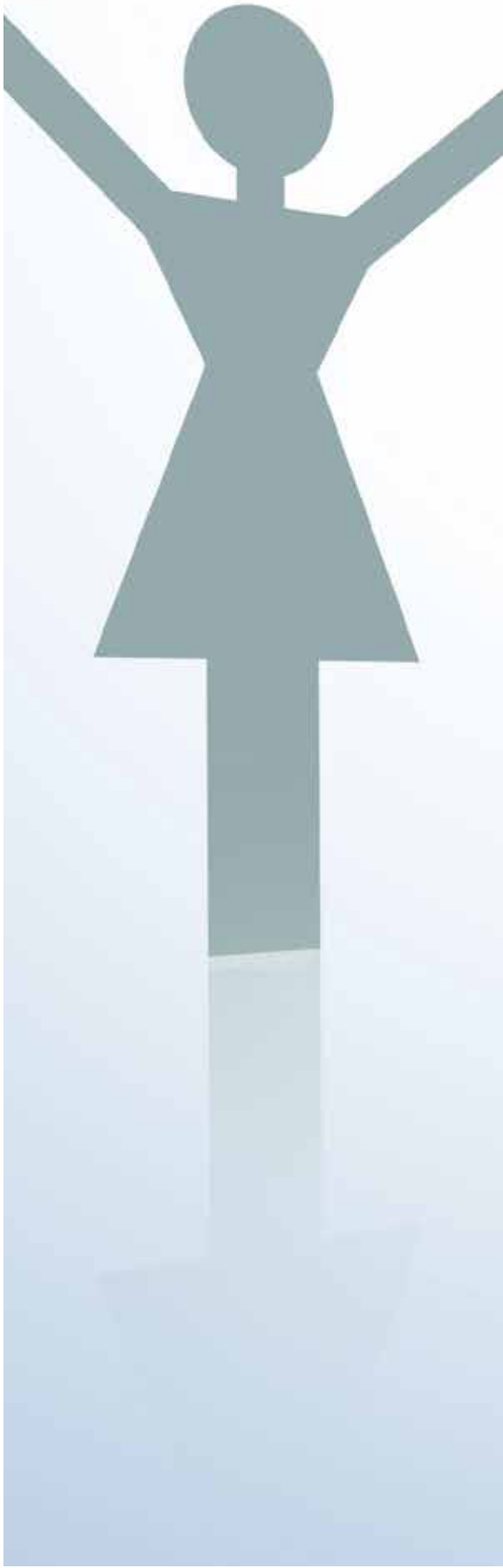
The recent Internet phenomenon of quite strenuous disagreement over the color of a dress illustrates the challenge of separating perception from reality. Perspectives can differ widely, and people fiercely defend their perspective as truth. "That dress is blue!" "Are you kidding me?! It's WHITE*!" With such attachment to our own perspectives, it becomes difficult to entertain multiple explanations or find common ground.

Science instructs that how people perceive the background and context determines how they see the color of the dress. Similarly, when talking about an issue like the advancement of women in the legal profession, widely varying perspectives result in frequent, sometimes heated, debates about the "truth" of women's experience in legal practice.

But there *is* an undeniable statistical truth: The equity partnerships of AmLaw 100 firms have to increase their numbers of women beyond the 15-17 percent range. It is in the unpacking of this truth – the search for root causes – where difficulties with perception versus reality quickly

* A Google search of "what color is the dress" reveals this controversy and the science behind it.

Scott Westfahl is the faculty director of Executive Education and a professor of Practice at Harvard Law School. As the faculty director of HLS Executive Education, he leads the law school's effort to support and develop lawyers across the arc of their careers, particularly as they advance to new levels of leadership and responsibility. He also teaches in Executive Education's global leadership programs, focusing on leadership, motivation and development of professionals, and organizational alignment. Within the law school's J.D. curriculum, he teaches courses on problem solving, teams, networks and innovation. Prior to joining the Harvard faculty, Professor Westfahl served for nine years as the director of Professional Development at Goodwin Procter LLP, spent six years leading professional development for the Washington, D.C. office of McKinsey & Co. and practiced law with Foley & Lardner for 10 years. He is a graduate of Dartmouth College and Harvard Law School.



A 2012 McKinsey study of leading companies found that for companies ranking in the top quartile for executive-board diversity, returns on equity were 53 percent higher than for those in the bottom quartile.[2]

Studies show that the more women included on a top leadership team, the more likely the team's success[2]

arise. That is especially true when firms consider whether their economic structures and systems may be at fault. Do their structures and systems create hidden roadblocks for women? Or have they been refined to create a close approximation of gender-blind meritocracy, so that the fault lies elsewhere? Your background and the context from which you view the problem certainly color your answer to those questions. Or "where you stand depends upon where you sit," as my favorite government professor Laurence Radway, used to say.

Here is an especially tricky example: Some perceive a disadvantage arising when women lawyers disproportionately receive firm committee assignments involving recruiting or diversity, rather than compensation determination or formation of firm strategy. They believe that the systems for determining committee participation are flawed and biased against women. Yet others believe that the process for determining committee assignments is the result of carefully crafted, time-tested nomination or election procedures. Experience, respect from peers and hard work matter – not gender. In their view, any gender differentiation in outcomes is irrelevant in such a meritocracy. In the end, it becomes very difficult to untangle these kinds of arguments, because cause-and-effect analysis depends not only upon many other variables, but also upon the disruption of closely held perceptions.

Unlocking the power of gender diversity first requires acknowledging, rewarding and promoting people based upon broader competencies that translate directly to the bottom line – but that have often been ignored or described dismissively as "soft skills" due in some measure to gender bias, I believe.

So what can we do? Where is there hope for making progress?

First, the business case for diversity needs to be more clearly stated and embraced, so that any partner wishing his or her firm to be more successful will have solid reasons to engage in solution-finding. In our Harvard Law School Executive Education leadership programs, we present law firm leaders with research and data from the business world to help achieve this goal. For example, we discuss the work of Scott Page, author of *The Difference*,[1] who proves mathematically that diverse teams solve difficult problems more effectively, provided two conditions exist. First, the diverse teams need a high-enough baseline of relevant experience. Second, they need to work well together to overcome the challenges presented by their diverse cognitive backgrounds, learning and working styles.

We also look to the increasing number of studies showing that the more women included on a top leadership team, the more likely the team's success. For example, a 2012 McKinsey study of leading companies found that for companies ranking in the top quartile for executive-board diversity, returns on equity were 53 percent higher than for those in the bottom quartile.[2] Additional studies have shown that having more female members on a team significantly enhances the collective intelligence of that team.[3] Most recently, McKinsey studied hundreds of organizations and concluded that companies in the top quartile of gender diversity were 15 percent more likely to have financial returns above their national industry median.[4]

Diversity-related metrics in the legal profession are almost entirely input driven. General Counsel demand that law firms report the number of women and minority attorneys working on their matters, but then do not measure attendant improvements in legal outcomes in any meaningful way. Members of the Leadership Council on Legal Diversity are now looking at this issue closely. There is high confidence in finding direct correlation between gender diversity and improved legal outcomes, client satisfaction and law firm financial success, if for no other reason than it is hard to fathom that results achieved by top companies – i.e., our clients – would not be replicated.

As that data emerge, its power should resonate and drive creative problem solving to improve the diversity of law firm

leadership teams. In turn, law firm business economic structures and systems should evolve to drive the gender-diversity-results-in-performance imperative. True believers such as former Reed Smith Chairman Greg Jordan began engineering diverse leadership representation on faith several years ago; others will be likely to follow as the business case becomes more clear.

Second, firms should pay much greater attention to unlocking the power of gender diversity. Several years ago I wrote a book entitled *You Get What You Measure* to help law firms create effective lawyer evaluation systems based upon a competency model that articulates what firms actually expect of their junior, mid- and senior-level associates. A critical resource for the book was the ABA Commission on Women in the Profession's important 2008 report, *Fair Measure: Toward Effective Attorney Evaluations, Second Edition*. The report includes a helpful resource detailing gender biases that often appear in or influence performance evaluations. It prompted me to ensure that important competencies, such as "listening," were included in the model I proposed. Listening is a critical skill for any lawyer, yet many law firm competency models still don't include it. Coincidentally or not, it happens to be a skill at which women often excel relative to their male peers. Unlocking the power of gender diversity first requires acknowledging, rewarding and promoting people based upon broader competencies that translate directly to the bottom line – but that have often been ignored or described dismissively as "soft skills" due in some measure to gender bias, I believe.

The true break-out moment can come when those competencies are fully leveraged. Relative to other professionals, lawyers are critically undertrained and underprepared to collaborate and work in teams. That undertraining starts in law school and is perpetuated in practice.[5] With research showing that women dramatically improve team performance and thereby overall financial results, law firms will accelerate their unlocking of the power of gender diversity if they pay much greater attention to training their lawyers how to work in teams and introducing the kind of team structures and processes that accounting, consulting and engineering firms have long used to improve efficiency and client service.

"Building diverse teams is the way of the future," noted McDonald's Corporation General Counsel Gloria Santona at NAWL's recent 2015 Mid-Year Meeting in Chicago. Women lawyers seeking to take advantage of this trend should invest in becoming better team leaders and collaborators. Seek out

As the market for legal services emerges from the great recession, there is sharp debate around whether that market is in a paradigm shift

related training and find new leadership opportunities to practice what you learn.

Third, women need to be their own best advocates in this effort. Consider the experience of a woman partner we know who had been groomed for a leadership position but suddenly found herself facing a late, unexpected challenge from one of her male partners. She confided to a few male friends and her husband that if she wasn't chosen for the role, "it wouldn't be the end of the world." Each of these men strongly advised her not to share that thought with anyone else at the firm. Their advice? If she wanted the position, she needed to say so, explain to others why she was qualified and display full confidence that she was the best candidate. That is certainly what most men would do, they noted. Some women counter that double standards apply and they can't directly advocate for themselves in such a situation.[6] Rather, they advise, enlist other women (and male supporters) to advocate for you. "Create a conspiracy" of cross-promotion, recommended McGuire Woods' Chicago Office Managing Partner Amy Manning at NAWL's Mid-year Meeting. Her point: know what your fellow women attorneys do well and let others know about it, deliberately and frequently, as they do the same for you (both inside your firm and also with clients).

Know what your fellow women attorneys do well and let others know about it, deliberately and frequently, as they do the same for you (both inside your firm and also with clients).

Either way, though, research does indicate that women are too often wary of being their own advocates. Adam Grant's excellent book *Give and Take* discusses how when women are challenged to ask for a raise, they do not succeed as well as men, but when they are asked to advocate for a raise for someone about whom they care, they are equally or more successful.[7]

Where else can we find hope? As the market for legal services emerges from the great recession, there is sharp debate around whether that market is in a paradigm shift. As my Harvard Law School colleague David Wilkins always notes, the problem with paradigm shifts is that by definition you don't know if you're in one until years later when someone writes the definitive book to let you know that yes, indeed, 20 years ago you were in a paradigm shift.

Paradigm shift or no, as we meet with and train law firm leaders from around the world at our Harvard Law Executive Education leadership programs, we are definitely seeing a greater openness to new ideas and frameworks, and a hunger for research- and data-driven strategies. This continues to be the case even as many firms are returning to record levels of profitability. It doesn't feel like "business as usual" and that is likely a very good thing for moving the needle past 15-17 percent.

Endnotes

1 Scott E. Page, *The Difference: How The Power of Diversity Creates Better Groups, Firms, Schools, and Societies, (New Jersey: Princeton University Press, 2007)*

2 Thomas Barta, Markus Kleiner and Tilo Neumann, "Is there a payoff from top-team diversity?", McKinsey Quarterly, April 2012

3 Anita Woolley and Thomas Malone, "What Makes A Team Smarter? More Women", Harvard Business Review, June 2011.

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5 Heidi Gardner, "Why It Pays To Collaborate With Your Colleagues", The American Lawyer, February 26, 2015 *available at* http://www.americanlawyer.com/id=1202718495533/Why-It-Pays-To-Collaborate-With-Your-Colleagues?slreturn=20150209100942. Scott Westfahl, "How the Executive Education Learning Model is Closing the Legal Profession's Leadership Gap", PD Quarterly, November 2014 *available at* https://execed.law.harvard.edu/assets/2014/11/1114-PDQ-Westfahl.pdf

6 Some data supports this view. See: Laurie A. Rudman, "Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management", Journal of Personality and Social Psychology Vol. 74, No. 3, 1998

7 Adam Grant, *Give and Take: Why Helping Others Drives Our Success*, (New York: Penguin Books, 2013)

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Three honored at Mid-Year Meeting

Awards were presented for leadership, public service and meeting NAWL's 'Challenge' at NAWL's 2015 Chicago gathering

NAWL Leadership Award
Laurel G. Bellows

Laurel G. Bellows, principal in The Bellows Law Group, PC and former ABA President, is the recipient of the 2015 Leadership Award. The Leadership Award is presented to a lawyer whose personal contributions have helped advance women lawyers and promote diversity in the legal profession.

Bellows is a leader in the legal community on the local and national levels. She is past Chair of the American Bar Association's House of Delegates, the ABA's policy-making body.

She is past president of the 22,000-member Chicago Bar Association and the National Council of Bar Presidents. American Lawyer Magazine selected Bellows as one of seven women nationally who contributed most to the advancement of women in the legal profession.

Chicago Magazine designated her as a Power Lawyer and Crain's Chicago Business named her in the Who's Who in Chicago Business List and as one of Chicago's 100 Women of Influence.

Additionally, Bellows served on the Standing Civil Reform Act Advisory Committee of the U. S. District Court for the Northern District of Illinois, the Illinois Supreme Court Special Commission on the Administration of Justice and the U. S. Senate Judicial Nominations Commission for the Northern District of Illinois.

NAWL Public Service Award Susan S. Sher

Susan S. Sher, senior adviser to the president of the University of Chicago and to the executive vice president of Medical Affairs, is the recipient of NAWL's 2015 Public Service Award. The Public Service Award is presented to a lawyer who has demonstrated throughout her career a dedication and commitment to exemplary public service and social responsibility.

Sher returned to the University after spending two years at the White House where she was special assistant to the President and Associate White House Counsel – a position that focused on the legal issues related to health care reform. She also served as assistant to the President and Chief of Staff for Michelle Obama. In addition, she served as White House liaison to the Jewish community.

From 1993 to 1997 Sher was the first woman to serve as corporation counsel for the City of Chicago, the city's chief lawyer, responsible for representing the Mayor, city departments, boards and commissions on all legal matters. From 1985 to 1989 she was Associate General Counsel and Director of Labor & Litigation for the University of Chicago.

A graduate of the Loyola University of Chicago School of Law and George Washington University, Sher recently joined the Board of Trustees of Loyola University. She served previously on many boards, including as Chair of the University of Chicago Laboratory Schools and as Vice Chair of the Board of Trustees of Mt. Sinai Hospital Medical Center & Schwab Rehabilitation Hospital & Care Network. She also was on the Board of Directors of High Jump and of the YWCA of Greater Chicago. She also has served on a variety of task forces and committees involving not-for-profit corporations and healthcare, including the Illinois Hospital Association, the Attorney General's Charitable Advisory Task Force and the Donor's Public Trust Task Force.

NAWL Challenge Award McDonald's Corp.

McDonald's Corporate Legal Department is the recipient of this year's Challenge Award. The Challenge Award is presented annually to an in-house legal department that has either met or adopted policies designed to meet the NAWL Challenge – that by 2015, women will represent 30 percent of law firm equity partners, 30 percent of chief legal officers and 30 percent of tenured law school faculty members.

The award was accepted by Gloria Santona, executive vice president, General Counsel and secretary for McDonald's Corp. Santona leads McDonald's worldwide legal, compliance, regulatory and corporate governance functions. She also is involved in the company's strategic direction and growth. She joined McDonald's as an attorney shortly after law school, and has held several management positions in the legal department. She became corporate secretary in 1996; U.S. general counsel in 1999 and corporate general counsel in 2001.

Under Santona's leadership, women in the McDonald's legal group represented 50 percent of the global legal senior leadership team and more than 50% of the attorney positions in the legal group in the U.S.

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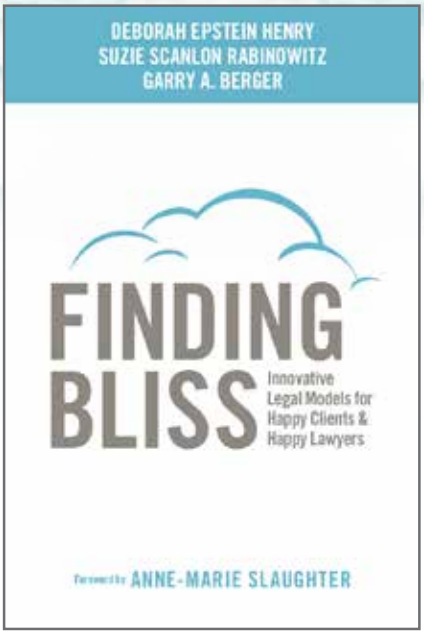

Finding Bliss

Innovative Legal Models for Happy Clients & Happy Lawyers

By Deborah Epstein Henry, Suzie Scanlon Rabinowitz and Garry A. Berger

HOW DOES A LAWYER FIND BLISS in a demanding, pressure-filled profession that is constantly in flux? Though the title of this book may leave you feeling somewhat skeptical, you may want to reserve judgment.

Each of the authors took the traditional path at the beginning of their legal careers, however, Garry A. Berger founded Berger Legal LLC, a virtual law firm, in 2002. Suzie Scanlon Rabinowitz recently launched SRD Legal Group, a women-owned virtual law firm; and Deborah Epstein Henry is president of Flex-Time Lawyers LLC. Then, in 2011, the three came together to found Bliss Lawyers, a secondment law firm, and in their new book, Finding Bliss, they share the expertise they gained along their journeys.

The book includes seven "key concepts" — with a chapter dedicated to each — in which the authors believe both traditional and new-model firms must focus to more effectively deliver legal services.

Given the authors' backgrounds, it follows the first concept would be Innovation. The chapter is dedicated to the multitude of changes affecting the legal world today — among them globalization, the need to serve international and increasingly sophisticated clients, as well as the trend of clients keeping more work in-house.

Innovation defines six law firm models evolving to address the changing demands of the profession: Process, Foundation and Information Firms; Virtual Law Firms; Secondment Firms; A Combined Virtual and Secondment Firm; Nontraditional Law Firms; and Evolved Traditional Law Firms.

Each chapter is introduced by a thought leader. Randal Milch, Executive Vice President and General Counsel, Verizon, opens the chapter on Value. "I believe the billable hour is at the root of many law firm challenges," he says, adding general counsel have a negative perception of hourly rates as related to value for law firm services.

The other five chapters are Predictability and Trust; Flexibility; Talent Development; Diversity and Inclusion; and Relationship Building.

Important concepts such as solid ethics, accountability and hard work will never change. However in the fast moving global, virtual world of the 2010s, nearly everything else must. To remain profitable law firms must innovate – perhaps on a daily basis. *Finding Bliss, Innovative Legal Models for Happy Clients & Happy Lawyers;* 2015 American Bar Association; 800 285-2221; www.shopaba.org.

Reviewed by WLJ editor Laura Williams. Send your suggestions for book reviews to williamslaura2000@hotmail.com.

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Panelists at the 2015 Mid-Year Meeting dispelled the myth that "nice girls don't" strive for power. Left to right, Susan Lees, executive vice president, general counsel and secretary of Allstate Insurance Co.; Laurel Bellows, principal of The Bellows Law Group PC; Lisa Madigan, Illinois Attorney General; Gloria Santona, executive vice president, general counsel and secretary of McDonald's Corp. and Susan Sher, senior adviser to the president of the University of Chicago and to the executive vice president of medical affairs.

Photo: Marty Morris/MPM Photography LLC

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Breakout sessions were well attended at the 2015 NAWL Mid-Year Meeting held in Chicago March 5. Seated front to back, Anne-Kathrin Kroemer, corporate counsel for Esurance; Tina McKeon, partner with Kilpatrick Townsend & Stockton LLP; Kerri Reuter, attorney with Allstate Insurance Co.; Andrea Kramer, partner with McDermott Will & Emery; Kristin Sostowski, director of Gibbons PC and Winnie Nguyen, employment attorney with Allstate Insurance Co.

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Theme at the 2015 NAWL Mid-Year Meeting was The Power of Us: Building a Better Future Together. Andrea Kramer, partner, with McDermott Will & Emery, left, and Stephanie D. Neely, vice president, assistant treasurer of Allstate Insurance Co. spoke on the topic "Building Clout While Navigating Gender Bias: Opening Up Career Opportunities for Women Lawyers" at one of the breakout sessions.

Photo: Marty Morris/MPM Photography LLC

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Discussion was lively at the 2015 NAWL Mid-Year Meeting. Stephanie A. Scharf, partner with Scharf Banks Marmor LLC, raises a question during one of the breakout sessions.

Photo: Marty Morris/MPM Photography LLC

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Networking Roster

The NAWL Networking Roster is a service for NAWL members to provide career and business networking opportunities within NAWL. Inclusion in the roster is an option available to all members, and is neither a solicitation for clients nor a representation of specialized practice or skills. Areas of practice concentration are shown for networking purposes only.

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INT International
INV Investment Services
IST Information Tech/ Systems
JUV Juvenile Law
LIT Litigation
LND Land Use
LOB Lobby/Government Affairs
MAR Maritime Law
MEA Media
MED Medical Malpractice
M&A Mergers & Acquisitions
MUN Municipal
NET Internet
NPF Nonprofit
OSH Occupational Safety & Health
PIL Personal Injury
PRB Probate & Administration
PRL Product Liability
RES Real Estate
RSM Risk Management
SEC Securities
SHI Sexual Harassment
SPT Sports Law
SSN Social Security
STC Security Clearances
TAX Tax
TEL Telecommunications
TOL Tort Litigation
TOX Toxic Tort
TRD Trade
TRN Transportation
T&E Wills, Trusts & Estates
WCC White Collar Crime
WOM Women's Rights
WOR Worker's Compensation

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NAWL meetings are a good place to network, meet colleagues and catch up with friends. Center, Erica Weisgerber, associate, Debevoise & Plimpton LLP takes a break from the intense atmosphere of the meetings.

Photo: Marty Morris/MPM Photography LLC

Join the Club!

Join the **NAWL Challenge Club** – work together to make lasting change in the legal profession.

In 2006, the National Association of Women Lawyers issued the NAWL Challenge to increase to at least 30 percent the number of women equity partners, women chief legal officers and women tenured law professors. While the profession has made strides in two of the areas, the number of women equity partners remains relatively stagnant. The NAWL Challenge Club is for those law firms and corporate legal departments committed to increasing the number of women equity partners in law firms.

Corporate legal departments that join the Club will have access to a network of top female talent from firms that are dedicated to advancing and retaining women attorneys. Law firms that join the Club will have the opportunity to select women on the equity partner track to participate in networking events and pitch sessions with corporate Club members.

Corporations are encouraged to join the Club by contacting Caitlin Kepple at kepplec@nawl.org. Law firm members must be Sustaining Sponsors of NAWL to receive membership in the Club. The number of memberships is dependent on Sustaining Sponsorship level. For information on becoming a 2015 NAWL Sustaining Sponsor, visit www.nawl.org/sustainingsponsor and contact Caitlin at kepplec@nawl.org.

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