

IN-HOUSE MYTHS

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Prevailing myths hold that in-house legal departments offer an attractive work-life balance and equality in their promotion policies, if only in contrast to the hypercompetitive and glass ceiling practice realities at large law firms. This Article challenges both myths. While in-house departments do offer greater flexibility, they increasingly impose on the personal lives of their lawyers, sometimes in less than obvious ways. And while in-house departments have a better gender record than large law firms in terms of promotion to senior positions of power and influence, they nonetheless feature similar patterns of implicit gender discrimination. In-house myths obscure implicit discrimination by suggesting that one can opt out of the problem and that it may not afflict all segments of the profession. Disproving these myths, the Article attempts to refocus attention on the complex problem and subtle manifestations of implicit discrimination in (and outside) the house.

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INTRODUCTION

The meaning of “going in-house” has changed dramatically over the last fifty years. Becoming in-house counsel used to evoke negative connotations, associated with failing to make partner, diminished professional status, more clerical and less challenging quality work, and reduced pay. As the role of in-house counsel changed within corporate entities and vis-à-vis outside counsel, so has its perception among lawyers: in-house counsel positions are increasingly understood not as consolation prizes for failing to make partner but as desirable and prestigious lateral moves offering an attractive mix of professional status, competitive pay, and a better work-life balance.

In theory, for women (and men) lawyers at large law firms on the hypercompetitive partnership track, in-house counsel positions represent not only the promise of an alternative, less stressful career path, but also a better shot at professional equality. As documented by an extensive body of literature, at large law firms, women lawyers face the glass ceiling effect and are systematically and significantly underrepresented at the partner levels, especially as powerful equity partners. In-house counsel positions offer the promise of greener pastures because many of the documented reasons for inequality at large law firms—the increasingly demanding and rigid time commitment tied into the billable hour method, the expectation of becoming a rainmaker and developing a book of business, the inherent yet implicit reliance on increasingly harder-to-come-by mentoring and training—are missing from the in-house landscape, holding a promise for an equal professional playing field. Moreover, in recent years large corporations have been in the forefront of pushing for diversity, and one might expect the commitment to apply to the entities’ in-house lawyers as well.

As it turns out, however, in-house counsel positions may not be a professional haven, not for lawyers seeking a more balanced work-life environment, and not for attorneys seeking diversity and equality in the workplace. Rather, available evidence suggests that while in-house legal departments feature greater flexibility, diversity, and equality than large law firms and other segments of the legal profession, some of the

same patterns that characterize the experience of women lawyers at large law firms and in the legal profession more generally, that is increased participation and representation overall coupled with stratification, under-representation in senior and powerful positions, over-representation in lower-end positions, and pay inequality, also apply to their experience in-house. This Article studies the myths of in-house counsel, namely that it offers a better work-life balance and that it features a more equal work environment compared to other segments of the legal profession, explains how and why the myths developed, and explores the lessons that emerge from debunking them. Disproving these myths, the Article refocuses attention on the complex problem and subtle manifestations of implicit discrimination in-house and outside of it, and examines both accountability for pursuing substantive diversity and means of achieving it.

I. THE PROMISE OF IN-HOUSE PRACTICE

The emergence of the modern in-house counsel role, the growth of in-house counsel departments, and the rise of in-house counsel professional status within the profession have been described repeatedly as “one of the most significant shifts in the legal profession.”¹ From the legal profession’s internal perspective the rise of in-house counsel raises important questions.² First, in-house counsel positions give rise to complex questions of legal ethics, such as the exercise of independent professional judgment while working for a single client,³ and the

1. Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 277 (1985); Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1057–67 (1997); Omari Scott Simmons & James D. Dinnage, *Innkeepers: A Unifying Theory of the In-House Counsel Role*, 41 SETON HALL L. REV. 77, 79 (2011).

2. Notably, the legal profession was not a driving force behind the rise of in-house counsel. The rise of in-house counsel is primarily explained in terms of the needs and interests of corporate entities. Yet the rise does impact the legal profession significantly. On the value of in-house counsel to corporations, see Simmons & Dinnage, *supra* note 1, at 110–40. See generally Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984).

3. See Hugh P. Gunz & Sally P. Gunz, *The Lawyer’s Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of In-House Counsel*, 39 AM. BUS. L.J. 241, 244 (2002) (arguing that there is little empirical evidence to show that in-house lawyers’ exercise of professional judgment is compromised by organizational pressures); Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 489–90 (1989). See generally John J. Creedon, *Lawyer and Executive—The Role of the General Counsel*, 39 BUS. LAW. 25 (1983); Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011 (1997); Ted Schneyer,

efficacy of multijurisdictional practice of law, as the practice of in-house lawyers often necessitates practicing law on a national and even global basis.⁴ Second, it illustrates the agility of American lawyers and their ability to reinvent themselves as important actors in strategic decision-making junctures. Whereas in-house counsel was an insignificant constituency as late as the 1970s,⁵ today in-house lawyers account for nearly ten percent of the profession and hold prestigious positions, demonstrating the capacity of lawyers to respond and adapt to changing market conditions and move into new roles while maintaining their elevated cultural status.⁶ Third, the rise of in-house counsel is intertwined with significant changes in the standing and role of large law firms, such that the evolving relationship between in-house and outside counsel holds revealing insights about the ebbs and flows of power within the profession, the rise of new elites and the decline of others.⁷

Professionalism and Public Policy: The Case of House Counsel, 2 GEO. J. LEGAL ETHICS 449 (1988).

4. Carol A. Needham, *The Changing Landscape for In-House Counsel: Multijurisdictional Practice Considerations for Corporate Law Departments*, 43 AKRON L. REV. 985, 993–97 (2010). See generally Daly, *supra* note 1.

5. Compare Carl D. Liggio, Sr., *A Look at the Role of Corporate Counsel: Back to the Future--Or Is It the Past?*, 44 ARIZ. L. REV. 621, 622 (2002) (“During the 1960s and 1970s corporate [i.e., in-house] counsel were looked on with disdain by the outside bar. The corporate counsel role was deemed a parking place for those associates who couldn’t make partner.”), with Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 23 (“Beginning in the late 1970s, in-house law departments became significantly larger and began handling more of their companies’ day-to-day contractual and regulatory issues, as well as many kinds of litigation.”).

6. Lisa H. Nicholson, *Making In-Roads to Corporate General Counsel Positions: It’s Only a Matter of Time?*, 65 MD. L. REV. 625, 633 (2006). For a general discussion on the role of in-house and corporate counsel’s increased numbers and prominence, see, for example, H.J. Aibel, *Corporate Counsel and Business Ethics: A Personal Review*, 59 MO. L. REV. 427 (1994); Chayes & Chayes, *supra* note 1, at 277; Daly, *supra* note 1, at 1070–72; Gunz & Gunz, *supra* note 3, at 244; Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179, 199 (2001); Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 EMORY L.J. 1201, 1201 (1997) [hereinafter Liggio, *The Changing Role of Corporate Counsel*]; Liggio, *supra* note 5, at 632; Rosen, *supra* note 3 at 480; Steven L. Schwarcz, *To Make or to Buy: In-House Lawyering and Value Creation*, 33 J. CORP. L. 497, 498 (2008); Sida Liu, *Palace Wars over Professional Regulation: In-house Counsel in Chinese State-owned Enterprises*, 2012 WIS. L. REV. 547, 554 (documenting the rise of in-house counsel in China). But see Larry Ribstein, *Delayering the Corporation*, 2012 WIS. L. REV. 305 (anticipating the decline in the number of and professional status of in-house lawyers).

7. RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* (1995) (analyzing the rise of administrative lawyers to elite status following the Great Depression and the New Deal); Eli Wald, *The Rise and Fall of the WASP*

Some of these questions have been explored thoroughly: a lot of ink has been spilled by legal ethics scholars concerned with the possible loss of independence by in-house lawyers, with the most recent cycle focused on the ability and willingness of in-house counsel lawyers to serve as gatekeepers;⁸ and perhaps not enough attention has been given to the lessons the entire profession can learn from the experience of in-house counsel with national law practice.⁹ Legal profession scholars have begun to explore the new and expanding role of in-house counsel,¹⁰ and the evolving relationship between in-house legal departments and large law firms. While it is clear that in-house counsel positions have grown in scope, importance, and prestige vis-à-vis the work done and role traditionally occupied by large law firms,¹¹ it is far from clear that large law firms have been at the losing end of this continuously evolving relationship. Arguably, while the new allocation of work, power, and authority has in the short run resulted in loss of ground, volume of work, and profits by large firms, in the longer run the shift could allow outside counsel to focus their attention on high-end, high-profit, complex legal work, increase their profitability, and maintain their elite status. And while the increased volume of work (now done or managed by in-house counsel) once upon a time served as a catalyst for large law firm growth,¹² the mere size of a large law firm, once the litmus test for status and prestige, no longer serves as the

and *Jewish Law Firms*, 60 STAN. L. REV. 1803 (2008) (exploring the rise of the large law firm to prominence as an elite institution in the late nineteenth and early twentieth centuries, the emergence of new elite Jewish law firms after 1945, and the role in-house lawyers played in bringing about these changes).

8. See generally Sung Hui Kim, *Naked Self-Interest? Why the Legal Profession Resists Gatekeeping*, 63 FLA. L. REV. 129 (2011); Nicholson, *supra* note 6, at 634–35; Lisa H. Nicholson, *SarbOx 307's Impact on Subordinate In-House Counsel: Between a Rock and a Hard Place*, 2004 MICH. ST. L. REV. 559, 561; David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2071–76 (2010).

9. See Daly, *supra* note 1; Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in a Global Age*, 48 SAN DIEGO L. REV. 489 (2011).

10. Rosen, *supra* note 3.

11. Marc Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-To-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747, 751 (1990); Grace M. Giesel, *The Business Client Is a Woman: The Effect of Women as In-House Counsel on Women in Law Firms and the Legal Profession*, 72 NEB. L. REV. 760, 762 (1993); Robert L. Nelson and Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457, 486–87 (2000).

12. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 4–5 (1991); Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1882 (2008).

yardstick for elite status,¹³ and so large law firms, even if they are unable to grow as fast, may end up adjusting to and benefiting from the new practice realities.

As the complexly symbiotic relationship between in-house legal departments and large law firms continues to unfold and their battle for prestige and elite status rages on, one group of lawyers has arguably emerged a clear winner—senior associates and junior partners at large law firms, especially women lawyers who disproportionately experience the glass ceiling effect.¹⁴ For these lawyers, the rise of in-house counsel

13. The size of the firm used to define status. See Galanter & Henderson, *supra* note 12, at 1896 (discussing the prestige associated with ranking among largest firms); Randall S. Thomas et al., *Megafirms*, 80 N.C. L. REV. 115, 142–43 (2001) (describing Skadden Arps’s growth in size and status in response to increased client demand); David B. Wilkins, *Partner, Shmartner!* EEOC v. Sidley Austin Brown & Wood, 120 HARV. L. REV. 1264, 1264–65 (2007). Now, size is no longer the primary test for elite status, replaced by profits per partner. See Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909, 1916 (2006); Galanter & Henderson, *supra* note 12, at 1896; Kim, *supra* note 8, at 139.

14. See Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 295–99 (1995) [hereinafter Epstein et al., *Glass Ceilings and Open Doors*]; Cynthia Fuchs Epstein, *Women in the Legal Profession at the Turn of the Twenty-First Century: Assessing Glass Ceilings and Open Doors*, 49 U. KAN. L. REV. 733, 733–40 (2001) [hereinafter Epstein, *Women in the Legal Profession at the Turn of the Twenty-First Century*]; S. Elizabeth Foster, *The Glass Ceiling in the Legal Profession: Why Do Law Firms Still Have So Few Female Partners?*, 42 UCLA L. REV. 1631, 1632–34 (1995); Judith S. Kaye, *Women Lawyers in Big Firms: A Study in Progress toward Gender Equality*, 57 FORDHAM L. REV. 111, 119–21 (1988); Judith S. Kaye & Anne C. Reddy, *The Progress of Women Lawyers at Big Firms: Steadied or Simply Studied?*, 76 FORDHAM L. REV. 1941, 1941–44 (2008); Nancy J. Reichman & Joyce S. Sterling, *Recasting the Brass Ring: Deconstructing and Reconstructing Workplace Opportunities for Women Lawyers*, 29 CAP. U. L. REV. 923, 923–27, 938 (2002) [hereinafter Reichman & Sterling, *Recasting the Brass Ring*]; Nancy J. Reichman & Joyce S. Sterling, *Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers*, 14 TEX. J. WOMEN & L. 27, 28–30 (2004) [hereinafter Reichman & Sterling, *Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers*]; Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041 (2011); Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585 (1996); Deborah L. Rhode, *The “No-Problem” Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731 (1991) [hereinafter Rhode, *The “No-Problem” Problem*]; Steve French, Note, *Of Problems, Pitfalls and Possibilities: A Comprehensive Look at Female Attorneys and Law Firm Partnership*, 21 WOMEN’S RTS. L. REP. 189, 189–90, 209 (2000); Nancer H. Ballard, *Equal Engagement: Observations on Career Success and Meaning in the Lives of Women Lawyers* (Ctr. for Research on Women, Working Paper No. 292, 1998); see also CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 5–8 (2d ed. 1993) [hereinafter EPSTEIN, *WOMEN IN LAW*]; MONA HARRINGTON, *WOMEN LAWYERS: REWRITING THE RULES* 18, 25–26, 47, 147, 188–89, 197 (1993). See generally VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* (1999).

departments and the expanding role of in-house lawyers meant the establishment of a new elite career path, one in which equality could become a reality, an appealing alternative to the inhospitable practice conditions at large law firms, which feature under-representation of women attorneys in positions of power. Of course, in a historical context, turning to corporate America and its in-house legal departments in search of equality appears to be both misguided and ironic, given its documented past of institutionalized gender discrimination.¹⁵ Understanding the promise of in-house legal departments relative to prevailing realities at large law firms thus necessitates some grounding in the dynamic worlds of large law firms, in-house counsel, and their evolving relationship.

Large law firms were established to service large corporate entities and elite interests.¹⁶ In their “golden era,”¹⁷ large law firms had formed long-term relationships with large corporate entities, near-exclusively representing these clients across the spectrum of their legal needs, ranging from routine corporate legal paperwork, such as keeping corporate minutes and submitting corporate filings to assisting with strategic decision-making in matters such as mergers, acquisitions, and large-scale litigation.¹⁸ These relationships were not only very lucrative for large law firms, but also constitutive of their elite status within the legal profession: the constant flow of paperwork provided a reliable and significant income stream which built the firms’ financial standing and helped them attract and recruit top talent out of law schools; and the

Over time, the growing participation of women lawyers may transform in-house legal departments. For example, Judith Kaye, former Chief Judge of the State of New York, suggests that the increased number of women lawyers in in-house legal departments plays a role in the changing role of in-house counsel attorneys. See Judith S. Kaye, *Foreword: What’s Next? A Paved but Perilous Road* to MICHELLE COLEMAN MAYES & KARA SOPHIA BAYSINGER, *COURAGEOUS COUNSEL—CONVERSATIONS WITH WOMEN GENERAL COUNSEL IN THE FORTUNE 500*, at 3, 4 (2011).

15. ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 15–18 (2d ed. 1993); Sharyn L. Roach, *Men and Women Lawyers in In-House Legal Departments: Recruitment and Career Patterns*, 4 *GENDER & SOC’Y* 207 (1990); see also David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”*: *The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 *HARV. L. REV.* 1548, 1553–54 (2004) (exploring past race-based discriminatory practices employed by corporate America).

16. Magali Sarfatti Larson, *On the Nostalgic View of Lawyers’ Role: Comment on Kagan and Rosen’s “On the Social Significance of Large Law Firm Practice,”* 37 *STAN. L. REV.* 445, 448 (1985); Wald, *supra* note 7, at 1813.

17. Galanter & Henderson, *supra* note 12, at 1894; see GALANTER & PALAY, *supra* note 12, at 21, 24, 33–34; Wilkins, *supra* note 8, at 2075.

18. GALANTER & PALAY, *supra* note 12, at 33–34; Giesel, *supra* note 11, at 794; Wilkins, *supra* note 8, at 2078–79 (describing the long-term relationships law firms had with their primary entity clients).

high-profile transactions and litigations established their professional reputation atop the profession.¹⁹ Moreover, the growth of large corporate entities combined with the expansion of regulation to which they were subject, fueled a growth in the number and size of large law firms.²⁰

Increased competition and structural changes in the market for corporate legal services, however, have changed the nature of the typical large law firm-large corporate entity relationship. On the supply side, the rise in the number of law firms led to the decline of long-term stable relationships as corporate clients turned to different law firms to handle their various needs and did not necessarily retain the same law firms repeatedly, even when satisfied with their performance.²¹ On the demand side, the rise and growth of in-house legal departments allowed corporate clients to both handle some of their basic legal and corporate paperwork internally and more effectively manage their overall legal needs, cutting costs and eliminating a significant income source for large law firms.²² Over time, as in-house counsel grew in sophistication, they began to handle some of the high-profile work as well, assumed greater responsibility for strategic and preventive legal work, and more effectively managed the work of the large law firms, now called outside counsel.²³

These fundamental changes were symbolically captured in the reference to the heads of in-house legal departments as “general counsel”: on the one hand, the term reflected a new reality in which in-house lawyers, historically perceived as second-class attorneys vis-à-vis

19. ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 231 (1988) (arguing that law firms are the embodiment of power in the legal system); Galanter & Henderson, *supra* note 12, at 1869–71; Wilkins, *supra* note 13, at 1277.

20. Galanter & Palay, *supra* note 11, at 796 (describing the rise of corporate demand and its effect on large firms); Robert L. Nelson, *Of Tournaments and Transformations: Explaining the Growth of Large Law Firms*, 1992 WIS. L. REV. 733, 736–37.

21. George P. Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. REV. 1635, 1637 (2006); Galanter & Henderson, *supra* note 12, at 1894–95; Galanter & Palay, *supra* note 11, at 797; Wilkins, *supra* note 8, at 2085–87 (describing the in-house—large law firm relationships as shifting from unique long-term relationships, to multiple short-term competitive relationships, and finally to a handful of “preferred provider[]” relationships); John S. Lipsey, *Shift in Focus: Keeping Clients Happy*, NAT’L L.J., Jan. 29, 2001, at B19.

22. Galanter & Palay, *supra* note 11, at 751; Giesel, *supra* note 11, at 762–63; Schwarcz, *supra* note 6, at 498–99; Wald, *supra* note 7, at 1849.

23. Daly, *supra* note 1, at 1061–62; Giesel, *supra* note 11, at 789; Liggiio, *The Changing Role of Corporate Counsel*, *supra* note 6, at 1205–06; Rosen, *supra* note 3, at 483.

large law firm lawyers, exercised more power and became the lead lawyers for the entities;²⁴ and on the other hand it signaled that large law firms no longer provided regular, general, and continuous legal services to corporate entities, and instead were increasingly limited to ad hoc, high-profile, unique, and specialized representations, under the supervision and management of in-house counsel.²⁵ Over time, this sea change led to a transformation in the professional standing of in-house lawyers, from a low-tier status of “failures” who were unable to make it as partners in large law firms,²⁶ to an elite, desirable status of powerful and influential professionals.²⁷

Importantly, the increased status of in-house lawyers was not only the result of their growing role and responsibilities within corporations and vis-à-vis outside counsel, but also a reflection of the dynamic practice realities within large law firm themselves. Increasingly competitive practice realities, corresponding structural changes, and an ideological shift transformed the nature and meaning of large law firm partnerships: partners increasingly worked longer and harder,²⁸ the implied expectation of de facto tenure has been lost,²⁹ the culture of

24. Chayes & Chayes, *supra* note 1, at 277; Daly, *supra* note 1, at 1059–60; Walker B. Davis, *Reflections of a Kept Lawyer*, 53 A.B.A. J. 349, 349–50 (1967); Giesel, *supra* note 11, at 790; Liggio, *The Changing Role of Corporate Counsel*, *supra* note 6, at 1203; Rosen, *supra* note 3, at 479; Jeffrey S. Slovak, *The Ethics of Corporate Lawyers: A Sociological Approach*, 1981 AM. B. FOUND. RES. J. 753, 772.

25. Baker & Parkin, *supra* note 21, at 1654–55; Daly, *supra* note 1, at 1061–62; Liggio, *The Changing Role of Corporate Counsel*, *supra* note 6, at 1207; Rosen, *supra* note 3, at 485. David Wilkins points out that within large corporate entities, some general counsel have subsequently “traded in the legal sounding title of ‘general counsel’ for the more corporate sobriquet Chief Legal Officer . . . in order to clearly signal that they are part of the ‘C’ suite of top executive officers in the company.” David B. Wilkins, *Is the In-house Counsel Going Global? Assessing the Role of Internal Counsel in Emerging Economies*, 2012 WIS. L. REV. 251.

26. Giesel, *supra* note 11, at 790–91; Hazard, *supra* note 3, at 1011–12; Rosen, *supra* note 3, at 504; Marc I. Steinberg, *The Role of Inside Counsel in the 1990s: A View from Outside*, 49 SMU L. REV. 483, 484 (1996) (quoting Aibel, *supra* note 6, at 427).

27. Chayes & Chayes, *supra* note 1, at 277; Rosen, *supra* note 3, at 479, 481.

28. Galanter & Henderson, *supra* note 12, at 1892–93; Giesel, *supra* note 11, at 785.

29. See Galanter & Henderson, *supra* note 12, at 1892; Giesel, *supra* note 11, at 785 (summarizing numerous news articles about big firms firing partners); Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1129–30 (2011) [hereinafter Wald, *A Primer on Diversity*] (discussing the new multiple tracks for associates and partners in firms); David B. Wilkins, *Partners without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. STUDY LEGAL ETHICS 15, 15 (1999); Catherine Rampell, *At Well-Paying Law Firms, a Low-Paid Corner*, N.Y. TIMES, May 24, 2011, at A1.

“lockstep compensation” has been replaced with an “eat what you kill” ethos,³⁰ and a proliferation of statuses rendered the very title of “partner” unclear.³¹

As the professional allure of “making partner” at a large law firm was tainted and in decline,³² cohorts of large law firms’ lawyers, associates, junior partners, and senior partners alike, began to look for career alternatives, and in-house counsel positions seemed attractive in theory for at least three interrelated reasons. First, they were presumed to entail significantly less-demanding schedules compared with the 24-7 mentality of large law firms and allow for striking a better work-life balance.³³ Second, they were assumed to allow for greater flexibility, in that in-house counsel, even when working long hours, were free of the “billable hour”—the need to account for every moment of their time and to meet certain specified targets.³⁴ Third, by definition, working for one client exclusively, in-house lawyers were liberated of the “rainmaking” burden to develop and bring in business and free to focus on their law practice, an expectation that led large law firms’ attorneys to spend long, non-billable hours developing business on top of their increased billable goals.³⁵

30. MILTON C. REGAN JR., *THE FALL OF WALL STREET LAWYER: EAT WHAT YOU KILL* 36–38 (2004); Galanter & Palay, *supra* note 11, at 752; Ronald J. Gilson & Robert H. Mnookin, *Sharing among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 *STAN. L. REV.* 313, 340 (1985).

31. *See* Baker & Parkin, *supra* note 21, at 1665; Galanter & Henderson, *supra* note 12, at 1875–77; Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Firms*, 78 *FORDHAM L. REV.* 2245, 2262 (2010).

32. *See* Galanter & Henderson, *supra* note 12, at 1892–93; Giesel, *supra* note 11, at 783–84 (discussing the past understanding of partnership as denoting respect and collegial support). *See generally* Wilkins, *supra* note 13.

33. Nicholson, *supra* note 6, at 652; Roach, *supra* note 15, at 208; Wald, *supra* note 31; David Machlowitz, *Corporate Moves: Achieving a Delicate Balance*, *A.B.A. J.*, Aug. 1989, at 62, 62.

34. Steinberg, *supra* note 26, at 484; *see* WALT BACHMAN, *LAW V. LIFE: WHAT LAWYERS ARE AFRAID TO SAY ABOUT THE LEGAL PROFESSION* 102 (1995); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 302 (1993); Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 *UMKC L. REV.* 239, 246–47 (2000).

35. Baker & Parkin, *supra* note 21, at 1637; Ann J. Gellis, *Great Expectations: Women in the Legal Profession, A Commentary on State Studies*, 66 *IND. L.J.* 941, 967–68 (1990–91) (arguing that lack of “rainmaking” expectations is one reason why more women attorneys are employed by the government); Giesel, *supra* note 11, at 787 (discussing how not having to engage in “rainmaking” is particularly appealing to women attorneys).

In-house counsel positions appeared particularly appealing to women lawyers. In contrast to the glass ceiling effect,³⁶ documented patterns of structural discrimination,³⁷ and significant underrepresentation in senior and powerful positions at large law firms,³⁸ in-house counsel positions held the promise of equality for women lawyers, a promise bolstered by a well-publicized, growing emphasis on diversity and the business case for it in corporate America.³⁹ The equality promise of in-house counsel positions was premised on the argument that the very reasons that have held women lawyers back at large law firms—increasingly long and rigid hours, rainmaking expectations grounded in business networking, gender stereotypes, and a prevailing ideology of 24-7 undivided loyalty to the firm and its clients—were inapplicable and irrelevant in the corporate sphere. Of course, many of these considerations would also apply to men attorneys, some of whom may conceive of in-house counsel as offering a better shot at equality.

Notably, such a rosy image of in-house counsel has little to do with the actual practice realities of lawyers working in-house for large corporate entities, and more to do with the practice realities experienced by lawyers working for large law firms. The promise of a better and more desirable professional life as in-house counsel, in other words, was and is, to a significant extent, the product of mounting dissatisfaction and displeasure of large law firms' lawyers with their work realities, along the lines of "anything must be better than this," and was not grounded in an informed assessment of the work, conditions, and realities of in-house counsel.

Much has been made as of late of the naïveté of lawyers and of law students and their apparent habit of making decisions irrespective of relevant available information. Large law firms and their lawyers have been criticized for running their shops with little regard to

36. See sources cited *supra* note 14 and accompanying text.

37. Wald, *A Primer on Diversity*, *supra* note 29, at 1119–23, 1141–42.

38. See Epstein, *Women in the Legal Profession at the Turn of the Twenty-First Century*, *supra* note 14, at 738–40, 746; Giesel, *supra* note 11, at 762. See generally Wald, *supra* note 31.

39. David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 856–57 (1998); Wilkins, *supra* note 15, at 1555–58. See generally ANTHONY PATRICK CARNEVALE & SUSAN CAROL STONE, *THE AMERICAN MOSAIC: AN IN-DEPTH REPORT ON THE FUTURE OF DIVERSITY AT WORK* 59 (1995) (“[T]he benefits of diversity tend to fall into three broad categories: workforce quality, market sensitivity, and organizational agility.”); Raymond L. Ocampo, Jr., *On Hiring Women and Minority Attorneys: One General Counsel’s Perspective*, ACCA DOCKET, Summer 1994, available at <http://careers.findlaw.com/diversity/articles/onhiring.html> (describing Oracle Corporation’s outside counsel retention policy).

management imperatives of for-profit entities.⁴⁰ Law students have been taken to task for continuing to flock to law schools notwithstanding mounting evidence of the questionable value of the J.D. degree.⁴¹ Explanations of these patterns range from organizational management insights in the case of law firms,⁴² to the cultural allure of being a lawyer, its cost-benefit value notwithstanding, in the case of law students.⁴³ Arguably, the infatuation of large law firms' lawyers with the notion of going "in-house" may similarly be guided by wishful thinking and myths rather than by rational analysis and facts.

In defense of large law firm lawyers seeking greener pastures, the promise of in-house practice is informed by the hypercompetitive and glass ceiling realities in large firms and a dearth of actual information about in-house practice. Much of the existing legal literature on in-house counsel is of little help to lawyers interested in learning more about in-house positions. To begin with, the scholarship's emphasis on the increased role and prestige of in-house counsel might serve unintentionally to foster illusions of greener pastures. Another theme explored by the literature—loss of professional independence and the ability to exercise judgment vis-à-vis one powerful client—may also be of little relevance to large law firm lawyers whose practice in a hierarchical structure already introduced them firsthand to limited independence.⁴⁴ This, to be clear, is not a Robertsian attack on legal scholarship as detached from the day-to-day realities of practicing

40. See Galanter & Henderson, *supra* note 12, at 1913; Wilkins, *supra* note 8, at 2111–12. See generally Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957 (2006).

41. See, e.g., Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 CREIGHTON L. REV. (forthcoming 2012) (manuscript at 30–35), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989114; David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 9, 2011, at BU1; Herwig Schlunk, *Mamas 2011: Is a Law Degree a Good Investment Today?* (Vanderbilt Law & Econ., Working Paper No. 11-42, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1957139.

42. See Alfieri, *supra* note 13, at 1915; David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1630–31 (1998) (describing how the law firm's structure instills and exhibits culture and values).

43. Segal, *supra* note 41; Wilkins & Gulati, *supra* note 42, at 1629–30 (describing the historic cultural allure of being a lawyer and its lasting effects).

44. See generally Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988). Loss of independence takes place not only by virtue of being subject to the control of senior lawyers, but also because of the rise of risk management procedures displacing individual exercise of professional judgment. See Alfieri, *supra* note 13, 1933–40; Galanter & Henderson, *supra* note 12, at 1912; Regan, *supra* note 40, at 1962–63.

lawyers.⁴⁵ Both the role transformation of in-house counsel and the question of the ability of corporations' lawyers to exercise independent professional judgment are legitimate and relevant inquiries pertaining to the practice of law in-house. Yet these inquiries simply do not address the separate issues of equality and diversity, and worse, may indirectly serve to distract those large law firm lawyers, who already want and are inclined to believe that in-house counsel positions must be better than the practice realities at large firms, from exploring them further. To allow lawyers contemplating a move in-house to act on a more informed basis, Part II collects the available information on equality and diversity in in-house legal departments. Part III explores the failure of in-house counsel positions to meet the promises of a better work-life balance and of enhanced equality.⁴⁶

II. IN-HOUSE REALITIES

In 1980 there were 54,624 attorneys employed by in-house legal departments, accounting for 10% of licensed attorneys practicing law.⁴⁷ In 2000 there were 75,945 in-house attorneys,⁴⁸ an impressive growth of nearly 40%. It should be noted, however, that the U.S. lawyer population grew from just over 542,000 in 1980⁴⁹ to just over 1,066,000 in 2000,⁵⁰ an increase of nearly 100%, meaning that in-house

45. Chief Justice Roberts has assailed the relevance of legal scholarship to law practice. See *Law Prof. Ifill Challenges Chief Justice Roberts' Take on Academic Scholarship*, ACSBLOG (July 5, 2011), <http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts%E2%80%99-take-on-academic-scholarship>; Debra Cassens Weiss, *Law Prof Responds after Chief Justice Roberts Disses Legal Scholarship*, ABA J. (July 7, 2011, 5:29 AM), http://www.abajournal.com/news/article/law_prof_responds_after_chief_justice_roberts_disses_legal_scholarship/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email. The Chief Justice is not the first to have criticized legal scholarship in this fashion. See Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

46. This Article explores gender equality and diversity at in-house legal departments and large law firms. This is not to belittle of course other disturbing patterns of under-representation and implicit discrimination that are very much present at these institutions and in the legal profession more generally. See Wald, *A Primer on Diversity*, *supra* note 29, at 1122.

47. BARBARA A. CURRAN ET AL., AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S, at 19 (1985) [hereinafter 1980 STATISTICAL REPORT].

48. CLARA N. CARSON, AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000, at 28 (2004) [hereinafter 2000 STATISTICAL REPORT].

49. 1980 STATISTICAL REPORT, *supra* note 47, at 4.

50. 2000 STATISTICAL REPORT, *supra* note 48, at 27.

legal positions grew at a slower pace than the legal profession in the same time period.⁵¹

Of 54,624 in-house attorneys in 1980, 50,527 were men (92.5%) and 4,097 were women (7.5%).⁵² By 2000, the percentage of women in-house counsel had risen significantly. Out of 75,945 attorneys, 54,972 in-house lawyers were men (72.4%), and 20,973 were women (27.6%),⁵³ reflecting a meaningful step toward formal gender equality in in-house counsel positions.⁵⁴ Indeed, in the year 2000 women lawyers accounted for 27% of all employed U.S. attorneys,⁵⁵ meaning that their representation within in-house legal departments in fact slightly exceeded their percentage within the profession and meets the standard of formal equality.

The achievement of formal diversity in-house is especially striking given the relatively modest growth of the in-house industry between 1980 and 2000: over that twenty-year span the industry added a net of 21,321 new in-house counsel positions, and women accounted for a net gain of 16,876 positions, a staggering 79%.⁵⁶ This is noteworthy because as some commentators have pointed out, in the relatively stable work environment of in-house counsel previously dominated by male attorneys, diversity gains are hard to accomplish if new positions are not created.⁵⁷

In addition, there are some positive indicia of increased substantive gender equality,⁵⁸ for example, in terms of equal compensation. In Corporate Counsel's 2010 annual list of the highest-paid general counsel, a female attorney topped the list for the first time since its inception in 1994,⁵⁹ and fourteen out of the top one hundred best-paid general counsel were women.⁶⁰ It should be noted, however, that at 14% of best-paid general counsel, women attorneys who accounted in

51. Accordingly, in-house attorneys have accounted for only 8.4% of U.S. lawyers in 2000. *Id.* at 6.

52. 1980 STATISTICAL REPORT, *supra* note 47, at 40.

53. 2000 STATISTICAL REPORT, *supra* note 48, at 28.

54. Wald, *A Primer on Diversity*, *supra* note 29, at 1093–1100 (defining “formal diversity”).

55. 2000 STATISTICAL REPORT, *supra* note 48, at 27.

56. *See id.* at 28; 1980 STATISTICAL REPORT, *supra* note 47, at 19, 40.

57. KEVIN T. LEIGHT & MARY L. FENNELL, PROFESSIONAL WORK: A SOCIOLOGICAL APPROACH 191 (2001).

58. *See* Wald, *A Primer on Diversity*, *supra* note 29, at 1105–09 (defining “substantive diversity”).

59. David Lat, *Who Are America's Best-Paid General Counsel?*, ABOVE THE LAW (July 19, 2011, 6:19 PM), <http://abovethelaw.com/2011/07/who-are-americas-best-paid-general-counsel>.

60. *Id.*

2010 for nearly 19% of general counsel at Fortune 500 companies,⁶¹ were still under-represented. Also, the percentage of women lawyers serving in the visible leadership position of general counsel of a Fortune 500 company has increased significantly over the past decade, more than doubling since 2000.⁶²

Table 1: Female General Counsel at Fortune 500 Companies

| Year | Number | Percentage |
|--------------------|--------|------------|
| 2000 ⁶³ | 42 | 8.4% |
| 2004 ⁶⁴ | 75 | 15% |
| 2005 ⁶⁵ | 76 | 15.2% |
| 2006 ⁶⁶ | 83 | 16.6% |
| 2007 ⁶⁷ | 90 | 18% |
| 2008 ⁶⁸ | 92 | 18.4% |
| 2009 ⁶⁹ | 85 | 17% |
| 2010 ⁷⁰ | 94 | 18.8% |
| 2011 ⁷¹ | 101 | 20.2% |

61. Thomas Threlkeld, *MCCA 2010 Survey of Fortune 500 Women General Counsel*, MINORITY CORP. COUNS. ASS'N, <http://www.mcca.com/index.cfm?fuseaction=page.viewPage&pageID=2107> (last visited Feb. 16, 2012).

62. Figures are based on MCCA's surveys of Fortune 500 women general counsel. See *Research*, MINORITY CORP. COUNS. ASS'N, <http://www.mcca.com/index.cfm?fuseaction=Page.viewPage&pageId=2077&parentID=471&nodeID=1> (last visited Feb. 16, 2012); see also MAYES & BAYSINGER, *supra* note 14, at 11 (describing the three waves of women general counsel).

63. Alea Jasmin Mitchell, *The Status of Fortune 500 Women General Counsel in 2004*, MINORITY CORP. COUNS. ASS'N, <http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=716> (last visited Feb. 16, 2012).

64. *Id.*

65. Alea J. Mitchell et al., *Diversity & the Bar: MCCA Annual Survey of Fortune 500 Women General Counsel*, MINORITY CORP. COUNS. ASS'N, <http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=1294> (last visited Feb. 16, 2012).

66. Alea J. Mitchell, *MCCA 2006 Survey of Fortune 500 Women General Counsel*, MINORITY CORP. COUNS. ASS'N, <http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=1207> (last visited Feb. 16, 2012).

67. Rachel Ray, *MCCA's 2007 Survey of Fortune 500 Women General Counsel*, MINORITY CORP. COUNS. ASS'N, <http://mcca.com/index.cfm?fuseaction=page.viewpage&pageid=1480> (last visited Feb. 16, 2012).

68. Rachel Ray et al., *MCCA 2008 Survey of Fortune 500 Women General Counsel*, MINORITY CORP. COUNS. ASS'N, <http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=1766> (last visited Feb. 16, 2012).

69. *MCCA 2009 Survey of Fortune 500 Women General Counsel*, MINORITY CORP. COUNS. ASS'N, <http://www.mcca.com/index.cfm?fuseaction=page.viewPage&pageID=1931> (last visited Feb. 16, 2012).

70. Threlkeld, *supra* note 61.

On the other hand, women attorneys are still under-represented in positions of power and leadership, for example, serving as general counsel of Fortune 500 and 1,000 companies. MCCA's 2010 survey of Fortune 500 women general counsel indicates that 94 women served as top legal officers in Fortune 500 companies (18.8%), and that eighty women served as general counsel of Fortune 501-1,000 companies (16%).⁷² While at the time an all-time record for female general counsel, the percentage is still far below that of women in-house counsel.

Analysis of the number and breakdown of in-house counsel positions thus indicates increased formal gender diversity consistent with the trend in the legal profession more generally.⁷³ At the same time, however, and notwithstanding significant gains, especially within the ranks of Fortune 500 general counsel, the numbers reveal a disappointing gender showing in senior powerful positions, again consistent with the trend in the legal profession of gender under-representation and failure of substantive diversity.

The trends suggested by the data should not be overstated. First, the in-house counsel universe is quite diverse. Comparing large in-house legal departments with solo and small departments might not only compare apples and oranges but also obscure important facts about formal equality. For example, is the increased hiring of women lawyers driven by large in-house departments or by a grassroots movement of solo and small departments? Does in-house department size tend to correlate with the size of the entity that houses it? If so, are large publically traded entities the true force behind increased gender equality in-house? Similarly, do distinct patterns of hiring and promotion emerge across industries? Do in-house departments in the pharmaceutical, accounting, and finance industries have a better gender diversity track record compared with traditional manufacturing entities? No doubt, future empirical research will shed additional light on increased formal and substantive equality in the hiring practices of in-house legal departments.⁷⁴

71. Press Release, Minority Corporate Counsel Association, MCCA Survey: Women Serving as General Counsel At Fortune Companies Reaches New High (Oct. 1, 2011), *available at* <http://www.mcca.com/index.cfm?fuseaction=Feature.showFeature&featureID=276>.

72. Threlkeld, *supra* note 61.

73. See Wald, *A Primer on Diversity*, *supra* note 29, at 1093-1100.

74. Between the mid-1990s and the mid-2000s, *Corporate Legal Times* published an annual survey of the largest legal departments, occasionally including an "industry breakout." See, e.g., *The Largest Legal Departments*, CORP. LEGAL TIMES, Aug. 2005, at 32, 32-43.

Second, a general counsel at a Fortune 500 entity is certainly not the only elite, powerful in-house legal position. Within large in-house departments, additional positions, such as associate general counsel, might confer elite status on their holders, and many positions outside of the Fortune 500 circle might be understood to confer desirable elite status. Additional research of such visible, powerful positions would provide insight into whether the trend of increased yet consistent substantive gender under-representation is present in these elite in-house positions as well.⁷⁵

Nonetheless, the available evidence does suggest parallel patterns to those taking place in the legal profession more generally: significantly increased formal gender equality and increased substantive equality accompanied by a persistent glass ceiling effect (under-representation in elite powerful positions). Indeed, preliminary evidence indicates that some in-house lawyers, perhaps disappointed with their practice realities, are leaving their positions and returning to large law firms.⁷⁶ Yet drawing strong conclusions from this data is impossible to do. On the one hand, some in-house lawyers may leave their positions not because of dissatisfaction with their work-life balance or prospects for promotion but rather because large law firms, eager to better understand in-house hiring decisions of outside counsel, are aggressively pursuing them. On the other hand, other in-house lawyers who may be dissatisfied are not returning to large law firms because after spending time in-house removed from general law practice they are pursuing opportunities in the business world.⁷⁷

75. Empirical studies estimate the percentage of women partners at large law firms at 15%. Wald, *supra* note 31, at 2251, n.27. At rates of 15% to 20% for the same time period, the representation of women general counsel at Fortune 500 companies is higher. Indeed, substantive gender diversity in-house is even more striking, if one compares general counsel to managing partners, their analogous position at large law firms, which is estimated at a meager 6%. Roberta D. Liebenberg, *Breaking through the Glass Ceiling — Attaining Equality for Women Lawyers*, U.S. NEWS & WORLD REP. <http://bestlawfirms.usnews.com/editorialarticles.aspx?articleid=10> (last visited Mar. 31, 2012).

76. Joel F. Henning, *Jawboning Key to Managing Outside Lawyers, Lateral Hiring is a Two-way Street Now*, CORP. LEGAL TIMES 1, 23 (Aug. 1, 1993) (“What used to be a one-way street—people moving from law firms into legal departments—is now a two-way street. And in many cases, outside firms are recruiting people from legal departments, because they have that expertise and special skills.”); *see, e.g.*, Press Release, Shearman & Sterling LLP, Shearman & Sterling Recruits Top M&A Lawyer, available at <http://practiceview.muzeview.com/links/index.php?id=233595> (reporting the return of a senior in-house counsel at a Fortune 500 company to his former elite law firm).

77. *See infra* Part III.A.2 (arguing that a career trajectory in-house may cause lawyers to distance themselves from the practice of law).

III. THE FAILED PROMISE OF IN-HOUSE PRACTICE

A. *The Elusive Promise of a Better Work-Life Balance In-house*

The practice of law at a large law firm can be incredibly rewarding. Large law firms represent large entities and do complex and cutting-edge work, offering their lawyers high-profile, high-quality work⁷⁸ compared with other practice settings, and while legal paperwork is often part of the mix at these firms,⁷⁹ leaner staffing and the shift of some paperwork to in-house legal departments, paralegals, contract lawyers, and outsourced attorneys have improved the quality of work of associates and junior partners.⁸⁰ Next, large law firms benefit from elite status atop the profession and offer their lawyers prestige and professional standing.⁸¹ Finally, large law firms offer competitive pay, traditionally at the top of the pay scale,⁸² which is increasingly attractive given the growing cost of legal education.⁸³

At the same time, life at large law firms is often challenging. The billable hour method combined with increased billable targets⁸⁴ results

78. Chayes & Chayes, *supra* note 1, at 296; Wilkins, *supra* note 13, at 1277.

79. Wilkins & Gulati, *supra* note 42, at 1609–10.

80. See Chayes & Chayes, *supra* note 1, at 294–95; Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 *FORDHAM L. REV.* 2137, 2149 (2010); Wald, *supra* note 31, at 2261.

81. See, e.g., Galanter & Henderson, *supra* note 12, at 1928; Bryant G. Garth, *Legal Education and Large Law Firms: Delivering Legality or Solving Problems*, 64 *IND. L.J.* 433, 433 (1988–89) (“Large law firms are the most successful institutional component of the American legal profession according to the criteria of economic prosperity, proximity to the corridors of economic and political power, and the influence exerted on the legal profession generally.”); Wald, *supra* note 31, at 2271.

82. See, e.g., Janan Hanna & Rachel M. Zahorsky, *What America’s Lawyers Earn*, 97 *A.B.A. J.* 35 (2011); Schwarcz, *supra* note 6, at 504 n.40; Wald, *A Primer on Diversity*, *supra* note 29, at 1096.

83. See Denis Binder, *The Changing Paradigm in Public Legal Education*, 8 *LOY. J. PUB. INT. L.* 1, 10–15 (2006) (documenting law school tuition “explosion”); Michael L. Coyne, *Law School for the White and Wealthy*, *NAT’L L.J.*, Apr. 11, 2011, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202489489121>; William K.S. Wang, *The Restructuring of Legal Education along Functional Lines*, 17 *J. CONTEMP. LEGAL ISSUES* 331, 333 (2008) (summarizing available data on law school tuition increases). See generally John A. Sebert, *The Cost and Financing of Legal Education*, 52 *J. LEGAL EDUC.* 516 (2002).

84. Fortney, *supra* note 34, at 246–47; Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 *FORDHAM URB. L.J.* 171, 171–72 (2005) [hereinafter Fortney, *The Billable Hours Derby*]; Galanter & Palay, *supra* note 11, at 752; Nicholson, *supra* note 6, at 652; Wald, *A Primer on Diversity*, *supra* note 29, at 1123.

in increasingly long workdays often spilling into weekends, imposing on and compromising one's shrinking personal life, and diminishing the quality of one's professional life.⁸⁵ The pressure to bill leads to hour "famine," as associates compete, in good and bad economic times, for assignments that would allow them to meet their billable targets.⁸⁶ Increased billable hours goals crowd out non-billable activities, such as mentoring and training,⁸⁷ as well as networking with colleagues,⁸⁸ and further extend the number of hours one has to spend in the office working. In turn, these lead to lack of flexibility.⁸⁹ Large law firm hours are thus long and rigid.⁹⁰

To this basic tradeoff, recent trends have added instability, insecurity, and unpredictability over an extended period of time.⁹¹ Whereas under the traditional tournament structure large law firm associates could expect to work hard for six to eight years knowing that many would not make partner, promotion to partnership did provide a significant measure of stability and work security alongside increased

85. HOLLY ENGLISH, *GENDER ON TRIAL: SEXUAL STEREOTYPES AND WORK/LIFE BALANCE IN THE LEGAL WORKPLACE* 195–97 (2003); Ballard, *supra* note 14, at 22–26; Fortney, *supra* note 34, at 263–92; Galanter & Henderson, *supra* note 12, at 1920–21; Gellis, *supra* note 35, at 967 (distinguishing this feature of large firms' environments from government work environments); Giesel, *supra* note 11, at 782–83.

86. Fortney, *supra* note 84, at 173; Galanter & Henderson, *supra* note 12, at 1913; Wald, *A Primer on Diversity*, *supra* note 29, at 1137–38.

87. KRONMAN, *supra* note 34, at 302; Galanter & Henderson, *supra* note 12, at 1907, 1914 (discussing the decline in mentoring and training in firms); Giesel, *supra* note 11, at 778 (discussing the value of mentoring relationships); Wilkins, *supra* note 8, at 2108–09 (examining the decline in partner training of associates).

88. See Chayes & Chayes, *supra* note 1, at 296 (explaining how billable projects crowd out other commitments at large law firms).

89. Galanter & Henderson, *supra* note 12, at 1921. See generally CYNTHIA FUCHS EPSTEIN ET AL., *THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIFE, FAMILY, AND GENDER* (1999); Christen Linke Young, Note, *Childbearing, Childrearing, and Title VII: Parental Leave Policies at Large American Law Firms*, 118 *YALE L.J.* 1182 (2009); Kim Tasso, *Opinion: Law Firms' Flexible Working Policies—Could Do Better*, *LAWYER*, Feb. 15, 2010, at 6, available at <http://www.thelawyer.com/opinion-law-firms%E2%80%99-flexible-working-policies-%E2%80%93-could-do-better/10034>.

90. Law firms do not generally implement policies that would allow associates to work on a more flexible schedule. See Wald, *supra* note 31, at 2263; see also Barbara Kellerman & Deborah L. Rhode, *Women and Leadership: The State of Play*, in *WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE* 1, 4–6 (Deborah L. Rhode & Barbara Kellerman eds., 2007); Wald, *A Primer on Diversity*, *supra* note 29, at 1129; Young, *supra* note 89.

91. See generally Galanter & Henderson, *supra* note 12; Wald, *supra* note 7, at 1862; Wilkins, *supra* note 13, at 1277.

compensation and elevated status, and those who did not make partner could rely on the firm to assist them in securing a job elsewhere.⁹²

The growth in the number and size of large law firms and the shift to an elastic structure have changed all of that.⁹³ Some large law firm lawyers are hired off the partnership track for an uncertain period of time without the security and status of large law firm practice.⁹⁴ Associates face longer tracks and promotion to partnership no longer means job security, as junior partners continue to compete for equity partnership positions and even equity partners now face the prospects of demotion and termination.⁹⁵ And the mere size and number of law firms as well as growing mobility means that large law firms are no longer as committed to or invested in helping departing lawyers find their next jobs.⁹⁶

As a result, while large law firms continue to attract top talent out of law schools, attrition rates are high and dissatisfaction among senior associates and junior partners is mounting.⁹⁷ To be sure, attrition rates, especially for junior associates, have always been high for large law firms, in fact, the traditional tournament structure was inherently built on high attrition rates;⁹⁸ and some studies indicate that satisfaction rates for large law firm lawyers are high and holding.⁹⁹ Nonetheless, one struggling to strike an effective work-life balance practicing with a

92. Galanter & Henderson, *supra* note 12, at 1873; Wilkins & Gulati, *supra* note 42, at 1629 (discussing how associates who did not complete the partner tournament were confident in their ability to find another job).

93. Wilkins & Gulati, *supra* note 42, at 1615–16; David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493, 535–36 (1996); see Galanter & Henderson, *supra* note 12, at 1896–97.

94. Galanter & Henderson, *supra* note 12, at 1875, 1882–91; Galanter & Palay, *supra* note 11, at 752; Wald, *A Primer on Diversity*, *supra* note 29, at 1129–30.

95. Lawrence J. Fox, *The End of Partnership*, 33 FORDHAM URB. L.J. 245, 247 (2005) (“Elevation to partnership no longer comes with any sense of tenure.”); Galanter & Henderson, *supra* note 12, at 1875–77; Galanter & Palay, *supra* note 11, at 753–54; Wald, *supra* note 31, at 2261; Wilkins, *supra* note 13, at 1274.

96. See Érica Gorga & Michael Hallberstam, *Knowledge Inputs, Legal Institutions and Firm Structure: Towards a Knowledge-Based Theory of the Firm*, 101 NW. U. L. REV. 1123, 1195–1200 (2007).

97. See Fortney, *supra* note 34, at 283–84; Nicholson, *supra* note 6, at 632; Wald, *A Primer on Diversity*, *supra* note 29, at 1090.

98. Galanter & Palay, *supra* note 11, at 774–90; Wilkins, *supra* note 15, at 1587.

99. Chayes & Chayes, *supra* note 1, at 298–99 (discussing law students’ continued interest in large law firms); Ronit Dinovitzer & Bryant G. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 LAW & SOC’Y REV. 1, 23 (2007); Galanter & Henderson, *supra* note 12, at 1926–27 (discussing satisfaction rates at big firms among students from lower tier law schools).

large law firm might be tempted to believe that in-house counsel positions must be, if only by default, less demanding and more flexible.

Indeed, in some ways, they are. Corporate entities rarely adhere to the billable hour method,¹⁰⁰ and while they generally do not offer part-time arrangements,¹⁰¹ they are more flexible in the sense that significant “face time” in the office is not an inherent employer expectation,¹⁰² that is, in-house attorneys can more easily rearrange their work schedules to accommodate conflicting personal commitments.¹⁰³

Yet one should not underestimate the demands of in-house counsel positions. As Lisa Nicholson has documented, the hours worked by in-house attorneys are long and getting longer.¹⁰⁴ Perhaps more importantly, simply comparing “hours worked” at large law firms and in-house counsel positions, as well as “flexibility,” is to compare apples and oranges. While “hours worked” is in fact an important aspect of the work-life balance, it is not the only aspect. Moreover, context matters: what one means by “hours worked” and “flexibility” differs across work environments. That is, the workplace environment differs greatly between large law firms and in-house legal departments in ways that shape and impact both the “work” and “life” components of the work-life balance.

1. TIME WORKED V. CLARITY OF WORK

At a large law firm with its billable hour method, “hours worked” could be easily defined as the sum total of billable hours and non-billable hours. Large law firm work is uniform and strongly structured, in the sense that every associate hour billed, and every non-billable hour (administrative tasks, time spent networking, doing pro bono work, etc.) is spent toward a clear and specified goal—promotion to partnership. Law firms often have either formal or “informal” goals for billable and non-billable hours, for example, for pro bono work. As

100. Fortney, *The Billable Hours Derby*, *supra* note 84, at 184–85 (discussing lateral moves from law firms to in-house positions to escape billable hour requirements); Giesel, *supra* note 11, at 788.

101. Nicholson, *supra* note 6, at 658 (noting that only a few in-house departments offer true part-time positions). *But see* Giesel, *supra* note 11, at 788 (arguing that there are more part-time options available in corporate legal departments compared with large law firms).

102. *See* Nicholson, *supra* note 6, at 662.

103. CORP. COUNS. PROJECT, PROJECT FOR ATT’Y RETENTION, BETTER ON BALANCE: THE CORPORATE COUNSEL WORK/LIFE REPORT 3 (2003), *available at* <http://www.attorneyretention.org/Publications/BetterOnBalance.pdf>.

104. Nicholson, *supra* note 6, at 660; *see also* LARRY SMITH, INSIDE/OUTSIDE: HOW BUSINESSES BUY LEGAL SERVICES 283 (2001) (describing how in-house work has become just as demanding as working at a law firm).

importantly, increasingly all lawyers are rainmakers, or rainmaker wannabes,¹⁰⁵ making increased billable goals a necessary yet insufficient condition: one must invest (non-billable time) in meeting pro bono goals, building networks, securing powerful mentors, and otherwise pursuing a high visibility. Put differently, the meaning of—and expectations with regard to—both billable and non-billable hours are well-established at large law firms.¹⁰⁶

Prima facie, it seems as if in-house lawyers should work shorter hours. In-house counsel do not generally bill their time, and thus the line between billable and non-billable hours is much murkier, and even as their hours increase, most work less than fifty hours a week.¹⁰⁷

In-house legal departments, however, feature a very different work environment than that of large law firms, one that is significantly more diffused and unstructured. In particular, while job descriptions and expectations are presumably effectively communicated with regard to “official” work hours, in-house legal departments do not have a culture and structure that give meaning to something akin to non-billable time.

At first, this may seem like the very manifestation of the desirability of in-house counsel positions compared with large law firm positions, in terms of striking an effective work-life balance. Unlike large law firms, where the combined expectations of both billable and non-billable hours are overbearing, in-house legal departments only have expectations for “official” work, and no structured expectations exist regarding “soft” activities (analogous to pro bono, networking,

105. See Galanter & Palay, *supra* note 11, at 752; Wald, *supra* note 31, at 2256; Wald, *A Primer on Diversity*, *supra* note 29, at 1131–32 (discussing partners’ desire to be either rainmakers or “super-rainmakers”); Jonathan Lindsey et al., *Compensation Is Key to Attracting and Retaining Rainmakers*, L. FIRM PARTNERSHIP & BENEFITS REP., July 2002, at 1; see also Baker & Parkin, *supra* note 21, at 1637; Phyllis Weiss Haserot, *How to Get Associates into the Act*, NAT’L L.J., Aug. 25, 1986, at 15, 15. See generally REGAN, *supra* note 30, at 37–38 (exploring the cultural transformation of a large law firm’s understanding of the partner’s role and the growing expectations and pressures to become a rainmaker).

106. Richard Abel, *The Paradoxes of Pro Bono*, 78 FORDHAM L. REV. 2443, 2446 (2010); Fortney, *The Billable Hours Derby*, *supra* note 84, at 179; William G. Ross, *Kicking the Unethical Billing Habit*, 50 RUTGERS L. REV. 2199, 2203 (1998) (noting that experts agree that approximately one-third of office time involves non-billable activities); David B. Wilkins, *Doing Well By Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. 1, 16–26 (2004). But see also Wilkins & Gulati, *supra* note 42, at 1596–97 (arguing that large law firms feature information asymmetry, such that expectations are communicated informally to some but not others).

107. Nicholson, *supra* note 6, at 652 (stating that in-house attorneys work approximately fifty hours per week and rising); see also CORP. COUNS. PROJECT, *supra* note 103, at 3; Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 981 (2005).

and business development). A close examination, however, reveals the naïveté of such a simplistic approach.

At least outside of senior legal positions, in-house lawyers are often thought of within the entity as cost-centers,¹⁰⁸ commonly perceived as naysayers who do not generate profit and therefore value.¹⁰⁹ Changing that image among one's peers is likely to be time-consuming: the ability to create value, and to be perceived as doing so, may be a function of spending the necessary time to get to know the business inside and out, to understand and master non-legal aspects of pertinent issues, and to prove and reprove to skeptics one's value and worth.¹¹⁰

The challenge is compounded exactly because of the lack of well-established tracks and structure. The flip side, if you will, of the large law firm's long hours, is that sophisticated and well-informed associates know how to spend their time, especially their non-billable time.¹¹¹ In contrast, some in-house lawyers may not realize that simply meeting "official" expectations may be insufficient, and worse, that even if one is willing and able to spend "soft" hours at the office, how to spend them effectively is less than clear. In-house lawyers, in other words, have to be more creative, in a sense, than their large law firm counterparts. To be sure, even at large law firms it might be hard to find a powerful mentor with whom one could spend non-billable time, let alone establish a meaningful relationship with such a mentor, but at least large law firm associates and junior partners know, or should know, to look for a mentor. Similarly, getting pro bono work—which might allow one to demonstrate her commitment to the firm's values and gain valuable experiences and professional growth unattainable from work done on behalf of paying clients—is relatively easy to do within large law firms.¹¹² Of course, adding pro bono commitments to

108. Liggio, *The Changing Role of Corporate Counsel*, *supra* note 6, at 1219; Rees W. Morrison, *What Value Do In-house Lawyers Produce?*, NAT'L L.J., May 9, 2011, at 8. *But see* Schwarcz, *supra* note 6, at 500 (challenging the assumption of lawyers as cost-centers as inaccurate).

109. *See generally* Schwarcz, *supra* note 6; Morrison, *supra* note 108.

110. Daly, *supra* note 1, at 1060–61; Peter J. Gardner, *A Role for the Business Attorney in the Twenty-First Century: Adding Value to the Client's Enterprise in the Knowledge Economy*, 7 MARQ. INTELL. PROP. L. REV. 17, 43 (2003) (arguing that businesses can best succeed by utilizing in-house legal departments and discussing ways of demonstrating this to corporation executives); Wilkins, *supra* note 15, at 1552–53 (arguing that such a perception is already changing).

111. This is not to suggest that the task is either conceptually straightforward or that it is easily attainable in practice.

112. Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357 (2010) (examining the growing role of large law firms as providers of pro bono legal services).

an already long and rigid billable expectation might be harder, and one must also watch against not allowing pro bono work to overshadow and interfere with the flow of valuable work for paying clients. Pro bono commitments are thus most meaningful when they come in addition to, not instead of, billable work for paying clients, a task more easily said than done. But at least in theory the task facing large law firm attorneys is clear, as opposed to the “soft” and often unclear expectations of in-house attorneys.

The structured/diffused distinction captures some of the complexity that prevents a simple comparison of “work hours” between large law firms and in-house legal departments. On the one hand, it may be easier for an in-house lawyer to “get away” with leaving the office at five o’clock every day and “not work” weekends. But doing so may be at one’s own expense in terms of career advancement in the long run: without the imposing structure and clarity of the large law firm, one has to self-motivate and work hard to get to know the corporate entity—its work, its people—and figure out how to create value which will enhance one’s work experience. One has to uncover the meaning of “soft” hours that are so important for one’s career and success in-house.¹¹³

Importantly, working less is “easy” not only in the sense that the hours in-house are shorter, but also in the sense that finding “soft” work is harder in-house. Indeed, some of the hours may be spent on what traditionally would not be considered “work”; that is, one is not going to be compensated for such “soft” hours.¹¹⁴ It might be difficult to work harder pursuing “soft” opportunities in-house, which may look like good news in the short run but is in fact bad news in the long run, especially for those lacking in entrepreneurship, drive, and self-esteem.

This, of course, is not to belittle the challenges facing large law firm associates. Extensive literature documents the fallacy of working hard and expecting to do well as a result. Even at large law firms, associates must be smart: they must work long and hard hours, but also

113. Wilkins & Gulati, *supra* note 42, at 1596–97 (discussing the inherent importance of not assuming that working hard and doing what you are told would be sufficient for making partner); *see also* Renée M. Landers et al., *Rat Race Redux: Adverse Selection in the Determination of Work Hours in Law Firms*, 86 AM. ECON. REV. 329 (1996); Steven C. Bennett, *From Plebe to General: Planning the Campaign*, NAT’L L.J., Aug. 24, 1998, at C6 (“Associates who find secure nests in simple, rote areas may rarely fail, but they probably will not progress much.”).

114. Generally, large law firms do not directly pay associates and partners for overtime or billable hours exceeding formal or informal goals. But they do often pay year-end bonuses that reflect billable and non-billable goals, and promotion to partnership could be thought of as deferred compensation for hours worked as an associate.

find time to network, befriend powerful senior associates and partners, find mentors, and understand, identify, and pursue non-obvious opportunities.¹¹⁵ The point is not that large law firm associates and junior partners can simply work hard within the established law firm framework and expect to do well, that is, to be promoted to partnership and, once promoted, to be handed clients, power, and status within the firm. Such a perspective would be not only naïve, but also likely foolish. At the same time, however, the structure of law firms does provide guidance and clues for sophisticated associates and junior partners seeking promotion and advancement to positions of power.

In contrast, at in-house legal departments the shorter hours and relative lack of structure may end up being a long-term trap. The hours one “must” spend in the office may be shorter, but the burden is on in-house lawyers to spend the time finding ways to become valuable and pursue careers within the entities. To be sure, the particular challenge facing in-house lawyers is not just one of “getting” the corporate environment. Rather, because in-house attorneys are inherently outsiders to and within the corporation, in addition to “getting it”—which may be a time-consuming and difficult task for lawyers trained in law schools and by large law firms—in-house attorneys must find creative and non-obvious ways to demonstrate that they are team players who understand the business goals and culture of the entity and can serve it effectively.

It should be noted, however, that while large law firms generally feature robust structure compared with the diffused work environment of in-house legal departments, the “softness” of in-house departments varies. Large institutionalized departments tend to be more structured, demanding longer hours and leaving little room for “soft” hours. In-house lawyers at smaller departments, however, may experience more diffused environments. Moreover, in-house lawyers in closely held companies face a unique “soft” hours challenge. While they might be less concerned with advancement within the in-house department (such departments are likely to be relatively small with only limited opportunities for advancement) they would likely encounter pressures and incentives to invest significant “soft” hours getting to know the ins and outs of the company and forming strong personal relationships with

115. Fortney, *The Billable Hours Derby*, *supra* note 84, at 179; Nicholson, *supra* note 6, at 647 (arguing that considerations other than simply working hard are even more essential for women lawyers to succeed in elite firms); Wilkins, *supra* note 29, at 44; Wilkins & Gulati, *supra* note 42, at 1596–97; David B. Wilkins & G. Mitu Gulati, *What Law Students Think They Know about Elite Law Firms: Preliminary Results of a Survey of Third Year Law Students*, 69 U. CIN. L. REV. 1213, 1222 (2001) (criticizing the simplistic assumption that working hard is both necessary and sufficient for success at large law firms).

the relevant executives. While such significant “soft” hour commitments might enable in-house counsel to overcome the outsider stereotype and open doors for future advancement in the company outside of the in-house department, the investment is likely going to be highly firm specific and may not be transferable or valuable otherwise.¹¹⁶

The distinction between time worked and clarity of work does not mean that “soft” hours in-house are an impossible to figure out conundrum. One can, of course, ascertain how to effectively spend “soft” hours in-house in the context of pursuing work stability and possible promotion. “Soft” hours in-house do, however, differ from non-billable hours in two important ways. First, the former are inherently less structured and hard to pin down because they are more firm and industry specific than the fairly generic non-billable hours at large firms. Second, law students and lawyers are relatively well trained to figure out and excel at non-billable work (for example, pro bono). While deciphering “soft” hours in-house is possible, lawyers are relatively poorly trained for the task. Moreover, to the extent that “soft” hours are akin to non-billable hours, once an in-house attorney works significant “soft” hours the actual hours worked in-house (official and “soft” hours combined) may resemble the time commitment of large law firm attorneys, pulling the rug from underneath the expectation of a better work-life balance in-house.

2. ESTABLISHED CAREER TRACKS V. TERMINAL POSITIONS

Large law firms offer more or less a clear picture of career advancement. One starts as an associate and within a certain time frame is promoted to partnership or let go. Even in an increasingly elastic tournament structure featuring non-partnership and non-equity partnership tracks, and even when the actual standards for advancement are less than clear, a large law firm lawyer often has a good sense of where she stands in any given point in time in terms of work stability and prospects for promotion.

For lawyers working for in-house legal departments the picture is considerably muddier, with many positions being “dead-ends” in the sense of having no clear path to advancement, either within the in-house department or outside of it. Many in-house legal positions do not lend themselves to promotion to non-legal positions within the corporate entity,¹¹⁷ and many legal positions do not have an obvious

116. I thank Jolene Yee, Associate General Counsel at E. & J. Gallo Winery, for pointing this out to me.

117. Roach, *supra* note 15, at 217.

path to a more senior legal position within the entity.¹¹⁸ Moreover, senior in-house legal positions are often lateral positions, recruited from the ranks of senior lawyers outside of the entity.¹¹⁹ This significantly complicates the challenge facing in-house junior lawyers: on the one hand, they need to invest ample “soft” time getting to know the business and its people; on the other hand, to the extent their next job may be for another entity, they do not want to develop firm-specific knowledge which would be of little use elsewhere. In any event, advancement is a function not only of doing one’s job well, but also of thinking outside of the box, creating value, and looking for opportunities, all “soft” but nonetheless time-consuming activities—looking for the next not-obvious job within or outside the entity and positioning oneself for advancement.

That is not to say, of course, that in-house attorneys face an incomprehensible black box of promotion prospects. At some corporate entities, for example, in-house lawyers seeking a long-term future with the company could compete for a job outside of the in-house legal department, after spending some time in-house. After gaining such business experience, one could either seek promotion outside of the legal department or return in-house, seeking a more senior position.¹²⁰

Nor is it entirely accurate to describe in-house positions as “dead-end” jobs, because the characterization suggests a negative connotation whereas to many the permanent nature of the position might be a desirable quality. In fact, for those attorneys who choose to opt out of the large law firm hypercompetitive rat race, the relatively pressure-free experience, at least in the sense that their current in-house position is not understood to be a stepping stone or a stop along the way to their next job might be a desirable aspect of in-house positions.

Even so, such a career track is clearly not as structured as the large law firm track, often involves non-legal positions and abandoning one’s profession, entails reduced opportunities for future mobility (and is thus, counterintuitively, less flexible than a position at a large law firm) and may vary across corporate entities. Moreover, the number of senior positions in-house is finite, imposing a significant limit on career advancement within the legal department. Large law firms can always, in theory, make another partner. If one proves herself as a valuable attorney and a potential rainmaker, a large law firm could elect her a

118. *Id.* at 216; Nicholson, *supra* note 6, at 655–56.

119. Liggio, *A Look at the Role of Corporate Counsel*, *supra* note 6, at 632; Nicholson, *supra* note 6, at 631; Roach, *supra* note 14, at 215; Rosen, *supra* note 3, at 497; Wilkins, *supra* note 8, at 2096.

120. I thank Karen Ripley, Chief Legal Officer at MillerCoors LLC, for making this point.

partner and grow the top of the pyramid structure of the firm, possibly with the consequence of adding associates to support the new partner. This, in fact, has historically been the internal growth engine of large law firms.¹²¹ In contrast, in-house legal departments do not feature a similar internal growth engine that would create analogous new “general counsel” positions. Differently put, the top of the pyramid in-house is not constantly growing as it does within law firms, resulting in significantly limited opportunities for promotion in-house. This ties into the inherent difference regarding the role of lawyers in law firms and in-house: while at law firms, lawyers are a profit-center and the growth of the firm is desirable when financially justified; at in-house departments, lawyers are a cost-center and the growth of the legal department is generally understood as undesirable.

In sum, to do their job well and position themselves for promotion, large law firm lawyers need to work very hard, meeting both billable and non-billable targets. Conveniently, doing your job well at large firms will lend itself to promotion.¹²² In-house lawyers also need to work very hard: while their “official” work-hours expectation is usually lower than billable targets, “soft” hours spent trying to do the job well and convert colleagues who tend to think of lawyers as cost-centers may add significantly to the task, and are made even more challenging by the diffused nature of in-house counsel work. It is often not at all clear how to spend “soft” time, which is necessary for doing one’s job. Worse, doing one’s job well in-house typically will not lend itself to promotion within the entity or to a lateral position elsewhere. This makes spending “soft” time networking with people who think of you as an obstacle and a cost-center even more essential, which the unstructured and diffused nature of in-house legal departments makes harder.

3. MOBILITY V. TRAVEL AND TRANSFERS

For all the talk about the nationalization and globalization of law practice,¹²³ it continues for the most part to be a local affair, at least in terms of physical travel. Even as the practice of law increasingly demands multi-jurisdictional knowledge, technology allows large law

121. GALANTER & PALAY, *supra* note 12, at 4–19.

122. *See* Galanter & Palay, *supra* note 11, at 781.

123. *See* Michael M. Boone & Terry W. Conner, *Change, Change, and More Change: The Challenge Facing Law Firms*, 63 TEX. B.J. 18, 20 (2000); Daly, *supra* note 1, at 1058; Gardner, *supra* note 110, at 18–19. *See generally* Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737 (1994); Wald, *supra* note 9; Wilkins, *supra* note 8, at 2089–91.

firm lawyers to practice nationally and globally from their firm's offices virtually. Large law firms, even those with multiple offices, regional and national, usually do not have an inherent expectation of transfer. If one was hired as an associate in a firm's office, one could expect to make partner in that office to the extent promotion to partnership is at all a viable option. Put differently, usually promotion neither necessitates transfer, nor is made more likely by a willingness to transfer to another office.¹²⁴ To be sure, increased mobility is now a common feature of law practice,¹²⁵ but most of this lateral movement is between firms and within jurisdictions and does not involve significant travel or transfer within the same firm or across jurisdictions.¹²⁶

In contrast, to the extent that a path for advancement exists in senior in-house counsel positions, it often involves a greater expectation of travel and transfer to corporate headquarters. Some junior in-house positions are regional, in proximity to local plants, offices, or regional headquarters.¹²⁷ Other junior positions may be in the entity's corporate headquarters but may involve more travel, compared with large law firms, to address corporate legal issues wherever the entity does business.¹²⁸ To the extent then that in-house legal positions are attractive to lawyers who seek a better work-life balance, the increased travel and possibility of transfer constitute a disadvantage compared with large law firm practice.¹²⁹

124. Large law firms do not generally move lawyers among offices in part because of state-based admission rules that make it difficult to transfer attorneys from one jurisdiction to another. See Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 NW. J. INT'L L. & BUS. 487, 489 (2003) (“[R]estrictive rules of practice . . . complicate or limit the ability of firms to move lawyers among offices . . .”).

125. Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension between Confidentiality and Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199 (2007).

126. One growing exception to limited internal mobility within large law firms is secondment—the lending of a lawyer to a host organization for a limited period, usually an entity client or another law firm. See COMM. ON PROF'L & JUDICIAL ETHICS, N.Y. CITY BAR ASS'N, FORMAL OPINION 2007-2 (2007), available at <http://www2.nycbar.org/Ethics/eth2007.htm> (discussing secondment of law firm attorneys and association with a law firm); Wilkins, *supra* note 8, at 2092–93.

127. Nelson & Nielsen, *supra* note 11, at 471–72; Nicholson, *supra* note 6, at 655.

128. Roach, *supra* note 15, at 215; Wald, *supra* note 9, at 496; Machlowitz, *supra* note 33, at 62.

129. The expectation of travel for in-house attorneys is very much a function of the size of the in-house department and the industry. For example, lawyers for a small closely held entity might not have to travel frequently whereas in-house attorneys for a large entity with branch offices or legal needs that span many jurisdictions might have to travel more frequently.

4. ISOLATION V. TEAMWORK

Structured and diffused work environments as well as the tradeoff between increased mobility and the expectation of travel and transfers account for the different work-life choices offered by large law firms and in-house legal departments. Importantly, while the choices and their manifestations are different, they are as complex in-house as they are at large law firms. Another important difference has to do not with the work-life balance itself but rather with the quality and environment of the work experience.

Large law firm practice is isolating.¹³⁰ With an increased emphasis on billable hours, large law firm lawyers face a reduced incentive to get to know and spend time with colleagues, let alone staff members.¹³¹ Moreover, competitiveness undermines possible friendships, at least among similarly situated peers in the same practice group.¹³² But certain aspects of large firm practice mitigate some of these factors. By virtue of spending long hours in the office, and the inherent teamwork characteristic of large law firm practice,¹³³ one constantly interacts with, and has the potential to form friendships with, both subordinates and superiors. Indeed, to the extent that the 24-7 culture of large law firms makes it difficult to maintain relationships with non-Big Law members, the same culture may indirectly foster friendships within these firms. Also, one can form relationships with similarly situated associates in other practice groups. And one way to secure the effective assistance of the staff is to be, simply put, nice.

Perhaps as importantly, most everybody working at large law firms is in the same boat. One is, if you will, not uniquely situated, at least in terms of isolation within the firm and the possible impact of the long and rigid work hours on isolation in one's personal life outside of the firm. Furthermore, one can always find professional support outside of the firm. There is a proliferation of bar associations offering a venue for interacting with lawyers who practice in the same fields of law,¹³⁴ or

130. Wilkins & Gulati, *supra* note 42, at 1634 (describing firms' incentives and conditions which result in high levels of unsupervised work).

131. *See generally* Fortney, *supra* note 84.

132. Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 678 (2005); *see* REGAN, *supra* note 30, at 37-38; Galanter & Henderson, *supra* note 12, at 1910.

133. Galanter & Palay, *supra* note 11, at 748; Fern S. Sussman, *The Large Law Firm Structure—An Historic Opportunity*, 57 FORDHAM L. REV. 969, 971 (1989); Wald, *supra* note 7, at 1806.

134. Leslie C. Levin, *Specialty Bars as a Site of Professionalism: The Immigration Bar Example*, 8 U. ST. THOMAS L.J. 194, 194 (2011).

hail from the same or similar backgrounds.¹³⁵ Or one can associate with other law school alumni, or even connect with similarly situated lawyers virtually.

Isolation within the large law firm context is thus the result of insufficient time to pursue a rich personal life because of the stringent demands of one's professional life,¹³⁶ and of the consequences the rat race large law firm practice has become. Increased competitiveness and the "eat what you kill" culture undermine the foundation for true friendships, even as teamwork necessitates professional courtesy and shallow collegiality.

Much has been written as of late about the importance of teamwork in the context of in-house legal work. Summarizing the key attributes of successful in-house lawyers, Michelle Mayes and Kara Baysinger list: "political savvy; emotional intelligence; fielding and prioritizing multiple inputs without getting overwhelmed; keeping a calm, cool, and collected head in times of crisis and keeping it all together; *an ego-free, consensus-focused approach to strategy, decision-making, hierarchy, and other considerations.*"¹³⁷ Yet, while being a team member is a constitutive characteristic of a successful in-house counsel, in-house attorneys experience significant levels of isolation in their practice, perhaps even more so than large law firm lawyers.

In-house lawyers experience isolation in distinct ways at two different levels. Within the corporation they are often perceived as outsiders,¹³⁸ working alone, removed from non-lawyers, from corporate colleagues,¹³⁹ especially vis-à-vis lower-ranked executives who often see only one goal, generating profit, and thus little use for lawyers, as opposed to higher-up executives who have been tested in decision-making entailing complex legal elements who might better appreciate the value lawyers can generate. And they are uniquely situated, as compared with the entity's non-lawyers employees.¹⁴⁰ Such isolation is

135. Wilkins, *supra* note 15, at 1607 (describing minority bar associations); Veta Richardson, *Analyzing Changing Demographics in Law Departments, MCCA Offers Recommendations for Women and Minorities*, LEGAL TIMES, Sept. 15, 2003 (reporting the results of the Minority Corporate Counsel Association's annual survey of the Fortune 500).

136. Chayes & Chayes, *supra* note 1, at 296; Fortney, *The Billable Hours Derby*, *supra* note 84, at 179–81; Fortney, *supra* note 34, at 246–47; Galanter & Palay, *supra* note 11, at 752; Nicholson, *supra* note 6, at 652; Wald, *A Primer on Diversity*, *supra* note 29, at 1123.

137. MAYES & BAYSINGER, *supra* note 14, at 30 (emphasis added).

138. See *supra* notes 107–10 and accompanying text.

139. MAYES & BAYSINGER, *supra* note 14, at 28; *supra* notes 107–10 and accompanying text.

140. See *supra* notes 107–10 and accompanying text.

hard to bridge: compared with their corporate counterparts, in-house lawyers may hail from different backgrounds and have different goals, job prospects, and professional aspirations.¹⁴¹ In this sense, in-house counsel work is inherently isolating.

In-house attorneys must bridge the gap, prove themselves valuable to the entity, and overcome the outsider perception. Yet overcoming being an outsider is both time-consuming and costly. Moreover, passing and covering as insiders, even when successful, is only relative, not absolute, such that one continues to bear the costs of being an outsider over time.¹⁴²

At the same time, in-house lawyers also experience a sense of isolation from the organized bar and the legal profession. Historically, in-house lawyers were looked down upon as “second-class citizens[]” who could not make it as partners at large law firms,¹⁴³ and as sellouts who did not share lawyers’ defining characteristic of independence.¹⁴⁴ But even as their status improved, in-house lawyers do have unique practice conditions that insulate and isolate them from the realities of most other lawyers. They do not need to generate business, or worry about collecting fees, billing time, etc., and at the same time they face unique challenges such as remaining generalists in highly specialized legal work, serving one client, and operating as a cost-center rather than as a profit generator.¹⁴⁵ They experience different practice challenges than firm lawyers and tackle different legal and non-legal questions, mostly dealing with different types of clients and work environments. Consequently, contrasted with large law firm lawyers, in-house attorneys experience their daily professional experiences as isolating.¹⁴⁶

Overall, the existing evidence suggests that while in-house lawyers work increasingly long hours, in-house practice generally offers a

141. See *supra* notes 107–10 and accompanying text.

142. Eli Wald, *The Visibility of Socioeconomic Status and Class-Based Affirmative Action: A Reply to Professor Sander*, 88 DENV. U. L. REV. 861, 865–67 (2011).

143. Hazard, *supra* note 3, at 1011–12; see also Giesel, *supra* note 11, at 790–91; Rosen, *supra* note 3, at 504; Steinberg, *supra* note 26, at 484.

144. Wilkins, *supra* note 8, at 2075. See, e.g., Louis D. Brandeis, *The Opportunity in the Law*, Address Before Harvard Ethical Society (May 4, 1905), in 39 AM. L. REV. 555, 557–59 (1905) (urging a graduating class of law students to stand their professional ground and practice as lawyers for the people instead of as servants of corporate interests).

145. Daly, *supra* note 1, at 1061–62 (describing the four main roles that in-house attorneys occupy); Gardner, *supra* note 110, at 39; Giesel, *supra* note 11, at 791; Kim, *supra* note 6, at 201; Rosen, *supra* note 3, at 504–05.

146. Cf. Liu, *supra* note 6, at 554 (describing the separation between Chinese lawyers and enterprise legal advisors who counsel Chinese state-owned enterprises).

better work-life balance compared with large law firm practice. At the same time, one should not underestimate the work-life challenges facing in-house attorneys nor assume that in-house practice offers an attractive work-life balance.¹⁴⁷ While in-house lawyers may on average work shorter hours than their large law firm counterparts and benefit from greater flexibility, the diffused work environment in-house—both in terms of the necessary investment of “soft” hours and in terms of having to think outside of the box to demonstrate one’s value and pursue non-structured career advancement opportunities—the increased travel and transfer prospects, and the significant sense of isolation experienced by in-house lawyers all render striking an effective work-life balance at in-house departments a complex and challenging task.

B. *The Elusive Promise of Greater Equality In-house*

Inequality in the legal profession, and in particular gender inequality, is a well-documented phenomenon.¹⁴⁸ Nineteenth-century courts throughout the country routinely refused to admit women into the profession finding them unsuitable to practice law.¹⁴⁹ Twentieth-century law schools and law firms explicitly and overtly refused to admit female students or hire, let alone promote, them as associates and partners.¹⁵⁰ Early codes of professional conduct reflected and celebrated

147. Nelson & Nielsen, *supra* note 11, at 487; Nicholson, *supra* note 6, at 631; Schwarcz, *supra* note 6, at 528–29; Joan C. Williams et al., *Better on Balance? The Corporate Counsel Work/Life Report*, 10 WM. & MARY J. WOMEN & L. 367, 448 (2004) (concluding that attorneys seeking to balance work and life commitments by moving to corporate law departments should investigate the particular department policies before assuming all in-house departments provide these benefits).

148. See sources cited *supra* note 14 and accompanying text.

149. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (stating that women’s nature precludes them from membership in the professions and suits them to “the domestic sphere as that which properly belongs to the domain and functions of womanhood”); *In re Goodell*, 39 Wis. 232, 245 (1875) (finding women’s “tender susceptibility” inconsistent with the qualities required by the practice of law). The U.S. Supreme Court subsequently validated the sentiments expressed by such state court opinions by holding that states have the power to determine whether women are competent to practice law. *In re Lockwood*, 154 U.S. 116, 118 (1894).

150. Ballard, *supra* note 14, at 2; Beatrice Dinerman, *Sex Discrimination in the Legal Profession*, 55 A.B.A. J. 951, 951 (1969) (noting that women admitted to law schools are more closely scrutinized than men for “ability and motivation” in the admissions process). See generally RONALD CHESTER, *UNEQUAL ACCESS: WOMEN LAWYERS IN A CHANGING AMERICA* 87–116 (1985); KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT* 57–61 (1986). In 1992, Cynthia Fuchs Epstein found that while women attorneys have constituted 40–50% of entering associate classes, they account for only 37% of associates and approximately 11% of partners. Epstein et al., *Glass Ceilings and Open Doors*, *supra*

a masculine ethos by constituting the combative adversary system as the paradigmatic system for finding truth, administering justice, and practicing law and treated “warm zeal” as the characteristic of excellence of practice.¹⁵¹ Not until the 1970s did women begin entering the profession in substantial numbers, and not until the 1980s did women law students regularly account for approximately fifty percent of law students and entry-level associates at large law firms.¹⁵² By the late twentieth century intentional, explicit, and systematic gender discrimination in the profession had been by and large eradicated.¹⁵³

Implicit, institutional, and structural gender discrimination, however, remains a troublesome impediment to equality.¹⁵⁴ Numerous studies confirm that women lawyers are concentrated in low-status practice areas of the profession and underrepresented in high status practice areas; are underrepresented within the elite segments of the bar; and are paid less than their male counterparts for comparable positions and work.¹⁵⁵ The literature identifies five inter-related reasons for this glass ceiling effect: the impact of negative gender stereotypes, inhospitably rigid workplace structures, declining opportunities for training and mentorship that tend to disproportionately affect women lawyers, professional ideologies that define excellence in implicit masculine terms, and sexual harassment.¹⁵⁶

Of course, the gradual shift toward greater gender equality within the legal profession, the decline of intentional discrimination and the perseverance of implicit discrimination, and gender underrepresentation in positions of power and influence are not unique to the legal

note 14, at 314. In 2007, women accounted for 16% of equity partners, 26% of non-equity partners, and 30% of “of counsel” lawyers. NAT’L ASS’N OF WOMEN LAWYERS, NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 4 (2007), available at <http://nawl.timberlakepublishing.com/files/FINAL%20survey%20report%2011-14-07%20for%20website.pdf>.

151. Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys’ Loyalty to Clients*, 40 ST. MARY’S L.J. 909, 928–36 (2009) (quoting L. Ray Patterson, *Legal Ethics and the Lawyer’s Duty of Loyalty*, 29 EMORY L.J. 909, 938 (1980)) (internal quotation marks omitted).

152. Paula A. Patton, *Women Lawyers, Their Status, Influence, and Retention in the Legal Profession*, 11 WM. & MARY J. WOMEN & L. 173, 173 (2005).

153. Wald, *A Primer on Diversity*, *supra* note 29, at 1098.

154. *Id.*

155. ABA, THE REPORT OF AT THE BREAKING POINT: A NATIONAL CONFERENCE ON THE EMERGING CRISIS IN THE QUALITY OF LAWYERS’ HEALTH AND LIVES—ITS IMPACT ON LAW FIRMS AND CLIENT SERVICES 6 (1991) (“[W]omen in most positions continue to be worse off financially than their male colleagues.”); Ronit Dinovitzer et al., *The Differential Valuation of Women’s Work: A New Look at the Gender Gap in Lawyers’ Incomes*, 88 SOC. FORCES 819, 843–50 (2009).

156. Wald, *supra* note 31, at 2255–58 (summarizing the literature on the causes of implicit gender discrimination).

profession and reflect similar trends in America and its workforce. Yet, paying close attention to the various manifestations of implicit gender discrimination and underrepresentation across workforce arenas and, especially, in the legal profession is important.

First, while expecting lawyers and the legal profession to be at the forefront of the quest for equality may smack of self-serving lawyer exceptionalism,¹⁵⁷ there are compelling reasons to demand more from lawyers in the fight against implicit discrimination. As high priests and ministers of law and justice,¹⁵⁸ or even mere public citizens,¹⁵⁹ lawyers should set the standard for pursuing equality. Indeed, failure to do so might pull the rug from under the bar's claim of its special professional status.¹⁶⁰ Next, equality is at the core of the rule of law. While inequality may be a fact of life in many walks of life, its presence undermines the very meaning of law. For example, gender inequality may be a prevailing practice reality among carpenters,¹⁶¹ but its lamentable presence does not undermine what it means to be a carpenter; whereas because equality is a constitutive element of the law, inequality does undermine both the meaning of law and what it means to be a lawyer. Finally, given the role of law and lawyers in our society as important instruments and constituents of our democracy and leadership, equality in the profession strengthens our democracy and active participation in it.¹⁶²

157. See John P. Heinz et al., *Lawyers for Conservative Causes: Clients, Ideology, and Social Distance*, 37 LAW & SOC'Y REV. 5, 33–34 (2003); Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73, 76–77 (2010).

158. Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1879–1910*, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 51–74 (Gerard W. Gawalt ed., 1984) (exploring the elevated role and status of lawyers in American society).

159. See MODEL RULES OF PROF'L CONDUCT PREAMBLE ¶ 1 (2011) ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a *public citizen having special responsibility for the quality of justice.*" (emphasis added)); Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323 (2009) (examining in detail the "special responsibilities" of lawyers as "public citizens").

160. See, e.g., Thomas D. Morgan, *Calling Law a "Profession" Only Confuses Thinking about the Challenges Lawyers Face*, 9 U. ST. THOMAS L.J. (forthcoming 2012) (manuscript at 4–7), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2007296. But see Eli Wald, *An Unlikely Knight in Economic Armor: Law and Economics in Defense of Professional Ideals*, 31 SETON HALL L. REV. 1042 (2001).

161. David A. Cotter et al., *Gender Inequality at Work*, U. MD. http://www.bsos.umd.edu/socy/vanneman/papers/Cotter_etal.pdf (last visited Mar. 31, 2012) (alongside truck-driving, carpentry is the most male dominated occupation in the United States).

162. ABA PRESIDENTIAL INITIATIVE COMM'N ON DIVERSITY, *DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS* 10, 18 (2010).

Second, unlike intentional gender discrimination, which in historical context tended to be overt, implicit discrimination is harder to pin down and document. The devil, if you will, is in the details, and so are means of overcoming it. Therefore, even if implicit discrimination in the legal profession is nothing more than a symptom of the greater phenomenon in American society and its workforce, documenting its manifestations across different arenas of the legal profession is a constitutive and necessary step toward overcoming it.¹⁶³

1. IMPLICIT GENDER DISCRIMINATION AT LARGE LAW FIRMS

Large law firms, historically overt and systematic discriminators on the basis of ethno-religious affiliation, gender, racial identity, socioeconomic, and cultural background, have come a long way.¹⁶⁴ Explicit intentional discrimination has all but been eliminated,¹⁶⁵ and large law firms have been at the forefront of promoting diversity within their ranks, attaining notable success in terms of entry-level recruitment.¹⁶⁶ At the same time, however, implicit structural discrimination is still very much a reality, with women attorneys experiencing the glass ceiling effect and significant gender underrepresentation at the senior associates, junior partners, and especially equity partners' ranks.¹⁶⁷

163. Wald, *A Primer on Diversity*, *supra* note 29, at 1119–41.

164. Deborah L. Rhode, *Gender and Professional Roles*, 63 *FORDHAM L. REV.* 39, 68 (1994); Wald, *supra* note 31, at 2286–87; *see* Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 *J. LEGAL PROF.* 1, 4–8 (2009) (summarizing data on large law firms' expenditures on diversity and the disappointing results achieved, especially in terms of retention and promotion); *see also* Erin Brereton, *The New Face of Law Firm Diversity*, *LEGAL MGMT.*, May/June 2010, at 28 (reviewing large law firms' spending on diversity programs); Laura Finckle & Mark A. Bridgeman, *Committed to Inclusion: Examining Innovative Law Firm Diversity Programs*, *LEGAL MGMT.*, May 2009, at 24 (surveying large law firms' diversity initiatives).

165. Wald, *A Primer on Diversity*, *supra* note 29, at 1090; Wilkins, *supra* note 29, at 27. *See generally* JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976).

166. Brayley & Nguyen, *supra* note 164, at 4–8; Wald, *A Primer on Diversity*, *supra* note 29, at 1090; Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated against on the Job*, 26 *HARV. WOMEN'S L.J.* 77, 88 (2003).

167. Deborah L. Rhode, "What's Sex Got to Do with It?": *Diversity in the Legal Profession*, in *LEGAL ETHICS STORIES* 233 (Deborah L. Rhode & David Luban eds., 2006); Wald, *supra* note 31, at 2287; *see* Epstein et al., *Glass Ceilings and Open Doors*, *supra* note 14, at 296; Epstein, *Women in the Legal Profession at the Turn of the Twenty-First Century*, *supra* note 14, at 739; Foster, *supra* note 14, at 1632; Kaye, *supra* note 14, at 111–12; Kaye & Reddy, *supra* note 14, at 1942; Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 *MICH. J. RACE & L.* 127, 137–38 (2000);

To begin with, biased stereotypical assumptions about qualifications, competence, and divided loyalties inhibit substantive gender equality at large law firms. Women lawyers are often assumed to misunderstand the complexities of the business world and to owe insufficient loyalty to the firm and its clients out of a competing loyalty to their families and children,¹⁶⁸ stereotyping that persists even in the face of evidence to the contrary.¹⁶⁹ Next, the rigid organizational structure of large law firms, for example, its reliance on increased billable targets and expectations of significant non-billable hours, as well as anticipation of one's development as a rainmaker, tend to disfavor women lawyers, who continue to disproportionately shoulder competing personal obligations. Declining training and mentoring opportunities at firms impact all of its attorneys, but disproportionately affect women lawyers who were historically and are still often considered "outsiders" to the all important "old-boys" professional networks that, in turn, play a role in the ability to develop as a rainmaker.¹⁷⁰ Finally, the culture and ideology of a 24-7 commitment and total loyalty to the firm and its clients, and the "eat what you kill" mentality and expectation that partners become rainmakers impose greatly on all large law firm lawyers' personal lives, but have a disproportionate impact on women lawyers seeking a career at large law firms.¹⁷¹ Recent trends, like the adoption of risk-management procedures with the unintended consequence of further diluting the evaluation process of content¹⁷² and the creation of multiple tracks with the unintended consequence of relegating women to non-partnership and non-equity-partnerships tracks,¹⁷³ further aggravate the plight of women lawyers. Thus, the disappointing and static retention,

Reichman & Sterling, *Recasting the Brass Ring*, *supra* note 14, at 923-25; Reichman & Sterling, *Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers*, *supra* note 14, at 29. On racial under-representation, see Wilkins & Gulati, *supra* note 93, at 496-97.

168. ABA COMM'N ON WOMEN IN THE PROFESSION, *THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION* 14-16 (2001); Wald, *supra* note 31, at 2256.

169. RONIT DINOVTZER ET AL., *AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS* 68 (2009) (finding that women lawyers at large law firms bill almost as many hours as their male counterparts).

170. See sources cited *supra* note 87.

171. Roach, *supra* note 15, at 208; Wald, *supra* note 31, at 2262-63; Wald, *A Primer on Diversity*, *supra* note 29, at 1131; Williams & Segal, *supra* note 166, at 136.

172. See Alfieri, *supra* note 13, at 1910; Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 *GEO. J. LEGAL ETHICS* 95, 96 (2008).

173. Wald, *A Primer on Diversity*, *supra* note 29, at 1131. See generally Alexandra Kalev, *Cracking the Glass Cages? Restructuring and Ascriptive Inequality at Work*, 114 *AM. J. SOC.* 1591 (2009); Rebecca Korzec, *Working on the "Mommy-Track": Motherhood and Women Lawyers*, 8 *HASTINGS WOMEN'S L.J.* 117 (1997).

promotion, and equity realities at large law firms may drive women (and men) lawyers to in-house positions in search of diversity and equality.¹⁷⁴

2. THE EXPECTATION OF GREATER GENDER EQUALITY IN-HOUSE

At large law firms, the interplay of two gender stereotypes hinders the career advancement of women lawyers: incompetence and inferior understanding of business realities, and insufficient loyalty to the firm and its clients because of assumptions about competing personal obligations which result in divided loyalties. Combined, both stereotypes feed gendered assumptions about the ability of women lawyers to become successful rainmakers. Over time, experience tends to disprove the business incompetence stereotype, whereas the divided loyalties stereotype persists even in the face of proven loyalty and empirical proof to the contrary.¹⁷⁵ At corporate in-house legal departments, one may expect gendered stereotyping to have less of a negative impact on career advancement. Not only may the business incompetence stereotype be somewhat disproven by experience, but also its effects may not be perceived as debilitating: within the in-house department, lawyers are often called upon to manage outside counsel and concentrate on legal rather than business tasks, and there is ample business expertise outside of the department to assist lawyers, who are perceived in any event to be outsiders to the corporate world.

Similarly, the divided loyalties stereotype may have less of a negative impact in-house compared with large law firms. While for-profit corporate entities certainly expect loyalty and devoted service, they may not expect 24-7 and undivided loyalty from their in-house attorneys. In contrast to large law firms, where lawyers are the profit-centers and rainmakers, a reality that breeds an expectation that equity partners be around 24-7 generating business for the firm, in-house lawyers are often understood as cost-centers. They certainly are expected to be available and to do their part, but they are not commonly understood as the essential human capital component whose presence is needed around the clock to make the business succeed.

Moreover, Joan Williams and others have suggested that in-house women lawyers may benefit from a phenomenon known as the “flip side of bias,” namely the ability of particular groups to benefit under

174. CATALYST, *WOMEN IN LAW: MAKING THE CASE* 57 (2001); Giesel, *supra* note 11, at 762; Roach, *supra* note 15, at 208; Wilkins, *supra* note 15, at 1557; Williams & Segal, *supra* note 166, at 118.

175. *See* DINOVIETZ ET AL., *supra* note 169, at 68.

certain conditions from stereotypical biases when the very stereotypes depict desirable characteristics.¹⁷⁶ “By default alone,” writes Williams:

women have traditionally been under the pressure of not putting themselves ahead in the packing order, but rather, assuming a more attentive, helpful, emotionally intelligent role. These are the sort of things they were expected to do, but now, these same qualities are seen as being very effective for corporate legal leadership.¹⁷⁷

Such a “flip side of bias,” it has recently been argued, is “an unforeseen game-changing advantage to women lawyers on the rise.”¹⁷⁸ Indeed, a gender-based “flip side of bias” phenomenon may help explain the advances made by women attorneys serving as general counsel at Fortune 500 companies and mitigate some of the structural features inherent to in-house practice that inhibit the career advancement of women lawyers.

Next, while the rigid structure, particularly increased billable targets and the expectation of significant office face-time, help explain the glass ceiling effect at large law firms, in-house departments are typically not nearly as rigid. Most do not utilize the billable hour method and do not require considerable face time. To the contrary, flexibility of work hours characterizes in-house legal departments: even as the total work hours of in-house lawyers have been on the rise, the hours tend to be flexible such that in-house attorneys exercise greater control over their schedules and can rearrange them with greater ease to accommodate and fit conflicting personal commitments.

In-house departments do not tend to feature scarce mentoring and training “famine” for two related reasons. Unlike large law firms, where the already long hours and pressure to bill clients and generate business constitute incentives to senior associates and partners not to mentor and train their juniors, no such disincentive scheme exists in-house. Moreover, the traditional large law firm model builds on the hiring of inexperienced junior attorneys straight out of law school and their training at the firm, creating a competitive environment and “famine” for mentoring and training, which has no equivalent at in-house departments. In contrast, many in-house lawyers are hired

176. Wald, *supra* note 31, at 2276–86; Wald, *supra* note 7, at 1844–47, 1860; Eli Wald, *The Rise of the Jewish Law Firm or Is the Jewish Law Firm Generic?*, 76 UMKC L. REV. 885, 929–33 (2008) [hereinafter Wald, *The Rise of the Jewish Law Firm*].

177. MAYES & BAYSINGER, *supra* note 14, at 31.

178. *Id.* at 30.

laterally already possessing the requisite experience and skill sets needed for the job and providing more senior in-house attorneys with little reason not to train those who do need assistance.

Finally, the contemporary rise of a hypercompetitive masculine ideology at large law firms that defines and measures professional excellence in terms of “eat what you kill” and 24-7 aggressive commitment to serve the interests of entity clients further inhibits the career advancement of women lawyers at large firms.¹⁷⁹ The resurgence of masculine ideology at large law firms, it should be noted, is far from an obvious development. Large law firms, at least in theory, were conceived as and meant to be meritocracies, and therefore, if only implicitly, gender-blind.¹⁸⁰ Of course, they were not and are not strictly meritorious,¹⁸¹ featuring structural gender discrimination.¹⁸² Moreover, the longstanding legacy and ethos of masculinity in law practice, evident for example in the adversarial system’s demand for “warm zeal” and combativeness,¹⁸³ helps explain and provide a context for the continued prevalence of structural discrimination.

Indeed, the deep masculine roots of the profession help explain the long staying power of gender stereotypes: women lawyers were assumed not to be tough or aggressive enough to be effective litigators, and when large law firms emerged with their emphasis on transactional work, women lawyers were assumed not to have the requisite understanding of business to be effective corporate advisors.¹⁸⁴ Over time, as alternative styles of practice have become more common, featuring for example the “ethic of care” and collaborative approaches,¹⁸⁵ zeal has been declining in popularity,¹⁸⁶ and some

179. Wald, *supra* note 31, at 2284.

180. *Id.* Of course, the conception of merit advanced by the elite law firms was developed in an era in which hardly any women practiced law.

181. See Wald, *supra* note 7, at 1821–23; Wilkins & Gulati, *supra* note 42, at 1608–09 (arguing that large firms’ claims of meritocracy have never been accurate).

182. Wald, *A Primer on Diversity*, *supra* note 29, at 1118; Williams & Segal, *supra* note 166, at 86.

183. See Rhode, *supra* note 164, at 44–53; Wilkins, *supra* note 8, at 2068–69.

184. Nicholson, *supra* note 6, at 649; Wald, *supra* note 31, at 2274; Joan C. Williams & Elizabeth S. Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of “Carers” in the Workplace*, 13 DUKE J. GENDER L. & POL’Y 31, 33 (2006); Machlowitz, *supra* note 33, at 65 (1989) (discussing how women in corporate settings face additional challenges of assumed lack of business knowledge).

185. Cynthia Grant Bowman, *Women and the Legal Profession*, 7 AM. U. J. GENDER SOC. POL’Y & L. 149, 172 (1999); Carrie Menkel-Meadow, *Toward a Theory of Reciprocal Responsibility between Clients and Lawyers: A Comment on David Wilkins’ Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 901, 906 (1998) [hereinafter Menkel-Meadow, *Toward a Theory of Reciprocal Responsibility Between Clients and Lawyers*]; Carrie Menkel-Meadow, *What’s Gender Got to Do with It?: The Politics and*

masculine imagery, such as “Rambo-style depositions,” is now used in derogatory professional terms.¹⁸⁷ Nonetheless, the masculine roots of the profession help provide some of the necessary background for understanding contemporary realities.

In contrast, corporate entities, and their in-house legal departments, appear to feature a different ideology, one that is grounded in profit maximization, and, as of late, inclusive of social corporate responsibility and a commitment to pursuing diversity. The expectation that corporate entities will do better in terms of diversity, presumably including their in-house legal departments, is therefore grounded in the “business case for diversity”¹⁸⁸ and the well-advertised commitment of corporate America to diversity.¹⁸⁹

Perhaps surprisingly, the expectation of greater equality in hiring and promotion policies in-house is also grounded in history. In-house general counsels have played an important role in combating discrimination and fostering diversity in the legal profession before.¹⁹⁰ The rise of in-house counsel and the appointment of general counsels helped break down the old boys network’s ties between traditional white-anglo-saxon-protestant (WASP) corporate America and Wall Street’s elite WASP law firms. Charged with obtaining high-quality legal advice under a budget constraint, general counsels were more inclined than their predecessor decision-makers, predominantly WASP senior corporate executives, to hire Jewish, Catholic, and “mixed” law firms.¹⁹¹ Such early manifestation of the “business case for diversity,” however, illustrates both the strengths and weaknesses of utilitarian-based diversity initiatives. On the one hand, general counsels did help introduce ethno-religious diversity into the previously WASP-dominated upper echelon of elite Wall Street law firms. On the other hand, the driving force was ultimately retaining quality legal services at

Morality of an Ethic of Care, 22 N.Y.U. REV. L. & SOC. CHANGE 265, 292–93 (1996) (examining the ethic of care in lawyering); Nicholson, *supra* note 6, at 640; Wilkins, *supra* note 8, at 2071 (describing how large entity clients are increasingly demanding a collaborative approaches and commitments from their law firms).

186. Wilkins, *supra* note 8, at 2068–69.

187. *Id.* at 2073–74 (discussing law suits filed against aggressive lawyers).

188. See SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007); Nicholson, *supra* note 6, at 642–45.

189. Nicholson, *supra* note 6, at 628.

190. Wald, *supra* note 7, at 1848; Wald, *The Rise of the Jewish Law Firm*, *supra* note 176, at 905–06.

191. PAUL HOFFMAN, *LIONS IN THE STREET: THE INSIDE STORY OF THE GREAT WALL STREET LAW FIRMS* 135–36 (1973); Wald, *supra* note 7, at 1848; Wald, *The Rise of the Jewish Law Firm*, *supra* note 176, at 905.

a competitive cost, and enhanced diversity was nothing more than a beneficial side effect, foreshadowing current realities.

In sum, because in-house legal departments do not feature the same manifestations of gender stereotypes common at large law firms, have more flexible work conditions, do not rely on mentoring and training to the extent large firms do, offer better incentives for mentoring and training, and do not feature hypercompetitive ideologies, one might reasonably expect them to offer more equal work conditions for lawyers who shoulder personal responsibilities, predominantly women.

3. IMPLICIT DISCRIMINATION AT IN-HOUSE LEGAL DEPARTMENTS

Unfortunately, in-house legal departments appear to offer no better shot at equality than large law firms do. While the details vary, the same patterns of implicit discrimination that afflict large law firms—stereotyping, structural rigidity, reliance on social capital, and inhospitable ideology—are also very much present in in-house legal departments, and the results are predictably similar: while women lawyers fare well at entry-level and junior positions,¹⁹² they are woefully under-represented in senior, powerful, leadership positions.¹⁹³

While the divided loyalties stereotype may have less of an impact on in-house attorneys, and women attorneys may benefit from the gender stereotype of being better listeners and team players,¹⁹⁴ the incompetence stereotype, which has been in decline at large law firms, may still have negative consequences in-house. Promotion to senior positions within the in-house department, let alone outside of the department to C-suite positions, requires not only mastery of business knowledge but also the perception of it, opening the door to negative gender assumptions about the business knowledge and expertise of women lawyers.

192. Nicholson, *supra* note 6, at 626–28; see NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 150, at 4; Williams & Segal, *supra* note 166, at 88.

193. Nicholson, *supra* note 6, at 626–28; Williams & Segal, *supra* note 166, at 88. See generally Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 375–78 (1994); Paula A. Patton, *Women Lawyers, Their Status, Influence, and Retention in the Legal Profession*, 11 WM. & MARY J. WOMEN & L. 173, 173 (2005) (stating that “women [lawyers] comprise about one-half of the ABA-accredited law school graduating class but account for [less than seventeen percent] of the partners in law firms nationwide,” and the disparity in women partners is even more striking given that almost seventy-one percent of women lawyers work in private practice law firms).

194. For a discussion of the so-called “flip side of bias” phenomenon, see *supra* notes 176–177 and accompanying text.

Moreover, unlike large law firms, where the existence of generations of competent women lawyers has helped gradually disprove the incompetence stereotype, the ongoing gender under-representation in corporate America's C-suites has not allowed the experience of women there to undermine the prevalence of the stereotype. The continued masculine culture and male dominance in the senior ranks of corporate America may help explain the under-representation of women lawyers in senior ranks of in-house legal departments. Appointments as general counsel and associate general counsel are ultimately senior executive appointments, which depend to an extent on one's social capital and, in particular, effective networking. To the extent that women lawyers possess or are perceived to possess less social capital than their male counterparts, they may be at a disadvantage competing for senior in-house positions.

Without a doubt, even as the average hours of in-house lawyers are on the rise, in-house departments feature shorter, and, as importantly, more flexible work arrangements. Yet, other structural features of in-house departments somewhat negate their relative advantage vis-à-vis law firms in terms of the plausibility of gender equality. The diffused nature of in-house legal departments, both in terms of lack of structured promotion tracks and clearly established expectations about "soft" hours, and in terms of dead-end positions whereby the work done in junior positions does not necessarily lend itself for promotion and does not allow one to develop skills that would be applicable and relevant in a more senior legal position, will especially disfavor women attorneys for several related reasons.

First, the implied expectation of significant investment of "soft" hours by in-house attorneys, operating in the context of a male-dominated ideology of "ideal workers" and of lawyers being perceived as "outsiders," means that junior in-house lawyers must rely on networking and connections to better understand and do their jobs effectively, and, subsequently, to secure their next position. To the extent that women lawyers tend to have or are assumed to have reduced social capital compared with their male counterparts, this structural feature of in-house legal departments will tend to disfavor women lawyers.

Second, and related, because senior in-house counsel positions are often staffed laterally from the ranks of senior associate and partners from large law firms,¹⁹⁵ and because these ranks evidence structural

195. Roach, *supra* note 15, at 215; Erin Abrams, *Women Rising up the Ranks as CFOs and General Counsel*, GLASS HAMMER (June 5, 2008, 11:40 AM), <http://www.theglasshammer.com/news/2008/06/05/women-rising-up-the-ranks-as-cfos->

discrimination and feature mostly men lawyers,¹⁹⁶ the glass ceiling effect at large law firms will tend to transfer and translate itself into gender under-representation at senior levels at in-house legal departments.

Third, to the limited extent that junior in-house counsel lawyers are promoted internally, and since their legal in-house jobs do not train them well for senior positions, those promoted would have to prove themselves by developing well-rounded careers and demonstrating understanding not only of the legal aspects of corporate challenges but also the business, financial, and other aspects of the work environment. Put differently, top positions require business understanding and therefore trigger gender stereotypes about business incompetence, not unlike gender stereotypes that afflict women lawyers at large law firms.¹⁹⁷ Promotion to senior positions would also require significant investment of “soft” hours, triggering gender stereotypes regarding divided loyalties and women lawyers’ inability to meet the goals of the “ideal worker” corporate ideology.

Moreover, some of the structural features of in-house practice that make it less of a work-life haven may have a disproportionate impact on women lawyers. Top positions require “soft” time commitment, travel, and the possibility of transfer, which women lawyers who continue to bear greater responsibility for childrearing may be unable or unwilling to meet. Worse, even when they are willing and able to accommodate increased travel and transfer, women lawyers may become victims of stereotypical assumptions about their divided loyalties and desire to stay home.¹⁹⁸

Next, the decentralized structure of in-house counsel practice breeds isolation for lawyers and may be experienced more acutely by women lawyers, to the extent that female lawyers tend to have a preference for collaborative practice settings and collegiality.¹⁹⁹ Once again, gendered assumptions may hinder the career path of women

and-general-counsel/ (“The path to the GC’s office often involves many years at a law firm . . .”).

196. LEICHT & FENNELL, *supra* note 57, at 180; Wald, *supra* note 31, at 2251, 2263; Machlowitz, *supra* note 33, at 66.

197. Wald, *supra* note 31, at 2274; Machlowitz, *supra* note 33, at 64, 66.

198. Peter Glick & Susan T. Fiske, *Sexism and Other “Isms”: Independence, Status, and the Ambivalent Content of Stereotypes*, in *SEXISM AND STEREOTYPES IN MODERN SOCIETY: THE GENDER SCIENCE OF JANET TAYLOR SPENCE* 193, 206–07 (William B. Swann, Jr. et al. eds., 1999); Williams & Segal, *supra* note 166, at 95 (discussing the negative impact of “benevolent stereotyping”).

199. See Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on A Women’s Lawyering Process*, 1 *BERKELEY WOMEN’S L.J.* 39 (1985); Menkel-Meadow, *Toward a Theory of Reciprocal Responsibility between Clients and Lawyers*, *supra* note 185, at 906; Wald, *supra* note 31, at 2281.

attorneys even if they in fact have no such preferences, as decision-makers may nonetheless attribute to them such stereotypical preferences.²⁰⁰

Finally, in-house legal departments do not feature a hypercompetitive ideology that defines and celebrates professional excellence in terms of a 24-7 commitment. But neither are they built upon and organized around a meritocratic ideology. Rather, a masculine past, not unlike that of the legal profession and its large law firms, provides the backdrop for corporate hierarchy and bureaucracy. As Rosabeth Moss Kanter notes, the ideal type of the American corporate manager was a man. Rationalization “gave bureaucratic organizations their advantage of efficiency over other types of organized groups. Bureaucracy was the truly ‘passionless’ organization; it was singularly unromantic—even singularly inhuman. . . . eliminati[ng] from official business love, hatred, and all purely personal, irrational, and emotional elements which escape calculation[s.]”²⁰¹ all reflecting and contributing to a masculine ethic. “[A] ‘masculine ethic’ of rationality dominated the spirit of managerialism and gave the manager role its defining image.”²⁰²

This role ideology lent itself, in an historical context, to men dominating managerial positions.²⁰³ And while the picture may not be as bleak as it was in 1973, it is still fairly disheartening for women. The norm and expectation of senior management in corporate America, popular talk about board diversity notwithstanding,²⁰⁴ is still male.²⁰⁵

200. Madeline E. Heilman, *Sex Stereotypes and Their Effects in the Workplace: What We Know and What We Don't Know*, 10 J. SOC. BEHAV. & PERSONALITY (SPECIAL ISSUE) 3, 7 (1995); Wald, *supra* note 31, at 2275; Williams & Segal, *supra* note 166, at 97.

201. KANTER, *supra* note 15, at 22 (quoting FROM MAX WEBER: ESSAYS IN SOCIOLOGY 215–16 (Hans Gerth & C. Wright Mills eds., 1958)) (internal quotation marks omitted); see also Galanter & Henderson, *supra* note 12, at 1912; Williams & Segal, *supra* note 166, at 99–100 (discussing how law is associated with masculine characteristics).

202. KANTER, *supra* note 15, at 25; see also Wald, *supra* note 31, at 2274–75; Williams & Segal, *supra* note 166, at 94 (arguing that masculine ideals dominate the workplace environment).

203. GAIL COLLINS, WHEN EVERYTHING CHANGED: THE AMAZING JOURNEY OF AMERICAN WOMEN FROM 1960 TO THE PRESENT 22 (2009) (“A report on women in management by *Harvard Business Review* in the 1960s said there were so few [of them] ‘there is scarcely anything to study.’ The idea that men were supposed to be in charge went beyond conventional wisdom; it was regarded as scientific fact.”); KANTER, *supra* note 15, at 16–17; see Roach, *supra* note 15, at 208.

204. See Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 795–97; Galanter & Henderson, *supra* note 12, at 1924 (discussing media coverage of diversity efforts by firms); Nicholson, *supra* note 6, at 643

Joan Acker argues that “[i]n organizational logic, both jobs and hierarchies are abstract categories that have no occupants . . . no gender. . . . [F]illing the abstract job is a disembodied worker”²⁰⁶ So far, so good, notes Acker, however, “[t]he closest the disembodied worker doing the abstract job comes to a real worker is the male worker whose life centers on his full-time, life-long job, while his wife or another woman takes care of his personal needs and his children.”²⁰⁷ This is how an “ideal worker” ideology is conceived, in which “[t]he concept ‘a job’ is thus implicitly a gendered concept, even though organizational logic presents it as gender neutral.”²⁰⁸ Once organizational logic is couched in terms of gender neutrality and meritocracy, the “paradox of meritocracy” follows, whereby managers that show greater bias favoring men over equally performing women, ironically justify their assessments in terms of “gender neutral merit,” and fail to see the fallacy of the analysis.²⁰⁹ This masculine ideology has rendered women “outsiders” in senior levels of corporate America in a sense that helps explain the disproportionate impact of certain structural features of in-house counsel positions on women lawyers.²¹⁰

At the end of the day, while in-house legal departments do not feature many of the characteristics of structural discrimination common

(discussing how diversity in corporations makes them more attractive employers); Wald, *A Primer on Diversity*, *supra* note 29, at 1091 (explaining that many firms display their diversity achievements and commitments on their websites); LeeAnn O’Neill, *Hitting the Legal Diversity Market Home: Minority Women Strike Out*, MOD. AM., Spring 2007, at 7, 10–11.

205. Wilkins & Gulati, *supra* note 115, at 1247; *see also* Wilkins, *supra* note 15, at 1579; Williams & Segal, *supra* note 166, at 99–100 (discussing how women who display masculine characteristics are further discriminated against because they are disliked).

206. Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER & SOC’Y 139, 149 (1990).

207. *Id.*

208. *Id.*; *see also* Dana M. Britton, *The Epistemology of the Gendered Organization*, 14 GENDER & SOC’Y 418 (2000); Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women’s Ascent up the Organizational Ladder*, 57 J. SOC. ISSUES 657 (2001). *But see* Erin Reid, *Passing as Superman: The Ideal Worker and Men’s Professional Identities* (unpublished manuscript) (2011) (on file with author) (finding no empirical support for the theory of gendered organizations).

209. Emilio J. Castilla, *Gender, Race, and Meritocracy in Organizational Careers*, 113 AM. J. SOC. 1479 (2008); Emilio J. Castilla & Stephen Benard, *The Paradox of Meritocracy in Organizations*, 55 ADMIN. SCI. Q. 543, 567–68 (2010).

210. “Conventional masculinity,” writes Joan Williams, “is involved in the constant signaling of who is higher on the hierarchy... What’s needed is more thoughtfulness about how to free certain work cultures from masculine bravado. The result will be a lot more co-ed common sense.” MAYES & BAYSINGER, *supra* note 14, at 31.

to large law firms—there is no expectation of business development and rainmaking capabilities, no inherent expectation of long billable hours and a 24-7 commitment to the firm, and no professional ideology that defines excellence in terms of undivided loyalty to the firm—unfortunately, these characteristics are replaced with other discriminatory features: gender stereotypes about business knowledge that influence promotion patterns to senior in-house and C-suite positions, implicit expectations of long “soft” hours alongside diffused work environments which in turn reintroduce reliance on social capital, greater travel and transfers, increased isolation both within the corporate entity and vis-à-vis other segments of the legal profession, and reliance on an “ideal worker” ideology and entrepreneurial spirit in a masculine work environment.

IV. THE FUTURE OF WORK-LIFE BALANCE, EQUALITY, AND DIVERSITY IN-HOUSE

The in-house myths, holding that in-house legal departments offer a superior work-life balance and a more equal playing field in terms of promotion to senior and powerful positions compared with large law firms, are just that, myths. In-house departments do in general demand shorter hours and offer greater flexibility but the better work-life balance should not be overstated because other structural and institutional features informally extend the de-facto hours expectation and undermine the attractiveness of the balance. And while many of the details of structural discrimination that plague the career advancement of women lawyers at large law firms are not present at in-house departments, other features create a similar environment of implicit discrimination.

The takeaway from debunking the in-house myths, however, is not that women (and men) lawyers should not practice in-house, any more than the well-documented glass ceiling effect at large law firms should discourage women (and men) lawyers from seeking equality there. Rather, in the short run, discrediting the work-balance and equality myths can play a constructive role in allowing women (and men) lawyers to seek and compete for in-house positions on an informed basis with a more accurate understanding of the trades-offs these positions offer, the challenges that lay ahead, and the steps necessary to address them. In the longer run, exposing the in-house myths for what they are can help avoid the temptation to look for easy solutions in the fight against under-representation in positions of power and influence and refocus attention on the formidable challenges of combating implicit discrimination.

A. *What “Went Wrong?” Why Are In-house Departments Not a Professional Haven for Women Lawyers?*

Nothing “went wrong” in-house, except for the unrealistic expectation that in-house departments become professional havens for women lawyers. One way to understand the glass ceiling experience of women lawyers at large law firms is in the context of, and as an example of, broader implicit structural discrimination taking place in work environments that are becoming more competitive, increasingly demanding, and less hospitable to the “personal” sphere in the work-life balance, with a disproportionate impact on women lawyers who continue to shoulder an uneven personal burden in our culture. Viewed in such a light, large law firms are not evil entities, but rather paradigmatic examples of for-profit entities that struggle, notwithstanding significant investments in diversity, with gender underrepresentation in an increasingly competitive marketplace for legal services. Furthermore, from this perspective, the expectation that large law firms will or should do better than other for-profit entities reflects unrealistic lawyer exceptionalism, and the expectation that in-house legal departments will and should do better, overlooking the fact that these are departments of for-profit entities, was naïve. If nothing else, that in-house departments experience the same patterns of increased pressure on the work-life balance, inequalities, and implicit gender discrimination is not at all surprising.

It should be noted, however, that the in-house myths were not solely grounded in the disappointing and persistent glass ceiling realities at large law firms. Corporate America has been a recent leader in pursuing the “business case for diversity,” with a highly visible campaign to demand enhanced gender (and racial) diversity from its outside counsel, and one could have reasonably expected to see these policies and their consequences impact the in-house departments of these entities as well. Indeed, the numbers do reflect a significant formal and substantive change since 2000, which is quite striking given that since 2008 in-house legal departments appear to be experiencing stagnant growth, and given that the number of general counsel positions at Fortune 500 is finite.²¹¹ At the same time, in-house legal departments and lawyers are inherently somewhat of outsiders, separate from the general entity and its culture and thus, arguably, diversifying in-house legal departments and even general counsel would be easier to do than

211. *Supra* Part II. While corporate America’s “call for action” deserves some credit, some of its outcomes have been counterintuitive, resulting in gender and racial matching and pigeonholing minority attorneys to certain clients and tasks.

diversifying other senior management positions, at least as evidenced by the abysmal number of female chief executive officers.²¹²

As Sung Hui Kim argues, corporate entities are good about telling others, such as large law firms and law schools, about diversity, but may not be as good in pursuing diversity themselves.²¹³ While joining amicus briefs calling on law schools to diversify their student bodies and faculties, and demanding that outside counsel diversity efforts be monitored and managed by in-house counsel, large corporate entities have not managed to attain substantive equality in their own in-house legal departments and have a very poor record of gender diversity outside of these departments. While already hiring the best and most prestigious elite law firms, large corporate entities have taken advantage of their relative power vis-à-vis large law firms and the increased competition in the market for corporate legal services to demand, at little to no cost to themselves, that large law firms feature enhanced diversity. And not only was this nearly cost-free, but also it had the side benefit of creating positive public relations free of charge: corporate America was not only committed to diversity, it was showing the way to America's elite law firms!

Diversifying their own in-house legal departments, especially outside of the visible Fortune 500, was and is altogether a different story. Diversification at entry levels was relatively easy to achieve at little cost: recruiting disillusioned mid-level female (and male) associates from large law firms was easy enough to do. And indeed, the percentage of women in-house lawyers has increased tremendously over the last twenty-five years.²¹⁴ Similarly, diversification at the most visible levels of general counsel at Fortune 500 companies may also be, relatively speaking, easy to do, exactly because lawyers are perceived to be "outsiders," and the in-house legal department an "outsider" in the corporate environment. There are, after all, only a finite number of Fortune 500 general counsel positions, and change at that level does not require nor reflect a fundamental transformation of the gendered culture of corporate America. Achieving substantive diversity goals and equality outside of entry level positions and at the most visible legal positions at the top of the pyramid, however, is altogether a different story requiring a systematic overhaul of corporate culture, work ethos, and prevailing organizational structures.

212. PAUL PHILIPPE FRERE, BOARD PRACTICES: THE STRUCTURE OF BOARDS AT S&P 1,500 COMPANIES 39-47 (U.S. ed., 2011).

213. Sung Hui Kim, *The Diversity Double Standard*, 89 N.C. L. REV. 945, 953-54 (2011).

214. *See supra* Part II.

To begin with, achieving gender diversity at senior levels of in-house legal departments is in part a function and a reflection of the pool of available candidates, the so-called pipeline problem.²¹⁵ Recruiting primarily laterally from within the ranks of large law firms, large corporations are facing a shallow pool of women lawyers. Moreover, the problem is also a reflection of under-representation in corporate America, outside in-house legal departments. Notwithstanding corporate America's love affair with diversity talk, and, in particular, with board diversity talk,²¹⁶ its diversity track record in senior management levels is shockingly poor.²¹⁷ While some gains have been made in the realm of boards, senior managements continue to be the near exclusive domain of men.²¹⁸ As many have shown, gender homogeneity of key corporate decision-makers will tend to perpetuate itself, and, not surprisingly, the result tends to be a male-dominated senior in-house counsel rank.

Moreover, as David Wilkins has argued, while the business case for diversity can result in positive progress toward enhanced diversity, its normative desirability is suspect and should not be overstated. Ultimately, the business case for diversity is just that, a business instrumental and utilitarian case, which depends and is constrained by the overall commitment of for-profit entities to maximize profits on behalf of shareholders, diversity and equality notwithstanding.²¹⁹

B. The Case for Diversity and Equality inside the House

Increased competition in the market for corporate legal services, growing client sophistication and commoditization of legal work has resulted in increased pressure on the personal sphere in the work-life balance struck by lawyers in the corporate hemisphere of the legal profession, at large law firms and in-house departments alike.²²⁰ And

215. See, e.g., THE EDUCATION PIPELINE TO THE PROFESSIONS: PROGRAMS THAT WORK TO INCREASE DIVERSITY (Sarah E. Redfield, ed., 2012); DOROTHY H. EVENSEN & CARLA D. PRATT, THE END OF THE PIPELINE: A JOURNEY OF RECOGNITION FOR AFRICAN AMERICANS ENTERING THE LEGAL PROFESSION (2012).

216. Regina F. Burch, *Worldview Diversity in the Boardroom: A Law and Social Equity Rationale*, 42 LOY. U. CHI. L.J. 585 (2011).

217. FRERE, *supra* note 212, at 39–47.

218. J. Robert Brown, Jr., *Neutralizing the Board of Directors and the Impact on Diversity* (Univ. of Denver Legal Studies, Research Paper No. 11-18, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1938427.

219. See Wilkins, *supra* note 15.

220. On the separation of hemispheres in law practice, whereby large law firms tend to service large entity clients and solo and small law firms commonly serve individual clients, see JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319–20 (1982) (the legal profession consists of two

while in-house departments still offer a more attractive work-life balance compared with large law firms especially in terms of flexibility of hours worked, the differences are not as pronounced as one might expect and are narrowing. As importantly, the growing pressure on the personal lives of lawyers is not unique to the legal profession and is, in part, a feature of increased global competition in service industries.

Yet how large law firms, in-house departments, and the legal profession as a whole respond to these challenges remains a fundamental issue in need of addressing. In addition to whatever reasons that support diversity initiatives and commitment to gender equality outside of the legal profession,²²¹ there are compelling reasons as to why the legal profession and some of its leading constituencies as such must actively pursue substantive diversity.²²² Commitment to equality, what it means to be a lawyer, access to legal services, and recognition of the role law plays in our society as a stepping stone for leadership positions all justify a special, or heightened commitment to diversity and equality within the legal profession.²²³

That lawyers qua lawyers and the legal profession as a whole ought to lead in the battle for substantive gender equality sounds, admittedly, like lawyer exceptionalism, and might serve, indirectly, to legitimize and support lawyers' claims to continued special professional status and benefits, and to defeat calls for de-regulation of the profession.²²⁴ For purposes of this Article, it is unnecessary to engage with the greater debate over the desirability of professionalism and

categories of lawyers whose practice settings, socioeconomic and ethno-religious backgrounds, education, and clientele differ considerably).

221. Wald, *A Primer on Diversity*, *supra* note 29, at 1121 (arguing that gender stereotyping within law firms is in part a product of processes that take place outside these firms); see VALIAN, *supra* note 14, at 198–208. See generally JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000).

222. See Wald, *A Primer on Diversity*, *supra* note 29, at 1101, 1112; see also Trevor C.W. Farrow, *Sustainable Professionalism*, 46 *OSGOODE HALL L.J.* 51, 91 (2008) (“[G]ender equality is a fundamental legal norm The law in Canada now demands adherence to the equality principle. The legal profession should show leadership by adopting equality norms as its own.” (internal citations omitted)); Williams & Segal, *supra* note 166, at 120.

223. Wald, *A Primer on Diversity*, *supra* note 29, at 1101, 1103; see also Daly, *supra* note 1, at 1069; Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 *AM. B. FOUND. RES. J.* 613, 615–17 (arguing that effective access to law and lawyers is a condition for first-class citizenship).

224. See, e.g., Morgan, *supra* note 160 (manuscript at 7–14); Ribstein, *supra* note 6 (arguing that in-house departments populated by cohorts of lawyers are a self-serving invention, which is not warranted by the actual needs of corporate entities).

lawyer exceptionalism.²²⁵ Suffice it to say that as long as lawyers continue to be recognized as professionals, claim the benefits of professional status, and explain their elevated position in terms of commitment to the rule of law and equality as one of its core elements, it is legitimate, indeed reasonable, to hold them to higher standards of equality and substantive diversity.

Moreover, certain constituencies of the legal profession, for example, elite segments of the bar and entities such as large law firms that unintentionally practice implicit, institutional, and structural discrimination are under a special duty to lead in the battle for equality.²²⁶ In other words, the legal profession's heightened duty to equality and substantive diversity should not be equally distributed among all members of the profession. Rather, elite segments and constituencies of the profession that engage in implicit gender discrimination must do more than other lawyers to undo their own discriminatory policies and conduct.

Proponents of substantive diversity in the legal profession argue that elite legal positions serve as a stepping stone to positions of influence and leadership in our society and that gender under-representation in the upper echelons of the bar leads to such under-representation in leadership positions throughout our society and thus breeds inequality and injustice as well as distrust in our leading institutions.²²⁷ Gender under-representation in in-house legal departments turns out to be a case at hand. To the extent that in-house legal departments tend to recruit senior lawyers from within the ranks of senior associates and junior partners at large law firms and thus "import" the inequality common at large law firms into the world of in-house counsel, the result underlines the importance of pursuing and achieving substantive diversity and equality within large law firms. Failure to do so results not only in under-representation of women as equity partners at Big Law, but also in under-representation of women as general counsel in corporate America, and in the C-suites of corporate America more generally.

Should in-house legal departments be subjected to the heightened duty to pursue gender equality and substantive diversity? The analysis entails a two-step inquiry: first, are in-house legal departments and their lawyers members of the legal profession; and second, if so, do in-house departments practice implicit discrimination?²²⁸ This Article

225. See sources cited *supra* note 157.

226. Wald, *A Primer on Diversity*, *supra* note 29, at 1112–20.

227. *Id.* at 1096; Wilkins, *supra* note 8, at 2118–19 (asserting that misuse of lawyers' privileged status undermines public trust in the profession).

228. See Wald, *A Primer on Diversity*, *supra* note 29, at 1112–19.

answers the second inquiry in the affirmative. But are in-house departments for purposes of assessing accountability for equality and responsibility for diversity a constituency of the legal profession?

As members of the legal profession, like all attorneys, in-house lawyers should be obligated to pursue equality. On the other hand, the reasons that compel commitment to substantive diversity applicable to lawyers qua lawyers and to law firms qua law firms, do not immediately apply to in-house counsel, who are employees of for-profit corporate entities, with the same force.²²⁹ Compared with large law firms, corporate entities have a more legitimate and compelling interest, recognized in the doctrines of corporate law, in maximizing profits, irrespective of the per se pursuit of equality and diversity. To the extent, for example, that a pool of qualified candidates for senior in-house counsel positions—senior associates and junior partners at large law firms—consist predominately of men lawyers, corporations have a legitimate reason to hire them, uninhibited by considerations such as the inherent importance of equality to the role of law. Moreover, not only do unique additional justifications compel lawyers as lawyers to seek equality and substantive diversity (compared with non-lawyers), but also lawyers' independence usually empowers them to effectuate changes within the legal profession and act on their heightened duty to equality.²³⁰ In contrast, in-house lawyers often do not have the power to effectuate change at the senior levels of the in-house department even if they were committed to doing so, because such hiring and promotion decisions are often made by non-lawyers.

On the other hand, some unique justifications for equality and diversity that apply to large corporate entities, and do not usually apply to lawyers as lawyers, such as social corporate responsibility and the business case for diversity, may prove to be sufficient to trigger a heightened commitment to equality in-house. To the extent, for example, that corporate entities begin to acknowledge their responsibilities and duties as social citizens and pursue the goals of equality and diversity independent of the business case for them, a gradual cultural transformation may render pursuit of gender equality in-house more attainable. Of course, as long as shareholder supremacy and profit maximization continue to dominate American corporate law and culture, such a sea change may be a remote possibility.

229. Or, at least, substantive diversity justifications unique to lawyers and the legal profession may apply with similar force to general counsel and heads of in-house legal departments but not to the corporate entities as a whole, and heads of in-house legal departments may not have the ultimate authority and power to effectuate and pursue substantive diversity initiatives to the extent large law firms can.

230. Gordon, *supra* note 44.

CONCLUSION

That in-house legal departments, which are after all part of corporate America, turn out not to be a professional haven for women lawyers, notwithstanding the wishful thinking of some large law firm lawyers, is perhaps not surprising. The beliefs that in-house departments offer an attractive work-life balance and greater equality in promotion to positions of power and influence are exaggerated myths. Furthermore, that in-house departments feature implicit gender discrimination similar to patterns evident at large law firms as well as the American workforce more generally is likely, upon reflection, to be expected. At the same time, the recent gender diversity gains made by in-house legal departments have been significant. In-house women lawyers have attained the goal of formal diversity and have made visible strides toward substantive diversity. In particular, in-house departments do offer a more attractive work-life balance compared with large law firms at least in terms of greater flexibility, and have, at least at the highly visible level of the Fortune 500 general counsel level, made impressive substantive diversity gains. The experience of women attorneys at in-house legal departments thus suggests three conclusions.

First, within the legal profession, there is no substitute for a heightened commitment to formal and substantive diversity.²³¹ There are no simple solutions to the complex problem of implicit gender discrimination, no easy means of escaping it, for example, by opting out of large law firms to in-house legal departments, and no quick fixes to it. Instead, unintentional structures, organizations, policies, and procedures that result in disparate impact on the hiring and promotion of women (and minority) lawyers must be identified, challenged and mitigated. As long as lawyers justify their professional standing and elevated status in terms of their commitment to the rule of law and equality, they must lead the battle for gender equality and substantive diversity.

Second, the duty of all members of the legal profession to pursue equality should not be shouldered evenly by all lawyers and legal actors. Leading legal institutions, such as large law firms and elite in-house legal departments, that play an important symbolic role in the legal profession and that implement, albeit unintentionally, structures, organizations, policies and cultures, which result in implicit gender discrimination must do more than other lawyers to prevent, mitigate and correct for the unintended consequences of their conduct. Prevailing practice realities at both large law firms and in-house legal

231. Nicholson, *supra* note 6, at 662-65; Wald, *A Primer on Diversity*, *supra* note 29; Wilkins, *supra* note 15, at 1559.

departments reveal significant patterns of implicit discrimination and inequality that ought to be actively combated by these institutions.

Finally, inside and outside of the legal profession, implicit discrimination is an evil that must be tackled head on. Unintended and unintentional as implicit discrimination may be, it has real and harmful consequences that must be addressed by legal means.²³² Even as explicit intentional discrimination has been in decline, implicit discrimination helps sustain the legacy and consequences of intentional discrimination, pulling the rug from underneath the “no-problem” problem approach to gender inequality.²³³

232. See, e.g., Rebecca J. Cook, *Structures of Discrimination*, 28 MACALESTER INT’L J. 33 (2012); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003).

233. Rhode, *The “No-Problem” Problem*, *supra* note 14.

