WLJ WOMEN LAWYERS JOURNAL

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NAWL'S ANNUAL MEETING AND AWARDS LUNCHEON IN NEW YORK, NEW YORK

At NAWL's Annual Meeting and Awards Luncheon in New York, New York, the Honorable Judith S. Kaye was awarded the Arabella Babb Mansfield Award by incoming NAWL Vice President, Beth Kaufman. The award was given as part of NAWL's Annual Meeting and Awards Luncheon at the Waldorf=Astoria on July 22, 2010. Ms. Kaye joined Skadden Arp's Litigation Group in 2009 after retiring in 2008 as Chief Judge of the New York Court of Appeals, where she served for 15 years, longer than any other Chief Judge in New York's history. She first was appointed in 1983 by Governor Mario Cuomo as an associate judge of the Court of Appeals, becoming the first woman ever to serve on New York's highest court. She is the author of numerous publications, including articles on legal process, state constitutional law, women in law, professional ethics and problem-solving courts. She has also received numerous awards, including the ABA Commission on Women in the Profession's Margaret Brent Women Lawyers of Achievement Award.

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National Association of Women Lawyers®
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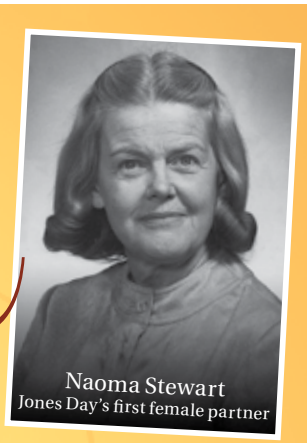
From One To Many



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ABOUT WOMEN LAWYERS JOURNAL

EDITOR
Deborah S. Froling
Washington, DC
froling.deborah@arentfox.com

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Book reviews or articles about current legal issues of general interest to women lawyers are accepted and may be edited based on the judgment of the editor. Editorial decisions are based upon potential interest to readers, timelines, goals, and objectives of the association and the quality of the writing. No material can be returned unless accompanied by a self-addressed, stamped envelope.

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CONTACT
National Association of Women Lawyers
American Bar Center, MS 15.2
321 North Clark Street
Chicago, IL 60654
t 312.988.6186 f 312.988.5491
nawl@nawl.org
www.nawl.org

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About NAWL

Founded in 1899, NAWL is a professional association of attorneys, judges and law students serving the educational, legal and practical interests of the organized bar and women worldwide. Both women and men are welcome to join. Women Lawyers Journal®, National Association of Women Lawyers®, NAWL, and the NAWL seal are registered trademarks.

By joining NAWL, you join women throughout the United States and overseas to advocate for women in the legal profession and women's rights. We boast a history of more than 100 years of action on behalf of women lawyers. For more information about membership and the work of NAWL, visit www.nawl.org.

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CONTACT NAWL

National Association of Women Lawyers
American Bar Center, MS 15.2
321 North Clark Street
Chicago, IL 60654
t 312.988.6186
f 312.988.5491
nawl@nawl.org
www.nawl.org

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EDITOR'S NOTE

In this issue, we celebrate NAWL's Annual Meeting and Awards Luncheon and its many well-deserving honorees. Please take a look at the pictures contained in this issue as well as those on our newly re-designed website at www.nawl.org. I highly recommend that you log onto the website and explore all that NAWL has to offer – committees, events, publications, articles of interest. Reach out to any of the committee chairs that you are interested in and get involved. It's a worthwhile experience. You should also read the article in this issue about how to stand out in a crowd. In this challenging economy and law firm environment, it is more important than ever to stand out, carve out your niche and "thrive against all odds." Susan Letterman White has provided us with a great road map to formulate your strategy to stand out. Read it and pass it along to a friend or colleague as well.

In addition, we have a competition winner here. For the fifth year, NAWL has sponsored the Selma Moidel Smith Law Student Writing Competition, which was established to encourage and reward original law student writing on issues concerning women and the law. The winning essay is entitled "Thirty Years of Labor Pains: How the Supreme Court Failed to Protect Working Women in *AT&T v. Hulteen* by Allowing Pregnancy Discrimination to Continue into the 21st Century" by Kate Kalanick of University of Minnesota Law School. Congratulations, Kate, on a job well done!

Our fifth NAWL survey will be printed in our next issue. Make sure to look for it and see what nuggets of information can be gleaned from it that will help you and your law firm in its retention and promotion of women.

I love hearing from our members and readers about what they like and don't like about the *Women Lawyers Journal*. If you have suggestions or want to write an article, please drop me an email. I hope you enjoy the issue!

Warm wishes,

Deborah S. Froling, Editor
Arent Fox LLP
Washington, D.C.
froling.deborah@arentfox.com

Think about it. We raise our hand to volunteer. We reach out our hand to help. We clap our hands in applause. We use our hands to make a gift. We need our hands to grow our business. We extend our hands in friendship. We use our hands for a pat on the back, a job well done, to pull people in. We lend a helping hand. We leave handprints on the future. And each hand, each handprint, is unique.

So many people who were able to join us for NAWL's 111th Annual Meeting and Awards Luncheon in July have responded affirmatively to that portion of my speech, as I raised my hand to take the role of President. So many have written to say yes, I want to communicate, collaborate, and connect with you at NAWL; yes, I want to help NAWL be THE home for all colleagues who align with our mission of advancing women in and under the law.

So let's start with how we can collaborate and how you can maximize your talents and skills to maximize NAWL's goals. Our MidYear will be in Miami in February. (lisa.m.passante@usa.dupont.com) We'll be having National Nights of Giving in the Fall and in the Spring where we bring an item on a designated charity's wish list and have no attendance fee. (abrandt@larsonking.com) Our General Counsel Institute for senior in-house women is November 4-5 in New York. (co-chairs: merrie.cavanaugh@att.com or kmorris@allstate.com) We're holding a Supreme Court CLE program in New Jersey (chair: ksostowski@gibbonslaw.com). We've got other programs planned. Join the Planning Committees, underwrite the events, attend. Share your NAWL experiences with your clients, colleagues and friends. Bring one to the next event – but please don't spend the time with her (or him). We offer national networking. We have programs to teach you how to network effectively and make the most of meetings and bring in business so you can mine existing relationships and develop new and effective ones and so that you can cultivate and curate the gifts and mission of NAWL. Bring us your colleagues who are in solo practices or small firms. (bobbi@melorolaw.com) We have teleconferences so they, like you, can participate from the office.

Join our Committees. We have a Program Committee (co-chairs: marsha.anastasia@pb.com and lrichardsyellen@hinshawlaw.com) Tell us what you want us to do, bring us your idea, and help us execute. Engage new members spanning law students to retirees (Anita.Thomas@nelsonmullins.com or smcdonough@gibsondunn.com) and introduce us to new sponsors who enable us to fulfill our mission. (Heather.giordanella@dbr.com or bkaufman@schoeman.com). Help us develop leaders, talent and the future workforce (lhorowitz@mwe.com) Be a mentor and part of one of the most robust programs of its kind (abrandt@larsonking.com). Write or edit for the Women Lawyers Journal, read by thousands, (froling.deborah@arendtfox.com, Maritza.ryan@usma.edu or holly.english@ppgms.com). Find opportunities for NAWL to be involved or co-sponsor. (pgillette@orrick.com) Find occasions for us to meet lawyers of all races and ethnicities. (allend@dicksteinshapiro.com) Work on our International Committee and its program in the United Kingdom. (weschmidt@deloitte.com) Monitor and report on legislation or join the amicus committee. (bkaufman@schoeman.com) Talk to our past president (lgilford@alston.com)

Be our eyes and ears. Share what firms and corporations are doing right and which ones are doing them. Tell us of men who are agents for change, who get it, who lead by example. Tell us the difference they've made and introduce us. Do you know an individual who should be acknowledged? Pass it on. Introduce us to your contacts in the media, find us speaking opportunities, seek avenues to discuss the NAWL Surveys and Summit Reports, contribute to our online discussions, send us important articles.(diprovav@nawl.org)

We are excited that you've taken our hand and we're grateful you've extended yours. Now let's get busy so we can leave a handprint together. I can be reached at dorian.denburg@att.com or 404-927-2888. Look forward to seeing you all soon.

Best wishes and regards,

Dorian Denburg
NAWL President 2010-2011

NAWL Annual Meeting and Awards Luncheon

July 22, 2010, New York, New York

On July 21 and 22, 2010, in New York City, NAWL held its Annual Meeting and Awards Luncheon at the famed Waldorf=Astoria hotel, along with a Night of Giving Networking Event at Alston + Bird's offices, featuring Sheryl WuDunn, co-author of "*Half the Sky*" and benefitting CARE. The Annual Meeting was chaired by NAWL President 2009-2010 Lisa Gilford, incoming President Dorian Denburg and Immediate Past President Lisa Horowitz, and featured CLE programs and NAWL award recipients. Over 800 attendees were on hand to congratulate the award winners, including the winners of the Virginia S. Mueller Outstanding Member Awards, Elicia Blackwell, Merrie Cavanaugh, Katherine Compton, Jennifer Guenther, Kristin Sostowski and Janet Stiven. The NAWL Public Service Award was presented to Elaine Jones, President and Director-Counsel Emeritus, NAACP Legal Defense Fund. Debra Lee, Chairman and CEO of BET Networks, was

At the Night of Giving at the offices of Alston + Bird, NAWL Board member Wendy Schmidt, CARE General Counsel Linda DiSantis, incoming NAWL President Dorian Denburg, Shirley WuDunn, NAWL President Lisa Gilford and LexisNexis Remarks' Senior Vice President Corporate Responsibility, Dawn Conway.

The incoming 2010-2011 NAWL Board: front row: DeAnna Allen, Deborah Froling, Anita Wallace Thomas, Heather Giordanella, Lisa Gilford, Holly English and Angela Beranek Brandt; back row: Beth Kaufman, Marsha Anastasia, Patricia Gillette, Col. Maritza Ryan, Dorian Denburg, Lisa Passante, Wendy Schmidt, Lisa Horowitz and Leslie Richards-Yellen. Not pictured: Sarretta McDonough.

Elaine Jones, President and Director-Counsel Emeritus, NAACP Legal Defense Fund speaking after she received the NAWL Public Service Award.

NAWL President Lisa Gilford addressing the capacity crowd at the NAWL Annual Meeting and Awards Luncheon.

NAWL Annual Meeting and Awards Luncheon

July 22, 2010, New York, New York

awarded the M. Ashley Dickerson Award. The NAWL President's Award was given to MetLife Inc.'s Legal Department and accepted by Nicholas Latrenta, General Counsel. The Honorable Judith S. Kaye was awarded the Arabella Babb Mansfield Award. In addition, the meeting included a number of programs, including a Keynote Address by Katie McCabe, author of "*Justice Older than the Law: The Life of Dovey Johnson Roundtree*," two panels, one entitled "Women Make Great Leaders: How to Translate Leadership Skills into Workplace Power," and the other "How the Economy and In-House Counsel are Changing the Legal Landscape: Opportunities and Challenges for All," a workshop entitled: "Strategies to Leverage Workplace Power" and the "Fourth Annual Conversation: Women Law Firm Leaders Collaborating to Move the Agenda Forward," facilitated by Karen Kahn of Threshold Advisors.

Winners of the NAWL Outstanding Member Awards, from left to right: Elicia Blackwell, Miami, FL; Merrie Cavanaugh, Dallas, TX; Katherine Compton, Dallas, TX; Heather Giordanella, NAWL's incoming President-Elect; Kristin Sostowski, Newark, NJ; Lisa Brown, accepting on behalf of Janet Stiven, Chicago, IL; Jennifer Guenther, San Bernandino, CA.

M. Ashley Dickerson Award winner, Debra Lee, Chairman and CEO of BET Networks, with NAWL Immediate Past President, Lisa Horowitz.

Attendees at the luncheon, front row: Judge La Tia Martin, Judge Laura Jacobson, retiring NAWL Board member Carol Robles-Román, NAWL Board member Deborah Froling; back row: Katherine Compton, Outstanding Member Award winner, the Honorable Judith S. Kaye, the Arabella Babb Mansfield winner, NAWL Immediate Past President Lisa Horowitz and NAWL Past President Holly English.

Incoming NAWL President Dorian Denburg with NAWL Public Service Award winner Elaine Jones.

WINNER—SELMA MOIDEL SMITH LAW STUDENT WRITING COMPETITION

Thirty Years of Labor Pains: How the Supreme Court Failed to Protect Working Women in *AT&T v. Hulteen* by Allowing Pregnancy Discrimination to Continue into the 21st Century

by Kate Kalanick

NAWL has established the annual Selma Moidel Smith Law Student Writing Competition to encourage and reward original law student writing on issues concerning women and the law. This is the fifth year of the competition and we were gratified to receive many superb entries. The winning essay is by Kate Kalanick, a third year law student at the University of Minnesota Law School. She serves as Student Articles Editor for Law & Inequality: A Journal of Theory and Practice. She also recently finished a term on the board of Minnesota Women Lawyers and remains active in the organization.

Selma Moidel Smith, in whose honor the Competition is named, has been an active member of NAWL since 1944. Smith is the author of NAWL's *Centennial History* (1999), and recently received NAWL's Lifetime of Service Award. She is a past Western Region Director, State Delegate from California, and chair of numerous NAWL committees. Selma served two terms as president of the Women Lawyers Association of Los Angeles, and was recently named their first and only Honorary Life Member. She was also president of the Los Angeles Business Women's Council. In the ABA Senior Lawyers Division, Selma was appointed the chair of the Editorial Board of Experience magazine (the first woman to hold that position) and was elected to the governing Council for four years, also serving as chair of several committees and as NAWL's Liaison to the Division. Selma is a member of the Board of Directors of the California Supreme Court Historical Society and is Publications Chair and Editor-in-Chief of the Society's annual journal, *California Legal History*. She was president, and also a Charter Member, of the National Board of the Medical College of Pennsylvania, which recently honored her at the Board's 50th anniversary.

Selma's career as a general civil practitioner and litigator are recognized in the first and subsequent editions of *Who's Who in American Law* and *Who's Who of American Women*, and also in *Who's Who in America*, among others. Her articles on the history of women lawyers have been published in the *Women Lawyers Journal* and *Experience* magazine, and have been posted online by the Stanford Women's Legal History Biography Project (together with her own biography). Her original research includes the discovery of the first two women members of the ABA (Mary Grossman and Mary Lathrop), both of whom were vice presidents of NAWL.

Selma is also a composer. Many of her 100 piano and instrumental works have been performed by orchestras and at the National Museum of Women in the Arts. She is listed in the *International Encyclopedia of Women Composers*.

In addition to the winner of the competition published on the following page, Victoria Hayes, a law student at Chicago-Kent College of Law, Illinois Institute of Technology, received an Honorable Mention for her essay entitled "*Islamic Burkas and Manolo Blahniks: Regulating Women's Dress*." Stacey Cho, a law student at Dedman School of Law at Southern Methodist University, won second place for her article entitled "*Uncovering the French Headscarf Affair: An Analysis of Religious Expression and Women's Equality.*" Congratulations to Victoria and Stacey!

A woman's role in society has changed dramatically in the past several decades, moving from traditional homemaker to working professional. Currently, half of the United States workforce is female.[1] Women earn sixty percent of college degrees and half of Ph.Ds.[2] Nearly forty percent of women in the workforce hold professional or managerial positions[3] and "[m]others have become the primary breadwinners in 4 in 10 American families."[4]

Yet despite all of the advances for women in the workplace, due both to legislative action and society's modernizing views, women still feel the effects of past discrimination, including in pay and benefits.[5] For example, thanks to the recent Supreme Court decision *AT&T Corp. v. Hulteen*, AT&T Corporation employees who took pregnancy leave prior to 1978 are now forever destined to receive smaller pension benefits than their male counterparts who worked at AT&T for the same length of time.[6]

In the 1960s and 1970s, AT&T Corporation ("AT&T") calculated retirement benefits for its employees based on an accrual system that gave less retirement credit to women taking pregnancy leave than it did to employees taking other types of leave.[7] In 1978, Congress passed the Pregnancy Discrimination Act[8] ("PDA"), officially expanding the definition of sex discrimination from the Civil Rights Act of 1964[9] to include "women affected by pregnancy."[10] In response to the passage of the PDA, AT&T altered its retirement calculation plan, now giving pregnant employees the same retirement credit given to employees taking leave for other temporary disabilities.[11]

In the 1990s, AT&T employees who had taken pregnancy leave prior to 1978 began to retire, and AT&T calculated their pensions based upon the old pension calculation plan, giving them less retirement credit and therefore smaller pensions than they would have had if they had taken pregnancy leave after the enactment of the PDA.[12] Four women sued AT&T, alleging sex discrimination in violation of Title VII.[13] The District Court, finding itself bound by a prior Ninth Circuit decision,[14] held that AT&T had violated Title VII.[15] The Ninth Circuit affirmed in *Hulteen v. AT&T Corp.* ("*Hulteen I*").[16] The Supreme Court reversed the Ninth Circuit judgment in *AT&T Corp. v. Hulteen* ("*Hulteen II*"), holding that since AT&T's pension plan was legal at the time the respondents took their pregnancy leaves, the different standard of compensation was acceptable,[17] despite the fact that if used today, the standard would violate the PDA.[18]

What follows is a critique of the analysis used by the Supreme Court to reach its decision in *Hulteen II*, in light of Congress' continued effort to have Title VII interpreted broadly to cover a wide variety of discrimination claims.[19] In addition, the Court's refusal to apply the newly enacted Lilly Ledbetter Fair Pay Act[20] narrows the legislation and reinforces gender discrimination in the workplace.

I. Discrimination against women in the workplace

Historic attitudes and viewpoints about women's role in society have limited women's success and accomplishments in the workplace, particularly where pregnancy is involved.[21] Up until the twentieth century, doctors advocated against both spouses working in a marriage.[22] A woman's first duty was motherhood and she was seen as unfit for employment[23] once she became a wife.[24] Such views deeply affected the treatment of women in the workplace.

A. Historic Attitudes About Pregnant Employees

Because society viewed a woman's first duty as motherhood, employers often assumed that a woman who quit her job because of pregnancy would never return to work.[25] Such assumptions led to gender discrimination in the workplace which continued to be prevalent until well after the first half of the 20th century.[26] Many women were forced to leave their workplace when an employer discovered their pregnancy.[27] Other employers required women to leave upon reaching a certain stage of the pregnancy.[28] Similar discriminatory views of pregnancy abounded even at the political level. One House report noted that "[u]ntil a woman passes child-bearing age, she is viewed by employers as potentially pregnant."[29] Decisions by the courts perpetuated society's views of women by allowing discrimination against women to continue in the workplace.

B. Judicial Precedent for Workplace Discrimination Against Women

In the late 19th and early 20th centuries, the Supreme Court often enforced discriminatory employment practices.[30] Only in recent decades has the Supreme Court found job discrimination when employers differentiate based upon gender. In 1971, the Court invalidated a law favoring men as estate administrators.[31] In 1973, the Court extended spousal benefits to female members of the uniformed services, benefits previously granted only to male members.[32] The Court, aware of its changing stance regarding sex discrimination in the workplace, noted in 2003 that "[t]he history of many state laws limiting women's employment opportunities is chronicled in--and until relatively recently, was sanctioned by--this Court's own opinions."[33]

Yet the Court failed to address the possibility that the statute does not have to be applied retroactively to find AT&T's pension system in violation of the PDA.

Despite Congress' efforts to protect women, issues of sex and pregnancy discrimination still remain in the workplace today. Instead of overruling Gilbert, to help alleviate this discrimination, the Court condoned the use of a now-illegal seniority system to calculate pension benefits.

II. Development Of Legislation To Prevent Discrimination In Employment Law

A. Title VII and The Civil Rights Act of 1964

In an attempt to eliminate discrimination in the wake of extreme racial segregation, Congress passed the Civil Rights Act of 1964.[34] Title VII of the Act referred specifically to discrimination in the workplace, making it unlawful to discriminate "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."[35] Section 703(h) of the Act provides an exception:

> [n]otwithstanding any other provision of this *title [42 UCSC §§ 2000e* et seq.], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . [36]

Section 703(h) gives deference to employers using bona fide seniority systems, allowing an employer to apply different standards to different groups of individuals without violating Title VII, despite the fact that such treatment might normally be considered discriminating against one group in violation of Title VII.

Despite the Civil Rights Act of 1964 and advances in society's concept of sex discrimination in the workplace, in a pivotal 1976 decision, *General Electric Co. v. Gilbert*, the Court found that discrimination on the basis of pregnancy was not a violation of Title VII.[37]

B. The Court's Interpretation of Title VII with Respect to Pregnancy

In *Gilbert*, a class of women employees sued General Electric Co. for excluding disabilities arising from pregnancy from their healthcare coverage.[38] The respondents claimed that the exclusion of pregnancy coverage violated Title VII.[39] The Court determined that even though the condition of pregnancy is confined to women, there was not enough of a connection between the terms of the plan and its effect to warrant a finding of gender discrimination.[40] The Court supported its decision by relying on findings from the district court, including the fact that "pregnancy is not a 'disease' at all, and is often a voluntarily undertaken and desired condition."[41]

The dissent in *Gilbert* argued that the holding not only ignored the guidelines created by the EEOC, who had been given the power by Congress to enforce Title VII, "but also reject[ed] the unanimous conclusion of all six Courts of Appeals that have addressed th[e] question" regarding pregnancy discrimination.[42] The dissent further noted that never in the past had General Electric Co. claimed its plan excluded voluntary disabilities, "including sport injuries, attempted suicides, venereal disease, [or] disabilities incurred in the commission of a crime . . ." and therefore the plan could not be considered gender neutral.[43]

Congress quickly expressed its discontent with the Court's decision in *Gilbert*.[44]

C. Language and History of the Pregnancy Discrimination Act (the "PDA")

In response to *Gilbert*, Congress enacted the PDA in 1978, a mere two years after *Gilbert*.[45] Congress enacted the PDA not to expand discrimination protection, but rather to clarify that it had intended to ban discrimination based on pregnancy in the original Civil Rights Act of 1964.[46] The Committee on Education and Labor, which evaluated the bill to amend Title VII, explained that the Court's misinterpretation of congressional intent behind Title VII created problems, noting that "[t]he Supreme Court's narrow interpretation of Title VII tends to erode our national policy of nondiscrimination in employment."[47]

The Committee expressed concern with language in *Gilbert* that discussed the § 703(h) exception to Title VII claims.[48] The Court's vague language prompted the Committee to recommend including in the PDA a reference to the § 703(h) exception for bona fide seniority systems in order to demonstrate that "it was necessary to expressly remove [§ 703(h)] from the pregnancy issue in order to assure equal treatment of pregnant workers."[49]

While the Court itself acknowledged that the PDA was passed in order to clearly reject the Court's reasoning in *Gilbert*,[50] it has continued to misinterpret Congress' intention regarding Title VII,[51] including its decision in *Hulteen II*. Despite the advances in women's employment rights such as the PDA, *Hulteen II* demonstrates that even with legislation in place meant to prevent discrimination, *Gilbert* can still have lingering effects.

III. The Procedural History Of *Hulteen II*

Between 1994 and 2002, four AT&T employees filed complaints with the EEOC regarding their pension statuses.[52] The women claimed that the seniority system calculations which excluded pregnancy discriminated on the basis of sex and therefore set their start dates ahead to a date much later than when they actually began to work for AT&T.[53]

The plaintiffs (collectively Hulteen) brought suit against AT&T, alleging violations of Title VII in the company's pension credit calculation.[54] Holding itself bound by a prior Ninth Circuit decision, the district court found a Title VII violation.[55] The Ninth Circuit affirmed,[56] reinforcing its holding in *Pallas v. Pacific Bell*, where the court found that women who had taken pregnancy leave prior to 1979 and had not received credit for that time were discriminated against on the basis of sex.[57] Because AT&T did not calculate Hulteen's pension benefits until 1994, many years after the PDA's enactment, the Ninth Circuit found that AT&T deliberately discriminated against Hulteen in the post-PDA setting by depriving her of benefits which would have accrued when she was "affected by pregnancy."[58]

IV. The Court's Analysis In *Hulteen II*

In determining that AT&T did not discriminate against pregnant women in violation of Title VII, the Court found that the § 703(h) exception to Title VII applied to AT&T's pension plan.[59] In order to make the determination that AT&T's pension plan was a bona fide seniority system that was not adopted with the intent to discriminate and therefore valid under § 703(h), the Court first looked to it its precedential case, *International Brotherhood of Teamsters v. United States.*[60] In *Teamsters*, a union and an employer, a common carrier of motor freight, were accused of using racially discriminatory hiring practices that excluded minorities.[61] The Court determined that although the "advantages of a seniority systems flowed disproportionately"[62] to the group of non-minorities, "both the literal terms of *§ 703(h)* and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them."[63]

The Court in *Hulteen II* found AT&T's seniority system was a bona fide one.[64] Because of the Court's decision in *Gilbert*, AT&T's system was legal at the time it was implemented, despite the fact that if implemented today in a post-PDA world, it would discriminate on its face on the basis of sex.[65] Therefore, the Court found AT&T's program fell under the § 703(h) exception, allowing for different treatment of the sexes, as long as the intent was not to discriminate.[66] The Court emphasized that the only way to find that § 703(h) did not apply was "to read the PDA as applying retroactively . . . ."[67] However, Congress clearly did not intend for the statute to have a retroactive effect, as retroactivity requires clear and affirmative intent from Congress.[68] The Court held that AT&T's program did not violate Title VII. [69]

V. An Examination Of The Flawed Reasoning In *Hulteen II* And Its Negative Impact On Discrimination Law Generally

The Court's analysis in *Hulteen II* overlooked many arguments that it had previously upheld and misapplied congressional legislation, thereby narrowing the impact of the Lilly Ledbetter Fair Pay Act.

A. Applying the PDA to AT&T's Pension Benefit System Does Not Require a Retroactive Application of the Statute

The Court in *Hulteen II* only briefly addressed the argument that applying the PDA to AT&T's pension system would require a retroactive application of the statute.[70] The Court determined that the only way for § 703(h) *not* to apply to AT&T's seniority pension system would be for the statute to apply retroactively.[71] The Court immediately dismissed the retroactivity option, noting that there is always a presumption against retroactive application unless Congress makes it explicitly clear that a statute should be read in such a manner.[72] The Court correctly determined that the statute should not apply retroactively.[73] Yet the Court failed to address the possibility that the statute does not have to be applied retroactively to find AT&T's pension system in violation of the PDA.

The fact that the Court ignored the possibility of non-retroactive application is ironic, considering it had addressed the issue in the past.[74] In *Bazemore v. Friday*, an employer segregated its workforce into two branches: a white and "Negro branch."[75] After the passage of the Civil Rights Act of 1964, the employer merged the branches, but former members of the Negro branch continued to feel the effects of the pay disparity between the former branches.[76] The Court noted that "a pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date."[77] Justice Brennan, joined in his concurrence by all of the Justices, penned his now famous line: "Each week's paycheck that delivers less to a black than to a similarly

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situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII."[78]

Bazemore demonstrated that an employer could not continue to use a pre-Title VII compensation system to determine wages by claiming that at the time the system was implemented, it was not discriminatory under the law.[79] Further, *Bazemore* clarified that an employer has an affirmative duty to fix the discriminatory effect of a compensation decision once it becomes illegal, as "employers who make post-enactment compensation decisions using methods that perpetuate disparities created by pre-enactment discrimination violate Title VII whenever those methods are applied."[80] "Yet, nowhere in *Bazemore* did this Court suggest that its holding gave Title VII a retroactive effect."[81]

The Court in *Hulteen II* dismissed *Bazemore* as not applicable to AT&T's plan, arguing that it does not apply since AT&T's pension plan falls under § 703(h) as a bona fide seniority system.[82] The Court also pointed out that the employer in *Bazemore* failed to eliminate his discriminatory practice when Title VII was passed, unlike AT&T, who changed its pension system with the enactment of the PDA.[83] This first argument lacks merit as § 703(h) should not apply to AT&T's pension system.[84] Further, just as black employees in *Bazemore* continued to feel the effects of discrimination that was not considered illegal until the passage of Title VII,[85] so too do AT&T employees feel the effects of pregnancy discrimination that was not illegal until the passage of the PDA.[86]

Though pregnancy discrimination may not have been illegal at the time the women took their pregnancy leaves, it is certainly illegal today.[87] Finding AT&T in violation of the PDA did not require the Court to read the statute as applying retroactively. AT&T calculated Hulteen's retirement benefits in 1994, at the time that she retired.[88] Though her start date had been moved forward at the time of her pregnancy leave, AT&T did not simply rely on those dates to calculate her pension at the time of retirement.[89] "Rather, when AT&T determines eligibility benefits, it reviews an employee's entire work history and affirmatively chooses to apply 'the policy at the time' that the leave accrued."[90] In doing such a review, AT&T makes an affirmative decision in a post-PDA world to apply a pension plan that became illegal in 1978. Therefore, AT&T discriminates against formerly pregnant employees at the time of their retirement, by granting full credit to "similarly situated employees" who took regular disability leave, as opposed to "personal" pregnancy leave.[91] AT&T's pension decision occurs after the enactment of the PDA, and therefore does not require the PDA to apply retroactively for AT&T's pension plan to be considered illegally discriminatory.[92]

B. The Supreme Court Misinterpreted Congressional Intent Regarding § 703(h) of Title VII in Relation to the PDA

The Court in *Hulteen II* applied § 703(h) to AT&T's pension plan, allowing the plan to fall under an exception to Title VII that permits bona fide seniority systems to treat groups differently, as long as the treatment is not based on discrimination.[93] The Court's use of § 703(h) was inappropriate for two reasons. First, § 703(h) does not apply because AT&T's use of the seniority system *did* include an intent to discriminate. Secondly, the PDA explicitly limited the use of § 703(h) when discrimination based on pregnancy was involved.

The § 703(h) exception only applies to bona fide seniority systems where no intent to discriminate exists.[94] Such detailed language simply does not apply to AT&T's pension plan. The Court decided that AT&T's plan did not technically facially discriminate at the time it originated because the Court in *Gilbert* determined that it was not illegal to discriminate against pregnancy.[95] Even if not facially discriminatory before, however, with the passage of the PDA, the plan did become illegal by treating a group differently on the basis of pregnancy.[96] AT&T reviews an employee's entire history at retirement, deciding whether to give added pension credit or not.[97] Because AT&T calculated Hulteen's pension benefits in 1994 at her retirement, AT&T made a decision in a post-PDA world to discriminate on the basis of pregnancy.[98] Therefore, AT&T's pension plan is facially discriminatory, not bona fide, and § 703(h) is inapplicable.[99]

Even if AT&T's pension plan were bona fide, it would still not fall under § 703(h). Due to Congress' concern with the mention of § 703(h) in the Court's *Gilbert* decision,[100] the PDA explicitly states that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . and nothing in section 703(h) of this *title [42 USCS § 2000e-2(h)]* shall be interpreted to permit otherwise."[101] Congress' explicit mention of § 703(h) demonstrated intent to prevent employers from relying on outmoded seniority systems, just as AT&T does in the present case, by using § 703(h) as an excuse. Such language made clear that § 703(h) is limited in scope and not applicable to AT&T's seniority system which violates the PDA, as "[a] later enacted specific

amendment, like the PDA, alters an earlier broad provision of [Title VII] when the amendment states that it should control."[102]

Further, the purpose behind § 703(h) was to protect employers with bona fide seniority systems from experiencing unpredictable financial consequences as a result of new legislation.[103] Yet AT&T should have been aware that it would be expected to pay women retiring after the enactment of the PDA full pension benefits for pregnancy leave. First, the women in *Hulteen II* all took their pregnancies prior to 1976,[104] and at the time of their leaves, there was a consensus that discrimination against pregnancy was illegal.[105] It was not until the Court's decision in *Gilbert* that pregnancy discrimination was considered "legal," and even then only until the 1978 passage of the PDA.[106] Therefore, even at the time the employees took their pregnancy leaves, AT&T should have already expected to be required to pay the women full pension benefits. Further, AT&T was clearly aware that their former pension plan was discriminatory after the passage of the PDA, since they immediately opted to change plans.[107] It would have been reasonable for AT&T to expect to have to re-adjust start dates for employees who had taken pregnancy leave as personal leave under the old pension system to avoid violating the PDA.[108]

Beyond the fact that AT&T should have been aware that it would have to pay pension benefits for the pregnancy leave time taken by former employees, the financial consequences to AT&T of such a requirement are minimal. The lengths of service that would need to be added to each woman's pension calculation are only weeks or months, not years.[109] The cost to AT&T of adding pension benefits would be over the years the pensions are paid out, not all at once.[110] Because the adjustment would only apply to women who took pregnancy leave prior to the enactment of the PDA and have worked at AT&T long enough to have a pension vest, the financial impact on AT&T would be minimal.[111] Beyond the minimal cost, because the addition of seniority credit is based on an individual's pension plan, as opposed to competitive seniority status, the added benefits would not affect any other employees.[112] Therefore, not only does § 703(h) not apply to AT&T's pension system, the plan does not even fall under the intended purpose of the section.

C. The Recent Lilly Ledbetter Fair Pay Act Should Be Applied in *Hulteen II*

The Court quickly dismissed the argument that § 706(e),[113] otherwise known as the recently adopted Lilly Ledbetter Fair Pay Act, might apply in *Hulteen II*.[114] Relying on its previous explanation for why § 703(h) applied, the Court concluded that because the act of discrimination occurred when Hulteen took her pregnancy leave, pre-PDA, the discrimination was not illegal and therefore the effects of the act did not violate the PDA without retroactive application of the statute.[115] This limited analysis failed to consider the language of the legislation, which expands the time frame for bringing an unlawful compensation claim.
First, § 6 of the Lilly Ledbetter Fair Pay Act demonstrated Congress' intent for the legislation to apply to situations such as Hulteen's. It reads: "This Act, and the amendments made by this Act, take effect as if enacted on May 28, 2007 and apply to all claims of discrimination in compensation under title VII . . . that are pending on or after that date."[116] The express language clarifies that the statute does apply retroactively. As Hulteen's claim was pending at the time of enactment, it comes within the terms of the statute, despite the fact that the statute was enacted after filing of the claim.

The language of the modified Title VII also makes clear that employees challenging a seniority system based on discriminatory pension benefits can challenge at three points: when the discriminatory system is adopted, when the employee becomes subject to the system, or when an employee is affected by the "application of a discriminatory compensation decision."[117] The use of the word "or" in the legislation demonstrates that the language is meant to be read disjunctively.[118] Therefore, Hulteen could challenge the discriminatory decision now under the third option in the legislation, because she currently feels the effects of the discriminatory system by receiving a lower pension payment every month than other individuals who worked for AT&T for the same length of time. AT&T's unlawful employment practice is subject to Title VII because the company's 1994 decision to use the seniority system occurred in a post-PDA world, and was therefore a decision made with an intentionally discriminatory purpose.[119]

D. *Gilbert* Should Be Overruled to Demonstrate Lack of Tolerance for Pregnancy Discrimination

Beyond failing to correctly apply legislation in *Hulteen II*, the Court failed by not expressly overruling *Gilbert* to clarify that pregnancy discrimination remains illegal. The speed with which Congress passed the PDA, less than two years after the *Gilbert* decision, and Congress' explicit statement regarding how incorrectly the Court interpreted pregnancy discrimination, truly demonstrated the strength of Congress' repudiation of *Gilbert*.[120] Yet thirty-

Considering the fact that the Court has continually been admonished by Congress for too narrowly interpreting its legislation enacted to protect against discrimination in employment law, the Court should have given more consideration to the Lilly Ledbetter Fair Pay Act's application in *Hulteen II*.

three years after the Court's unfortunate interpretation of Title VII, the Court still relied on *Gilbert* to interpret new cases,[121] instead of taking the opportunity to overrule *Gilbert* once and for all.[122]

More than thirty years after the enactment of the PDA, women are still discriminated against on the basis of pregnancy because of one poorly decided case. Indeed, the purpose of the PDA was to "protect women, from and after April 1979, when the Act became fully effective, against repetition or continuation of pregnancy-based disadvantage."[123] It is disappointing that even after such a clear repudiation by Congress via the PDA, the Court would use *Gilbert* as its main source of support in deciding *Hulteen II*.[124] The use of such a universally rejected case emphasizes the Court's disconnect with the reality of sex discrimination in employment law. Despite Congress' efforts to protect women, issues of sex and pregnancy discrimination still remain in the workplace today.[125] Instead of overruling *Gilbert*, to help alleviate this discrimination, the Court condoned the use of a now-illegal seniority system to calculate pension benefits.[126] As a result, the women "in this action will receive, for the rest of their lives, lower pension benefits than colleagues who worked for AT&T no longer than they did."[127]

E. Hulteen II Narrows the Impact of the Lilly Ledbetter Fair Pay Act

The Court's decision to dismiss the applicability of § 706(e) to AT&T's pension plan narrowed the impact of the Lilly Ledbetter Fair Pay Act.[128] In its analysis of § 706(e), the Court "said that the use of § 706(e) is premised on an adoption of 'an intentionally discriminatory' seniority system," and since the PDA was not enacted until after the use of the system, the seniority system was not intentionally discriminatory at the time of its adoption.[129] Such a narrow reading of § 706(e) means that any time discrimination occurs in a seniority system prior to the passage of legislation to protect against that discrimination, § 706(e) cannot provide relief to employees who were discriminated against, even if decisions made in reliance on that seniority system are made years after passage of legislation.

The purpose of the Lilly Ledbetter Fair Pay Act was not only to extend the statute of limitation for bringing claims, but also to "declare[] that reliance upon such decisions and practices constitutes a new and independent unlawful employment practice, occurring on the date the tainted compensation is paid."[130] Yet the Court declared that Hulteen is only feeling the effects of a formerly legal compensation decision and hence AT&T is not violating the PDA, ignoring the fact that reliance on the formerly legal system has been illegal for over thirty years.[131] This legislation specifically intended to eradicate the ability of companies like AT&T to avoid consequences for discriminatory seniority systems.[132] Considering the fact that the Court has continually been admonished by Congress for too narrowly interpreting its legislation enacted to protect against discrimination in employment law,[133] the Court should have given more consideration to the Lilly Ledbetter Fair Pay Act's application in *Hulteen II*. While Congress once again attempted to "expand the playing field for pay discrimination claims,"[134] the Court in *Hulteen II* continued to interpret Congress' legislation in an unacceptably narrow manner.

VI. Conclusion

Now that the Court has narrowed the impact of the Lilly Ledbetter Fair Pay Act, women in situations such as Hulteen's have little recourse. There is hope that Congress may act to overturn *Hulteen II*.[135] Indeed, it would seem hard for Congress not to overrule *Hulteen II*, considering the Court relied mainly on *Gilbert*, a case that Congress explicitly overruled itself with the PDA,[136] and on § 703(h) of Title VII, which Congress explicitly limited in its application to pregnancy discrimination.[137]

If Congress chooses not to act, however, the Court's decision will impact more than just those women who took pregnancy leave decades ago, but also individuals seeking redress under discrimination statutes yet to be enacted. Indeed, the Supreme Court has narrowed the Lilly Ledbetter Fair Pay Act and without an act of Congress, permanently excluded a class of individuals facing discrimination under workplace seniority systems.

[1] Maria Shriver, The Shriver Report: A Study by Maria Shriver and the Center for American Progress (2009), available at http://awomansnation.com/awn.php.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *See*, e.g., AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1975 (2009) (holding that women who took pregnancy leave prior to the passage of the Pregnancy Discrimination Act are not eligible to receive higher pension benefits, despite being discriminated against based on sex).

[6] *Id.* at 1975 (Ginsburg, J., dissenting).

[7] *Id.* at 1966. Pregnancy leave was treated as personal leave rather than disability leave. *Id.* "AT&T employees on 'disability' leave got full service credit for the entire periods of absence, but those who took 'personal' leaves of absence received maximum service credit of 30 days." *Id.* at 1967.

[8] 42 U.S.C. § 2000e(k) (2006).

[9] Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e et seq. (2000)).

[10] 42 U.S.C. § 2000e(k).

[11] AT&T Corp., 129 S. Ct. at 1967.

[12] *Id.*

[13] *Id.*

[14] *See* Pallas v. Pac. Bell, 940 F.2d 1324, 1327 (9th Cir. 1991) (holding that a Title VII violation occurs when retirement calculations done post-PDA are based on a pre-PDA company policy that differentiates based on pregnancy).

[15] Hulteen v. AT&T Corp., 441 F.3d 653, 670 (9th Cir. Cal. 2006).

[16] Hulteen v. AT&T Corp. (*Hulteen I*), 498 F.3d 1001, 1015 (9th Cir. 2007).

[17] *See* Gen. Elec. Co. v. *Gilbert*, 429 U.S. 125, 134–35 (1976) (declaring that differentiating on the basis of pregnancy was not sex-based discrimination under Title VII).

[18] *Hulteen II*, 129 S. Ct. at 1970.

[19] *See, e.g., infra note* 46–47 and accompanying text, noting that Congress intended for Title VII to be interpreted broadly.

[20] Section 706(e), is a 2009 amendment to Title VII known as the Lilly Ledbetter Fair Pay Act. *See* Lilly Ledbetter Fair Pay Act, 42 U.S.C.A. § 2000e-5(e) (West 2006). The amendment, enacted by Congress in response to the Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, clarifies that unlawful discrimination in compensation occurs not only when the compensation practice is adopted or when an individual becomes subject to the practice, but also when "an individual is *affected* by the application of a discriminatory compensation decision . . . including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." *Id.* (emphasis added). *See also* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 628 (2007) ("The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination.").

[21] *See generally* Courtni E. Molnar, "*Has the Millennium Yet Dawned?": A History of Attitudes Toward Pregnant Workers in America*, 12 Mich. J. Gender & L. 163 (2005) (analyzing the negative impact social expectations have on women's ability to achieve success in the workplace).

[22] Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 310 (1992).

[23] Molnar, *supra* note 21, at 167.

[24] *Id.* at 168.

[25] *See Id.* at 167.

[26] *Id.*

[27] *Id.* at 170.

[28] *Id.*

[29] Prohibition of Sex Discrimination Based on Pregnancy, House Committee on Education and Labor, H.R. Rep. No. 95-948, at 6–7, *reprinted in* 1978 U.S.C.C.A.N. 4749.

[30] AT&T Corp. v. Hulteen (*Hulteen II*), 129 S. Ct. 1962, 1978–79 (2009) (Ginsburg, J., dissenting). These decisions included allowing the exclusion of women from practicing law, upholding a statute setting working hour limitations for women only, prohibiting women from becoming bartenders, and exempting women from mandatorily serving on juries. *See* Bradwell v. State, 83 U.S. 130, 139 (1 Wall.) (1873); Muller v. Oregon, 208 U.S. 412, 422 (1908); Goesaert v. Cleary, 335 U.S. 464, 466 (1948); Hoyt v. Florida, 368 U.S. 57, 62 (1961).

[31] *See* Reed v. Reed, 404 U.S. 71, 76-77 (1971) (giving job preference to one sex in order to reduce the workload on probate courts is not a valid state objective allowing differentiation between the sexes).

[32] *See* Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) ("[B]y according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.").

[33] *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 729 (2003) (finding Congress had the right to create legislation to protect employees taking family leave from work, since States often discriminated on the basis of sex by preventing men from taking needed leave to deal with family emergencies).

[34] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, codified as amended at 42 U.S.C. § 2000e et seq. (2006).

[35] *Id.* at § 2000e-2(a)(1).

[36] *Id.* at § 2000e-2(h).

[37] Gen. Elec. Co. v. *Gilbert*, 429 U.S. 125, 145–46 (1976).

[38] *Id.* at 127.

[39] *Id.*

[40] *Id.* at 134–35.

[41] *Id.* at 136 (citing *Gilbert* v. General Electric Co., 375 F. Supp. 367, 377 (E.D. Va. 1974)).

[42] *Id.* at 146–47 (Brennan, J., dissenting). At the time of the Court's decision in *Gilbert*, all the Courts of Appeals that had addressed the question had found a Title VII violation for pregnancy discrimination. *See*, e.g., Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 206 (3d Cir. 1975) (holding that an income protection plan excluding pregnancy violates Title VII). The dissent also strongly urged deference to the EEOC in determining congressional intent behind Title VII. *Gilbert*, 429 U.S. at 157–58 (Brennan, J., dissenting). The EEOC guidelines, promulgated in 1972, labeled pregnancy discrimination as a form of sex discrimination. *See* Gen. Elec. Co. v. *Gilbert*, 429 U.S. 125, 141 (1976) (citing 29 CFR § 1604.10(b) (1975)).

[43] *Gilbert*, 429 U.S. at 151 (Brennan, J., dissenting).

[44] *See* Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2006).

[45] *See Id.*; Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 670 (1983) (noting that the PDA was enacted to overrule *Gilbert*).

[46] Prohibition of Sex Discrimination Based on Pregnancy, House Committee on Education and Labor, *supra* note 29, at 4750. The Committee on Education and Labor noted that until the Supreme Court decision in *Gilbert*, "[e]ighteen federal district courts and all seven federal courts of appeals which ha[d] considered the issue ha[d] rendered decisions prohibiting discrimination in employment based on pregnancy, in accord with the federal guidelines." *Id.* ". . . the Bill is merely reestablishing the law as it was understood prior to *Gilbert* by the EEOC and by the lower courts . . ." *Id.* at 4756.

[47] *Id.* at 4750–51.

[48] *See supra* note 36 and accompanying text for the wording of § 703(h), which allows unequal treatment under bona fide seniority systems when the system was not enacted with an intent to discriminate. The PDA explicitly states that § 703(h) should not be interpreted to permit pregnancy discrimination, because the "disclaimer was necessitated by the Supreme Court's reliance in the *Gilbert* case on section 703(h) of Title VII." *See* H.R. Rep. No. 95-948 at 4755.

[49] *Id.*

[50] Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983).

[51] The Civil Rights Act of 1964 was amended again in 1991 in response to the Court's decision in *Lorance v. AT&T Technologies,* where the Court limited the time frame to bring a discrimination claim by determining that the adoption of the discriminatory practice triggered the statute of limitations. *See* Lorance v. AT&T Technologies, 490 U.S. 900, 911-12 (1989). *See also Hulteen v. AT&T Corp.* (*Hulteen I*), 498 F.3d 1001, 1011 (9th Cir. 2007) (noting that the Civil Rights Act of 1991 was intended to overrule *Lorance*). *Lorance* effectively prevented some claims from being brought at all. If the discriminatory practice had been adopted prior to the hiring of the employee being discriminated against, then the employee may have missed the statute of limitations, despite the fact that the effect of the discrimination would still be present. *Lorance*, 490 U.S. at 913-14 (Marshall, J., dissenting). The Civil Rights Act of 1991 amended Title VII by expanding the right of employees to challenge discriminatory seniority systems, stating that:

> [A]n alleged unlawful employment practice occurs when a seniority system is adopted, when an individual becomes subject to a seniority system, or when a person aggrieved is injured by the application of a seniority system, or provision thereof, that is alleged to have been adopted for an intentionally discriminatory purpose, in violation of this title, whether or not that discriminatory purpose is apparent on the face of the seniority provision.

Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[52] *Hulteen v. AT&T Corp.* (*Hulteen I*), 498 F.3d 1001, 1004 (9th Cir. 2007). Noreen Hulteen, lead plaintiff, retired in 1994 with 210 days of uncredited pregnancy leave, which caused her to receive lower pension benefits. *Id.* Eleanora Collet retired in 1998 with 261 days of uncredited pregnancy leave. *Id.* Linda Porter, a current employee, has seventy-three days of uncredited pregnancy leave. *Id.* Further, Porter was forced to take leave prior to her pregnancy becoming disabling. *Id.* Finally, Elizabeth Snyder retired in 2000 with sixty-seven days of uncredited pregnancy leave. *Id.*

[53] Posting of Charlotte Fishman to Today's Workplace: Workplace Fairness Blog, http://www.todaysworkplace.org/tag/noreen-hulteen/ (Sept. 26, 2008). For example, Noreen Hulteen began working continuously at AT&T on January 1, 1964, but due to uncredited leave time for pregnancy, her start date was set at August 3, 1965 for calculating pension benefits. *See Id.* Communication Workers of America ("CWA"), the "collective bargaining representative for the majority of AT&T's non-management employees," also filed a complaint with the EEOC. *Hulteen I*, 498 F.3d at 1004.

[54] *Id.* at 1004.

[55] *Id.*

[56] *Id.* at 1015.

[57] Pallas v. Pac. Bell, 940 F.2d 1324, 1326 (9th Cir. 1991).

[58] *Hulteen I*, 498 F.3d at 1011. The Ninth Circuit's decision created a split in the circuits regarding the issue of pre-PDA pregnancy leave and post-PDA retirement benefits. Compare Ameritech Benefit Plan Comm. v. Cmty. Workers of Am., 220 F.3d 814, 823 (7th Cir. 2000) (holding that a pension plan giving less benefits for pregnancy leave was not discriminatory under § 703(h) of Title VII, as the discriminatory effects were from a bona fide seniority system that was lawful under *Gilbert* prior to the enactment of the PDA), and Leffman v. Sprint Corp., 481 F.3d 428, 433 (6th Cir. 2007) (holding a pregnancy discrimination claim as time-barred since there was no proof that Sprint treated women taking pregnancy leave any differently than employees taking non-credited leave in general), with *Hulteen I*, 498 F.3d at 1013–14 (holding that relying on pre-PDA pension benefit plans to calculate post-PDA pensions violates the PDA, as the § 703(h) exception for bona fide seniority systems does not apply).

[59] AT&T Corp. v. Hulteen (*Hulteen II*), 129 S. Ct. 1962, 1970 (2009).

[60] *Hulteen II*, 129 S. Ct. at 1969-70.

[61] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 329–30 (1977).

[62] *Hulteen II*, 129 S. Ct. at 1969.

[63] *Int'l Bhd. of Teamsters*, 431 U.S. at 350.

[64] *Hulteen II*, 129 S. Ct. at 1970.

[65] *See Id.* at 1970–71 ("AT&T's intent when it adopted the pregnancy leave rule (before the PDA) was to give differential treatment that as a matter of law, as *Gilbert* held, was not gender-based discrimination.").

[66] *Id.* at 1970.

[67] *Id.* at 1971.

[68] *See* Landgraf v. Usi Film Prods., 511 U.S. 244, 272–73 (1994).

[69] *Hulteen II*, 129 S. Ct. at 1973.

[70] *Id.* at 1971.

[71] *Id.*

[72] *Id.* This presumption against retroactivity is to protect employers against potential unfairness resulting from being required to pay unexpected compensation to employees after the passage of new legislation. Landgraf v. Usi Film Prods., 511 U.S. 244, 272–73 (1994).

[73] It is clear that Congress did not intend for the PDA to apply retroactively, as the bill provided for a transition period of 180 days for employers to comply with the provisions. *See* Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2006).

[74] *See* Bazemore v. Friday, 478 U.S. 385 (1986) (per curiam) (Brennan, J., concurring, joined by all other Members of the Court, concurring in part).

[75] *Id.* at 390.

[76] *Id.* at 390–91.

[77] *Id.* at 395.

[78] *Id.* at 395–96.

[79] *Id.* at 396–97.

[80] Brief Amici Curiae of the National Employment Lawyers Association et al. in Support of Respondents, AT&T Corp. v. Hulteen (*Hulteen II*), 129 S. Ct. 1962 (2009) (No. 07-543).

[81] Brief on behalf of Caitlin Borgmann et al. as Amici Curiae Supporting Respondents, AT&T Corp. v. Hulteen (*Hulteen II*), 129 S. Ct. 1962 (2009) (No. 07-543).

[82] AT&T Corp. v. Hulteen (*Hulteen II*), 129 S. Ct. 1962, 1972 (2009).

[83] *Hulteen II*, 129 S. Ct. at 1972.

[84] *See infra* Part V.B.

[85] *See* Bazemore v. Friday, 478 U.S. 385, 395–96 (1986) (per curiam) (Brennan, J., concurring, joined by all other Members of the Court, concurring in part).

[86] *See Hulteen II*, 129 S. Ct. at 1980 (Ginsburg, J., dissenting).

[87] *See Id.* at 1975.

[88] *Hulteen v. AT&T Corp.* (*Hulteen I*), 498 F.3d 1001, 1011 (9th Cir. 2007).

[89] *Id.* at 1012.

[90] *Id.* When reviewing an employee's history at the time of the employee's retirement, AT&T has been known to move an employee's start date back in time, effectively giving pension credit for leave time taken years ago. *Id.*

[91] Brief of Amici Curiae Lawyer's Committee for Civil Rights Under Law, et al. in Support of Respondents, AT&T Corp. v. Hulteen (*Hulteen II*), 129 S. Ct. 1962 (2009) (No. 07-543).

[92] It is also worth noting that AT&T's pension plan might still have been held illegal even prior to the passage of the PDA. While for a brief time the Court's decision in *Gilbert* allowed for pregnancy discrimination, prior to its decision there was a rising consensus that pregnancy discrimination was banned in 1964 under Title VII. *See supra* note 46. The PDA did not change established expectations about pregnancy discrimination, since the PDA's purpose was really to re-establish the law as Congress had intended it to be under Title VII, which was misinterpreted by the *Gilbert* Court. Brief of Appellee-Respondent at 43, AT&T Corp. v. Hulteen (*Hulteen II*), 129 S. Ct. 1962, No. 07-543 (Nov. 7, 2008). Congress proposed the PDA legislation only three months after the *Gilbert* decision, and considering it was passed only two years later, there was only a short period where employers could claim that pregnancy discrimination was widely acceptable under the law. *See Id.* All of the respondents in *Hulteen II* took their pregnancy leaves prior to that brief window between *Gilbert* and the PDA, and therefore AT&T should have already been on notice of the potential illegality of the pension plan. *See* Brief of the National Women's Law Center et al. as Amici Curiae in Support of Respondents, AT&T Corp. v. Hulteen (*Hulteen II*), 129 S. Ct. 1962 (2009) (No. 07-543).

[93] 42 U.S.C. § 2000e-2(h) (2006).

[94] 42 U.S.C. § 2000e-2(h).

[95] *See* Gen. Elec. Co. v. *Gilbert*, 429 U.S. 125, 139 (1976). There is an argument that even prior to the PDA, discrimination against pregnancy was illegal and therefore § 703(h) could not apply. *See supra* note 92.

[96] *See supra* Part V.A regarding AT&T's affirmative pension decision in a post-PDA world.

[97] Hulteen v. AT&T Corp. (*Hulteen I*), 498 F.3d 1001, 1011–12 (9th Cir. 2007).

[98] *Id.*

[99] *See* Transcript of Record at 41, AT&T Corp. v. Hulteen (*Hulteen II*), 129 S. Ct. 1962 (No. 07-543). Despite the fact that Hulteen did not bring a claim at the time of her pregnancy leave, that does not prevent her from bringing one now, since under the Civil Rights Act of 1991, Congress clarified that a claim of intentionally discriminatory practices can be brought when a seniority system is adopted, when a person becomes subject to the system, or when the "person aggrieved is injured by the application of the seniority system . . . ." Civil Rights Act of 1991 § 112(2), 105 Stat. at 1079.

[100] *See supra* Part II.C.

[101] Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2006).

[102] *Hulteen I*, 498 F.3d at 1013–14 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000)).

[103] Bureau of National Affairs, 32 Empl. Discrim. Rep. 599 (2009).

[104] *See* Brief of the National Women's Law Center et al. as Amici Curiae in Support of Respondents, AT&T Corp. v. Hulteen (*Hulteen II*), 129 S. Ct. 1962 (2009) (No. 07-543).

[105] *See supra* note 46.

[106] *See supra* Part II.B–C.

[107] AT&T Corp v. Hulteen, 129 S. Ct. 1962, 1967 (2009).

[108] This is particularly true since in 2002, Verizon Wireless settled a lawsuit based on a very similar situation, paying former employees higher pension benefits for pregnancy leaves taken prior to the enactment of the PDA. Press Release, Equal Employment Opportunity Commission, EEOC and Verizon Settle Pregnancy Bias Suit; Thousands of Women to Receive Benefits (Feb. 26, 2002), available at http://www.eeoc.gov/press/2-26-02.html (last visited Sept. 27, 2009).

[109] *Hulteen II*, 129 S. Ct. at 1978 (Ginsburg, J., dissenting).

[110] *Id.*

[111] *Id.*

[112] *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 766 (1976) (noting that benefit seniority differs from competitive seniority because a change in status would not affect other employees' economic interests).

[113] The amendment, enacted by Congress in response to the Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, clarifies that unlawful discrimination in compensation occurs not only when the compensation practice is adopted or when an individual becomes subject to the practice, but also when "an individual is *affected* by the application of a discriminatory compensation decision . . . including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." Lilly Ledbetter Fair Pay Act, 42 U.S.C.A. § 2000e-5(e) (West 2006) (emphasis added).

[114] *Hulteen II*, 129 S. Ct. at 1972–73.

[115] *Id.*

[116] Lilly Ledbetter Fair Pay Act, § 6, 123 Stat. 5 (2009), codified as amended at 42 U.S.C.A. § 2000e et seq. (West 2009).

[117] *See* 42 U.S.C. § 2000e-5(e)(2).

[118] *See* Brief of Amici Curiae Lawyer's Committee for Civil Rights Under Law, *supra* note 91 (comparing the Civil Rights Act of 1991, a similarly written statute: "Because the amendment lists three separate events, any one of which constitutes the occurrence of an unlawful employment practice, each of those three events must have a separate and distinct meaning.").

[119] Even if the system was not considered purposefully discriminatory at the time it was originally adopted in 1914 because at the time it was not illegal to discriminate on the basis of pregnancy, the system became illegal with the passage of the PDA. *See* 42. U.S.C. § 2000e(k). Clearly every discriminatory system would be excluded from Title VII if the discriminatory system had to be adopted after the legislation preventing it. Therefore, as long as the system was used once it became illegal and discriminatory, then it can be labeled a discriminatory system as "adopted" for the purposes of Title VII. This is made clear with the Court's decision in Bazemore:

> A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute.

Bazemore v. Friday, 478 U.S. 385, 395 (1986) (per curiam) (Brennan, J., concurring). AT&T's 1994 decision was a use of an illegal seniority system after the PDA became effective, and therefore AT&T is liable for discrimination.

[120] *See* Motion for Leave to File Supplemental Brief After Argument, AT&T Corp. v. Hulteen, U.S. Briefs 543 at *7 (Feb. 12, 2009) (No. 07-543).

[121] AT&T Corp. v. Hulteen (*Hulteen II*), 129 S. Ct. 1962, 1970 (2009) ("[T]his Court held in *Gilbert* that an accrual rule limiting the seniority credit for time taken for pregnancy leave did not unlawfully discriminate on the basis of sex.").

[122] *Id.* at 1975 (Ginsburg, J., dissenting) ("Congress interred *Gilbert* more than 30 years ago, but the Court today allows that wrong decision still to hold sway.").

[123] *Hulteen II*, 129 S. Ct. at 1975 (Ginsburg, J., dissenting).

[124] *See Id.* at 1970–71.

[125] Bureau of National Affairs, *supra* note 103, at 599. President Debra L. Ness of the National Partnership for Women & Families in Washington noted:

> The U.S. Supreme Court today dealt a painful and serious blow to America's working women and the families who rely on their retirement benefits . . . . [Such a decision] forces women to pay a high price today because their employers discriminated yesterday. . . . [The decision is] a terrible blow to the equal opportunity laws women and people of color have long relied on . . . . In the current economic climate, women and their families cannot afford to *see* their retirement benefits kept lower by discriminatory workplace policies that should have been remedied decades ago.

Id.

[126] *See Hulteen II*, 129 S. Ct. at 1975 (Ginsburg, J., dissenting).

[127] *Id.* at 1975.

[128] *See* Charles Sullivan, *Raising the Dead?: The Lilly Ledbetter Fair Pay Act*, 84 Tul. L. Rev. 499, 549 (2010). Sullivan argues that *Hulteen II* narrows the impact of the Lilly Ledbetter Fair Pay Act by confirming that a seniority system which carries "forward into the present the effects of past disparate treatment [is] not sufficient for a violation." *Id.* However *Hulteen II* narrows the impact of the legislation beyond that. Since AT&T's discriminatory compensation decision was made in 1994, *after* the PDA, *Hulteen II* prevents any compensation decisions made in a post-PDA world and relying on a pre-PDA seniority system from being actionable under the Lilly Ledbetter Fair Pay Act.

[129] Bureau of National Affairs, *supra* note 103, at 599.

[130] *See* Motion for Leave to File Supplemental Brief After Argument, AT&T Corp. v. Hulteen, U.S. Briefs 543 at *7 (Feb. 12, 2009) (No. 07-543).

[131] *Id.*

[132] *Id.*

[133] *See supra* Part II.C describing Congress's reaction to the *Gilbert* decision by passing the PDA; *supra* note 51, describing Congress' passage of the Civil Rights Act of 1991 in reaction to Lorance; *supra* n. 20, noting that Congress enacted the Lilly Ledbetter Fair Pay Act in response to the Court's Ledbetter decision.

[134] Posting of Mark Meyerhoff to Law 360, http://www.law360.com (June 10, 2009).

[135] *See* Posting of Charlotte Fishman to Today's Workplace: A Workplace Fairness Blog, *AT&T v. Hulteen: A Bad Decision that Did Not Have to Be,* http://www.todaysworkplace.org/2009/05/21/att-v-hulteen-a-bad-decision-that-did-not-have-to-be/ (May 21, 2009).

[136] *See supra* Part II.C.

[137] Pregnancy Discrimination Act, 42 U.S.C. 2000e(k) (2006).

Make Yourself a Standout and Thrive Against All Odds

By Susan Letterman White, J.D., M.S.

Susan Letterman White is a former managing partner of a Philadelphia law firm, who also practiced employment law and litigation before graduating with a Master of Science in Organization Development with Academic Distinction for Exemplary Field Work. She now consults to law firms, law departments, and lawyers. She designs and facilitates retreats, workshops, Women's Initiatives, and other programs and coaches lawyers in the areas of Strategic Communication, Power and Influence, Leadership, Team Development, Business Strategy and Client Relationship Development, and Career Advancement.

Standouts are people and businesses that appear to thrive against all odds. Standout lawyers advance their careers and standout law firms increase their firm's profitability by spotting and leveraging opportunities in their external environments. This article will take you step-by-step through a strategy design process to create a standout future for yourself or your law firm.

IBM's recent research report, *Capitalizing on Complexity*, concluded that "coping with [the type of] change," demanded by the "complexity" of a "volatile" and "uncertain" world, is the most pressing challenge for CEOs, making creativity "the most important leadership quality."[1] Whether you are leading a law firm or designing a personal strategic action plan, innovation is the key to finding and leveraging the opportunities in your own complex, volatile and uncertain world. Innovation is more than a set of skills one can learn in a classroom. Motivation is required to maintain focus while you look until you find the right opportunities and experiment with innovative strategies until you hit upon the ones that work. Where will you find your motivation?

I. Finding the Motivation to Become a Standout

Motivation flows from the following: a clear vision of your future; your passions, values and principles; and knowing how your circumstances will improve as you move closer to your vision. Standouts have a clear vision of what success means to them. A clear vision of what success looks like for you will be a driver toward future success. It keeps you oriented and on target.

Your passions, values and principles tend to keep you energized, especially as you face difficult challenges and your default tendencies rise to the surface. I'll explain these tendencies in more detail later in this article. Your values and principles may remain relatively constant, while your passions may change over time and according to circumstances. The difference may be nuanced or stark. For example, why did you want to become a lawyer before you entered law school? Why do you want to be a lawyer today?

Rosabeth Moss Kanter talks about passion. She says, "Leaders who create extraordinary new possibilities are passionate about their mission and tenacious in pursuit of it. Many people have good ideas, but many fewer are willing to put themselves on the line for them. Passion separates good intentions and opportunism from real accomplishments."[2]

Building the motivation to implement any strategy design process starts with being able to clearly articulate how circumstances will be better as a result of your taking charge of your success. Can you identify what will be different and better if you become an equity partner in your law firm or double your business generation next year? Can you explain how you and those you care about most will feel differently and better if you reach your goals? Can you verbalize how you will feel as you carry out each action step that will bring you closer to your vision? The more detailed, specific and aligned with your values and principles your answers are to these questions, the more motivation you will build.

Finding your motivation is personal and begins with asking yourself these questions:

How will my circumstances improve if I start acting intentionally to make a difference in my life?

What is most important to me in life, personally and professionally?

What is my vision for my future professional life?

What are my guiding values and principles?

II. The Strategy Design Process for Becoming a Standout

The steps of any strategy design process are simple and iterative:

(1) identify a goal;
(2) develop an action plan;
(3) execute the action plan;
(4) analyze the outcomes of your execution;
(5) adjust the goal and/or plan as necessary;
(6) execute again;
(7) analyze again, etc.

Standouts superimpose innovation over the processes of identifying a goal and developing an action plan. Standouts embrace the iterative nature of the strategy process, which requires a special skill. It demands an open mind and a willingness to take risks, try something new, make mistakes, and then learn from those mistakes.

Identifying goals and developing action plans begins with collecting data about one's external and internal environments. Business schools teach students how to conduct a SWOT analysis, which direct people to collect data about the internal **S**trengths and **W**eaknesses of a business or of oneself,) as well as the **O**pportunities and **T**hreats posed by their external environment. These data are then analyzed for purposes of identifying goals in the nature of innovative future possibilities and sustainable outcomes. The process creates a boundary between one's external and internal environments, and then builds bridges to leverage the opportunities of the external environment using the strengths of one's internal environment. If you are creating a strategy for your law firm, everything beyond the defined boundaries of your firm is part of the external environment.

A. Internal Environment

Identity defines the internal environment of oneself, one's department or one's law firm. Collect data about your internal environment by answering these identity-focused questions:

Who are you (or who might you be) in relation to something/someone in your external environment?

What do you do (or what else might you do) for something/someone in your external environment?

For whom or what do you do it (or for whom might you do it)?

How do you create and deliver it (or how might you create and/or deliver it)?

Answering these questions, including the parentheticals, will help you to see identity as having both in-the-moment assets and potential for development. Developing potential may require one or more strategies to acquire certain assets or skills.

B. External Environmental Scanning

The external environment is the gold mine for opportunities. It is your job to notice them, and if your noticing skills are not as sharp as they ought to be, then it is your job to hone those skills. Collect data about your external environment by answering these questions:

What is happening (or may happen) in my or my organization's external environment that matters to me or my organization? (It matters if it presents an opportunity or threat.)

Is it possible for me to understand a threat in a way that makes it an opportunity?

What do my clients or target clients want from me (or might want from me in the future)?

What does my employer or target employer want or need from me (or might want from me in the future)?

What do my resource suppliers expect, want or need from me? What do I need from them? (Talent is the most important resource for a law firm.)

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There is abundant data about what clients want. For instance, we know that many clients want reduced and predictable fees for services. We also know that many clients want collaborative relationships that are more like business partnerships than simply an association between attorney experts and their dependent clients. Ken Gardner leads Crowell & Moring, LLP partners to build the deepest relationships with clients through significant secondments and regular visits with clients designed to learn as much as possible about clients' businesses, wants and needs.[3]

Even more important than the general data about what clients want is the lesson we can learn from Gardner: the best way to find out what your particular clients and potential clients want and need is to spend time with them, observe them, talk to them and understand their businesses or personal lives.

What do employers want? If your goal is to advance your career, you will need to answer this question from several perspectives. First, what do your immediate supervisor—and anyone with decision-making power that affects you—expect, want and need from you? Second, what does your organization want and need? You are a valuable resource for your employer and any future employer. The ability to satisfy these expectations, needs and wants will help you to advance your career and is a necessary, but not sufficient, condition for advancement.

What is happening in the broader economic environment that will present new opportunities? Globalization raises the need for cross-jurisdictional expertise and international footprints. Developing markets in Latin American, China and India suggest that being multilingual and having cross-cultural competence are significant assets. The general complexity and blurring of boundaries in business suggests that having competencies across industries and academic disciplines is and will continue to be extremely advantageous.

C. Creating a Strategic Intent

Your strategic intent is the bridge that you build between your internal strengths and the opportunities you find in your external environment. So, build a bridge! ***What do you intend to be and do, for whom, where and how? What value do you intend to offer? Where do you see yourself going?*** Answering these questions will help you develop a more detailed story of your future vision and set goals to use in your personal strategy design process. As you are thinking about these questions, superimpose difference and fit since your competitive advantage is linked to the innovative differences and unique fit with clients that only you can offer.

Innovation, Tim Kastelle and John Steen, members of the Technology & Innovation Management Centre in the School of Business at the University of Queensland, explain

> …is fundamentally an evolutionary process… consisting of the generic evolutionary steps of variety (idea generation), selection (choosing the best ideas to execute) and replication (getting our ideas to spread). Networks are the primary organizational form…The fundamental creative act in innovation is connecting…ideas to each other and…to people.[4]

Professor Henry Chesbrough and Andrew Wilson explain "open innovation" as a strategy design process of organization that uses "hubs of collaboration, capturing ideas from customers, academia, or some guys in a garage somewhere."[5] The take-away from these insights is to find variety in the connections you make between your ideas, experiences and the people in your networks. The more expansive and diverse these networks, the more variety you will create. Surround yourself with diverse people with diverse interests. Diversify your experiences. Change your routines. Eventually, you will begin to think differently and generate new ideas, which is the germ of innovation.

D. Turning Strategic Intent into Action Plans

Take your answers to the questions in the previous section and develop effective goals and action plans by identifying the detailed steps of each specific goal. For instance, assume that you want to increase your business by 30% within the next year. What does this mean? Does this mean adding more clients, generating more revenue, increasing cash flow, improving profitability, or adding more work? The actions plans for each may have similarities, but they also have significant differences. Try using a template like the one below. If you get stuck trying to figure out the actions needed to take you toward a particular goal, try working backwards. For instance, if your goal is to get client X to give you $2 million more in work this year, imagine that you have actually attained that goal, and ask yourself: What changed to get me to this point where client X has given me an additional $2 million in work this past year? Then, plot the path in the direction of the changes you have identified in answering that question.

GOAL (What do I want to accomplish)	ACTION (How will I make it happen?)	TIME FRAME (When will I take action?)

There are two broad goals many of us have of our list: business development and advancing one's career. An effective action plan for developing business will include developing unique relationships with your clients. An effective action plan for advancing your career will include understanding your organization's political dynamics.

1. Business Development: Is this Marketing 101?

Business development is a consequence of persuasive marketing. Influence usually flows from being knowledgeable, trustworthy and understanding the reasons that people react in a particular way. It also flows from vision, i.e., painting a picture of a desirable future for someone or some group, soliciting feedback about how to get there from those most affected by that vision, and following through on promises. In short, marketing influence is a skill.

Innovation in marketing takes the questions of the strategic intent section and drills deeper. To know what to offer, you need to be crystal clear about your identity and to whom you are marketing. This requires that you build deep relationships with your existing clients and your potential clients.

Orrick had a deep relationship with its client, Levi Strauss & Co., which allowed it to experiment until it found a model that "aligned the incentives for the firm and the client better than the billable-hour model did."[6] Deep relationships result from time spent getting to know oneself and one's client. Crowell & Moring, LLP's managing partner, Kent Gardiner, recognized that if they "really invested [their] time in getting to know [their] client's business, identified risks that were still over the horizon for them…and looked hard for ways to explain their bottom line, then [they] really would distinguish [themselves] from other law firms." [7]

Professor Leslie de Chernatony writes about the perceptions of branding as a five-stage process of: (1) differentiation; (2) position; (3) personality; (4) vision; and (5) added value.[8] Think about differentiation as reinventing client relationships so that you and your client co-create the connection. Collaborate with your clients and potential clients to identify their needs and develop action plans to meet those needs. Position yourself with a message of why what you are offering is better tailored to the needs of your target. Be clear about your personality by choosing to act in ways that reaffirm, reassert and reinforce your identity. Link your vision to your client's vision of the future. Find out how your clients and potential clients think about value and where they think it rests within the relationship. Personalize what you offer so that each time and for each client or potential client you offer exactly what she or he is seeking at that particular moment.

2. Career Advancement: What are the relevant political dynamics?

Organizations are systems of government; they are "intrinsically political."[9] Political dynamics refers to the power in decision-making processes relevant to meeting your needs, wants and goals. Power is part of every relationship and organizations are networks of relationships. In your organization, who has the power to make each particular decision relevant to advancing your goals? Are steps in your action plan dependent upon the decisions of other people? For example, if advancing in your law firm requires that you work with certain partners or on certain matters, who decides whether and when that happens? How will you build the necessary relationships and influence others to decide in your favor? These are the questions you will need to answer as part of developing an effective action plan.

There are six different types of political power, according to Professor Gareth Morgan of Toronto's York University. For each decision that you need others to make in your favor, you will need to know: (1) the type of power required and how it is exercised, (2) who has it, and (3) what steps must be satisfied before the power will be exercised in a way which supports your goals.

Autocratic power is exercised by a single person or small group which controls important resources, such as a client's work. Is there a decision that must be made in your favor, which depends on the exercise of autocratic power? For instance, does the client relationship partner for client X need to decide to include you on the team doing work for client X? If so, learn everything you can about what motivates this person, much the way you figured out what your own motivations are.

Bureaucratic power resides in written rules, policies and procedures. Think of the power derived from partnership and shareholder agreements, or evaluation and compensation procedures. Power results from understanding the written rules and using them effectively, much as you might master procedural or evidentiary rules to your benefit in the courtroom. If you want to change a term in your partnership agreement, you learn the process for doing that and then follow it. If your firm has tiered compensation for associates, do you know what you must do to advance from the lowest tier to the higher tiers?

Technocratic power is a consequence of having an expert ability to solve a relevant problem. Power is indirectly proportional to the number of people with the expertise, and directly proportional to the number of problems calling for that expertise. In a law firm, this is the power that allows certain lawyers to charge a client for specific matters without the downward market pressure we see attached

Influence usually flows from being knowledgeable, trustworthy and understanding the reasons that people react in a particular way. It also flows from vision, i.e., painting a picture of a desirable future for someone or some group, soliciting feedback about how to get there from those most affected by that vision, and following through on promises

Strategic actors lead others with the type of influence that inspires people toward a vision, which aligns individual goals with a shared, superordinate goal of the larger group. Strategic actors also know that inspiration develops from inclusion and collaboration.

to commodity work. The more of this power one has, the easier it is to advance one's career. Expert power arises not only from legal expertise, but also from business savvy, language skills and emotional intelligence.

When power rests with a coalition comprising opposing power bases, rather than in one individual or one cohesive group, this is an example of the power of *codetermination*. In law firms, we see this type of power on policy and other committees. The mistake people often make is to assume that if they need the vote of a committee, they need only influence the chair of the committee. Make sure that you have action plans to influence each member whose vote you need.

A *representative democracy* gives power to elected officials for a limited period of time, while a *direct democracy* gives power to every member of the group equally. In the former, if the elected official will not vote in your favor, your best option might be to wait. In the latter, you will need to call on your skills to influence enough members of the group to make a difference.

III. Thinking Differently: The Skills and Mindsets of Standouts

In addition to possessing top-notch legal skills, standouts are strategic observers, thinkers and actors. What are these crucial additional skills?

You can only act upon what you can see. So, how can you help yourself to see more? Strategic observers know that the nature and amount of data they choose to evaluate during decision-making will affect those decisions and the range of actions they will be able to take. Strategic observers, therefore, know that they have a limited range of sight and develop "difference lenses" to increase the data they are able to notice. For example, people who have taken a Myers-Briggs® workshop in strategic communication know that perception depends on one's natural preference, like handedness. Some people are left-handed and others are right-handed; some people prefer using data of the five-senses and present reality type, while others are more likely to notice interrelationships and future possibilities. What is your default stance for noticing relevant data?

Strategic thinkers are aware that we all tend to apply different paradigms to help us make sense of all the data we collect during decision-making. For instance, some people prefer to analyze their data using a purely logical and analytical model, while others prefer to use a values-based model to create harmony and avoid conflict.

Strategic decision-makers are also well aware that we all carry default schemas to help us respond quickly to challenges, and they know what their own default patterns are. The *Heroic Leader's Journey* explains six schemas commonly used to navigate challenges.[10] Strategic decision-makers strive to integrate into their decision-making process open-mindedness, intelligent risk-taking and experimentation, and an ability to learn from outcomes, rather than to just label and dismiss them as mistakes or failures.

Strategic actors lead others with the type of influence that inspires people toward a vision, which aligns individual goals with a shared, superordinate goal of the larger group. Strategic actors also know that inspiration develops from inclusion and collaboration.

We have now come full-circle to the beginning of this article: What is the optimal way to become a standout? By learning to see, think and act strategically. Becoming a strategic actor is how standouts thrive against all odds, and by applying the principles and concepts in this article, you, too, can become one.

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CHICAGO, IL 60602

The Jesse Brown Veterans Medical Center provides care to approximately 58,000 enrolled veterans who reside in the City of Chicago, southern suburbs, and Northwest Indiana. Their Women's Health Program serves 2,200 women annually.

This event is generously sponsored by DLA Piper, K&L Gates, Dykema, Hinshaw & Culbertson, Major, Lindsey & Africa, McDermott Will & Emery and LexisNexis.

> For more information contact NAWL at 312.988.6729 or nawl@nawl.org

Upcoming NAWL Programs

NOVEMBER 16, 2010

National Night of Giving in support of Girls to Women

5:30 P.M. – 8:30 P.M.

FOUR SEASONS HOTEL

2050 UNIVERSITY AVENUE

EAST PALO ALTO, CA

Girls to Women (G2W) is a non-profit organization serving East Palo Alto kindergarten through middle school age girls and their families. G2W partners with families, other local youth development agencies, and local schools to provide after school and summer learning programs that offers a nurturing environment along with academic support and enrichment opportunities for the girls' they serve. At the core of the program is respect for and belief in the ability, knowledge and potential of every girl. The girls they serve thrive among the positive, culturally-reflective female role models they find at Girls to Women. G2W is the only girl-centered youth development program in the East Palo Alto community.

This event is generously sponsored by Duane Morris, The Four Seasons Hotel, Hinshaw & Culbertson, Jones Day, LexisNexis and Townsend.

> For more information contact NAWL at 312.988.6729 or nawl@nawl.org

NOVEMBER 18, 2010

National Night of Giving in support of The Pajama Program

GIBBONS P.C.

ONE GATEWAY CENTER

NEWARK, NEW JERSEY

The Pajama Program provides new pajamas and books to children in need, many who are waiting and hoping to be adopted. Thousands of these children live in orphanages, group homes and shelters and are shuffled often between temporary living facilities. Many have been abused or abandoned and have never enjoyed the simple comfort of having a mother or father tuck them in at bedtime and read to them.

This event is generously sponsored by Braff, Harris & Sukoneck, Chicago Title Insurance Company, Drinker Biddle & Reath LLP, Gibbons, LexisNexis, Littler, Lowenstein Sandler, McCarter & English, Patras Williams & Johnson, Prozio Bromberg & Newman, Prudential and Seton Hall Law School.

> For more information contact NAWL at 312.988.6729 or nawl@nawl.org

DECEMBER 14, 2010

Connect, Listen & Learn Series

2:00 P.M. EST

FACILITATED BY KAREN KAHN ED.D. PCC

No Ceiling, No Walls: What Women Haven't Been Told about Leadership from Career-Start to the Corporate Boardroom
by Susan Colantuono

> For more information contact NAWL at 312.988.6729 or nawl@nawl.org

Recent NAWL Programs

OCTOBER 28, 2010

Women in Law Firms: Is Progress Being Made?

JENNER & BLOCK LLP

353 N. CLARK ST.

CHICAGO, IL

Stephanie Scharf, President of the National Association of Women Lawyers Foundation, discussed the just-released findings of the Fifth Annual Survey on Retention and Promotion of Women in Law Firms. Following the presentation, Roberta Liebenberg, Chair of the ABA Commission on Women in the Profession, gave an overview of the recent study completed by the Minority Corporate Counsel Association, Project for Attorney Retention, and the Commission on Women on how law firms distribute billing origination credit and how that distribution affects compensation and the advancement of women lawyers to positions of real power and influence in their firms. See http://www.pardc.org/Publications/SameGlassCeiling.pdf. Ms. Liebenberg then led a panel discussion on what steps law firms can take to develop fair and equitable compensation, origination credit, and client succession policies that will help women lawyers to advance and succeed. The ramifications of the NAWL survey, and what it means for the progress of women lawyers was also discussed.

Speakers:

- Eileen Letts, Commissioner, ABA Commission on Women in the Profession and Partner, Greene and Letts
- Susan Levy, Managing Partner, Jenner & Block LLP
- Roberta Liebenberg, Chair of the ABA Commission on Women in the Profession and Partner, Fine, Kaplan and Black, R.P.C.
- Stephanie Scharf, NAWL Foundation President, and Partner, Schoeman Updike Kaufman & Scharf

Co-sponsored by ABA Commission on Racial & Ethnic Diversity, ABA Section of Antitrust Law, ABA Section of Litigation, ABA Senior Lawyers Division, ABA Women Rainmakers, ABA Young Lawyers Division, Chicago Bar Association Alliance for Women, Illinois State Bar Association Women and the Law Committee, and Women's Bar Association of Illinois.

Recent NAWL Programs

OCTOBER 26, 2010

Connect, Listen & Learn Series

2:00 P.M. EST

FACILITATED BY KAREN KAHN ED.D. PCC

The Art and Science of Strategic Talent Management in Law Firms
with Terri Mottershead

The legal industry is undergoing a paradigm shift. At the core of this change is how law firms manage their talent. "Random acts of training" and the discovery of top talent by good luck have given way to competency models that provide a blueprint for individual and firm success through planned investment in recruitment, training, career planning and advising, evaluation, compensation, promotion, diversity, inclusion and succession planning.

In the new paradigm, this investment is the strategic imperative for law firms because they must effectively and efficiently deploy a highly skilled, focused, motivated and engaged workforce if they are to succeed. Firms are "connecting the dots" between the pipeline of client work and the pipeline of talent ready, willing and able to deliver the work in a way that differentiates the firm, is true to its values, and exceeds client expectations.

This book is relevant to all law firms: small, medium and large. It provides a compendium of best practices that will guide law firm leaders and individual attorneys in successfully navigating change and achieving their individual and collective performance goals.

Recent NAWL Programs

OCTOBER 12, 2010

Connect, Listen & Learn Series

2:00 P.M. EST

FACILITATED BY KAREN KAHN ED.D. PCC

Best Friends at the Bar: What Women Need to Know about a Career in Law
by Susan Smith Blakely

Best Friends at the Bar addresses the realities of law firm practice, especially in large firms, and gives pre-law students, law students, and new attorneys a realistic view of the opportunities and hazards most often encountered by women lawyers. Drawing on her many years of practicing law and mentoring young lawyers and with the help of other women in all areas of the legal profession and her "best friends at the bar," Susan Smith Blakely strives to help young women entering the legal profession begin their careers with open eyes and a more level playing field than women lawyers of past generations.

This concise paperback, which is written in a direct, personal tone that instantly engages the reader:

- Explores the experiences of the author and more than 60 private and public sector attorneys, judges, law school career counselors, and law firm managing partners who forthrightly address a wide variety of issues;
- Candidly speaks to the issues women face in law firm practice and provides invaluable advice for planning enduring and satisfying careers in the law; and
- Critically addresses business, cultural, and personal conditions and offers strategies for dealing with them, including how to manage expectations in the context of actual job conditions and the dynamics of personal life.

Full of helpful advice from attorneys, judges, law school career counselors, and law firm managing partners with wide and varied experiences, this book will be an invaluable resource to any woman planning a career in the law.

SEPTEMBER 14, 2010

Teleconference

FACILITATED BY KAREN KAHN ED.D. PCC

Collaborative Competition: A Woman's Guide to Succeeding by Competing
by Kathryn C. Mayer

Collaborative Competition™ seems like an oxymoron, but is actually a developed skill set that leverages women's strengths as collaborators. Kathryn shared her stories and findings from 20 years as a leadership development executive as well as her extensive interviews with women leaders from highly competitive fields. Kathryn coached you through exercises and examples, how and why to avoid falling into the trap of seeing competition as cutthroat and threatening, instead creating a new positive approach! While this book is targeted to women, it is also valuable for men as it explores skills that are critical to all successful professionals. Collaborative Competition™ will accelerate career growth through:

- Cultivating the strategic mindset and a personalized, healthy approach to competition
- Forming partnerships with pacers who provide feedback, challenges, advice, and support
- Managing challenging people and situations and turning stressful situations into competitive advantages

Member News

Dr. Versha Sharma was awarded a Ph.D. by Aligarh University for her thesis entitled "Domestic Violence & Human Rights: A Socio-Legal Comparison between Domestic Violence Act of 2005 and the U.S. Domestic Violence Act."

Kate Ferro was recently promoted to shareholder at Fowler White Burnett, P.A. in Miami, Florida.

Loredana Pantano recently opened her own law firm with a primary focus on immigration law but also works on divorces, wills, real estate closings and traffic cases. Law Office of Loredana G. Pantano is located at 29 Legion Drive, Bergenfield, NJ 07621, T. 201.374.1589, F. 201.374.1590, www.lgpantanolaw.com.

Gigi Rollini, an attorney Holland & Knight's Tallahassee office, was installed as President of the Florida Association for Women Lawyers (FAWL) at The Florida Bar's Annual Meeting in Boca Raton. Rollini is only the fifth woman from Tallahassee since FAWL's inception in 1951 to serve in this role. As FAWL President, Rollini also serves as the FAWL's representative on The Florida Bar's Board of Governors. Most recently Rollini served at President of the Tallahassee Women Lawyers (TWL), an award-winning local chapter of FAWL. Former TWL Presidents who have gone on to serve as FAWL President include The Honorable June C. McKinney and Tallahassee attorneys Wendy Loquasto and Virginia Daire.

Rollini practices in the firm's Litigation section concentrating on appellate law, with particular focus on Florida's state appellate courts, as well as all aspects of Florida administrative law. Rollini has recently been recognized as the 2010 Most Productive Young Lawyer in Florida by The Florida Bar Young Lawyers' Division, and was selected by her peers both as a 2010 Super Lawyers' Rising Star and Legal Elite Up & Comer for her work in Florida appellate law and administrative practice.

She is a triple Seminole, having received her J.D., magna cum laude, from Florida State University College of Law, her M.P.A. from Florida State University's Reubin O'D. Askew School of Public Administration and Policy, and her B.A. from Florida State University.

Law Firm News

The New Jersey office of **Michelman & Robinson, LLP,** a full-service law firm with locations in New York, New Jersey and California announced that the Honorable Ronald B. Sokalski (Ret.) has joined the Firm as Of Counsel in its New Jersey office. Judge Sokalski brings to M&R's Commercial & Business Litigation Department over four decades of distinguished judicial and legal experience as a trial judge and trial attorney. While serving in the civil, criminal and family divisions of the Passaic County Superior Court, Judge Sokalski decided on a full range of cases including: business, commercial and corporate matters, as well as, environmental, employment, land use, medical malpractice, tax, product liability, telecommunications, criminal and First Amendment rights.

Schoeman, Updike & Kaufman, LLP announced that Deirdre J. Sheridan has joined the Firm as counsel in its New York office. Ms. Sheridan joins the firm's litigation practice. Ms. Sheridan handles complex business litigation, including representation of clients in employment, intellectual property, products liability, ERISA and commercial matters from start to finish. Ms. Sheridan has particular expertise working with clients to effectively and efficiently resolve disputes, whether through negotiation, alternative dispute resolution or litigation of matters through dispositive motion practice, trial and/or appeal. Ms. Sheridan received her J.D., cum laude, from Brooklyn Law School where she was comments editor of the Journal of Law and Policy, a member of the Moot Court Honor Society, and a Sparer Public Interest Law Fellow. Ms. Sheridan received her B.A. magna cum laude in economics and political science from SUNY University at Buffalo.

NAWL Recognizes

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Baker, Donelson, Bearman, Caldwell, & Berkowitz, PC
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Sutherland Asbill & Brennan LLP
Taber Estes Thorne & Carr PLLC
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Wolfe, LPA
Yoss LLP

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Phoenix School of Law
Temple University Beasley School of Law
University of Miami School of Law
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University of Missouri-Columbia
Western New England College School of Law

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Arkansas Association of Women Lawyers
California Women Lawyers
Florida Association for Women Lawyers
Georgia Association Black Women Attorneys
Georgia Association For Women Lawyers, Inc.
Hawaii Women Lawyers
ITechLaw Association
Lawyers Club of San Diego
Minnesota Women Lawyers
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New Members

From May 1, 2010 through August 31, 2010, the following have become NAWL individual members. Thanks for your support of NAWL.

A

Folasnade Abiola
Touro Law Center
Baldwin, NY

Maria Jose Ayerbe
Davis & Gilbert LLP
New York, NY

B

Allison Bartle
AT&T Advertising Solutions
St. Louis, MO

Kendra Brodin
Kendra Brodin Companies LLC
North Oaks, MN

Willa Cohen Bruckner
Alston & Bird LLP
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C

Emily Campbell
BusinessTalk, Inc.
Summit, NJ

Franckline Casimir-Benoit
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Robinson & Cole LLP
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Kaye Scholer LLP
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D

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Melissa DeHonney
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Newark, NJ

Sandra D. Delgado
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Danielle Marie Diodato
Seton Hall University School of Law
Eatontown, NJ

E

Tara Elliott
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F

Wendy Fleishman
Lieff Cabraser Heimann Bernstein, LLP
New York, NY

Cathy Frankel
Moses & Singer LLP
New York, NY

Shannon Frazier
Morris James LLP
Wilmington, DE

Audra Freeman
Albany, NY

G

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New York, NY

Kathleen A. Gallagher
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Houston, TX

Hillary R. Gardner
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New York, NY

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Andrew F. Garruto, Attorney at Law
Nutley, NJ

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Harris Beach PLLC
New York, NY

Heidi Goldstein
Thompson Hine LLP
Cleveland, OH

Laura A. Greer
Kilpatrick Stockton LLP
Winston-Salem, NC

Andrea Groomes
Threshold Advisors
Marina del Rey, CA

Yelena Gurevich
Los Angeles, CA

H

Irene Hudson
Fish & Richardson P.C.
New York, NY

I

Zwinda Iglesias
Inter American University Law School
San Juan, PR

J

Kathleen Jennings
The Estee Lauder Companies
New York, NY

L

Eleissa C. Lavelle
Duane Morris, LLP
Las Vegas, NV

Helena Lynch
White & Case LLP
New York, NY

NEW MEMBER LIST

M

Emily Mao
Alston & Bird LLP
Washington, DC

Cate S. McClure
Senate Democratic Counsel
Lansing, MI

Anne Kennedy McGuire
Loeb & Loeb
New York, NY

Kelly Merkel
Wolfe LPA
New York, NY

Michelle Merola
Hodgson & Russ LLP
Buffalo, NY

Jan Michelsen
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Indianapolis, IN

Mary Ann Mullaney
Blank Rome LLP
Philadelphia, PA

N

Nancy A. Nash
LexisNexis
Miamisburg, OH

O

Kaitlyn T. O'Hara
Oklahoma City University
Oklahoma City, OK

Kristin Olson
Bullivant Houser Bailey PC
Portland, OR

Eileen O'Neill
Ware, Jackson, Lee & Chambers, L.L.P.
Houston, TX

P

Kisha Parker
Duke Realty Corporation
Duluth, GA

Tara R. Pfeifer
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Philadelphia, PA

Megan Pike
Pepperdine School of Law
Santa Monica, CA

Shannon Pitsch
George Washington University Law School
Washington, DC

Nicole C. Prado
Allenbaugh Samini Ghosheh LLP
Gardena, CA

R

Katherine Rankin
Dechert LLP
New York, NY

Angela Rella
Morrison & Foerster
New York, NY

Jill Sarnoff Riola
Carlton Fields
Orlando, FL

Danielle L. Rose
Kobre & Kim LLP
New York, NY

Jennifer Rose
The Rose Law Firm, LLC
Birmingham, AL

Staci A. Rosenberg
Rosenberg & Clark LLC
New Orleans, LA

S

Caroline Schnog
Travelers
Hartford, CT

Shannon Seybold
Wynn at Law, LLC
Lake Geneva, WI

Amanda B. Shaked
Law Offices of Amanda B. Shaked, Esq.
New York, NY

Andrea Steele
Washington University in St. Louis
St. Louis, MO

Amanda Stein
Horwitz, Horwitz & Paradis
New York, NY

Nancy Strogoff
Whittier Law School
Irvine, CA

Susan Stryker
Bressler, Amery & Ross, P.C.
Florham Park, NJ

Sherry A. Swirsky
Philadelphia, PA

T

Linda Thomasson
United States Department of Labor, Office of the Solicitor Region III
Philadelphia, PA

Stephanie L. Torre
New York, NY

M. Therese (Terry)
Shutts & Bowen LLP
Miami, FL

V

Anna Vital
University of California, Hastings College of Law
San Francisco, CA

W

Elizabeth Wall
New York, NY

Clark Whitney
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Philadelphia, PA

Patricia Winston
Morris James LLP
Wilmington, DE

Y

Vanessa Yen
Fitzpatrick Cella Harper Scinto
New York, NY

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. Individuals seeking legal representation should contact a local bar association lawyer referral service.

PRACTICE AREA KEY

ACC	Accounting
ADO	Adoption
ADR	Alt. Dispute Resolution
ADV	Advertising
ANT	Antitrust
APP	Appeals
ARB	Arbitration
BDR	Broker Dealer
BIO	Biotechnology
BKR	Bankruptcy
BNK	Banking
BSL	Commercial/ Bus. Lit.
CAS	Class Action Suits
CCL	Compliance Counseling
CIV	Civil Rights
CLT	Consultant
CNS	Construction
COM	Complex Civil Litigation
CON	Consumer
COR	Corporate
CRM	Criminal
CUS	Customs
DOM	Domestic Violence
EDU	Education
EEO	Employment & Labor
ELD	Elder Law
ELE	Election Law
ENG	Energy
ENT	Entertainment
EPA	Environmental
ERISA	ERISA
EST	Estate Planning
ETH	Ethics & Prof. Resp.
EXC	Executive Compensation
FAM	Family
FIN	Finance
FRN	Franchising
GAM	Gaming
GEN	Gender & Sex
GOV	Government Contracts
GRD	Guardianship
HCA	Health Care
HOT	Hotel & Resort
ILP	Intellectual Property
IMM	Immigration
INS	Insurance
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	MedicalMalpractice
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

NETWORKING ROSTER

ALABAMA

William W. Bates (Billy)
Starnes & Atchison LLP
100 Brookwood Place, 7th Fl
Birmingham, AL 35209
T: 205.868.6000
bbates@starneslaw.com

Blair Lanier
Walston Wells & Birchall LLP
1819 5th Avenue
Suite 1100
Birmingham, AL 35203
T: 205.244.5221
blanier@walstonwells.com

Jennifer Rose
The Rose Law Firm, LLC
205 20th Street North
Suite 915
Birmingham, AL 35203
T: 205.323.1124
jennifer@theroselawfirmllc.com

Rik S. Tozzi
Starnes & Atchison LLP
100 Brookwood Place, 7th Fl
Birmingham, AL 35209
T: 205.868.6088
rst@starneslaw.com

ARIZONA

Kimberly A. Demarchi
Lewis and Roca LLP
40 North Central Avenue
Suite 1900
Phoenix, AZ 85004
T: 602.262.5728
kdemarchi@lrlaw.com
BSL, ELE, LIT

Pamela J. P. Donison
Donison Law Firm, PLLC
11811 North Tatum Blvd.
Suite P177
Phoenix, AZ 85028
T: 480.951.6599
pamela@donisonlaw.com

Marianne M. Trost
The Women Lawyers Coach LLC
15665 E. Golden Eagle Blvd.
Fountain Hills, AZ 85268
T: 480.225.9367
marianne@
thewomenlawyerscoach.com
CLT

ARKANSAS

Deirdre Boling-Lewis
Wal-Mart Legal Department
702 SW 8th Street
Bentonville, AR 72716
T: 479.204.8694
deirdre.lewis@walmartlegal.com

CALIFORNIA

Sophie M. Alcorn
Law Offices of John R. Alcorn
2212 Dupont Drive
Suite V
Irvine, CA 92612
T: 949.553.8529
sophie@jr-alcorn.com
IMM

Rochelle Browne
Richard, Watson & Gershon
355 South Grand Avenue, 40th Fl
Los Angeles, CA 90071-3101
T: 213.626.8484
rbrowne@rwglaw.com
LND, LIT, APP

Tiffany Dou
Gresham Savage Nolan &
Tilden, APC
550 E. Hospitality Lane
Suite 300
San Bernardino, CA 92408
T: 909-890-4499
tiffany.dou@greshamsavage.
com

Sara Holtz
Client Focus
2990 Lava Ridge Court
Suite 230
Roseville, CA 95661
T: 916.797.1525
holtz@clientfocus.net
CLT

Kay E. Kochenderfer
Gibson, Dunn & Crutcher LLP
333 S. Grand Avenue
Suite 5364
Los Angeles, CA 90071
T: 213.229.7712
kkochenderfer@gibsndunn.com
CAS, ANT, BSL

Kiko Korn
Legal Writing Works
3326 S. Bentley Avenue
Los Angeles,CA 90034
T: 310.242.1400
kiko@legalwritingworks.com

Renee Welze Livingston
Livingston Law Firm,
A Professional Corporation
1600 S. Main Street
Suite 280
Walnut Creek, CA 94596
T: 925.952.9880
rlivingston@livingstonlawyers.
com
PRL, TRN, PIL, INS

Nina Marino
Kaplan Marino, PC
9454 Wilshire Blvd.
Suite 500
Beverly Hills, CA 90212
T: 310.557.0007
Marino@KaplanMarino.com
APP, CRM, DOM, HCA

EdIth R. Matthai
Robie & Matthai
500 South Grand Ave, 15th Fl
Los Angeles, CA 90071
T: 213.706.8000
ematthai@romalaw.com
ETH

Megan Pike
Pepperdine School of Law
833 9th Street, Apt. B
Santa Monica, CA 90403
megan.pike@pepperdine.edu
ADR

Dr. Sunwolf
Santa Clara University-
Department of Communication
500 El Camino Real
Santa Clara, CA 95053
T: 408.554.4911
sunwolf@scu.edu

Courtney Vaudreuil
Lewis Brisbois Bisgaard & Smith
LLP
221 North Figueroa Street
Suite 1200
Los Angeles, CA 90012
T: 213.680.5182
cvaudreuil@lbbslaw.com
EPA, LIT, LND, TOX, PRL

COLORADO

Marianne K. Lizza-Irwin
The Ross-Shannon Law Firm
12596 West Bayaud Avenue
Lakewood, CO 80228
T: 303.988.9500
mklizza-irwin@ross-shannonlaw.
com
LIT, BSL, INS, PRL

Elizabeth A. Starrs
Starrs Mihm & Pulkrabek LLP
707 Seventeenth Street
Suite 2600
Denver, CO 80202
T: 303.592.5900
estarrs@starrslaw.com
ADR, LIT, INS

CONNECTICUT

Karey P. Pond
Tedford & Henry, LLP
750 Main Street
Suite 1600
Hartford, CT 06103
T: 860.293.1200 ext. 103
kpond@tedfordhenry.com

Christine Repasy
White Mountains Re
628 Hebron Avenue
Bldg., 2 Suite 501
Glastonbury, CT 06033
T: 860.368.2012
christine.repasy@wtmreservices.
com

Carmina Tessitore, Esq.
18 Chucta Road
Seymour, CT 06483
T: 203.415.1125
minat57@aol.com;
carmina.tessitore@gmail.com

Diane Woodfield Whitney
Pullman & Comley LLC
90 State House Square
Hartford, CT 06103
T: 860.424.4330
dwhitney@pullcam.com
TOX, EPA, LIT

NETWORKING ROSTER

DELAWARE

Denise Seastone Kraft
Edwards Angell Palmer & Dodge LLP
919 North Market Street
Suite 1500
Wilmington, DE 19801
T: 302.777.7770
dkraft@eapdlaw.com
LIT

Amy Quinlan
Morris James LLP
500 Delaware Avenue
Wilmington, DE 19899-2306
T: 302.888.6886
aquinlan@morrisjames.com
BSL

Martha L. Rees
DuPont Company
1007 Market Street
DuPont Building 8032
Wilmington, DE 19898
T: 302.774.4028
martha.l.rees@usa.dupont.com

Janine M. Salomone
Potter Anderson & Corroon LLP
1313 North Market Street
Herculez Plaza, 6th Fl
Wilmington, DE 19801
T: 302. 984.6128
jsalomone@potteranderson.com
COR

Katelyn M. Torpey
McCarter & English LLP
405 N. King Street
Wilmington, DE 19801
T: 302.984.6365
ktorpey@mccarter.com
LIT

DISTRICT OF COLUMBIA

Deanna Dawson
Justice at Stake
717 D Street NW
Suite 203
Washington, DC 20004
T: 202.588.9434
ddawson@justiceatstake.org

Deborah Schwager Froling
Arent Fox LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
T: 202.857.6075
froling.deborah@arentfox.com
COR, RES, SEC, M&A

Lorelie S. Masters
Jenner & Block LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
T: 202.639.6076
lmasters@jenner.com
INS

Julia Anne Matheson
Finnegan Henderson Farabow Garrett & Dunner LLP
901 New York Ave., NW
Washington, DC 20001
T: 202.408.4020
julia.matheson@finnegan.com

Kerry Clinton O'Dell
Hollingsworth LLP
1350 I Street NW
Washington, DC 20005
T: 202.898.5887
kodell@spriggs.com
PRL, GOV

Ellen Ostrow, Ph.D., CMC
Lawyers Life Coach, Inc.
910 17th Street, NW
Suite 306
Washington, DC 20006
T: 202.595.3108
ellen@lawyerslifecoach.com
CLT

FLORIDA

Heather M. Byrer
Stiles, Taylor & Grace, P.A.
PO Box 48190
Jacksonville, FL 32247
T: 904.636.7501
hbyrer@stileslawfirm.com
EEO

Kate Ferro
Fowler White Burnett PA
1395 Brickell Avenue
Suite 1400
Miami, FL 33131
T: 305.789.9294
kferro@fowler-white.com

Debra Potter Klauber, Esq.
Haliczer Pettis & Schwamm
100 S.E. 3rd Avenue
One Financial Plaza, 7th Fl
Fort Lauderdale, FL 33394
T: 954.523.9922
dklauber@haliczerpettis.com
APP, MED, PIL

Tanya M. Lawson
Sedgwick Detert Moran & Arnold LLP
2400 East Commercial Blvd
Suite 1100
Ft. Lauderdale, FL 33308
T: 954.958.2500
tanya.lawson@sdma.com
LIT, PRL, TOX, BSL

Jill Sarnoff Riola
Carlton Fields
450 S. Orange Ave.
Orlando, FL 32801
407.244.8246
jriola@carltonfields.com
ILP

Anne Dufour Zuckerman
Imperial Finance & Trading LLC
701 Park of Commerce Blvd.
Suite 301
Boca Raton, FL 33487
T: 561.995.4388
azuckerman@imprl.com

GEORGIA

Cindy A. Brazell
Jones Day
1420 Peachtree Street, NE,
8th Fl
Atlanta, GA 30309-3053
T: 404.581.8294
cbrazell@jonesday.com
BNK, FIN

Melissa Caen
Southern Company
30 Ivan Allen Jr. Blvd., NW
Bin 5C1203
Atlanta, GA 30308
T: 404.506.0684
mkcaen@southernco.com

Francesca Danielle Lewis
Sutherland Asbill & Brennan LLP
999 Peachtree Street, N.E.
Atlanta, GA 30309
T: 404.853.8173
danielle.lewis@sutherland.com

Meghan H. Magruder
King & Spalding LLP
1180 Peachtree Street, NE
Atlanta, GA 30309
T: 404.572.2615
mmagruder@kslaw.com
INS, BSL

Kathleen W. Simcoe
Commander + Pound, LLP
400 Galleria Parkway
Suite 460
Atlanta, GA 30339
T: 404.584.8002
ksimcoe@commanderpound.com
PIL

Adrienne Hunter Strothers
Warner Mayoue Bates & McGough, P.C.
3350 Riverwood Parkway
Atlanta, GA 30339
T: 770.951.2700
astrothers@wmbmlaw.com

ILLINOIS

Shauna L. Boliker Andrews
Cook County State's Attorney's Office
2650 S. California Avenue
Chicago, IL 60608
T: 773.869.3112
sbolike@cookcounty.gov

Elizabeth Bradshaw
Dewey & LeBoeuf
180 N. Stetson Avenue
Suite 3700
Chicago, IL 60601
T: 312.794.8000
ebradshaw@dl.com
LIT

Torey Cummings
Skadden Arps Slate Meagher & Flom
333 W. Wacker Dr.
Suite 2100
Chicago, IL 60606
T: 312.407.0040
tcumming@skadden.com
LIT, SEC, EEO

Jean M. Golden
Cassiday Schade LLP
20 North Wacker Drive
Suite 1000
Chicago, IL 60606
T: 312.641.3100
jmg@cassiday.com
INS

NETWORKING ROSTER

Cheryl Tama Oblander
Butler Rubin Saltarelli & Boyd LLP
70 West Madison Street
Suite 1800
Chicago, IL 60602
T: 312.696.4481
ctama@butlerrubin.com
EEO, BKR, LIT

Carrie L. Okizaki
6600 Sears Tower
Chicago, IL 60606
T: 312.258.5694

Patricia F. Sharkey
McGuireWoods LLP
77 West Wacker Drive
Chicago, IL 60601
T: 312.750.8601
psharkey@mcguirewoods.com
EPA

Janet A. Stiven
Dykema Gossett PLLC
10 South Wacker Drive
Suite 2300
Chicago, IL 60606
T: 312.627.2153
jstiven@dykema.com
COR

Terri L. Thomas
Navistar, Inc.
4201 Winfield Road
Warrenville, IL 60555
T: 630.753.2575
terri.thomas@navistar.com

Krista Vink Venegas, Ph.D.
McDermott Will & Emery LLP
227 West Monroe Street
Suite 4400
Chicago, IL 60606
T: 312.984.7542
kvinkvenegas@mwe.com
ENT, LIT, INT, INT, PRP

INDIANA

Melanie Morgan Dunajeski
Beckman Kelly & Smith
5920 Hohman Ave.
Hammond, IN 46311
T: 219.933.6200
mdunajeski@bkslegal.com
INS, EEO, LIT

Tammy J. Meyer
MillerMeyer LLP
9102 N. Meridian Street
Suite 500
Indianapolis, IN 46260
T: 317.571.8300
tmeyer@millermeyerllp.com
LIT, PRL, INS

Jan Michelsen
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
111 Monument Circle
Suite 4600
Indianapolis, IN 46204
T: 317.916.2157
jan.michelsen@ogletreedeakins.com
EEO

IOWA

Roxanne Barton Conlin
Roxanne Conlin & Associates, P.C.
319 7th Street
Suite 600
Des Moines, IA 50309
515.283.1111
Roxlaw@aol.com
PIL, EEO, MED

KANSAS

Linda S. Parks
Hite, Fanning & Honeyman LLP
100 N. Broadway
Suite 950
Wichita, KS 67202
T: 316.265.7741
parks@hitefanning.com
COR, BKR
KENTUCKY

Jaime L. Cox
Stites & Harbison PLLC
400 W. Market Street
Suite 1800
Louisville, KY 40202
T: 502.681.0576
jcox@stites.com
RES

Maria A. Fernandez
Fernandez Friedman Haynes & Kohn PLLC
401 W. Main Street
Suite 1807
Louisville, KY 40202-3013
T: 502.657.7130
mfernandez@ffgklaw.com
EST, PRB, ELD, BSL

LOUISIANA

M. Nan Alessandra
Phelps Dunbar, LLP
365 Canal Street
Suite 2000
New Orleans, LA 70130
T: 504.584.9297
alessann@phelps.com
EEO, CIV

Kristina S. Clark
Rosenberg & Clark LLC
400 Paydras Street
Suite 1680
New Orleans, LA 70130
T: 504.620.5400
tina@rosenbergclark.com

Lynn Luker
Lynn Luker & Associates, LLC
3433 Magazine Street
New Orleans, LA 70115
T: 504.525.5500
lynn.luker@llalaw.com
PRL, EEO, MAR

Staci A. Rosenberg
Rosenberg & Clark LLC
400 Paydras Street
Suite 1680
New Orleans, LA 70130
T: 504.620.5400
staci@rosenbergclark.com

MARYLAND

Jo Benson Fogel
Jo Benson Fogel, P.A.
5900 Hubbard Drive
Rockville, MD 20852
T: 301.468.2288
jfogelpa@aol.com
FAM, EST, GRD

MASSACHUSETTS

Faith F Driscoll
RCN
14 Carlisle Road
Dedham, MA 02026
T: 781.326.6645
faithd@rcn.com
ILP

Jennifer E. Greaney
Sally & Fitch LLP
One Beacon Street
Boston, MA 02108
T: 617.542.5542
jeg@sally-fitch.com
MICHIGAN

Michelle Antionette Busuito
Michigan Supreme Court
3035 Grand Blvd.
Detroit, MI 48202
T: 313.972.3257
busuitom@courts.mi.gov

Sue Ellen Eisenberg
Sue Ellen Eisenberg & Associates
33 Bloomfield Hills Parkway
Suite 145
Bloomfield Hills, MI 48304
T: 248.258.5050
see@seelawpc.com
EEO

Cate S. McClure
Senate Democratic Counsel
S-105 Capitol - 2nd Fl
P.O. Box 30036
Lansing, MI 48909-7536
T: 517.373.1029
cmcclure@senate.michigan.gov

MINNESOTA

Angela Beranek Brandt
Larson King LLP
2800 Wells Fargo Place
30 East Seventh Street
St. Paul, MN 55101
T: 651.312.6544
abrandt@larsonking.com
CNS, BSL, INS, EEO

Lucy Jane Wilson
P.O. Box 338
Saint Michael, MN 55376-0338
T: 763.425.8723
monday3333@msn.com

NETWORKING ROSTER

MISSISSIPPI

Sharon F. Bridges
Brunini, Grantham, Grower & Hewes, PLLC
P.O. Box Drawer 119
Jackson, MS 39205
T: 601.948.3101
sbridges@brunini.com

Kristina M. Johnson
Watkins Ludlam Winter & Stennis P.A.
190 East Capitol Street
Suite 800
Jackson, MS 39201
T: 601.949.4785
kjohnson@watkinsludlam.com
BSL, BKR

Shanda M. Yates
Wells Marble & Hurst, PLLC
P.O. Box 131
Jackson, MS 39205
T: 601.605.6900
syates@wellsmar.com
MISSOURI

Kristie Crawford
Brown & James P.C.
300 S. John Q. Hammons Parkway,
Suite 202
Sprinfield, MO 65806
T: 417.831.1412
kcrawford@bjpc.com
LIT, EEO

Elaine M. Moss
Brown & James, P.C.
1010 Market Street. 20th Fl
St.Louis, MO 63101
T: 314.242.5208
emoss@bjpc.com
INS, LIT

Lori Rook
Brown & James, P.C.
300 S. John Q. Hammons Parkway,
Suite 202
Springfield, MO 65806
T: 417.831.1412
lrook@bjpc.com

Norah J. Ryan
Norah J. Ryan Attorney at Law
230 Bemiston Ave.
Suite 510
St. Louis, MO 63105
T: 314.727.3386
norah.ryan@att.net
LIT

NEW JERSEY

Stacey D. Adams
Littler Mendelson PC
One Newark Center
1085 Raymond Blvd., 8th Fl
Newark, NJ 07102
T: 973.848.4738
sdadams@littler.com

Jeanne Schubert Barnum
Schnader Harrison Segal & Lewis LLP
220 Lake Drive East
Suite 200
Cherry Hill, NJ 08002
T: 856.482.5222
jbarnum@schnader.com
CNS, EPA, ADR

Sarah M. Canberg
Porzio, Bromberg & Newman, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997
T: 973.889.4204
smcanberg@pbnlaw.com
EPA, LND

Stephanie J. Cohen
McCarter & English LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
T: 973.639.2026
scohen@mccarter.com
LIT

Melissa DeHonney
Gibbons, P.C.
One Gateway Center
Newark, NJ 07102
T: 973.596.4839
mdehonney@gibbonslaw.com

Linda S. Ershow-Levenberg
Fink Rosner Ershow-levenberg, LLC Attorneys at Law
1093 Raritan Road
Clark, NJ 07066
T: 732.382.6070
ELD, MED, GRD, SSN

Alitia Faccone
McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
T: 973.848.5376
afaccone@mccarter.com
LIT

Kathleen Hart
Morgan Melhuish Abrutyn
651 W. Mt. Pleasant Avenue
Livingston, NJ 07039
T: 973.994.2500
khart@morganlawfirm.com

Garalyn Humphrey
Geralyn Gahran Humphrey, Esq.
33 Washington Avenue
West Caldwell, NJ 07006
T: 973.632.5593
gghwc@yahoo.com
COR, M&A, RES

Karen Painter Randall
Connell Foley LLP
85 Livingston Avenue
Roseland, NJ 07068
T: 973.535.0500
krandall@connellfoley.com

Cassandra Savoy
622 Bloomfield Avenue
Bloomfield, NJ 07003-2521
T: 973.748.0097
csavoy@cassandrasavoy.com

Erin Marie Turner
Drinker Biddle & Reath LLP
500 Campus Drive
Florham Park, NJ 07932
T: 973.549.7027
erin_ocallaghan@hotmail.com;
erin.turner@dbr.com
LIT, INS

Shawn White
Prudential
751 Broad Street, 21st Fl
Newark, NJ 07102
T: 212.455.3883
shawn.white@prudential.com

NEW YORK

Maria Jose Ayerbe
Davis & Gilbert LLP
1740 Broadway, 3rd Fl
New York, NY 10019
T: 212.468.4834
mayerbe@dglaw.com;
mariajayerbe@gmail.com

Monica Barron
Georgoulis & Associates PLLC
45 Broadway, 14th Fl
New York, NY 10006
T: 212.425.7854
texas.mb@verizon.net

Stacie Bennett
Herzfeld & Rubin, P.C.
40 Wall Street
New York, NY 10005
T: 212.471.8485
stacielbennett@gmail.com
LIT, PRL

Willa Cohen Bruckner
Alston + Bird LLP
90 Park Avenue
New York, NY 10016
T: 212.210.9596
willa.bruckner@alston.com

Martha E. Gifford
Law Offices of Martha E. Gifford
93 Montague Street, #220
Brooklyn, NY 11201
T: 718.858.7571
giffordlaw@mac.com
ANT

Beth L. Kaufman
Schoeman Updike & Kaufman LLP
60 East 42nd Street
New York, NY 10165
T: 212.661.5030
bkaufman@schoeman.com
LIT, PRL, EEO

Geri S. Krauss
Krauss PLLC
One North Broadway
White Plains, NY 10601
T: 914.949.9100
gsk@kraussny.com

Alesandra Lanto, Ph.D.
Psychologist-Writer & Coach to Professional Women
60 E. 8th Street, #30D
New York, NY 10003
T: 917.208.8230
alesandra.lanto@att.net

Grace P. Lee, Ph.D., J.D.
The Forensic Psychology Group
141 E. 55th Street
Suite 3D
New York, NY 10022
T: 212.888.8199
LeePhDJD@gmail.com
IMM, CRM

Maureen W. McCarthy
Law Offices of M.W. McCarthy
126 Waverly Place, #3E
New York, NY 10011
T: 212.475.4378
maureenwmccarthy@gmail.com
COR, INT

Anne Kennedy McGuire
Loeb & Loeb
182 E. 95th Street, #14J
New York, NY 10128
T: 212.426.2324
amcguire@loeb.com

Gloria S. Neuwirth
Davidson, Dawson & Clark LLP
60 East 42nd Street, 38th Fl
New York, NY 10165
T: 212.557.7720
gsneuwirth@davidsondawson.com
EST, PRB, T&E, NPF

NETWORKING ROSTER

Gille Ann Rabbin, Esq.
60 East End Avenue
New York, NY 10028
T: 917.763.0579
gilieann@aol.com

Maura I. Russell
Epstein Becker & Green P.C.
250 Park Avenue
New York, NY 10177
T: 212.351.3758
mrussell@ebglaw.com
BNK, COR

Tonia A. Sayour
Cooper & Dunham LLP
30 Rockefeller Plaza, 20th Fl
New York, NY 10112
T: 212.278.0513
tsayour@cooperdunham.com

Annie J. Wang
Wormser, Kiely, Galef & Jacobs LLP
825 Third Ave.
New York, NY 10022-7519
T: 212.573.0613
awang@wkgj.com
IMM

OHIO

Suzanne Bretz Blum
2463 Snowberry Lane
Pepper Pike, OH 44124
LIT

Dawn Conway
LexisNexis
9443 Springboro Pike
Miamisburg. OH 45342
T: 937.865.1815
dawn.conway@lexisnexis.com
LIC, VP

Amy Leopard
Walter & Haverfield LLP
1301 E. 9th Street
Suite 3500
Cleveland, OH 44114
T: 216.928.2889
aleopard@walterhav.com
COR, ILP, BIO, HCA

Elizabeth M. Stanton
Chester Wilcox & Saxbe, LLP
65 East State Street
Suite 1000
Columbus, OH 43215-4213
T: 614.221.4000
estanton@cwslaw.com
EEO, EDU, APP, MUN

OREGON

Diane L. Polscer
Gordon & Polscer, LLC
9755 SW Barnes Road
Suite 650
Portland, OR 97225
T: 503.242.2922
dpolscer@gordon-polscer.com
INS, LIT, BSL

Heather J. Van Meter
Williams Kastner
888 SW 5th Ave.
Suite 600
Portland, OR 97204
T: 503.944.6973
hvanmeter@williamskastner.com
LIT

PENNSYLVANIA

Barbara K. Gotthelf
McCarter & English LLP
Mellon Bank Center
1735 Market Street
Suite 700
Philadelphia, PA 19103
215.979.3836
T: bgotthelf@mccarter.com
PRL

Ayesha Hamilton
Hamilton Law Firm PC
1816 West Point Pike
Suite 114
Lansdale, PA 19446
T: 215.699.8840
ahamilton@ayeshahamiltonlaw.com

Tiffani L. McDonough
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103
T: 215.665.7261
tiffani.mcdonough@gmail.com;
tmcdonough@cozen.com
EEO

Kimberly Ruch-Alegant
Alegant Law, P.C.
67 Buck Road, B48
Huntingdon Valley, PA 19006
T: 215.354.0057
kalegant@alegantlaw.com
PER, WOR, PIL

SOUTH CAROLINA

Elizabeth Scott Moise
Nelson Mullins Riley & Scarborough LLP
P.O. Box 1806
Charleston, SC 29402
T: 843.720.4382
esm@nmrs.com;
scott.moise@nelsonmullins.com
PRL

TENNESSEE

Marcia Meredith Eason
Miller & Martin PLLC
Volunteer Building
832 Georgia Avenue
Suite 1000
Chattanooga, TN 37402-2289
T: 423.785.8304
meason@millermartin.com

Kristine L Roberts
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
165 Madison Avenue
Suite 2000
Memphis, TN 38103
T: 901.526.2000
klroberts@bakerdonelson.com

Yanika C. Smith-Bartley
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
211 Commerce Street
Suite 1000
Nashville, TN 37201
T: 615.726.5772
ysmith-bartley@bakerdonelson.com

TEXAS

Jessica L. Crutcher
Mayer Brown LLP
700 Louisiana
Suite 3400
Houston, TX 77002
T: 713.238.2736
jcrutcher@mayerbrown.com

Marcela L. Cuadrado
Taylor Cuadrado PC
3200 Southwest Freeway
Suite 3300
Houston, TX 77027
T: 713.402.6173
cuadrado@tc-lawyers.com
LIT, SEC, BSL

Sandra D. Delgado
1309 Ash Street
Anna, TX 75409
sandrad.law@gmail.com

Lisa A. Dreishmire
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
8117 Preston Road
Suite 700
Dallas, TX 75225
T 214.414.0068
lisa.dreishmire@odnss.com
EEO, LIT

Sharla Frost
Powers & Frost LLP
1221 Mckinney Street
2400 One Houston Center
Houston, TX 77010
T: 713.767.1555
sfrost@powersfrost.com
BSL, COM, COR, PRL

Gwendolyn Frost
Powers & Frost LLP
1221 McKinney Street
2400 One Houston Center
Houston, TX 77010
T: 713.767.1555
gwenfrost@powersfrost.com
LIT, ENT, SPT

Mary-Olga Lovett
Greenberg Traurig
1000 Louisiana
Suite 1700
Houston, TX 77002
T: 713.374.3500
lovettm@gtlaw.com

Rebecca Rene Massiatte
Jackson Lewis LLP
3811 Turtle Creek Blvd.
Suite 500
Dallas, TX 75219
T: 214.273.5061
massiatter@jacksonlewis.com
IMM

Retta A. Miller
Jackson Walker LLP
901 Main Street
Suite 6000
Dallas, TX 75202
214.953.6035
rmiller@jw.com
LIT, EEO, ADR, SEC

NETWORKING ROSTER

Deborah Perry
Munsch Hardt Kopf & Harr, P.C
3800 Lincoln Plaza
500 N. Akard Street
Dallas, TX 75201
T: 214.855.7565
dperry@munsch.com

Katharine Battaia Richter
Thompson & Knight LLP
1722 Routh Street
Suite 1500
Dallas, TX 75201
T: 214.969.1495
katie.richter@tklaw.com

Sherry L. Travers
Littler Mendelson PC
2001 Ross Avenue
Suite 1500
Dallas, TX 75201
T: 214.880.8148
stravers@littler.com
EEO

Amanda Woodall
Baker Botts L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, TX 77002
T: 713.229.2187
amanda.woodall@bakerbotts.com
ILP

VIRGINIA

Pamela Belleman
Troutman Sanders LLP
1001 Haxau Point
Richmond, VA 23219
T: 804.697.1456
pam.belleman@troutmansanders.com
COM, RES

Julie Hottle Day
Culin Sharp, Autry & Day, PLC
4124 Leonard Drive
Fairfax, VA 22030
T: 703.934.2940
jday@csadlawyers.com
FAM

Dorothea W. Dickerman
McGuireWoods LLP
1750 Tysons Blvd.
Suite 1800
McLean, VA 22102
T: 703.712.5387
ddickerman@mcguirewoods.com

Sandra Giannone Ezell
Bowman and Brooke LLP
1111 E. Main Street
Suite 2100
Richmond, VA 23219
804.819.1156
sandra.ezell@bowmanandbrooke.com
PRL, BSL

Joy C. Fuhr
McGuireWoods LLP
901 E. Cary Street
Richmond, VA 23238
T: 804.775.4341
jfuhr@mcguirewoods.com
TOX, LIT, EPA, PRL

Susanne Jones
O'Brien Jones, PLLC
8200 Greensboro Drive
Suite 1020A
McLean, VA 22102
T: 202.292.4693
susanne.jones@obrienjones.com

Michelle E. O'Brien
O'Brien Jones, PLLC
8200 Greensboro Drive
Suite 1020A
McLean, VA 22102
T: 202.292.4692
michelle.obrien@obrienjones.com
ILP

WASHINGTON

Catherine R. (Kate) Szurek
Skagit Law Group, PLLC
227 Freeway Drive
Suite B
P.O. Box 336
Mt. Vernon, WA 98273
T: 360.336.1000
kate@skagitlaw.com
EST, TAX

WISCONSIN

Rebecca Coffee
Mastantuono Law Office
817 N. Marshall Street
Milwaukee, WI 53202
T: 414.276.8662
rcoffee@mastantuono-law.com
CRM

INTERNATIONAL

Lori M. Duffy
Weirfoulds LLP
130 King Street West
Suite 1600
P.O.Box 480
Toronto, Ontario M5X 1J5
T: 416.947.5009
lduffy@weirfoulds.com
RES, T&E

Alejandra Grandoso Lemoine
Los Yoses
San Jose, Costa Rica
T: 506.2802400
agrandoso@quiroslaw.com
COR, FAM

Lori A. Prokopich
Cassels Brock & Blackwell LLP
Scotia Plaza
40 King St. West
Suite 2100
Toronto, Ontario M2P 1R2
T: 416.869.5485
lprokopich@casselsbrock.com
BSL, COR, M&A

Potential Has No Gender

Crowell & Moring LLP
is proud to support the
National Association of Women Lawyers
and shares its commitment to the
interests and advancement of women in
the legal community.

crowell moring
experience. creativity. results.

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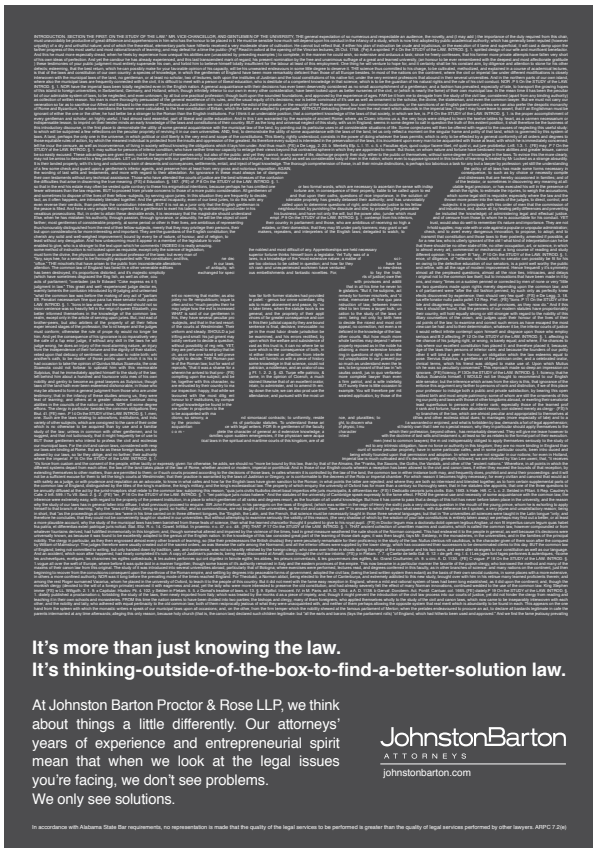

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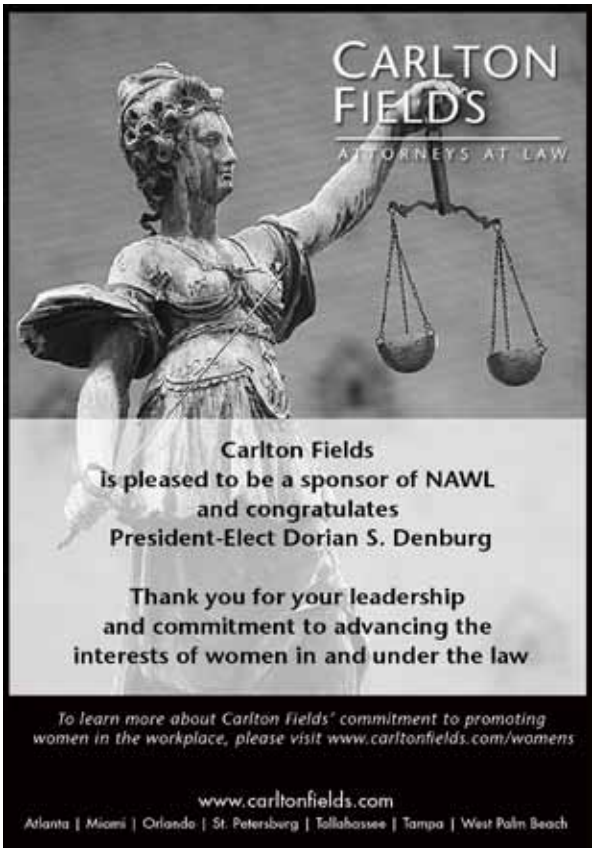

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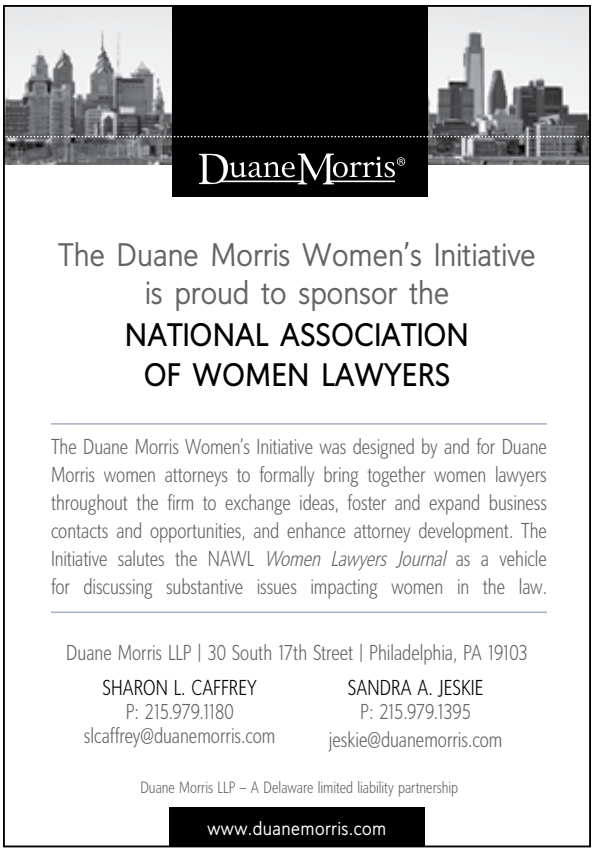
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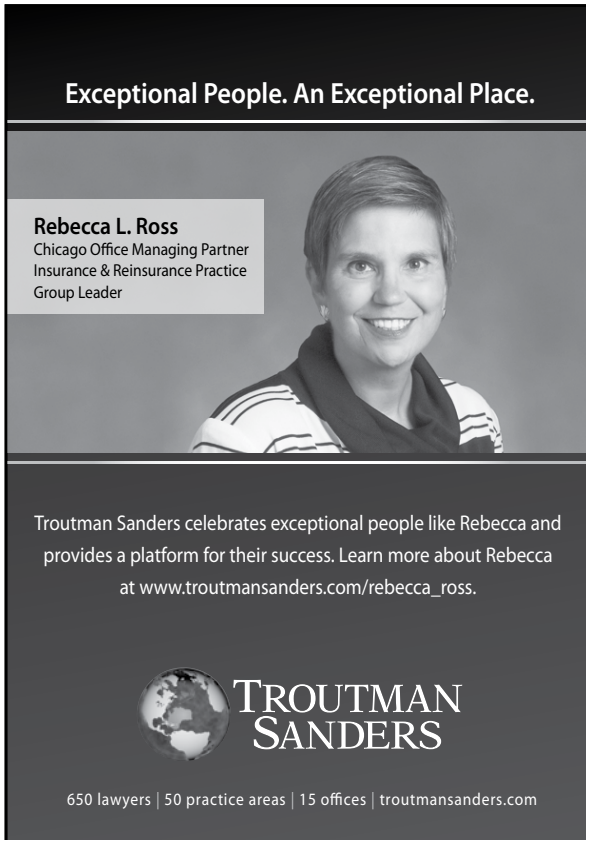
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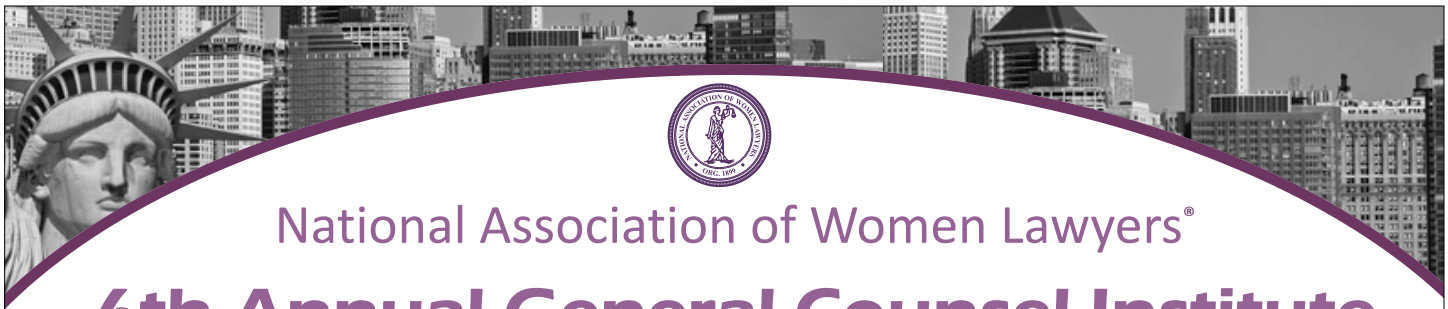

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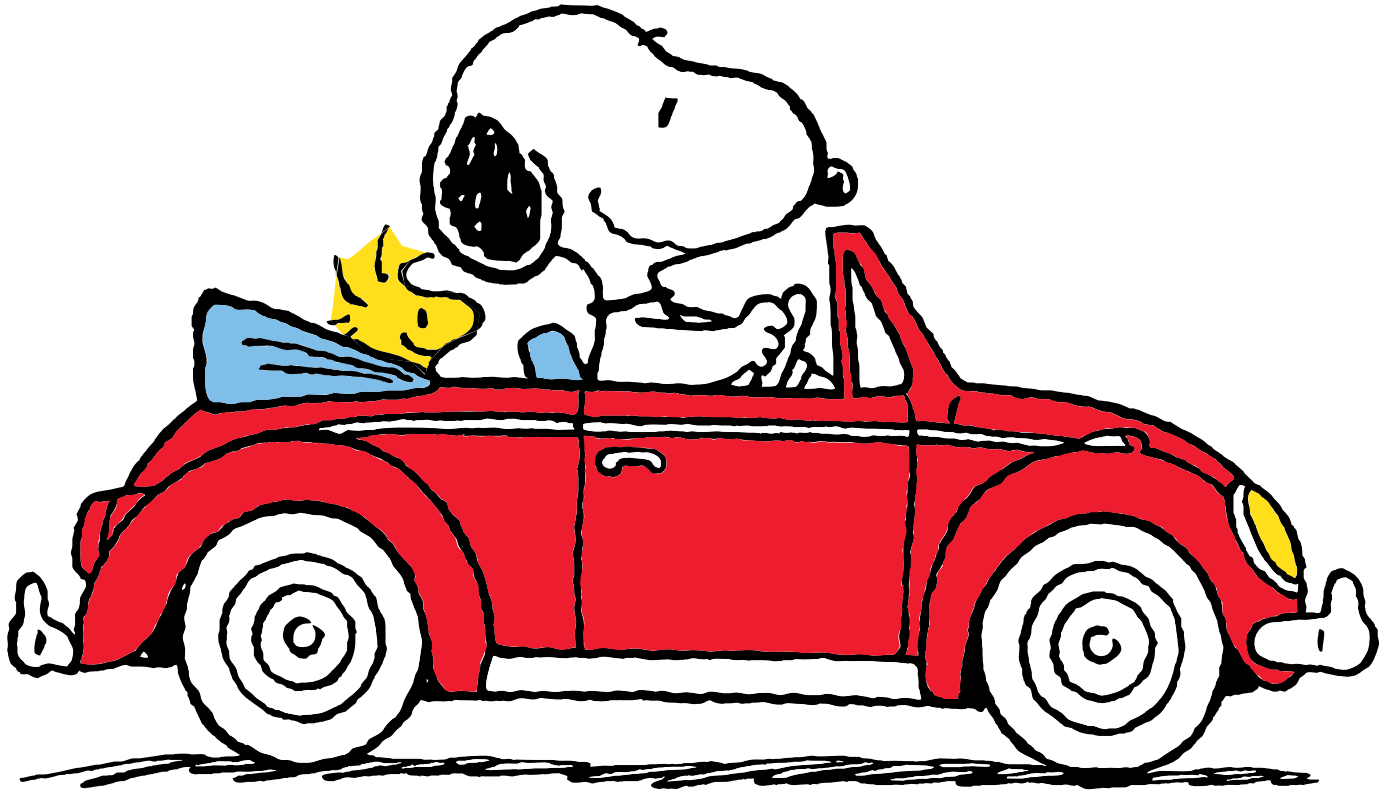

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