

# GENDER BIAS IN THE COURTROOM: COMBATING IMPLICIT BIAS AGAINST WOMEN TRIAL ATTORNEYS AND LITIGATORS

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## INTRODUCTION

Over the last several decades, women have made significant strides in the legal profession. Today, women account for nearly half of law student enrollment and occupy more leadership roles than in past years. While increasing numbers of women are attending law schools and entering law practice, women have not advanced to the highest levels of the legal profession at the same rate as men. Specifically, women account for only 34% of attorneys in private practice,<sup>1</sup> only 20.2% of partners,<sup>2</sup> 17% of equity partners,<sup>3</sup> 4% of managing partners at the 200 largest law firms,<sup>4</sup> and even a smaller percentage of lead counsel and first-chair trial attorneys.<sup>5</sup> Moreover, gender biases continue to pervade the courtroom and the legal profession, creating obstacles for women who wish to advance in their legal careers. This article explores the various gender biases that female attorneys confront in the legal profession that help explain the disproportionately small number of women trial attorneys and litigators.

Part I of this article will examine the history and trajectory of women's advancement in the legal profession, tracing accounts of the first women litigators through currently practicing litigators. Part II will discuss the empirical data that demonstrate the lack of fair treatment of women trial attorneys in the courtroom by judges and jurors. This Part concludes that both explicit, but mostly implicit, biases against women trial attorneys continue to pervade the courtroom despite the significant progress women attorneys have made in the last few decades. Part III will address the perils of implicit bias in the legal profession. This Part explains that gender bias undermines our legal system by jeopardizing fairness and equity. In other words, if female attorneys are discriminated by judges, jurors, and other attorneys, so are those attorneys' clients. Consequently, gender biases against female attorneys not only undermine the attorneys' credibility, but also affect their clients' opportunity to actually be heard and have a fair court proceeding.

Part III of this article recommends strategies to counter gender biases from the moment students start law school and throughout their legal careers. This Part concludes that with higher awareness about the gender biases that pervade the legal

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<sup>1</sup> COMM'N ON WOMEN IN THE PROFESSION, AM. BAR ASS'N, A CURRENT GLANCE AT WOMEN IN THE LAW 2 (2014), [http://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_july2014.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_july2014.authcheckdam.pdf).

<sup>2</sup> STEPHANIE A. SCHARF ET AL., NAT'L ASS'N OF WOMEN LAWYERS, REPORT OF THE EIGHTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 4 (2014) (reporting that in spite of a decades-old pipeline of women law school graduates, a disproportionately low number of women advance into the highest ranks of large firms).

<sup>3</sup> COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW, *supra* note 1, at 2.

<sup>4</sup> *Id.*

<sup>5</sup> Stephanie A. Scharf & Roberta D. Liebenberg, *First Chairs at Trial More Women Need Seats at the Table*, 24 PERSPECTIVES 1, 13 (2015) (finding that in civil cases, men are three times more likely to appear in lead roles than women, and that this gender gap is greatest in AmLaw 200 firms).

profession, active recruitment of women attorneys in traditionally male positions, and better mentoring and first-chair opportunities for women in the legal workplace, women litigators and trial attorneys can achieve greater gender equality inside and outside of the courtroom.

#### I. THE HISTORY OF GENDER BIAS IN THE LEGAL PROFESSION

The American legal profession has a long history of discrimination against women. For many years, law schools refused to admit women law students,<sup>6</sup> while those women who made it through law school were denied admittance to the bar.<sup>7</sup> Though educational barriers were gradually removed, well-qualified female attorneys continued to find it difficult, and sometimes impossible, to obtain attorney positions in law firms.<sup>8</sup> For example, Justice Sandra Day O'Connor of the Supreme Court graduated third in her Stanford Law School class in 1953, was a member of the Stanford Law Review and was elected Order of the Coif, yet her only job offer was from a law firm that wanted to hire her as a legal secretary.<sup>9</sup> Similarly, Justice Ruth Bader Ginsburg of the Supreme Court tied for first in her law school class at Columbia Law School in 1959 (after transferring from Harvard Law), and despite her outstanding credentials, not a single New York law firm offered her a position.<sup>10</sup> In fact, legendary jurist Felix Frankfurter refused to hire Ginsburg as a law clerk because of her gender.<sup>11</sup>

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<sup>6</sup> CYNTHIA F. EPSTEIN, *WOMEN IN LAW* 49 (1981) (ebook). The St. Louis Law School admitted women in 1869 and was the first law school in the United States to do so. *Id.* However, women were repeatedly denied admission to law schools and even those schools that formally opened their doors to women—Michigan in 1870, Yale in 1886, New York University in 1891, and Stanford in 1895—remained inhospitable to women students. *Id.* at 49-50. Moreover, even after every state bar agreed to admit women, it remained difficult for women to gain entrance to law schools. *Id.* at 51. *See generally* RONALD CHESTER, *UNEQUAL ACCESS: WOMEN LAWYERS IN A CHANGING AMERICA* (1985) (detailing personal accounts of women who attended law school in the 1920s and 1930s).

<sup>7</sup> KAREN B. MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT* 12 (1986). In 1869, Arabella “Belle” Mansfield became the first woman in the United States to be formally admitted to the bar. *Id.* *See also* *WOMEN IN AMERICAN LAW: FROM COLONIAL TIMES TO THE NEW DEAL* 218 (Marlene Stein Wortman ed., 1985). Nevertheless, in 1873, the United States Supreme Court refused to overturn Illinois’ prohibition against women practicing law. *Bradwell v. Illinois*, 83 U.S. 130 (1873). As a result, women were forced to engage in a state-by-state struggle for admission to the individual state bars. MORELLO, *supra*, at 22.

<sup>8</sup> MORELLO, *supra* note 7, at 12; *WOMEN IN AMERICAN LAW*, *supra* note 7, at 194.

<sup>9</sup> Laurence Bodine, *Sandra Day O'Connor*, 69 A.B.A. J. 1394, 1396 (1983). Ironically, one of the partners at the firm who offered Justice O'Connor the legal secretary position was former United States Attorney General William French Smith. *Id.*

<sup>10</sup> DEBORAH G. FELDER & DIANA ROSEN, *Ruth Bader Ginsburg, in FIFTY JEWISH WOMEN WHO CHANGED THE WORLD* 264, 267 (2003). Ginsburg explained: “In the fifties, the traditional law firms were just beginning to turn around on hiring Jews. . . . But to be a woman, a Jew, and a mother to boot, that combination was a bit much.” *Id.* Ginsburg applied to large numbers of law firms in New York, only to be rejected by every single one. DAWN BRADLEY BERRY, *THE 50 MOST INFLUENTIAL WOMEN IN AMERICAN LAW* 215 (1996). Ginsburg instead took a job teaching at Rutgers Law School and became involved in doing work for the American Civil Liberties Union (“ACLU”) in New Jersey. *Id.* at 217-18. Ultimately, as director of the ACLU’s Women’s Rights Project, Ginsburg litigated many of the major cases that developed the law of sex equality in the 1970s. *Id.*

<sup>11</sup> FELDER & ROSEN, *supra* note 10, at 267.

Throughout the 1950s and 1960s, other highly qualified, well-educated women were denied professional opportunities solely based on their gender. Their experiences were amply captured in a headline in the Harvard Law Record in December 1963, six months before their graduation: “Women Unwanted.”<sup>12</sup> The article described a survey of law firms that asked what characteristics were most desirable in applicants for law firm jobs on a scale from minus ten to plus ten; being a woman was rated at minus 4.9, lower than being in the lower half of the class or being African American.<sup>13</sup> Law firms’ justifications for their negative ratings of female candidates included: “‘Women can’t keep up the pace’; ‘bad relationship with the courts’; ‘responsibility is in the home’; [and] ‘afraid of emotional outbursts.’”<sup>14</sup>

Bias against female lawyers practicing in the courtroom has existed since women were admitted to the bar.<sup>15</sup> In 1918, the district attorney of San Francisco attempted to discredit Clara Shortridge Foltz, the first woman attorney in California, by stating in his closing argument to the jury: “She is a WOMAN, she cannot be expected to reason; God Almighty decreed her limitations . . . this young woman will lead you by her sympathetic presentation of this case to violate your oaths and let a guilty man go free.”<sup>16</sup> Similarly, in an autobiographical article discussing what it was like to be a female lawyer in 1917, Mary Siegel described her first courtroom proceeding as follows:

When my case was called, and I walked to the appropriate table a bailiff rushed over to direct me to where he said I belonged—the spectator’s bench. . . . Just before the hearing got underway, the presiding judge . . . asked the attorneys to approach the bench. As I walked toward him, I was reproached by the judge who virtually sneered when he repeated that he wanted to confer with the legal representatives, not an office stenographer. After I informed him that I filled that role, the astonished gentleman asked, “My God! What do I call you? Do you prefer ‘she’ lawyer, ‘woman’ lawyer, or ‘female’ lawyer?” I suggested that ‘counselor’ would be appropriate.<sup>17</sup>

Fortunately, through the courts and the political process, women made

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<sup>12</sup> JUDITH RICHARDS HOPE, *PINSTRIPES & PEARLS: THE WOMEN OF THE HARVARD LAW SCHOOL CLASS OF ‘64 WHO FORGED AN OLD-GIRL NETWORK AND PAVED THE WAY FOR FUTURE GENERATIONS* 151 (2003).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Arabella Mansfield was the first woman admitted to the legal profession in the United States. She was admitted to the Iowa bar in 1869. *Arabella Mansfield*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/biography/Arabella-Mansfield> (last updated Mar. 4, 2016).

<sup>16</sup> Mortimer D. Schwartz et al., *Clara Shortridge Foltz: Pioneer in the Law*, 27 *Hastings L.J.* 545, 545 (1976) (quoting Clara Shortridge Foltz, *Struggles and Triumphs of a Woman Lawyer*, *NEW AM. WOMAN* 4, 10 (1918)).

<sup>17</sup> Mary G. Siegel, “*Crossing the Bar*”: *A “She” Lawyer in 1917*, 7 *WOMEN’S RTS. L. REP.* 357, 360 (1982). *See generally* TIERRA FARROW, *LAWYER IN PETTICOATS* (1953) (containing the memoirs of Kansas City lawyer Tierra Farrow in the early 1900s). Farrow was the first female lawyer in Missouri and the third in the United States. *Id.*

substantial advances toward legal and personal equality.<sup>18</sup> As a result of the reawakening of the women's movement in the 1960s, other political activism toward dismantling workplace inequality, related lawsuits, and anti-discrimination lawmaking of the 1970s and 1980s,<sup>19</sup> women entered the legal profession in increasing numbers.<sup>20</sup> Today, women are entering law school and the legal profession in substantial numbers compared to past years.<sup>21</sup> Still, women comprise only 34% of practicing attorneys<sup>22</sup> and have not advanced to the highest leadership roles at nearly the same rate as men.<sup>23</sup> In private practice, women account for only 20.2% of partners,<sup>24</sup> 17% of equity partners,<sup>25</sup> and 4% of managing partners at the 200 largest law firms.<sup>26</sup> The number of women attorneys in lead counsel and trial attorney roles is even more strikingly small.<sup>27</sup>

Research indicates that significant gender bias exists in the courtroom among

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<sup>18</sup> See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979) (holding that men and women have equal rights and responsibilities to pay or receive alimony); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a woman's right to control reproduction); *Reed v. Reed*, 404 U.S. 71 (1971) (holding that the Equal Protection Clause of the Fourteenth Amendment forbids legislation giving a mandatory preference to members of one sex). See also Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (2012)) (prohibiting sex-based wage discrimination between substantially equal jobs); Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (2012)); Equal Credit Opportunity Act, Pub. L. No. 90-321, 88 Stat. 1521 (codified as amended at 15 U.S.C. §§ 1691-1691f (2012)) (prohibiting discrimination on the basis of sex or marital status in any credit transaction); Title IX of the Education Amendment Act of 1972, Pub. L. No. 92-318, 86 Stat. 235 (codified as amended at 20 U.S.C. §§ 1681-1688 (2012)) (prohibiting discrimination on the grounds of sex (and blindness) in all public undergraduate institutions, and in most private and public graduate and vocational schools receiving federal monies); Fair Housing Act, Pub. L. No. 92-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3619 (2012)) (prohibiting discrimination on the basis of sex in the sale, financing, and rental of housing).

<sup>19</sup> For a description of the interplay between feminist theory, feminist lawmaking, and women in the legal profession during this period, see Cynthia G. Bowman & Elizabeth M. Schneider, Symposium, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 *FORDHAM L. REV.* 249 (1998).

<sup>20</sup> See ALBIE SACHS & JOAN HOFF WILSON, *SEXISM AND THE LAW: A STUDY OF MALE BELIEFS AND LEGAL BIAS IN BRITAIN AND THE UNITED STATES* 195 (1978) (describing that the number of women attending accredited law schools jumped dramatically from 2,600 in 1966 to 26,000 in 1975).

<sup>21</sup> COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW, *supra* note 1, at 4, (citing female law school enrollment statistics from 1963 to 2012). In 2013, 47.3% of law school graduates were women. *Id.* at 4. See also Section of Legal Education and Admissions to the Bar, *Enrollment and Degrees Awarded, 1963-2013 Academic Years*, AM. BAR ASS'N (2013), [www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/enrollment\\_degrees\\_awarded.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.pdf).

<sup>22</sup> COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW, *supra* note 1, at 2.

<sup>23</sup> Scharf & Liebenberg, *supra* note 5, at 13 (concluding that men are three times more likely to appear in lead counsel roles than women, and that the gender gap is greatest in AmLaw 200 firms).

<sup>24</sup> *Id.* SCHARF ET AL., *supra* note 2 (reporting that in spite of a decades-old pipeline of women law school graduates, a disproportionately low number of women advance into the highest ranks of large firms).

<sup>25</sup> COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW, *supra* note 1, at 2.

<sup>26</sup> *Id.*

<sup>27</sup> Scharf & Liebenberg, *supra* note 5, at 9 (finding that in civil cases, women appear less often than men and are far less likely to designate their role as lead counsel or trial attorney).

women who are practicing litigators.<sup>28</sup> A Defense Research Institute (“DRI”) survey found that 70.4% of the participants have experienced gender bias in the courtroom.<sup>29</sup> Additionally, 54% of women attorneys in California surveyed by the State Bar of California Center for Access and Fairness in 2005 reported experiencing gender bias in the courtroom.<sup>30</sup> Furthermore, nine out of ten women surveyed by the Texas State Bar in 2004 reported “being the target of at least one incident of gender discrimination in the courtroom.”<sup>31</sup> Kat Macfarlane, an assistant law professor at LSU Law Center, stated: “Women in the public sphere, who argue cases in federal court and vote on bills in state legislatures, already find themselves ‘sitting at the table’. . . . But once they’ve taken their seats, they still aren’t recognized as legitimate speakers . . . .”<sup>32</sup>

While gender discrimination today is not always blatant or overt, various studies show that unconscious and subtle acts of gender bias continue to pervade the justice system. Women attorneys have reported experiencing gender bias from judges, jurors, and opposing counsel, including:

1. being mistaken for a secretary or paralegal;
2. being called a term of endearment (honey, sweetheart);
3. being critiqued for their voice sounding shrill or too high (this perception was echoed by judges who commented that a woman raising her voice in court was a problem because she sounds shrill, whereas a man sounds aggressive);
4. being treated differently (ignored, bullied, treated in a condescending manner); and

<sup>28</sup> DEF. RESEARCH INST., A CAREER IN THE COURTROOM: A DIFFERENT MODEL FOR THE SUCCESS OF WOMEN WHO TRY CASES 9 (2004) (citing statistic that majority of surveyed women have experienced gender bias in the courtroom, and that “[e]ven among women attorneys who have been successful in law firms, battles are still being fought on the front lines of firms to promote women into the ranks of first chair trial lawyers, rainmakers, and senior law firm managers”).

<sup>29</sup> *Id.*

<sup>30</sup> Bibianne Fell, *Gender in the Courtroom Part 1—Is Lady Justice at a Disadvantage in the Courtroom?*, NAT’L INST. FOR TRIAL ADVOC.: THE LEGAL ADVOCATE (Mar. 19, 2013), <http://blog.nita.org/2013/03/gender-in-the-courtroom-part-1-is-lady-justice-at-a-disadvantage-in-the-courtroom/>.

<sup>31</sup> *Id.*

<sup>32</sup> Kat Macfarlane, *Motion to Dismiss: From Catcalls to Kisses, Gender Bias in the Courtroom*, OBSERVER (July 10, 2013, 11:09 AM), <http://observer.com/2013/07/women-lawyers-sexism-nyc/#ixzz3Yzsq73Lp>. See also Sheryl Sandberg, Chief Operating Officer, Facebook, Address at TEDWomen 2010: Why We Have Too Few Women Leaders (Dec. 2010), [http://www.ted.com/talks/sheryl\\_sandberg\\_why\\_we\\_have\\_too\\_few\\_women\\_leaders?language=en](http://www.ted.com/talks/sheryl_sandberg_why_we_have_too_few_women_leaders?language=en). Sandberg told a story of four women from former Treasury Secretary Tim Geithner’s staff who attended a meeting at Facebook and sat off to the side of the room instead of around the large conference table. *Id.* Sandberg observed that because of their seating choice, they seemed like spectators instead of participants. *Id.* Sandberg urged not to expect getting a corner office by sitting on the sidelines. See *id.* Though she acknowledged the double standard for “assertive” women, who are too often perceived as “aggressive” or even a word that begins with “b.” *Id.*

5. having clients express a preference for male lead trial counsel (although judges reported that they often found women litigators better prepared and more likely to follow courtroom rules).<sup>33</sup>

The implications of these gender biases can be explained by empirical studies.

## II. EMPIRICAL DATA DEMONSTRATE THE IMPACT OF GENDER BIAS IN THE COURTROOM

Jury simulations, surveys, and new forms of social science experimentation conducted in various jurisdictions have revealed that juries and judges treat women differently than their male counterparts.<sup>34</sup> Over the past two decades, cognitive psychologists have shed light on the types of biases female attorneys experience in the courtroom through new and different ways to measure the existence and impact of hidden or implicit biases.<sup>35</sup> Implicit bias concerns attitudes or stereotypes that affect people's understanding, decision-making, and behavior, without them realizing it.<sup>36</sup> For example, someone might believe that women and men should be equally associated with science, but that person's automatic associations could show that he or she (like many others) associate men with science more than he or she associates women with science.<sup>37</sup> Explicit bias, in contrast, concerns stereotypes and attitudes that a person is aware of and expressly self-reports in surveys.<sup>38</sup> Gender bias is often outside the person's conscious awareness and implicit in that it can occur without realization, in contrast to someone's consciously held or explicit beliefs.<sup>39</sup> Scholars Mahzarin Banaji and Anthony Greenwald<sup>40</sup> posited that social behavior is not completely under our conscious control; rather, it is driven by learned stereotypes that operate automatically or unconsciously when we interact with other people.<sup>41</sup> Using experimental methods

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126-29 (2012).

<sup>37</sup> *Education*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/education.html> (last visited Mar. 18, 2016).

<sup>38</sup> JERRY KANG, NAT'L CTR. FOR STATE COURTS, *IMPLICIT BIAS: A PRIMER FOR STATE COURTS* 3 (2009). For example, if someone has an explicitly positive attitude toward chocolate, then that person has a positive attitude, knows about having a positive attitude and consciously endorses and celebrates that preference. *Id.* at 7. Implicit stereotypes, on the other hand, "are introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects." Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 8 (1995). Generally, we are unaware of our implicit stereotypes and may not endorse them upon self-reflection. *See* Kang et al., *supra*, at 36.

<sup>39</sup> *See* Greenwald & Banaji, *supra* note 38.

<sup>40</sup> Mahzarin Banaji is one of the chief developers of Implicit Association Tests and Anthony Greenwald is the researcher who created the test in 1994. *About Us*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/aboutus.html> (last visited Mar. 18, 2016). Various Implicit Association Tests can be accessed at <https://implicit.harvard.edu/implicit/>.

<sup>41</sup> Greenwald & Banaji, *supra* note 38.

in laboratory and field studies, researchers have provided ample evidence that implicit biases are pervasive and have real-world effects in the courtroom.<sup>42</sup>

*A. Scientists Use the Implicit Association Test to Measure Gender Biases in the Legal Profession*

In the 1990s, scholars Banaji, Greenwald, and their colleagues developed the Implicit Association Test (“IAT”) and have since been using the test to conduct social cognition research on implicit bias.<sup>43</sup> The IAT is a sorting task that measures time differences between schema-consistent pairings and schema-inconsistent pairings of concepts, as represented by words or pictures.<sup>44</sup> Specifically, the IAT pairs an attitude object (such as a racial group) with an evaluative dimension (good or bad) and tests how response accuracy and speed indicate implicit and automatic attitudes and stereotypes.<sup>45</sup> For example, in the first part of the IAT, the participant is told to sort words relating to concepts (e.g., African-American, European-American) into categories.<sup>46</sup> Hence, if the category “African-American” is on the left, and a picture of an African-American person appeared on the screen, the participant would press the “e” key.<sup>47</sup> In the second part of the IAT, the participant sorts words relating to the evaluation (e.g., pleasant, unpleasant).<sup>48</sup> Thus, if the category “unpleasant” is on the left, and an unpleasant word appeared on the screen, the participant would press the “e” key.<sup>49</sup> In the third part of the IAT, the categories are combined and the participant is asked to sort both concept and evaluation words.<sup>50</sup> As a result, the categories on the left side would be “African-American/Unpleasant” and the categories on the right side would be “European-American/Pleasant.”<sup>51</sup> In the fourth part of the IAT, the placement of the concepts switches.<sup>52</sup> If the category “African-American” was

<sup>42</sup> See, e.g., Roberta Liebenberg, *Has Women Lawyers Progress Stalled?*, LEGAL INTELLIGENCER, May 28, 2013, at 3-4. Ms. Liebenberg posits that, “[a]s a result of these implicit biases, women often have to demonstrate greater levels of competence and proficiency and are held to higher standards than their male colleagues.” *Id.*

<sup>43</sup> *Id.* at 4. Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464 (1998).

<sup>44</sup> Kang et al., *supra* note 36, at 1130. See also Greenwald et al., *supra* note 43, at 1464-66 (introducing the IAT). For more information on the IAT, see Brian A. Nosek et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, in AUTOMATIC PROCESSES IN SOCIAL THINKING AND BEHAVIOR 265 (John A. Bargh ed., 2007).

<sup>45</sup> Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 355 (2007) (citing Mahzarin R. Banaji, *Implicit Attitudes Can Be Measured*, in THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER 117, 123 (Henry L. Roediger, III et al. eds., 2001)).

<sup>46</sup> *Blindspot’s IAT Race Test*, HARVARD UNIV., <https://implicit.harvard.edu/implicit/user/agg/blindspot/indexrk.htm> (last visited Mar. 19, 2016).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*



previously on the left, now it would be on the right.<sup>53</sup> In the final part of the IAT, the categories are combined in a way that is opposite what they were before.<sup>54</sup> If the category on the left was previously “African-American/Unpleasant,” it would now be “European-American/Unpleasant.”<sup>55</sup> The IAT score is based on how long it takes a person, on average, to sort the words in the third part of the IAT versus the fifth part of the IAT.<sup>56</sup> The strength of the attitude or stereotype is determined by the speed at which the participant pairs the words.<sup>57</sup> IAT data can predict behavior in the real world, including in the courtroom.<sup>58</sup>

In fact, implicit bias evidence in the context of the legal profession, as measured by IAT studies, shows that implicit biases formulate at an early stage.<sup>59</sup> For example, one study tested whether law students hold implicit gender biases about women in the legal profession, and further tested whether these implicit biases predict discriminatory decision-making.<sup>60</sup> First, based on the stereotype of male leaders and women clerical workers, the researchers created and conducted the “Judge/Gender IAT” to test whether people hold implicit associations between men and judges and women and paralegals.<sup>61</sup> Next, based on the stereotype of men as professionals and women as homemakers, the researchers conducted an IAT to test whether people associate men with the workplace and women with the home and family.<sup>62</sup> In addition to testing for implicit gender bias in the legal setting, the researchers tested whether gender stereotypes predict biased decision-making.<sup>63</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; see also KANG, *supra* note 38, at 4; Anthony G. Greenwald & Linda Hamilton Krieger, Symposium, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 954 (2006) (“[M]any studies that have used an IAT attitude measure have also included a measure of one or more social behaviors that are theoretically expected to be related to attitude or stereotype measures.”).

<sup>58</sup> See KANG, *supra* note 38, at 4 (“There is increasing evidence that implicit biases, as measured by the IAT, do predict behavior in the real world—in ways that can have real effects on real lives.”); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 436 (2007) (noting that implicit bias predicts discriminatory behaviors in individuals); Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 753 (2001) (revealing that implicit bias predicts more negative evaluations of agentic, i.e., confident, aggressive, ambitious women in certain hiring conditions). See also DAN-OLOF ROTH, INST. FOR THE STUDY OF LABOR, *IMPLICIT DISCRIMINATION IN HIRING: REAL WORLD EVIDENCE 5* (2007), <http://ftp.iza.org/dp2764.pdf> (reporting that implicit bias predicts the rate of callback interviews based on an implicit stereotype in Sweden that Arabs are lazy).

<sup>59</sup> Justin Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL’Y 1, 1 (2010) (finding that implicit biases have already formulated by law school, well before these students enter the legal profession).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 3.

<sup>62</sup> *Id.* at 4.

<sup>63</sup> *Id.* In order to test whether gender stereotypes predict biased decision-making, the researchers included three additional gender-based measures in the study: a law firm hiring measure (participants were asked to select a candidate to hire); a judicial appointments measure (participants were asked to rank the desirability of masculine and feminine traits in appellate judges); and a law student organization budget cut measure (participants were asked to reallocate funds in response to budget cuts). *Id.* at 3.

The results supported the conclusion that law students implicitly associate men with judges, and women with paralegals, and therefore harbor an “implicit male leader prototype” in the legal setting.<sup>64</sup> Contextualized within legal scholarship on gender stereotypes, these results confirmed that law students associate men with career and women with home and family, as well as hold implicit male prototypes for the position of judge.<sup>65</sup> In sum, the study found that implicit biases were pervasive. Most importantly, this study demonstrated that individuals form their implicit associations as early as law school,<sup>66</sup> if not earlier.

*B. The Challenge of the Double Bind: Studies of Juries Reveal Unconscious Gender Biases Against Female Trial Attorneys*

Implicit gender bias undoubtedly exists and has real-world consequences that have negative impact on achieving fairness in trials, which are supposed to be a search for the truth regardless of the attorney’s gender. After centuries of men dominating most professions, masculinity has been associated with aggression, competitiveness, lack of sentimentality, and emotional control.<sup>67</sup> Femininity, on the other hand, has been associated with passivity, fragility, sensitivity, and nurturance.<sup>68</sup> If a woman acts the same way as a man, she may be viewed as abrasive, bossy, and combative.<sup>69</sup> According to scholars Barbara Kellerman and Deborah L. Rhode, these traditional gender stereotypes continue to force women into “a double standard and a double bind.”<sup>70</sup> In other words, “what is assertive in a man seems abrasive in a woman, and female leaders risk seeming too feminine or not feminine enough.”<sup>71</sup> According to Rhode and Kellerman, women face tradeoffs that men do not—“[a]spirating female leaders can be liked but not respected, or respected but not liked, in settings that may require individuals to be both in order to succeed.”<sup>72</sup> Consequently, men continue to be rated higher than women on most of the qualities associated with leadership.<sup>73</sup>

Women attorneys might encounter these biases when developing their courtroom style and persona.<sup>74</sup> A female trial attorney must tread lightly between societal stereotypes regarding feminine and masculine traits in order to be

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<sup>64</sup> *Id.* at 28.

<sup>65</sup> *Id.* at 32.

<sup>66</sup> *Id.* at 1.

<sup>67</sup> See Judith M. Bardwick & Elizabeth Douvan, *Ambivalence: The Socialization of Women*, in *WOMAN IN SEXIST SOCIETY* 225, 225 (Vivian Gornick & Barbara K. Moran eds., 1971).

<sup>68</sup> See *id.*

<sup>69</sup> *Id.*

<sup>70</sup> Deborah L. Rhode & Barbara Kellerman, *Women and Leadership: The State of Play*, in *WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE* 1, 7 (Deborah L. Rhode & Barbara Kellerman eds., 2006).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

perceived favorably in the courtroom. If she is soft-spoken and compassionate (“feminine” traits), she risks being perceived as too weak.<sup>75</sup> On the other hand, if a female attorney is aggressive or forceful (“masculine” traits), she risks being perceived as too abrasive.<sup>76</sup> Consequently, female attorneys struggle to maintain a style and persona somewhere between these stereotyped extremes.

Several studies have examined whether jurors react differently to male and female attorneys in the courtroom.<sup>77</sup> One such study examined the effects of a defense attorney’s presentation style and gender on jurors’ verdicts and evaluation of the attorney.<sup>78</sup> The methodology involved 135 undergraduate college students who read a brief summary of an assault-and-robbery case and watched a videotape of either a passive or aggressive male or female attorney interrogating a witness.<sup>79</sup> The research subjects then rendered a verdict and rated the witness and attorney on characteristics such as competency, credibility, and assertiveness.<sup>80</sup> The purpose of the study was to examine the effects of aggressive versus passive speech, and to see how those effects were moderated by the gender of the attorney and the gender of the juror.<sup>81</sup>

The results revealed that an aggressive attorney style is an advantage in the courtroom: “aggressive attorneys were found to be more successful than passive attorneys.”<sup>82</sup> In particular, male (but not female) participants were more influenced when a female, or especially a male, attorney was aggressive than when that attorney was passive.<sup>83</sup> Both attorneys’ gender and presentation style had some corresponding effects on the participants’ perceptions of the attorneys, although not on their overall ratings of competence.<sup>84</sup> Most importantly, the jurors did not view aggressiveness in men in the same light as aggressiveness in women.<sup>85</sup> Women in the study did not gain the same advantages from an aggressive style, in terms of causing the crime to be considered less serious and receiving fewer guilty verdicts, as men did.<sup>86</sup> Consequently, female attorneys were less successful than male attorneys in obtaining a “not guilty” verdict for their client.<sup>87</sup> This study suggests that female attorneys who seek to emulate male aggressiveness will not be as

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<sup>75</sup> *Id.* at 36. See generally EPSTEIN, *supra* note 6, at 279 (describing the ways in which women attorneys are treated by their colleagues and their families, the kinds of pressures and forms of discrimination, and the new and old ways they have dealt with their problems).

<sup>76</sup> See *id.*

<sup>77</sup> Peter W. Hahn & Susan D. Clayton, *The Effects of Attorney Presentation Style, Attorney Gender and Juror Gender on Juror Decisions*, 20 LAW & HUM. BEHAV. 533, 535 (1996).

<sup>78</sup> *Id.* at 536.

<sup>79</sup> *Id.* at 540.

<sup>80</sup> *Id.* at 533.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 548.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 549.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

successful as a man in the courtroom.

A more recent study sought to examine the effects of gender stereotypes of emotional expression on jurors' perceptions of an attorney's competence.<sup>88</sup> The participants—170 undergraduate students—watched a video of a closing statement of a male or female attorney expressing either anger or neutral emotions and were asked to render a verdict and rate the attorney's competence.<sup>89</sup> The participants rated an angry male attorney highest in competence; by contrast, an angry female attorney was rated lowest in competence.<sup>90</sup> The results also showed that the participants attributed the female attorney's anger to her emotional disposition, while the male attorney's anger was attributed to his situation.<sup>91</sup> These research findings further support the proposition that jurors perceive anger and aggression differently depending on the gender of the advocate.<sup>92</sup>

In a third study, Decision Quest (“DQ”), a jury consulting firm, conducted a survey and collected data from several hundred jurors throughout the country about women in the courtroom.<sup>93</sup> Though the DQ survey did not reveal either the presence or absence of unconscious or implicit bias,<sup>94</sup> one participant stated: “I don't think [female attorneys] are any less qualified than males, but I would prefer a male attorney because, sadly, there are sexism in juries and they're most likely going to favor male lawyers.”<sup>95</sup> Another survey participant felt that female attorneys are “equally competent, but possibly less respected by the average person in society.”<sup>96</sup> Thus, while the survey data may not have revealed statistically significant gender biases, some participants expressed preferences for male trial

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<sup>88</sup> Christian B. May, *Anger in the Courtroom: The Effects of Attorney Gender and Emotion on Juror Perceptions*, Paper 29, at 1 (2014) (B.S. thesis, Univ. Honors Program Theses, Georgia Southern University), <http://digitalcommons.georgiasouthern.edu/honors-theses/29/>.

<sup>89</sup> *Id.* at 12-13. Participants read a trial summary concerning a civil case adapted from social scientists and professors Dr. Valerie Hans and Dr. M. David Ermann (1989). *Id.* at 12. In this case, five employees sued their corporate employer for personal injuries sustained while working on the job. The corporation agreed to pay for the workers' medical bills but not for the workers' pain and suffering. *Id.* Participants then watched a video of an actor portraying an attorney delivering his or her closing arguments to the general direction of the camera, which was placed about where a jury would sit. *Id.* Each of the actors recorded an angry closing statement and an emotionally neutral closing statement. *Id.* The angry closing statement and the emotionally neutral closing statement were identically worded. *Id.* at 13. The study found that the angry male attorney was perceived as more competent than the angry female attorney. *Id.* at 21.

<sup>90</sup> May, *supra* note 88, at 10.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 19.

<sup>93</sup> Victoria Pynchon, *Juror Attitudes to Women in the Courtroom*, FORBES: FORBESWOMAN (Feb. 15, 2012, 11:11 AM), <http://www.forbes.com/sites/shenegotiates/2012/02/15/juror-attitudes-to-women-in-the-courtroom/>.

<sup>94</sup> With respect to stereotypes that male attorneys are viewed as “assertive,” while female attorneys are viewed as “aggressive,” 95% of respondents believed that male attorneys are aggressive, while 91% felt that female attorneys are aggressive. *Id.* However, this was considered a statistically insignificant difference. *See id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

lawyers over female trial lawyers based on their awareness of others' biases.<sup>97</sup>

*C. Judges and Arbitrators Also Have Unconscious Biases Against Female Attorneys*

How judges and arbitrators make decisions is important since not all cases are tried before juries. On the one hand, judges have taken an oath to impartially uphold the law,<sup>98</sup> are trained legal minds, and thus are presumably more objective decision-makers than are jurors. However, the decision-making process for judges, arbitrators, and mediators is not much different from juror decision-making.<sup>99</sup> Judges, like everyone else, make decisions based on their own set of biases—their decisions might be informed by their own race,<sup>100</sup> ethnic background, socioeconomic status,<sup>101</sup> gender,<sup>102</sup> sexual orientation, religion, ideology, or general upbringing.<sup>103</sup>

One behavioral study examined the effects of cognitive biases on judicial

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<sup>97</sup> *Id.* (citing Alison Wong & Blaine McElroy, *Gender in the Courtroom: Myth vs. Reality*, DECISION QUEST (2014), <http://www.decisionquest.com/utility/showArticle/?objectID=1317#Article>).

<sup>98</sup> See 28 U.S.C. § 453 (2012) (“Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: ‘I, \_\_\_\_, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as \_\_\_\_ under the Constitution and laws of the United States. So help me God.’”).

<sup>99</sup> Ann T. Greeley, *Gender and Racial Bias in the Courtroom*, AM. BAR ASS’N SECTION OF LITIG. 2012, SECTION ANN. CONF.: TRIAL TACTICS IN A DIVERSE WORLD, Apr. 18-20, 2012, at 3-4, [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac\\_2012/37-1\\_gender\\_racial\\_bias\\_in\\_the\\_courtroom.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/37-1_gender_racial_bias_in_the_courtroom.authcheckdam.pdf). For example, a number of older male attorneys, clients, and judges—including some female judges—do not believe women should wear pants in the courtroom, and that may be an issue with juries as well. See DEF. RESEARCH INST., *supra* note 28, at 11. “Judges still sometimes call women attorneys ‘dear’ and ‘honey’ and comment on the way they dress . . . . Several women have reported sexist or inappropriate comments by male judges or inappropriate behavior by opposing counsel that was not addressed by judges.” *Id.*

<sup>100</sup> Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1161–63 (2009) (finding that black judges and white judges perceive racial harassment differently, which means that the decision-making process is not completely objective: judges bring their personal experiences, or lack of experience, to bear when deciding cases).

<sup>101</sup> See Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 141 (2013) (“Because judges are more economically privileged than the average individual litigant appearing before them, they may be unaware of the gaps between their own experiences and realities and those of poor people. These gaps have contributed to patterns of judicial decisionmaking that appear to be biased against poor people as compared to others.”).

<sup>102</sup> Neil A. Lewis, *Debate on Whether Female Judges Decide Cases Differently*, N.Y. TIMES, June 3, 2009, at A16 (analyzing Justice Ginsburg’s arguments in *Safford Unified School District v. Redding*, 557 U.S. 364 (2009), which involved the appropriateness of the strip search of a thirteen-year-old girl by school authorities). Justice Ginsburg’s experience as a female may have influenced her interpretation of the issues and brought a new perspective that would not have been expressed in her absence. *Id.* See also Nicole E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 4 AKRON L. REV. 693 (2014) (reviewing the factors influencing judges’ intuitive thought processes and decisions).

<sup>103</sup> See Mark W. Bennett, *Essay: From the “No Spittin’, No Cussin’ and No Summary Judgment” Days of Employment Discrimination Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 706 (2013) (warning that judges have their own biases).

decision-making using data based on a survey of 167 federal magistrate judges.<sup>104</sup> The results showed that judges are just as susceptible to certain cognitive errors as were jurors.<sup>105</sup> In another study, several judges conveyed that raising one's voice in court was a problem for women because they came across as shrill, but not for men who were simply seen as being aggressive.<sup>106</sup> Interestingly, the male judges cited that one of their biggest challenges was dealing with entrenched biases against women when they act aggressively.<sup>107</sup>

The double-bind dilemma—or “Damned if You Do, Doomed if You Don’t” phenomenon<sup>108</sup>—also dictates the way in which female attorneys respond to gender bias in the courtroom. When offensive conduct occurs, a female attorney is conflicted between the need to confront the situation and nullify its demeaning effect, and a fear that any response will hurt her client’s case.<sup>109</sup> As one female attorney described the dilemma:

[W]e feel torn. To assert our own struggle even minimally is not what we are in court for . . . we know that what we say or don’t say as lawyers vitally affects the [client’s] chances for “justice.” If we question the treatment we are receiving, the judge, D.A. or whoever will think that we have a chip on our shoulders and will not look kindly on us or our [client]. If we don’t question the treatment, it will pass unnoticed, but so, we fear, will our legal arguments.<sup>110</sup>

Indeed, the burden usually rests on the female attorney to decide whether to call attention to the gender-biased conduct, which is a difficult choice when a client’s interests are at stake.<sup>111</sup> Therefore, it is crucial for judges to refrain from

<sup>104</sup> Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001).

<sup>105</sup> *Id.* at 788. State courts all over the country have also created committees on gender equality to explore the hidden biases in the court system. *See, e.g.*, SELECT COMM. ON GENDER EQUALITY, RETROSPECTIVE REPORT SELECT COMMITTEE ON GENDER EQUALITY 122-57 (2001), <http://www.mdcourts.gov/publications/pdfs/genderequalityreport2001.pdf>.

<sup>106</sup> DEF. RESEARCH INST., *supra* note 28, at 10-11.

<sup>107</sup> *Id.* The good news is that these researchers also found that sufficient motivation to suppress racial bias produces fairer and more just outcomes. *Id.*

<sup>108</sup> CATALYST, THE DOUBLE-BIND DILEMMA FOR WOMEN IN LEADERSHIP: DAMNED IF YOU DO, DOOMED IF YOU DON’T 1, 7 (2007), <http://www.catalyst.org/knowledge/double-bind-dilemma-women-leadership-damned-if-you-do-doomed-if-you-dont-0>.

<sup>109</sup> *See, e.g.*, Nancy Blodgett, *I Don’t Think Ladies Should Be Lawyers*, 72 A.B.A. J. 48 (1986) (describing that a female attorney whose husband was asked about his opinion about his wife being a lawyer said that his wife was torn between her desire to say something and fear of hurting her client’s interests); Cheryl Frank, *Sex Bias in Courts: Women Suffer, N.J. Panel Finds*, 70 A.B.A. J. 36 (1984) (describing that directly confronting remarks from the bench may put a client’s case in jeopardy).

<sup>110</sup> Beth Levezey & Joan Andersson, *Trials of a Woman Lawyer*, 1 WOMEN’S RTS. L. REP. 38, 40 (1974).

<sup>111</sup> *See* Lynn Hecht Schafran, *Women as Litigators: Abilities vs. Assumptions*, 19 TRIAL 36, 39 (1983) (listing commonplace sexual bias problems in the courtroom). Women also report biased comments from opposing counsel—in one example, a male attorney demanded that his female opponent not interrupt him any further, stating that “women attorneys have a hard time keeping their mouths shut.” Charisse R. Lillie, *Multicultural Women and Leader Opportunities: Meeting the Challenges of Diversity in the American Legal Profession*, in THE DIFFERENCE “DIFFERENCE” MAKES: WOMEN AND LEADERSHIP 105 (Deborah L. Rhode ed., 2003). *See also* Fred Imbert, *Panels On Sexism in Tech Get*

such biased conduct and to voluntarily intervene when it occurs so as to prevent this unfair treatment.<sup>112</sup> Moreover, there is a robust body of research that suggests female attorneys of color are at a distinct disadvantage inside and outside the courtroom.<sup>113</sup>

*D. The Intersectionality Between Race and Gender in the Legal Profession*

A female attorney of color faces a unique set of circumstances in the legal profession and what some have termed “the double bind of gender and race.”<sup>114</sup> In an American Bar Association study on gender and race in the legal profession, most of the surveyed women of color found it stressful to negotiate their gender and racial identities in a predominantly white, male environment.<sup>115</sup> Nearly half (49%) reported having been subjected to demeaning comments or other types of harassment while working at a private law firm, as did 47% of white women, 34% of men of color, and only 2% of white men.<sup>116</sup>

An Asian attorney recalled:

I had a managing partner call me into his office when I was a fourth year [associate]. He introduced me to the client, who was Korean, and he tells him that I’m Korean too. He says, “She eats kim chee just like you.” He said to me, “Talk to him.” I looked at the client and said, “It’s a pleasure to meet you. I’m sure you speak English better than I speak Korean.” The client’s face was so red. Then the partner left a message on my internal message system and he was speaking gibberish, trying to sound like an Asian speaker. I called every partner on my floor and said, “You need to come and listen to this.” I played that message ten times. Ten times.<sup>117</sup>

A Native American attorney said:

You have to have an incredibly tough skin. . . . I had people make comments like, “Oh, you’re Indian. Where’s your tomahawk? Are you going to scalp me?” Or, “Can I call you Pocahontas?” . . . When I was

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*Awkward At SXSW*, CNBC (Mar. 19, 2015, 4:13 PM), <http://www.cnn.com/id/102519949> (expounding on the idea of “maninterruptions,” where problematic gender dynamics emerged out of a high-profile shushing perpetrated by a male Google Executive Chairman, who repeatedly talked over former Google colleague Megan Smith, whose discussion ironically focused on problems with racial and gender diversity in the technology industry).

<sup>112</sup> See UNIFIED COURT SYS. OFFICE OF COURT ADMIN. N.Y. TASK FORCE, ON WOMEN IN THE COURTS APPENDIX A 224 (1986) (noting that survey respondents remarked that a few judges do intervene and describing the salutary effects when they did).

<sup>113</sup> Alexis A. Robinson, *Effects of Race and Gender of Attorneys on Trial Outcomes*, 23 JURY EXPERT 1, 4-5 (2011), <http://www.thejuryexpert.com/2011/05/the-effects-of-race-and-gender-of-attorneys-on-trial-outcomes/>.

<sup>114</sup> Scharf & Liebenberg, *supra* note 5, at 15.

<sup>115</sup> JANET E. GANS EPNER, COMM’N ON WOMEN IN THE PROFESSION, AM. BAR ASS’N, VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 10 (2006), <http://www.americanbar.org/content/dam/aba/marketing/women/visibleinvisibility.authcheckdam.pdf>.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

called “chief” and brought it to people’s attention I was told, “Oh, you’re spoiling [our work] environment here.” So I had to leave.<sup>118</sup>

Several women of color described how others caricatured them based on both gender and race, such as the African-American attorney who heard herself described as “an angry Black woman” or the Asian attorney who heard herself described as a “dragon lady.”<sup>119</sup>

While few studies have evaluated implicit biases about minority female attorneys, there is data suggesting that the risk of conviction may be especially prominent when the attorney is a “double minority.”<sup>120</sup> In another study, Jerry Kang and his colleagues created an IAT to test whether jurors rely on implicit ethnic biases when evaluating the performance of litigators.<sup>121</sup> Specifically, the researchers were interested in learning how mock jurors evaluate Asian American male litigators as compared to white male litigators.<sup>122</sup> The study examined whether explicit and implicit biases in favor of whites and against Asian Americans would alter a juror’s evaluation of a litigator’s disposition.<sup>123</sup> The researchers hypothesized that participants would associate white males with traits commonly associated with successful litigators (for example, eloquent, charismatic, and verbal) relative to Asian American males, who would be more likely associated with traits commonly assigned to successful scientists.<sup>124</sup> The results confirmed the researchers’ hypothesis—the participants did in fact implicitly associate white

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* Other available research on gender and race shows the more difficult road women attorneys of color experience. See, e.g., SCHARF ET AL., *supra* note 2, at 6; NAT’L ASS’N OF WOMEN LAWYERS & NAWL FOUND., REPORT OF THE NINTH ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 6 (2015), <http://www.nawl.org/p/cm/ld/fid=wu82#surveys>; EPNER, *supra* note 115, at 10-13. See also Greeley, *supra* note 99, at 2.

<sup>120</sup> Robinson, *supra* note 113.

<sup>121</sup> Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886, 886-88 (2010).

<sup>122</sup> *Id.* at 893 (explaining that the researchers intentionally did not examine ethnicity effects for women attorneys). “Our strategy was not to ignore gender, but to control for it, based on past evidence showing that lawyers are expected to be men rather than women . . . . As such, we expected that implicit and explicit stereotypes about ideal lawyers would activate thoughts of White men more than Asian men, but would not much activate thoughts of women of either race.” *Id.* (internal citations omitted). I am aware of no such study examining the explicit and implicit biases in favor of Asian female litigators compared to white female litigators.

<sup>123</sup> *Id.* at 896-97. The participants heard two depositions from two unrelated cases. *Id.* At the beginning of each deposition, the researchers showed the participants a picture of the litigator on a computer screen accompanied by his name for five seconds. *Id.* The researchers manipulated the race of the litigator by varying his name and photograph to be prototypically White (“William Cole”) or Asian (“Sung Chang”). *Id.* Participants then listened to the deposition through headphones and, at the same time, read the script of the deposition presented on a computer screen. *Id.* The transcript identified who was speaking, which meant that participants saw labels such as “Attorney Cole” or “Attorney Chang.” *Id.* At the end of the deposition, participants were asked to evaluate the litigator’s competence, warmth, and their willingness to hire him or recommend him to family and friends. *Id.* Next, participants saw a picture of the second litigator, then listened to the second deposition and evaluated the second litigator on the same dimensions. *Id.* at 897-98.

<sup>124</sup> *Id.*



males with traits commonly assigned to successful litigators.<sup>125</sup> That is, participants with higher levels of implicit bias were more likely to favor the white litigators' performances.<sup>126</sup> The study demonstrates that stereotypes about litigators and Whiteness alter how people evaluate identical lawyering, simply because of the race of the litigator.<sup>127</sup> Though race was only primed by a five-second picture and the last name of the lawyer shown on the transcript, the study was sufficiently salient to predict different evaluations of the litigator's performance—implicit stereotypes predicted pro-White favoritism and explicit stereotypes predicted anti-Asian derogation.<sup>128</sup>

While there is recourse available with respect to explicitly biased jurors, the same is not true for those jurors with implicit biases. In *Turner v. Stime*,<sup>129</sup> the court found that the jury had committed misconduct for making explicitly biased comments against the Asian American attorney, entitling the parties to a retrial.<sup>130</sup> In *Turner*,<sup>131</sup> Darlene and Bill Turner sued Dr. Nathan Stime and the medical clinic at which he worked for medical malpractice resulting in the amputation of Mrs. Turner's foot.<sup>132</sup> Mark Kamitomo, an Asian-American attorney of Japanese ancestry, represented the Turners, and a white male attorney represented Dr. Stime.<sup>133</sup> The jury returned a verdict for Dr. Stime, and it later became known that during deliberations several jurors referred to the Turners' attorney as "Mr. Kamikaze," "Mr. Miyashi," "Mr. Miyagi," or "Mr. Havacoma."<sup>134</sup> One juror also reportedly stated that the defense verdict was "almost appropriate" given that it was delivered on December 7—a reference to the day in 1941 when the Japanese attacked Pearl Harbor.<sup>135</sup>

The trial court found that the jury engaged in misconduct that affected the verdict and subsequently granted the Turners' motion for a new trial.<sup>136</sup> The Court of Appeals for the State of Washington affirmed.<sup>137</sup> This case shows that while there is recourse through the court system for explicitly biased conduct, recourse

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<sup>125</sup> *Id.* at 902.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 912.

<sup>128</sup> *Id.*

<sup>129</sup> *Turner v. Stime*, 153 Wash. App. 581 (Wash. Ct. App. 2009).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 584.

<sup>132</sup> *Id.* at 585.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 586.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 589. For jury misconduct to occur during deliberations, jurors would have to make racially derogatory remarks of a factual nature that reveal racial bias against a party's attorney and other jurors would have to respond to the remarks by chuckling and smirking. *Id.* Such misconduct does not inhere in the verdict and can be a ground for granting a new trial. *Id.* A party is entitled to a new trial on the basis of juror misconduct if "there was sufficient misconduct to establish a reasonable doubt that the party was denied a fair trial." *Id.* at 593 (citing *Gardner v. Malone*, 60 Wash. 2d 836 (1962), *amended by* 60 Wash. 2d 836 (1963)).

<sup>137</sup> *Id.* at 594.

for implicitly biased conduct is not as easily obtainable given the opaqueness of unconscious biases.

### III. COMBATING GENDER BIASES AGAINST WOMEN TRIAL ATTORNEYS AND LITIGATORS

The perils of implicit bias in the legal profession are manifold. Judgments about female attorneys based on their gender not only undermine the attorneys' credibility, but also affect their clients' access to fair court proceedings. Recognizing implicit bias and ways to debias one's approach to decision-making are thus critical to ensuring equal access to justice.<sup>138</sup> The Model Rules of Professional Conduct prohibit attorneys from exhibiting bias or prejudice "based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, . . . when such actions are prejudicial to the administration of justice."<sup>139</sup> To that end, attorneys must understand and acknowledge their own biases, which may manifest themselves as unconscious racism, sexism, ageism, or homophobia,<sup>140</sup> in pursuit of ethical and effective client representation, and gender parity.<sup>141</sup>

Countering juror bias is somewhat more difficult. Current tools to filter out biased jurors include juror questionnaires, directly questioning jurors during jury selection, as well as the lawyer's exercise of peremptory challenges.<sup>142</sup> Besides instructing the members of the jury that their decisions must be made impartially, there are few tools to combat jurors' implicit biases since jurors themselves might not be aware of the ways in which they evaluate attorneys, the attorneys' clients, or anyone else in the courtroom. Gender bias in the legal profession can be reduced through other means, however.

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<sup>138</sup> *What Is Implicit or Unconscious Bias?*, AM. BAR ASS'N, <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/what-is-implicit-bias.html> (last visited Nov. 20, 2015).

<sup>139</sup> MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2011). See Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563, 1578 n.60 (2013) (reiterating that ethical rules preclude lawyers from discriminatory manifestations).

<sup>140</sup> See Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 CLINICAL L. REV. 755, 769 (2004) (noting the potential for implicit bias to negatively affect the attorney-client relationship, and urging lawyers to acknowledge those biases in order to work toward overcoming them); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 407-08 (2002) (calling for lawyers "to confront their own cultural identity, including the biases and prejudices that accompany that identity . . .").

<sup>141</sup> See Tremblay, *supra* note 140, at 415-16 (advocating that attorneys examine and confront their own implicit biases).

<sup>142</sup> See Fed. R. Civ. P. 47.

*A. Remedies to Combat Gender Bias Starting in Law School and Continuing Throughout the Hiring Stages*

Given how early biases form, law schools should find ways to reduce gender bias as early as possible. First, the American Bar Association as well as law schools can implement a series of bias reduction courses from the first year of law school and throughout law graduates' careers. These training programs can be woven into student orientations or other required courses that include a training element. Law schools across the country can also implement programs like the Women, Leadership and Equality Program at the University of Maryland Francis King Carey School of Law.<sup>143</sup> The Women, Leadership and Equality Program combines teaching, experiential learning, and scholarship about women in the legal profession to equip law students with tools to combat engendered norms.<sup>144</sup> The program's goal is "to foster scholarship on the gendered nature of law and the legal profession" by grounding the students in theory, and subsequently applying that theory during a workshop in the following semester.<sup>145</sup> Students learn about implicit bias and take the IAT, learn about the history of women in the legal profession, and how to combat stereotypes and biases in the law firm, courtroom, corporate boardroom, or anywhere the student might pursue his or her career.<sup>146</sup> By promoting awareness in law school about gender biases that pervade the legal profession, these future professionals are better equipped to combat bias in the real world.

Second, the American Bar Association, the Association of American Law Schools, and law schools themselves can encourage law firms and other agencies to commit to hiring more women in counter-stereotypical (implicitly male prototype) roles. An implicit gender bias reduction study, conducted by social psychologists Nilanjana Dasgupta and Shaki Asgari, tested whether exposing female college student participants to women in counter-stereotypic roles would reduce the students' implicit gender biases.<sup>147</sup> The researchers tested their hypothesis by

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<sup>143</sup> The Women, Leadership and Equality Program at the University of Maryland Francis King Carey School of Law was created by Professor Paula Monopoli in 2003. "The Program helps students develop the professional skills necessary for success and leadership positions in law, business, government, the nonprofit sector, and the judiciary through its Rose Zetzer Fellowship Program. Named for the first woman admitted to the Maryland Bar Association, the Women, Leadership and Equality Program provides training in professional skills, including communication, organizational dynamics, leadership, and personal negotiation through externships and other practice-based learning." *Women, Leadership and Equality Program*, U. MD. FRANCIS KING CAREY SCH. LAW, <https://www.law.umaryland.edu/programs/wle/> (last visited Nov. 20, 2015).

<sup>144</sup> *Id.*

<sup>145</sup> Lori Romer, *Raising a Gavel for Women's Equality*, in UNIVERSITY OF MARYLAND BALTIMORE: 2009 RESEARCH AND SCHOLARSHIP 18 (2009), [https://www.law.umaryland.edu/programs/wle/documents/Raising\\_a\\_Gavel.pdf](https://www.law.umaryland.edu/programs/wle/documents/Raising_a_Gavel.pdf).

<sup>146</sup> Connie Lee was a student in Professor Monopoli's Gender and the Legal Profession seminar. The professor taught and administered the IAT, and invited numerous guest speakers to the course to discuss biases in the legal profession.

<sup>147</sup> See generally Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender*

studying the effect of counter-stereotypic exemplars on both short-term and long-term bias reduction.<sup>148</sup>

Specifically, the researchers examined whether teaching female college students about female leaders would reduce their gender stereotypes of women as supporting figures—rather than leaders.<sup>149</sup> To do this, the researchers asked the participants to review photos and short biographies of women in counter-stereotypic roles, including Justice Ruth Bader Ginsburg.<sup>150</sup> The researchers then conducted a stereotype-gender IAT in which participants had to group together male and female names with attributes of leaders and supporters.<sup>151</sup> The study found that participants who had learned about the women leaders displayed less implicit gender bias than members of the control group;<sup>152</sup> on the IAT, these participants were able to group together women with leadership attributes more quickly than their IAT counterparts.<sup>153</sup> Similarly, initiatives to promote and hire more women for lead trial attorney and litigator positions can reduce the gender schema that only white males hold these positions. The more exposure attorneys, judges, jurors, and the public have to women trial lawyers, the less likely they will continue to operate under the assumption that men predominantly occupy lead counsel positions or first-chair trials.

#### *B. Remedies to Combat Gender Biases After the Hiring Stages*

In order to achieve equality in the legal profession and level the playing field, gender biases must be combated even after hiring. Survey and interview results shed light on the reasons why women continue to experience so little progress in climbing the legal career ranks.<sup>154</sup> Women attorneys have recounted the lack of effective mentoring at all levels in the legal profession,<sup>155</sup> as well as limited opportunities for client development, as barriers to career advancement.<sup>156</sup>

#### 1. Women Attorneys Need More Opportunities for Client Development and More Opportunities to First-Chair Trials

One problem that women litigators have identified is that their employers fail

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*Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642 (2004) (finding that certain types of exposure to female role models temporarily reduced implicit bias).

<sup>148</sup> *Id.* at 642.

<sup>149</sup> *Id.* at 645.

<sup>150</sup> *Id.* at 645-46 (noting that other counter-stereotypic leaders included business leaders, scientists, and politicians).

<sup>151</sup> *Id.* at 646.

<sup>152</sup> *Id.* Members of the control group saw photos of flowers and read descriptions of those flowers. *Id.* at 646-47.

<sup>153</sup> *Id.* at 647. The researchers' summary stated, "[s]ituations that familiarize [women] with ingroup members who have succeeded in atypical leadership domains can have a strong impact on their automatic beliefs." *Id.* at 648.

<sup>154</sup> See DEF. RESEARCH INST., *supra* note 28.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

to provide them with the opportunity to work on an entire case and instead ask them to complete only discrete assignments within a case.<sup>157</sup> Limiting an associate's involvement to discrete aspects of the case reduces the opportunity for the developing lawyer to understand how her assignment affects the overall lawsuit.<sup>158</sup> Without this perspective, attorneys do not learn how to evaluate the litigation as a whole, and consequently, are rendered unsuitable for promotion to the partnership ranks.<sup>159</sup>

Strategies to remedy this gap in the learning process include ensuring that female litigators get opportunities to participate in client development, such as by interfacing with clients and receiving appropriate credit for their work.<sup>160</sup> Additionally, allowing female trial attorneys to fill lead counsel roles or first-chair cases, both large and small, will help advance the work and exposure of women attorneys. The more exposure women gain in leadership roles within the trial advocacy arena, the more accustomed judges, jurors and the general public will become to women trial attorneys.

## 2. Women Attorneys Need Improved and Increased Mentoring

Many women litigators lack effective mentoring relationships that help foster self-marketing and honing one's skillset.<sup>161</sup> An attorney who participated in the DRI survey commented that, "the absence of female role models causes insecurity among men and women."<sup>162</sup> In short, women would like to have more female role models, but do not have them.<sup>163</sup>

To that end, law firms and other corporate legal practices should encourage upper-level employees to take "female clerk[s], associate[s], and equity partner[s] to lunch on a regular basis to explore not only the legal issues of a specific case, but also other aspects of the practice of law that lead to professional success."<sup>164</sup> In the trial advocacy context, women trial attorneys need more trial attorney mentors to help them develop and improve their trial advocacy skills. Through effective mentoring, the female trial attorney will be well equipped when facing the gender biases she might experience in the courtroom.

## 3. Contending with the Demands of Work and Family Life

At some point in her career, a female attorney might decide to balance her heavy workload and unpredictable hours with the demands of raising or caring for a

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<sup>157</sup> *Id.* at 13.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 12.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> DEF. RESEARCH INST., WOMEN IN THE COURTROOM: BEST PRACTICES GUIDE 5 (2007).

family. In law firms, women attorneys have to meet the demands of their firm's billable hours requirements, as well as the demands of clients that expect their attorney to be readily available to handle their needs.<sup>165</sup> Women attorneys simultaneously are expected to handle the day-to-day domestic responsibilities that come with raising children or other family duties, such as caring for elderly parents.<sup>166</sup> Shifting to family life can be challenging, particularly for attorneys who aspire to advance through the ranks of a law firm.

Among the lawyers surveyed in the DRI study, 52% responded that the practice of law influenced their personal decision on the timing of motherhood.<sup>167</sup> Several stated they postponed having children until after advancing to partnership so that they could meet the demands required for partnership, as they perceived these demands to be in conflict with child rearing.<sup>168</sup> Others who made the decision to have children, and attempted to return to the partnership track, eventually decided to cut back their hours and get off the track because they could not meet the demands of their practice without negatively impacting their family.<sup>169</sup>

Law firms can alleviate these ongoing challenges by implementing flexible work schedules, telecommuting, and job sharing. Law firms should openly communicate these policies, encourage their use, and examine ways to enforce these policies that actually improve the work-life balance. Additionally, law firms should create and support women's initiatives to address the institutional barriers in law firms.<sup>170</sup>

#### 4. Additional Tools for Success for Women Trial Attorneys and Litigators

While research shows that women who act aggressively face a double bind dilemma, the same research also shows that women do not necessarily have to act aggressively to be effective in the courtroom.<sup>171</sup> Attorneys command the courtroom using different styles, and women have certainly found different methods to assert themselves and successfully advocate on behalf of their clients.<sup>172</sup>

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 13. See also Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 37 (2005).

<sup>167</sup> DEF. RESEARCH INST., *supra* note 28, at 15.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Noam Scheiber, *A Woman-Led Law Firm that Lets Partners Be Parents*, N.Y. TIMES (May 1, 2015), [http://www.nytimes.com/2015/05/03/business/a-woman-led-law-firm-that-lets-partners-be-parents.html?smid=pl-share&\\_r=1](http://www.nytimes.com/2015/05/03/business/a-woman-led-law-firm-that-lets-partners-be-parents.html?smid=pl-share&_r=1). One women-led law firm, named the Geller Law Group, has dedicated its mission "to show that parents can nurture their professional ambitions" to practice law "while being fully present in their children's lives." *Id.*

<sup>171</sup> See Larry Bodine, *Slides for NTL Webinar: How to Overcome Challenges Facing Female Attorneys*, NAT'L TRIAL LAWYERS (Nov. 19, 2014), <http://www.thenationaltriallawyers.org/2014/11/female-attorneys/>.

<sup>172</sup> See, e.g., Lynn Bratcher, *Women Trial Lawyers—As Good or Better than Men*, UNCOMMON COURAGE (2009), <http://uncommoncourage.blogspot.com/2009/11/women-trial-lawyers-as-good-or->

In fact, women trial attorneys nationwide have developed teaching tools to guide women into trial work, including strategies on “how to be heard and acknowledged” and “how to effectively persuade and/or advocate.”<sup>173</sup> The techniques, based on common linguistic and behavioral concepts, are designed to debias people’s perceptions about women.<sup>174</sup> These techniques equip women attorneys with different methods to command the courtroom, including the purposeful use of body language, strategies to maximize use of her voice, and ways to develop her own courtroom presence and style.<sup>175</sup>

#### CONCLUSION

The lack of women as lead counsel is not due to lack of talent. Women lawyers all over the country and world are successful trial lawyers and litigators and have undoubtedly made significant strides in the legal profession. Nevertheless, more progress must be achieved to address and eliminate bias against them. Leveling the playing field requires acknowledging gender biases and recognizing ways to combat them.

Attorneys in all practices should learn about implicit bias and how such biases can influence their decision-making processes. Equipped with the knowledge that the dynamics of unconscious biases may affect the decision-making processes of judges, jurors, and even opposing counsel, women trial attorneys and litigators can further advance through the ranks of the legal profession. Moreover, with better support from professional management at law firms and other corporate legal practices, more women can flourish in the legal profession. As more women enter law school and the legal profession, these strategies can help facilitate broader cultural change and combat existing gender biases in the legal profession.

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better.html; Jan Nielsen Little, *Ten Reasons why Women Make Great Trial Lawyers*, DAILY J., June 1, 2006, at 1-2, [http://www.kvn.com/Templates/media/files/pdfs/Jan\\_Column\\_June2006.pdf](http://www.kvn.com/Templates/media/files/pdfs/Jan_Column_June2006.pdf).

<sup>173</sup> Shaana A. Rahman, *Wanted: Women Trial Lawyers*, PLAINTIFF MAG., Feb. 2013, at 2, [http://www.rahmanlawsf.com/wp-content/uploads/Rahman\\_Wanted\\_Women-trial-lawyers.pdf](http://www.rahmanlawsf.com/wp-content/uploads/Rahman_Wanted_Women-trial-lawyers.pdf).

<sup>174</sup> *Id.*

<sup>175</sup> *See id.* Shaana A. Rahman, an experienced civil trial attorney, recommend communications skills that women trial attorneys can utilize in the courtroom. *Id.* Another program based in Washington State—The Female Trial Advocacy Program—focuses on the woman trial attorney’s voice, persona, and “feminine mystique” to hone trial advocacy skills. *Female Trial Advocacy Program*, KAREN KOEHLER, <http://www.karenkoehler.com/ftap.html> (last visited Nov. 20, 2015).

