COHENMILSTEIN

USC Annenberg
Inclusion Initiative

PEARL STREET FILMS

Kalpana Kotagal, Cohen Milstein Sellers & Toll
Dr. Stacy L. Smith, USC Annenberg Inclusion Initiative
Fanshen Cox DiGiovanni, Pearl Street Films
Leah Fischman, USC Annenberg Inclusion Initiative

Inclusion Rider Template
March 2018

1. Statement of Purpose:

- Recognizing that increasing the number of females—particularly recognizing the intersectional discrimination faced by females of color—and individuals from other under-represented groups, auditioning for supporting roles, and casting them whenever possible in a manner that retains story authenticity, will facilitate employment and create a stronger pipeline for more diverse representation on-screen,

- and that increasing the number of females—particularly once again recognizing the issues faced by females of color—and individuals from other under-represented groups, interviewing for certain off-screen positions, and hiring them whenever possible, will similarly facilitate employment and create a stronger pipeline, and will ultimately give rise to greater diversity off-screen,

- ACTOR/CONTENT CREATOR requests that STUDIO makes this addendum part of the contract between ACTOR/CONTENT CREATOR and STUDIO on the theatrical motion picture or series/web content now entitled "____."

2. Definitions

a. The term "supporting roles" is defined as SAG-AFTRA defines that term.[1]

b. The term "studio" should be read to include the major studios, mini-majors, independent financiers, and distributors.

c. The term "parties" means ACTOR/CONTENT CREATOR and STUDIO.

d. The term "under-represented group(s)" means people who identify themselves as females, people of color, disabled, Lesbian Gay Bisexual Transgender or Queer, or having a combination of these attributes.[2]

3. Auditions/Interviews:

[1] "Supporting Role" is a term that requires further negotiations and definition. For example, a supporting role should not affect story sovereignty and thus needs to be defined using the breakdowns available at SAG-AFTRA for minor roles.
[2] The parties should review the definition of the term "under-represented," as it is flexible and can be expanded to include, e.g., age.

a. The Director and Casting Director will audition at least one female and one person from any other under-represented group for all supporting roles. This includes engaging in the good-faith consideration of casting a female in a role scripted for a man or one whose gender is unspecified.

b. The individual(s) responsible for interviewing and hiring the crew will interview at least one female and one person from any other under-represented group for the following-off screen positions:[3]

i. Development and Production: Director of Photography/Cinematographer, Production Designer, Sound, 1st Assistant Director, 2nd Assistant Director, Costume Designer, Line Producers.

ii. Post-Production: Editor, Visual Effects, Composer.

c. All reasonable efforts will be made to ensure individuals auditioning or interviewing who have a mobility disability can access the audition or interview location.

4. Casting and Hiring Objectives:

a. Casting of Supporting Roles:

i. Consistent with story authenticity and achieving a high-quality result, the Director and Casting Director shall affirmatively seek opportunities to cast females, including females of color, and actors from other under-represented groups in all supporting roles.

ii. Wherever possible, the Director and Casting Director will select qualified members of under-represented groups for supporting roles in a manner that matches the expected demographics of the film's setting (with a confidence interval of XX%).[4] The Director and Casting Director shall rely upon state-by-state demographics to determine representational percentages and shall rely upon nationwide demographics where state-by-state data is not available. The Director and Casting Director are encouraged to seek advice or counsel regarding implementation of this provision from Dr. Stacy L. Smith of the USC Annenberg School for Communication and Journalism and/or Kalpana Kotagal of Cohen Milstein.

iii. To make a determination regarding benchmarks for casting of under-represented groups, the producer/studio and Dr. Stacy L. Smith[5] will consider

[3] The terms of paragraph 3.b.i-ii should be considered carefully with consideration for the existing pool of candidates.
[4] The appropriate targets should be discussed.
[5] There are a number of academics and/or industry advocates who can be consulted for this purpose.

the geographic location and time period in which the story is set. This consideration may also include, but shall not be limited to, whether the film is based on or adapted from historical or current true events. This determination should also include legal considerations.

b. Hiring Certain Off-Screen Positions: For all applicable roles, *see* ¶3b, the producer or studio shall make all reasonable efforts to fill those positions with qualified and available individuals who have been under-represented in that position and where those roles were not filled prior to involvement of ACTOR/CONTENT CREATOR.

5. Exception: On the rare occasion when story authenticity precludes application of ¶¶ 3a and 4a, a determination which is to be made by the producer or studio in conjunction with Dr. Stacy L. Smith and Fanshen Cox DiGiovanni of One Drop of Love and Pearl Street Films,[6] this Addendum will apply only to interviewing and hiring of off-screen roles, as specified in ¶¶ 3b and 4b. Where this exception to on-screen compliance is found to apply, all other terms of this Addendum continue to apply to the studio's efforts to interview and hire members of under-represented groups for off-screen positions.

6. Reporting: The Producer shall provide a report containing the following comprehensive data to Dr. Stacy L. Smith,[7] at the conclusion of production:

a. the total number of individuals who auditioned, or interviewed for, each covered supporting role or off-screen position, as defined in ¶¶ 3(a)-(b). This reporting should be disaggregated by each supporting role/off-screen position;

b. the number of those who auditioned (for supporting role positions) and interviewed (for off-screen positions) who identified themselves as:

(i) females;

(ii) people of color;

(iii) disabled;

(iv) Lesbian Gay Bisexual Transgender or Queer;

(v) a combination of diverse qualities identified in (i-iv);

c. the number of females and individuals from other under-represented groups who were cast in supporting roles;

[6] *See* n.5.

[7] The reporting mechanism could also be delivered to another agreed-upon outside source or committee appointed across agencies, studios and/or production companies.

d. the number of females and individuals from other under-represented groups who were hired for the off-screen roles covered by this Addendum.

e. To satisfy the reporting requirements of ¶6(b)(ii), those who audition or interview for included supporting roles or off-screen positions will be asked to voluntarily self-identify utilizing U.S. Census designations for race and ethnicity and will be provided with a statement affirming the value of diversity and explaining purpose of data collection to enhance diversity and inclusion in Hollywood. These individuals will be given the option to write-in their ethnic or racial background, sexual orientation or gender identity, or to decline to provide this information.

7. Use of Reporting: The reporting provided for in ¶6 shall remain confidential and anonymous in its disaggregated form, but may be used Dr. Stacy L. Smith[8] to inform research regarding diversity and inclusion in film and television and to advocate for greater inclusion in projects in which ACTOR/CONTENT CREATOR is involved.

8. Compliance: This paragraph provides a mechanism for determining whether the studio has complied with this Addendum's stated purposes of facilitating greater diversity in auditioning/interviewing and casting/hiring qualified individuals from under-represented groups and sets forth suggested monetary consequences for non-compliance.

a. On-Screen Roles: Whether a studio has complied with this Rider for on-screen roles will be determined by analyzing the demographics of characters in the project, not the demographics of actors. Dr. Stacy Smith will undertake this analysis. A project has complied with this Addendum if the demographics of characters on-screen match the expected demographics of the film's setting (with a confidence interval of XX%).[9] The analysis will be completed by Dr. Stacy Smith's team in accordance with its previously documented methods for evaluating content.[10]

b. If the determination is made that the studio has failed to comply in good faith with this Addendum as to the demographics of characters on-screen, the studio shall make a contribution of [INSERT SCALE]. That contribution will be used to establish and endow a scholarship fund for filmmakers from under-represented backgrounds, including females, to be overseen and administered by Fanshen Cox DiGiovanni of One Drop of Love and Pearl Street Films.[11] The contribution made pursuant to this paragraph shall constitute the complete and exclusive monetary penalty for non-compliance with this Addendum.

---

[8] *See* n.7.
[9] *See* n.4.
[10] *See* n.7.
[11] While we recommend a centralized unitary approach to such a scholarship fund, we recognize that other such work supporting inclusion in the industry is underway. Certainly, the recipient of such a contribution should be discussed.

c. Off-Screen Roles: Whether a studio has complied with ¶¶3(b) or 4(b) (relating to off-screen roles), is to be determined by designated representative of ACTOR/CONTENT CREATOR and designated representative of STUDIO. In making this determination, the designated representatives of ACTOR/CONTENT CREATOR and STUDIO will consider the totality of the circumstances, including data regarding the available pipeline of qualified candidates for each position and any other relevant data or anecdotal information.

9. Dispute Resolution: Those terms of ACTOR/CONTENT CREATOR'S contract setting forth processes for dispute resolution shall also govern the resolution of disputes pursuant to this Addendum.

Using the Morals Clause in Talent Agreements:

A Historical, Legal and Practical Guide

Noah B. Kressler*

INTRODUCTION

Photographs of model Kate Moss snorting cocaine splashed across newspapers worldwide on September 15, 2005. As the media frenzy began, there is no doubt that the headquarters of Chanel, H&M and Burberry were just as frenetic. Within days, all three terminated their endorsement deals with Moss.[1] None received the benefit of their bargain.

In the sale of goods, contract law recognizes the obligation of a seller to deliver conforming goods, in accordance with the contract.[2] A buyer's receipt of non-conforming goods may place the seller in breach.[3] Analogous rights and remedies are available to companies employing talent: the "morals clause" generally allows buyers, such as advertisers, to terminate a talent agreement when an actor's conduct is detrimental to the buyer's interests or otherwise devalues the performance due. In the 1950s, these clauses were infamously used by Hollywood studios to fire suspected communists and uniformly upheld by courts.[4] Today, the morals clause remains a standard term in advertising, motion picture and television talent agreements. Such a clause may read,

> The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general.[5]

---

* J.D. Candidate 2006, Tulane Law School; A.B., Political Science, Vassar College, 2001. Special thanks to Professor Gary Roberts, Jeffrey Googel, Lisa Williams-Fauntroy and Geoffrey Wiggins. Very special thanks to James Taylor, Terri Seligman, Kenneth Florin and Michael Linowes, for their trust, encouragement and the opportunity to pursue the work on which this Note is based.

1. *See, e.g.*, Cesar Soriano and Karen Thomas, *Moss Issues Apology*, USA TODAY, Sept. 23, 2005, at 3E.
2. U.C.C. §§ 2-301, 2-503(1), 2-601 (1998).
3. *Id.*
4. *See, e.g.*, RKO Radio Pictures, Inc. v. Jarrico, 128 Cal. App. 2d 172 (1954).
5. Loew's, Inc. v. Cole, 185 F.2d 641, 645 (9th Cir. 1950).

There is a great deal of criticism, uncertainty and misinformation about the morals clause: it is thought to be historically reprehensible, legally unenforceable and ambiguously drafted.[6] Meanwhile, attorneys and agents negotiating talent deals constantly encounter the morals clause, and it often becomes a point of negotiation between the parties. However, there is no substantive scholarly research on the subject and only a few cases interpreting the provision. In response, this Note seeks to explore the history and value of the morals clause, reaffirm the enforceability of an express morals clause and introduce the legal basis for an implied morals clause, breach of which is also just cause for termination. Finally, the Appendix presents and deconstructs numerous examples of the morals clause, and compares and analyzes their elements, in an effort to aid the practitioner in drafting an effective morals clause.

I. THE HISTORY OF THE MORALS CLAUSE

A. HOLLYWOOD, 1921

In the summer of 1921, Roscoe "Fatty" Arbuckle signed a three-year, $3 million contract with Paramount Pictures.[7] Over Labor Day weekend that year, the popular comedian hosted a party in a San Francisco hotel suite, after which, guest Virginia Rappe was found fatally ill in one of the bedrooms.[8] A witness told police that she heard screams coming from the bedroom when Arbuckle was in the room with her, and rumors began circulating that he sexually assaulted Rappe, crushing her with his weight.[9] Public opinion quickly turned against the comedian as newspapers nationwide gave the story front-page coverage.[10]

The Arbuckle scandal descended upon the country at a time of intense public

---

6. *See e.g.*, Robert Davenport, *Screen Credit in the Entertainment Industry*, 10 LOY. L.A. ENT. L. REV. 129, 133 n.26 (1990) ("[A]ll guild agreements now prohibit the inclusion of such clauses in their contracts . . . ."); Tom K. Ara, Note, *Free Speech vs. Free Press: Analyzing the Impact of* Nelson v. McClatchy Newspapers, Inc. *on the Rights of Broadcast Journalists*, 32 LOY. L.A. L. REV. 499, 504 (1999) ("Many collective bargaining agreements that are in place today for various media unions—such as the American Federation of Television and Radio Artists, the Screen Actors Guild, the Writers Guild of America, and the Directors Guild of America—prohibit morals clauses such as those found in McCarthy Era employment contracts."). While both the DGA and WGA expressly prohibit morals clauses in their collective bargaining agreements, neither of the actors unions, SAG and AFTRA, have done so. *See* Directors Guild of America Basic Agreement § 17-123 (2002); Writers Guild of America Minimum Basic Agreement art. 54 (2004) (discussing how the company will not include the so-called "morals clause" in any writer's employment agreement); Screen Actors Guild Theatrical Motion Pictures and Television Contract (2001); American Federation of Television and Radio Artists National Code of Fair Practice for Network Television Broadcasting (2004).

7. *See* ROBERT H. STANLEY, THE CELLULOID EMPIRE: A HISTORY OF THE AMERICAN MOVIE INDUSTRY 180 (1978). The contract was valued at almost $28 million in 2005 dollars.

8. *See* Sam Stoloff, *Fatty Arbuckle and the Black Sox: The Paranoid Style of American Popular Culture, 1919-1922*, *in* HEADLINE HOLLYWOOD: A CENTURY OF FILM SCANDAL 56 (Adrienne L. McClean & David A. Cook eds., 2001).

9. *See id.*

10. STANLEY, *supra* note 7, at 180.

scrutiny of morality within the motion picture industry. A year before, "America's Sweetheart" Mary Pickford established residency in Nevada to quickly divorce her husband and marry actor Douglas Fairbanks, but the Nevada Attorney General publicly alleged fraud and sought to set aside the divorce decree.[11] The increasing press attention on Hollywood frequently reported its excesses: parties, drinking and money (some stars earning in a week what many Americans earned in a year), creating widespread offense and resentment.[12] Additionally, the increasingly licentious nature of films compelled some states to impose restrictions on their content.[13] In 1915, the Supreme Court rejected the motion picture industry's First Amendment challenge to state censorship laws, holding that movies were unprotected speech: "[T]he exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded . . ., we think, as part of the press of the country or as organs of public opinion."[14]

Responding to public outrage toward Hollywood, Congress and numerous state legislatures considered censorship legislation in 1921 and 1922.[15] Arguing for strict oversight, Senator Henry L. Myers said on the Senate floor,

> At Hollywood, Calif., is a colony of these people, where debauchery, riotous living, drunkenness, ribaldry, dissipation, [and] free love, seem to be conspicuous. Many of these 'stars,' it is reported, were formerly bartenders, butcher boys, sopers, swampers, [and] variety actors and actresses. . . . From these sources our young people gain much of their views of life, inspiration, and education. Rather a poor source, is it not? Looks like there is some need for censorship, does it not?[16]

In response to these attacks, and to preempt censorship legislation, the major studios followed the lead of Major League Baseball, which, just months before in the aftermath of the Black Sox scandal, drafted a well-respected federal judge to be Commissioner of Baseball. The studios formed a trade association, and in early 1922, hired Will Hays, a former Republican National Committee chair and Postmaster General, to stem the tide of federal and state censorship through self-regulation.[17] Studios also began to insert morals clauses into their standard player's contracts to quickly disassociate from—and stop paying—scandal-plagued stars like Arbuckle.[18]

---

11. *Id.* at 179-80.
12. *See* Stoloff, *supra* note 8, at 60; *see also* RAYMOND MOLEY, THE HAYS OFFICE 29 (1945).
13. *See* MOLEY, *supra* note 12, at 25-27.
14. Mutual Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 244 (1915), *overruled by* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).
15. *See* STANLEY, *supra* note 7, at 179.
16. 62 Cong. Rec. 9657 (1922) (statement of Sen. Myers).
17. *See* STANLEY, *supra* note 7, at 182.
18. *See, e.g., id.* at 14, 43, 85; *see also, e.g.*, WILLIAM J. MANN, WISECRACKER: THE LIFE AND TIMES OF WILLIAM HAINES, HOLLYWOOD'S FIRST OPENLY GAY STAR 148 (1998).

B. HOLLYWOOD, 1947

Hollywood was in crisis in 1947. The year before, movie attendance in the United States was at an all-time high of 90 million people *per week*, but as soldiers returned home en masse, other recreational activities began to compete with films for public attention.[19] Sales of television sets began to climb quickly, leading studios to cut staff and let talent deals lapse.[20] Furthermore, a federal court found against the movie industry in a closely watched, decade-long antitrust litigation, ordering distributors to divest their ownership in exhibitors.[21] As studios faced these internal economic concerns, the beginning of the Cold War brought external political pressures.

The House Committee on Un-American Activities began investigating communist infiltration in the movie industry in 1940, and in 1947 began holding hearings in Los Angeles and Washington.[22] Forty-three subpoenas were issued to studio chiefs, writers, directors and actors, twenty-four considered "friendly" and nineteen "unfriendly."[23] In October, 1947, the committee heard testimony from "friendly" witnesses, including Louis B. Mayer, Jack Warner, Adolphe Menjou, Walt Disney, Ayn Rand and Gary Cooper, and ten "unfriendly" witness, including MGM writer Lester Cole, Twentieth Century Fox writer Ring Lardner Jr., and RKO director and producer Adrian Scott.[24] Each of the three, soon to be among the "Hollywood Ten," took the stand, gave his name, address and occupation and refused to answer whether he was a communist.[25] Heavy publicity followed the hearings, with front-page editorials on communist "infestation" of the movie industry and veterans and civics groups calling for boycotts of theaters exhibiting films made by alleged communists.[26] In late November, the Hollywood Ten were cited for contempt of Congress by the House of Representatives, and, later that day, fifty major motion picture companies pledged not to employ known communists, declaring their actions were, "a disservice to their employers and have impaired their usefulness to the industry."[27] Fearing widespread boycotts amid a shrinking market share of consumer leisure spending, studios used the morals clause, a customary term in talent agreements for twenty-five years, to terminate and disassociate from the scandalized Hollywood Ten. Cole, Lardner and Scott were among those notified that their employment agreements were terminated.[28]

---

19. *See* STANLEY, *supra* note 7, at 126.
20. *See id.* at 126-27.
21. United States v. Paramount Pictures, Inc., 66 F. Supp. 323 (S.D.N.Y. 1946), *amended by* 70 F. Supp. 53 (S.D.N.Y. 1946).
22. *See* STANLEY, *supra* note 7, at 128.
23. *Id.* at 129-31.
24. *Id.* at 130.
25. *Id.* at 131.
26. *Id.*
27. *Id.* at 132.
28. *See id.* at 132-33.

II. THE VALUE OF THE MORALS CLAUSE

Ivory Soap, marketed from 1881 as "99 and 44/100% pure,"[29] was Procter & Gamble's (P&G) first product and it revolutionized the marketplace by introducing consumers to the concept of branding.[30] The company created awareness among buyers that there may be tangible differences between two similar products of different brands:[31]

> Ivory was not just another soap—as everyone in the United States knows, it floats—but it had no secret ingredients, lower costs, or other features that made it wash and clean better than any other well-made bar of soap. What it did have were qualities that P&G fashioned into an image that consumers came to understand and value: quality, reliability, convenience, mildness, familiarity, and home-and-hearth values. Proctor & Gamble carefully crafted and nurtured these associations over time.[32]

In 1972, P&G hired a model named Marilyn Briggs to appear on new packaging for its 99 and 44/100% Pure Ivory Snow. Millions of boxes featuring her smiling face hit store shelves the same week the notorious X-rated film *Behind the Green Door* was released.[33] *Behind the Green Door* featured Marilyn Briggs, now known as adult film star Marilyn Chambers. The effect on P&G was virtually catastrophic: numerous reviews of the shocking and controversial film mentioned the product, and Ivory's association with "purity," "mildness" and "home-and-hearth values" was fiercely bruised.[34] Ironically, the company that created "branding" also suffered through its worst repercussions.

The experience of P&G demonstrates that any business or product associated with talent can be damaged by that relationship. Consequently, advertisers, television networks and movie studios all include the morals clause in their talent agreements. However, each class of buyers values the provisions of the moral clause differently because a breach of the morals clause uniquely affects the interests of each buyer.

---

29. *See* OSCAR SCHISGALL, EYES ON TOMORROW: THE EVOLUTION OF PROCTER & GAMBLE 33 (1981).

30. *See* DAVIS DYER ET AL., RISING TIDE: LESSONS FROM 165 YEARS OF BRAND BUILDING AT PROCTER & GAMBLE 29, 408 (2004).

31. *See id.* at 408. Last year, Proctor & Gamble spent $2.9 billion advertising brands such as Ivory, Crest, Tide, Clairol, Iams, Pampers, Scope and Vicks. Proctor & Gamble spent more money on U.S. advertising than any other company. *See* George Raine, *Annual Ad Spending Exceeds $141 Billion*, S.F. CHRON., Mar. 10, 2005, at C1.

32. DYER, *supra* note 30, at 408.

33. *See* Richard Starnes, *125 Years of 99.44% Pure*, OTTAWA CITIZEN, Sept. 1, 2004, at D3.

34. *See* Roger Ebert, *Behind the Green Door*, CHICAGO SUN-TIMES, Dec. 11, 1973 (film review), *available at* http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19731211/REVIEWS/312110301/1023 (last visited Dec. 2, 2005).

A. THE VALUE OF THE MORALS CLAUSE TO ADVERTISERS

Advertising featuring celebrities is ubiquitous.[35] Studies find that such advertisements generally affect consumers more favorably than non-celebrity advertisements, particularly among teenage consumers.[36] Companies looking to differentiate their product among a barrage of marketing messages, and to entertain and influence the purchases of potential consumers, turn to celebrities as a relatively cheap, easy and familiar way to manipulate consumer perception of a product.[37]

Such impressions are easily created. Social theorists argue that there is no inherent meaning in a good until an individual ascribes meaning to it.[38] Studies show that products, particularly those with undefined or generic images (i.e. bath towels or new products), when combined with a celebrity endorsement, tend to pass the public perception of that celebrity onto the product's "meaning."[39] Advertisers hope that the celebrity's established familiarity and credibility are transferred to the product, making that product similarly familiar and credible to the consumer.[40] For example, it was not only actress Candice Bergen who memorably endorsed Sprint long distance, but her popular "Murphy Brown" character as well.[41] Bergen's familiarity successfully transferred to the product and differentiated Sprint from its competitors. A Sprint executive noted, "Using Candice in our TV spots has allowed us to break away from the competition by coming across as witty, different, smart, and even a little bit sassy."[42]

"Meaning transference" was successful in the Bergen/Sprint pairing, but it can be a double-edged sword. Beyond business concerns about the *advertiser*

---

35. *See* Charles Atkin & Martin Block, *Effectiveness of Celebrity Endorsers*, 23 J. OF ADVERTISING RES. 57, 57 (Feb./Mar. 1983).

36. *See id.* at 60.

37. *See id.* at 57.

38. *See* Karl Marx, *The Fetishism of Commodities and the Secret Thereof, in* THE MARX-ENGELS READER 319-29 (Robert C. Tucker ed., 1972) (1887) (arguing that a cultural object is powerless, simply reflecting the desires of the social world it was created for, and that without anyone to receive those desires, an object's meaning is empty); WENDY GRISWOLD, CULTURES AND SOCIETIES IN A CHANGING WORLD 22 (1994) (agreeing with Marx and contending objects of culture are products of their creators, receivers, and the social world in which they are interpreted, and understanding the influences of each of these players is crucial to analyzing any cultural object).

39. *See* Mary Walker et al., *Celebrity Endorsers: Do You Get What You Pay For?*, 9 J. OF CONSUMER MKTG. 69 (Spring 1992). In a fascinating marketing study, consumers were asked to independently describe the characteristics of three products (bath towels, VCRs and jeans) and two celebrities (Madonna and Christie Brinkley). When each celebrity was combined with a product, the characteristics of the celebrity overshadowed those of the product. For example, consumers determined bath towels were bland, nondescript, ordinary, somewhat unattractive, soft, subdued and delicate. After viewing advertisements separately pairing Madonna and Christie Brinkley with the bath towels, Madonna's towels were attractive, neither high nor low quality, soft and feminine, risky, and somewhat low class. Christie Brinkley's towels were much more attractive than Madonna's, higher quality, softer and more feminine than Madonna's, and high class. *Id.*

40. *See* Alan R. Miciak & William L. Shanklin, *Choosing Celebrity Endorsers*, 3 MKTG. MGMT. 50, 50-59 (Winter 1994); JIB FOWLES, ADVERTISING AND POPULAR CULTURE 127 (1996).

41. *See* FOWLES, *supra* note 40, at 127.

42. *Id.* at 129.

transferring unintended negative meanings to products by selecting an improper spokesperson (for example, a celebrity identified as "risky" to endorse a mutual fund, or one identified as "unathletic" to endorse a sports drink), advertising history is replete with examples of celebrity product pairings where the *endorser* transferred negative meaning to the product by his or her conduct. For example, after Bruce Willis, Seagram's popular wine cooler spokesperson, entered an alcohol rehabilitation clinic, the company was "very embarrassed" and decided not to renew his lucrative endorsement deal.[43] Accordingly, studies find that advertisers choosing celebrity endorsers place a heavy emphasis on considerations of trustworthiness, values, image, reputation and publicity risk.[44] Advertisers worry that once a celebrity's image is connected with a product, it may become an albatross if it is besmirched by allegations of impropriety.[45] Consumer research confirms this fear is well justified, but when the connection between the product and celebrity is weak, detriment to the brand tends to be mitigated.[46] Consequently, advertisers use the morals clause in an attempt to quickly disconnect the celebrity/product association in the consumer's mind.

B. THE VALUE OF THE MORALS CLAUSE TO TELEVISION NETWORKS

Television—like radio before it—was developed by advertisers who have long exerted their dominance over the medium.[47] Initially, television programming was nothing more than long-form commercials, with advertisers buying time from a network, bankrolling a program's production costs, approving scripts and hiring actors, writers and directors.[48] In these sponsor-controlled hours, "[T]he sponsor was king. He decided on the programming. If he decided to change programs, network assent was considered pro forma. The sponsor was assumed to hold a 'franchise' on his time period or periods. Many programs were ad agency creations, designed to fulfill specific sponsor objectives."[49]

Numerous factors converged in the mid-1950s to bring an end to sponsor-

---

43. *See* Patricia Winters, *Wine Coolers Press Agencies to Ignite Sales*, ADVERTISING AGE, Jan. 18, 1988, at 1. Other such deals include Ivory with Marilyn Chambers, Seven-Up with Flip Wilson (later arrested for trafficking cocaine), Mazda with Ben Johnson (later implicated in an Olympic steroid scandal), Gillette with Vanessa Williams (later appearing nude in Penthouse magazine), Beef Industry Council with Cybil Shepherd (later telling a journalist she did not like to eat beef), Pepsi-Cola with Michael Jackson (later canceling his world tour amid charges of child molestation and admitting that he was addicted to painkillers), Pepsi-Cola with Madonna (later releasing her controversial video for "Like a Prayer"), Pepsi-Cola with Britney Spears (later appearing in numerous magazines drinking Diet Coke), O.J. Simpson with Hertz (later arrested for two murders), and National Fluid Milk Processors Board ("Got Milk?") with Mary-Kate and Ashley Olsen (the former later checked into a treatment facility for an eating disorder).

44. *See* Miciak & Shanklin, *supra* note 40, at 54.

45. *See id.* at 52.

46. *See* Brian Till & Terence Shimp, *Endorsers in Advertising: The Case of Negative Celebrity Information*, 27 J. OF ADVERTISING 67, 73 (1998).

47. *See* WILLIAM LEISS ET AL., SOCIAL COMMUNICATION IN ADVERTISING 107-112, 142 (1997).

48. *See id.* at 109, 112.

49. *Id.* at 109 (*quoting* ERIK BARNOUW, THE SPONSOR: NOTES ON A MODERN POTENTATE 33 (1978)).

franchised programming: first, television production costs rose sharply as talent demanded higher compensation for their role in popular programs; second, the end of World War II brought a flood of consumer goods to the market, raising the price of advertising time; third, the quiz show scandals focused public scrutiny on the internal machinations of the television industry and fourth, communist allegations increasingly began implicating television talent.[50] Faced with these considerations, advertisers began to purchase fifteen-, thirty- and sixty-second commercial increments within specific demographic groups.[51] This shifted programming control to the network, which now bore the responsibility of developing and sustaining programs that would receive large audiences in advertiser-friendly demographics, translating into higher ratings and increasing advertising prices.[52] As the interests of advertisers and television networks aligned, the networks assumed, "a conservative bias [toward programming], with no risks and no controversy that would exclude, alienate, or miss parts of the audience."[53] In the place of advertisers, networks became increasingly concerned about their talent's off-screen activities. It was aptly noted that, "The sponsor, from whom the money flowed, had left the sponsor's booth, but he had taken his influence along with him."[54]

Television programming continues to be directly influenced by advertising. Former NBC Chairman Grant Tinker observed, "It is an advertiser-supported medium, . . . and to the extent that support falls out, then programming will change."[55] Television history is replete with examples of advertiser's exercising this influence: when communist allegations against lead actress Jean Muir arose, General Foods Corporation cancelled production of the NBC program "Aldrich Family" in 1950; Kimberly-Clark Corporation and Vidal Sassoon, Inc., lobbied CBS to cancel the program "Lou Grant" in 1983 after star Ed Asner became a lightning rod for supporting several unpopular political positions, including El Salvador's communist guerillas.[56]

As television shows generate increasingly significant DVD, merchandising, and cross-promotional revenue, the program itself becomes a brand.[57] Networks recognize the risk of the public imputing the misdeeds of an actor onto the

---

50. *See* LEISS ET AL., *supra* note 47, at 112.

51. *See id.* at 112-13. *But see* Meredith Amdur, *Can Blurb Biz Go Showbiz?*, VARIETY, Mar. 3-9, 2003, at 1. There continue to be scattered "franchised hours" on television, such as Ford's sole sponsorship of the 2002 season premiere of FOX's "24" and Nokia's sole sponsorship of the 2001 season premiere of ABC's "Alias." More common is the product integration exemplified by FOX's "American Idol," which features sponsors Coca-Cola, Cingular Wireless and Ford in each episode, or NBC's "The Apprentice," which features rotating sponsors such as Domino's Pizza and Home Depot.

52. *See* LEISS ET AL., *supra* note 47, at 113-114.

53. *Id.* at 113.

54. *Id.* at 114 (*quoting* ERIK BARNOUW, THE SPONSOR: NOTES ON A MODERN POTENTATE 73 (1978)).

55. TODD GITLIN, INSIDE PRIME TIME 253 (1983).

56. *See id.* at 3-4; *see also* THOMAS PATRICK DOHERTY, COLD WAR, COOL MEDIUM: TELEVISION, MCCARTHYISM, AND AMERICAN CULTURE 35 (2003).

57. *See* GITLIN, *supra* note 55, at 253; Greg Hernandez, *TV Shows Old and New Send DVD Sales Soaring*, L.A. DAILY NEWS, Sept. 1, 2003, at F5.

character with which he is strongly associated.[58] For example, if a character is considered "pure," lascivious sexual behavior by the actor may irreparably taint that character in the public mind.[59] Jessica Biel, former teenage star of the family-oriented program "7th Heaven," sought to force producers to terminate her contract, so she posed semi-nude in *Gear Magazine* hoping to change audience perception of her and her character.[60] Similarly, NBC fired sportscaster Marv Albert—well-known for his coverage of the National Football League, National Basketball Association and Olympics—mere hours after he accepted a guilty plea in a highly publicized 1997 sexual assault.[61] Regardless of whether the network seeks to protect the program "brand" or the advertiser, the relationship between television talent, the program and its sponsors, are sufficiently close for networks to be concerned about the misdeeds of their talent. The morals clause is used in television to sever that connection.

C. THE VALUE OF THE MORALS CLAUSE TO MOTION PICTURE STUDIOS

The advertiser and branding considerations faced by television networks likewise apply to motion pictures, although this application is mitigated by the development of motion pictures independent from advertising. Today, however, movie executives often look to product placement and co-marketing opportunities to close the gap on soaring film budgets.[62] Advertisers recognize this and turn to top Hollywood talent agencies for entry into the insular world of feature film.[63] Led by William Morris Agency and Creative Artists Agency, advertisers such as General Motors, Coca-Cola, Banana Republic and the NFL turn to these agencies to leverage their film industry relationships and develop integrated marketing strategies.[64] William Morris President Dave Wirtschafter explained his vision for this market:

> Wouldn't it be interesting if J.J. Abrams—an agency client who created the hit shows "Alias" and "Lost"—had a deal with Ford, and we brokered that deal and took a lot of dough? And wouldn't it be even more interesting if the synergy between J.J.'s ideas and Ford's ideas began at inception, and Ford could time the release of a new model to the release of J.J.'s film featuring that model? They'd be happier, we'd be happier, and we'd be richer.[65]

---

58. Benjamin A. Goldberger, *How the "Summer of the Spinoff" Came to Be: The Branding of Characters in American Mass Media*, 23 LOY. L.A. ENT. L. REV. 301, 358 (2003).

59. *Id.*

60. Lisa de Moraes, *'7th Heaven' Actress's Naked Cry for Attention*, WASH. POST, Feb. 8, 2000, at C7 (noting Biel claimed playing the squeaky clean character prevented her from being considered for racier roles in feature films).

61. *See* Gary Levin, *NBC, MSG Take Albert Off Court After Guilty Plea*, DAILY VARIETY, Sept. 29-Oct. 5, 1997, at p. 36.

62. *See, e.g.*, Marc Graser, *Can H'W'D Afford its Tube Touts?*, VARIETY, Apr. 26-May 2, 2004, at 1.

63. *See* Claude Brodesser, *Agents in Fast Company*, VARIETY, Oct. 14-20, 2002, at 1.

64. *See id.*

65. Tad Friend, *Secret Agent Man*, NEW YORKER, Mar. 21, 2005, at 48, 59.

Co-promotion agreements between films and advertisers continue to be a popular source of revenue for studios. For instance, promotional partners in the Austin Powers films included Virgin Atlantic, Heineken, Philips and Starbucks, each of whom received joint marketing opportunities and advertising support from the studio in exchange for cash.[66] Budget limitations require that studios seek these additional sources of financing, requiring them to consider the image concerns of advertisers.

Studios also face similar branding considerations for their films as networks do for television programs.[67] Film sequels frequently outperform their predecessors at the box office, and DVD and merchandising sales further strengthen the franchise,[68] allowing studios to recoup losses from other films.[69] A film franchise is often far more important to the studio than the specific talent attached to the original.[70] For *Spider-Man 2*, Sony was willing to replace star Tobey Maguire when he briefly balked at shooting the sequel.[71] Furthermore, Universal Studios filmed *2 Fast 2 Furious* without the original's star, Vin Diesel,[72] and the third *American Pie* film without star Tara Reid.[73] As the value of a film's brand increases, elements are discarded if they become a liability. Studios and their marketing partners have a pecuniary interest in keeping a film's value as a brand high. They use the morals clause to ensure that value is not compromised by the improper conduct of talent.

III. TERMINATING THE TALENT AGREEMENT

A. BREACH OF AN EXPRESS MORALS CLAUSE AS JUST CAUSE FOR TERMINATING A TALENT AGREEMENT

Under New York and California law, a buyer may properly terminate the talent agreement of an actor who violates an express morals clause that requires conformance to public conventions, decency or morals.[74] Such conduct includes

---

66. *See* Andrew Hinds & Richard Morgan, *'Powers' to the People*, VARIETY, June 14-20, 1999, at 3.

67. Studios, too, are a brand, and some are particularly vulnerable to certain types of unfavorable publicity. The Disney brand, for example, would likely be harmed by a Disney film actor's transgressions, especially allegations involving sexual activity with a minor. *See* Gabriel Snyder, *Moore Fires Fresh Salvo vs. Mouse*, DAILY VARIETY, July 26, 2004, at 1 (suggesting that brand concerns were likely behind Disney's refusal to allow subsidiary Miramax Films to distribute Michael Moore's political documentary FAHRENHEIT 9/11).

68. *See, e.g.*, Carl DiOrio, *H'w'd: A Sequel Opportunity Town*, VARIETY, June 16-22, 2003, at 1.

69. *See, e.g.*, Justin Oppelaar, *New Line's Billion-Dollar Bet*, VARIETY, Jan. 20-26, 2003, at 11.

70. *See, e.g.*, DiOrio, *supra* note 68.

71. *See id*; Friend, *supra* note 65.

72. *See* DiOrio, *supra* note 68.

73. *See id.*

74. *See* Loew's, Inc. v. Cole, 185 F.2d 641 (9th Cir. 1950); Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844 (9th Cir. 1954); Scott v. RKO Radio Pictures, Inc., 240 F.2d 87 (9th Cir. 1957); RKO Radio Pictures, Inc. v. Jarrico, 128 Cal. App. 2d 172 (Cal. Ct. App. 1954); Nader v. ABC Television, Inc., No. 04-5034-CV, 2005 WL 2404546 (2d Cir. Sept. 30, 2005).

more than just a requirement to obey the law,[75] but also to refrain from behavior that tends to "shock, insult and offend the community and public morals and decency," bring the artist into "public disrepute, contempt, scorn and ridicule,"[76] or hurt[77] or prejudice[78] the interests of, lower the public prestige of,[79] or reflect unfavorably upon,[80] the artist's employer or the industry in general.[81] Determining whether an express morals clause is breached is a question of fact, dependent upon the wording of the morals clause and the conduct at issue.[82]

In *Loew's Inc. v. Cole*,[83] *Twentieth Century-Fox Film Corp. v. Lardner*,[84] and *Scott v. RKO Radio Pictures, Inc.*,[85] three uncooperative witnesses appearing before the House Committee on Un-American Activities each brought breach of contract claims against their employers after their talent agreements were terminated following appearances before the Committee and subsequent citations for contempt of Congress. Each of their contracts contained a similar morals clause.[86] In each case, the Ninth Circuit (applying California law) determined that termination was proper because the artist's refusal to answer committee questions, and subsequent contempt conviction, breached an express agreement to conduct himself "with due regard to public conventions"[87] or "in a manner that shall [not] offend against public decency [and] morality,"[88] which necessarily included an implied agreement to refrain from committing the misdemeanor of contempt of Congress.[89] *Lardner* and *Scott* relied on *Cole*'s reasoning that the natural result of the artist's refusal to answer the committee's questions was that the public would believe he was a Communist, and because a large segment of the public thought Communism was evil, the artist violated the express morals clause by failing to comport with public conventions and morals.[90]

Similarly, in *Nader v. ABC Television, Inc.*, the Second Circuit (applying New York law) recently rejected a claim that the morals clause is impermissibly ambiguous or vague: "Morals clauses have long been held valid and enforceable. There is no indication that New York departs from the generally applicable law on this point."[91] The court also affirmed the finding that a television actor's arrest for

---

75. *See Cole*, 185 F.2d at 649.
76. *Scott*, 240 F.2d at 90-91.
77. *See Lardner*, 216 F.2d at 851.
78. *See Cole*, 185 F.2d at 649; *Scott*, 240 F.2d at 90-91; *Jarrico*, 128 Cal. App. 2d at 175.
79. See *Lardner*, 216 F.2d at 851.
80. *See* Nader v. ABC Television, Inc., 330 F.Supp.2d 345, 347 (S.D.N.Y. 2004).
81. *See Lardner*, 216 F.2d at 851; *Scott*, 240 F.2d at 90-91.
82. *See Cole*, 185 F.2d at 649.
83. 185 F.2d 641 (9th Cir. 1950).
84. 216 F.2d 844 (9th Cir. 1954).
85. 240 F.2d 87 (9th Cir. 1957).
86. See *infra* Appendix for the text of *Cole*, *Lardner*, and *Scott*'s morals clauses.
87. *Cole*, 185 F.2d at 649.
88. *Lardner*, 216 F.2d at 850.
89. *Id.*; *Cole*, 185 F.2d at 649.
90. *Cole*, 185 F.2d at 649. For an identical result on identical facts by a California appeals court, see RKO Radio Pictures, Inc. v. Jarrico, 128 Cal. App. 2d 172 (1954).
91. Nader v. ABC Television, Inc., No. 04-5034-CV, 2005 WL 2404546 at *2 (2d Cir. Sept. 30,

drug possession and resisting arrest breached an express morals clause requiring that he not "commit any act or do anything which might tend to bring Artist into public disrepute, contempt, scandal, or ridicule, or which might tend to reflect unfavorably on ABC. . . .,"[92] because his arrest caused media coverage, "bring[ing] his conduct well within any reasonable interpretation of the clause."[93]

Thus, California and New York law recognize that breach of an express morals clause is just cause for terminating a talent agreement when the actor's conduct is viewed by a large segment of the public as shocking, insulting or offensive, or the effect of his actions (such as media coverage) hurts, prejudices or reflects unfavorably upon the artist or employer.

B. BREACH OF AN IMPLIED MORALS CLAUSE AS JUST CAUSE FOR TERMINATING A TALENT AGREEMENT

1. The Employee's Implied Obligation of Good Conduct

An employee owes a well-established common law duty to refrain from activities that may be detrimental to the employer's interests or otherwise devalue the performance due.[94] Finding a breach of this implied duty of good conduct is a question of fact, based on the circumstances of the employment and conduct at issue.[95] According to Professor Williston, "The test is . . . not morality in the abstract, but whether, taking the nature of the . . . employment into account, the acts complained of rendered the [employee] unfit to perform the duties which he had undertaken."[96]

New York law recognizes that breach of this implied duty is proper grounds to terminate an express employment agreement. In *Drayton v. Reid*, the court held that an employer was justified in terminating the employment contract of an actress

---

2005).

92. Nader v. ABC Television, Inc., 330 F.Supp.2d 345, 347-48 (S.D.N.Y. 2004).

93. *Nader*, 2005 WL 2404546 at *2 (2d Cir.).

94. *See* CORBIN ON CONTRACTS § 34.8 (1999) ("The employee's fraudulent or otherwise immoral action in his relations with third persons will justify his discharge [from a service contract] only in case such conduct also affects the value of the performance that is due to the master."); WILLISTON ON CONTRACTS § 54:43 (4th ed. 1990) ("A person hired under an employment contract for a definite term may. . . be discharged before the completion of the term . . . [for] improper conduct. . . [s]ince there is an implied obligation on the part of an employee to do no act that has the tendency to injure his or her employer's business or reputation, and . . . misconduct gives rise to good cause to terminate an employee."); RESTATEMENT (SECOND) OF AGENCY § 380 (1957) ("Unless otherwise agreed, an agent is subject to a duty not to conduct himself with such impropriety that he brings disrepute upon the principal or upon the business in which he is engaged."); RESTATEMENT (SECOND) OF AGENCY § 409 cmt. C (1950) ("The agent may be guilty of conduct which, although not such as constitutes a breach of contract for which the principal could bring an action or refuse compensation, indicates such bad moral qualities that the principal is likely to suffer loss if the agent continues to act. In such case the principal can properly discharge the agent.").

95. *See* Burt v. Catlin, 72 N.Y.S. 924 (N.Y. App. Div. 1901).

96. WILLISTON ON CONTRACTS § 54:45 (4th ed. 1990) (*quoting* Child v. Boyd & Corey Boot & Shoe Mfg. Co., 175 Mass. 493, 495 (Mass. 1900)).

whose lewd and immoral conduct caused a public scandal.[97] In *Burt v. Catlin*, an employer who terminated the employment contract of a farmhand who assaulted another employee was required to show that its interests were prejudiced.[98] In *Herbert v. Wood, Dolson Co., Inc.*, an employer who terminated the employment contract of a Manhattan real estate agent, who returned to the office drunk after a celebratory client lunch, was required to show that the employee's conduct diminished any value in the performance due, given industry and community norms.[99]

California law also recognizes an employer's right to terminate an express employment agreement for breach of this implied duty. In *Adams v. Southern Pacific Co.*, a railroad employer properly terminated the employment contract of a conductor whose off-duty activities included operating an illegal bar and allowing his houseboat to be used for prostitution, because such conduct brought disrepute upon the employer.[100] In *Lardner*, the court cited *Adams* in dicta, stating the studio properly terminated the employment agreement of a writer whose conduct before a Congressional committee would tend to hurt his employer because he also breached an implied obligation to "conduct himself with such decency and propriety as not to injure the employer in his business."[101] Squarely addressing this issue in *Scott*, the court held such conduct in fact breached "an implied covenant on [the employee's] part not to do anything which would prejudice or injure his employer."[102] Thus, New York and California law recognize an employer's right to terminate an express employment agreement based on the employee's breach of an implied duty of good conduct, when such conduct reasonably impairs the employer's interests or diminishes the value of the employee's performance.

2. Introducing an Implied Morals Clause

To justify terminating a talent agreement based on an actor's breach of an implied duty of good conduct, the court must first find a common-law employment relationship. The *Lardner* and *Scott* courts determined that talent were common law employees of the studio.[103] However, in the sixty years since those decisions, changes in the industry raise the significant issue of whether such an employment relationship still exists. First, Hollywood's shift from a "star system" (where studios signed exclusive, long-term contracts with talent) to a "free agency system" (where actors perform services for numerous buyers) calls into question whether

97. 5 Daly's Rep. 442, 444 (N.Y. Ct. Com. Pl. 1874).
98. *Burt*, 72 N.Y.S. at 925.
99. 185 N.Y.S. 325, 327 (N.Y. App. Div. 1920).
100. 266 P. 541 (Cal. 1928).
101. Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844, 850-51 (9th Cir. 1954).
102. Scott v. RKO Radio Pictures, Inc., 240 F.2d 87, 89 (9th Cir. 1957).
103. *Scott*, 240 F.2d at 89; *Lardner*, 216 F.2d at 850-51. *See also, e.g.*, De Haviland v. Warner Bros. Pics., Inc., 67 Cal. App. 2d 225 (Cal. Dist. Ct. App. 1944) (subjecting personal services agreement between talent and studio to California employment law limiting terms of employment agreements); *Drayton*, 5 Daly's Rep. 442.

actors are common-law employees or independent contractors.[104] Second, favorable tax consequences encourage prosperous actors to form personal services corporations (commonly known as "loan-outs"), which contract directly with buyers to provide the talent's services, potentially destroying privity and making such actors common-law employees of the loan-out company instead of the buyer.[105]

a. An Independent Contractor?

Actors today are generally deemed common-law employees—not independent contractors—for employment law purposes.[106] The question is analyzed similarly by courts in New York[107] and California.[108] In *Makarova v. United States*, the Second Circuit (applying New York law) held that a performer was an employee, not an independent contractor, because although she had a significant say over her dancing and acting, the producer maintained artistic control over her performance, required exclusivity for the term of the agreement and dictated her role, rehearsal and performance schedule, hairstyle, shoes, and make-up.[109] The court reasoned, "As long as the employer exercises control over such aspects as the dates and times of performances and the work to be performed," the performer is an employee under New York common law.[110] In *Johnson v. Berkofsky-Barret Productions, Inc.*, a California court held that an actor in a television commercial was not an independent contractor, but rather the employee of the production company that directed and supervised his performance in the commercial.[111] The court also noted that other factors weighed towards finding an employment relationship: he could be discharged at will; he supplied no tools, helpers or place of work; he earned compensation per day and not per job; he possessed no expert skill and he lacked

---

104. *See* STANLEY, *supra* note 7, at 24-28.

105. Talent is usually the sole shareholder and employee of loan-outs, which the IRS often argues should be disregarded as shams. To respect the form of the transaction and resist IRS scrutiny, the loan-out contracts with the buyer promising to provide the talent's services, then the loan-out contracts with talent to require performance of those services. For an in-depth discussion of tax considerations of loan-out corporations, see Mary LaFrance, *The Separate Tax Status of Loan-Out Corporations*, 48 VAND. L. REV. 879 (1995).

106. The employee-independent contractor distinction is significant, determining rights, remedies and obligations under a variety of state and federal laws, and the considerations for each vary slightly. *See* Robert Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought To Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295 (2001).

107. *See* Makarova v. United States, 201 F.3d 110, 114 (2d Cir. 2000) ("[T]he typical test of whether one is an independent contractor lies in the control exercised by the employer, and in who has the right to direct what will be done and when and how it will be done."). This is primarily determined by whether the employer holds the right to direct the manner and means of accomplishing the task.

108. *See* Johnson v. Berkofsky-Barret Prods., Inc., 260 Cal. Rptr. 67, 70 (Cal. Ct. App. 1989) ("[The] principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.").

109. *Makarova*, 201 F.3d at 114.

110. *Id.*

111. *Johnson*, 260 Cal. Rptr. at 70.

opportunity for profit or loss depending on his skills.[112] The factors these courts considered are frequently express terms in a talent agreement, including the buyer's right to artistic control over talent, determination of production schedules, exclusive use of the talent during principal photography and payment of fixed compensation per production day or week.[113] Consequently, actors remain common-law employees of the buyer in New York and California.

b. The "Loan-Out" Company's Employee?

Actors who use loan-out companies are also common-law employees of the buyer for employment law purposes. New York and California law simply disregard the loan-out when determining whether an employment relationship is present between a buyer and talent. In *Makarova*, the court found such a relationship under New York law, despite a contract between the producer and the performer's loan-out, because the performer individually guaranteed her personal services in an industry-standard inducement letter.[114] In *Johnson*, the court held that the actor's status as an employee of another company (which directed him to the shoot, advised him how to dress and received his payment) did not impact the nature of his relationship with the buyer under California law, "[t]hus, we need not focus on [that] link in the employment chain but must only determine if Johnson is in an employment relationship with [the buyer]."[115] In *Welch v. Metro-Goldwyn-Mayer Film Co.*, a California court found an employment relationship between an actor and the studio that contracted for her services through her loan-out company, because the talent agreement contained numerous standard, specific obligations that the studio owed to the actor individually, such as screen credit and an on-set trailer.[116] Thus, actors using loan-out companies are employees of the buyer under New York and California common law, regardless of whether they may also be deemed employees of a loan-out company.

c. The Status of Talent Today

The industry's shift toward a "free agency system" of employing talent, and the increasing use of loan-out companies by actors, do not alter the common-law employment relationship between buyers and talent. Consequently, talent agreements continue to imply an obligation of good conduct, which may be considered an implied morals clause.

---

112. *Id.*

113. *See* Entertainment Industry Contracts Form 11-1A (Long Form Performer Services Agreement (Studio Version) With Commentary) at ¶ 8.(a) (artistic control), ¶¶ 1.(b), 2.(a) (production scheduling), ¶¶ 1.(b), 2.(c), 4.(a), 9.(b) (exclusivity), ¶¶ 2.(a), (b), (d) (compensation), http://www.lexis.com (after signing in, from the "Legal" tab, select "Entertainment" under the "Area of Law - By Topic" category, then select "Entertainment Industry Contracts" under the "Contracts" category) (last visited Feb. 27, 2006).

114. *Makarova*, 201 F.3d at 112.

115. *Johnson*, 260 Cal. Rptr. at 69.

116. Welch v. Metro-Goldwyn-Mayer Film Co., 254 Cal. Rptr. 645, 655 (Cal. Ct. App. 1988), *rev'd on other grounds*, 769 P.2d 932 (Cal. 1989).

C. USING BOTH THE EXPRESS AND IMPLIED MORALS CLAUSES

The implied morals clause, derived from the employee's obligation of good conduct, does not arise solely in the absence of an express morals clause. The Ninth Circuit said that an employment agreement implies common-law duties that are not limited by the presence of an express morals clause. The court further stated that the buyer's right to terminate a talent agreement for specified causes does not generally prevent termination for legal causes not specified, thus an express morals clause gives the employer rights *in addition to* the common law, not rights in its place.[117] The court reasoned that while canons of construction include *expressio unius est exclusio alterius* (expressing or including one thing implies excluding another or the alternative), the intent of the parties is the primary consideration, and buyers include a morals clause to bolster potential remedies, not diminish them by waiving common-law rights.[118] This is strong authority that, absent an explicit limitation to the contrary, a court will find that an express morals clause in an employment agreement does not limit or waive the buyer's right to terminate a talent agreement for breach of the implied morals clause.

IV. CONCLUSION

The morals clause, devised to stem low public opinion of Hollywood and censorship of films, is now a standard term in advertising, television and motion picture talent agreements. Such a provision protects a buyer when an artist's conduct is detrimental to the buyer's interests or otherwise devalues the performance due. Including a morals clause in a written agreement is a prudent way to protect the unique interests of buyers and to put talent on notice of their role in that endeavor. Despite grumblings to the contrary, breaching an express morals clause remains just cause to terminate a talent agreement under New York and California law.

Derived from the employee's common-law duty of good conduct, an actor's breach of the implied morals clause is also just cause to terminate a talent agreement under New York and California law. Increased reliance on this implied duty would bring a number of benefits to buyers. Primarily, it would reduce transaction costs when negotiating talent deals, particularly with celebrities, whose representatives will frequently contest the morals clause. This implied duty allows buyers to entirely omit the provision from a talent agreement, yet rely on its protection. Also, buyers could raise breach of the implied morals clause as an additional defense in a breach of contract action or use it to justify the termination of a deal that does not include a written morals clause, such as a "handshake deal," binding offer or term sheet.

In sum, the legal basis of the morals clause is settled: an actor's obligation to

---

117. *See* Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844, 850-51 (9th Cir. 1954); Scott v. RKO Radio Pictures, Inc., 240 F.2d 87, 90-91 (9th Cir. 1957).

118. *Lardner*, 216 F.2d at 850.

abstain from conduct damaging the buyer's interests may arise from an express term of the contract, an implied common-law duty or both, and the breach of either is just cause for termination.

APPENDIX: DRAFTING AN EFFECTIVE MORALS CLAUSE

From a business perspective, the problem with the morals clause is inherent: "The clause kicks in after the fact, after the damage is done."[119] Consequently, this section is intended to be a forward-looking and thought-provoking tool for a practitioner drafting or revising a "boilerplate" express morals clause. Because contract language is idiosyncratic to the drafter and talent deals are fact-specific, writing an "ideal" morals clause would be unhelpful. Instead, gathered below is a cross-section of morals clauses, including those used in advertising, television and motion pictures deals, at all talent levels, from different buyers with varying levels of risk averseness.[120] These clauses are broken down into their component parts, general drafting considerations are noted for each and like elements are compared for the practitioner to determine which language may be the most useful.

A. SAMPLE MORALS CLAUSES

1. Advertising

a. A-List Talent

Advertiser shall have the right to terminate this Agreement in the event Talent commits any felonious act involving moral turpitude under federal, state, or local laws.[121]

b. B-List Talent and Risk-Averse Advertiser

Talent (i) has not been accused of or convicted of any crime (other than minor traffic violations), including, without limitation, any felony, crime of moral turpitude, morals offense or drug charge; (ii) is not now and has never been a user of illegal drugs or an abuser of alcoholic beverages and has never received treatment for drug or alcohol abuse; (iii) will not during the Term engage in any practice or acts which are likely to cause Advertiser embarrassment or which could be considered offensive or shocking to Advertiser's customers or the general

119. Interview with Lisa Williams-Fauntroy, Vice-President of Legal Affairs, Discovery Communications, Inc., in Silver Spring, Md. (Aug. 5, 2004).

120. In order to protect client confidentiality, some clauses were edited to remove identifying information. Also, the so-called "A-List," "B-List" or "Scale" terminology is provided only for purposes of background and identification, as the reader will notice that there is little relationship between the relative strength of the clause and the "level" of talent.

121. Provision based on contracts negotiated by or with participation of author.

public, and (iv) has disclosed to Advertiser any situation, event, legal or personal matter which if made public might cause a public relations issue. Advertiser shall have the right to terminate this Agreement if Talent breaches the foregoing warranties and representations. . . . It is understood and agreed that the foregoing shall not be Advertiser's exclusive remedy, but may be in addition to any other remedies available to it. Advertiser's decision with respect to all matters arising under this clause shall be conclusive.[122]

c. Scale Talent Engaged as Spokesperson

Advertiser shall have the right to terminate this Agreement in the event that there is a public reporting of allegations or accusations that Talent has engaged in conduct that is generally viewed by the public as highly offensive and reprehensible from a legal or moral perspective.[123]

2. Television

a. A-List Talent Closely Identified with Network

Network will have the right to terminate this Agreement for cause, which includes, without limitation . . .insubordination, dishonesty, intoxication, resignation . . .failure to conduct Talent's self with due regard to social conventions or public morals or decency, participation in any "adult" media (as determined by Network in its sole discretion) or commission of any act (in the past or present) which degrades Talent, Program, or Network or Producer or brings Talent, Network, Producer or the Program into public disrepute, contempt, scandal or ridicule (provided that Network shall so terminate this Agreement within a reasonable period of time of such information becoming public or coming to Network's attention) . . . . Network's use of Artist's services after termination of this Agreement shall not be deemed a reinstatement or renewal of this Agreement without the written agreement of the parties hereto.[124]

b. Talent Closely Identified with Program (Nader)

If, in the opinion of ABC, Artist shall commit any act or do anything which might tend to bring Artist into public disrepute, contempt, scandal, or ridicule, or which might tend to reflect unfavorably on ABC, any sponsor of a program, any such sponsor's advertising agency, any stations broadcasting or scheduled to broadcast a program, or any licensee of ABC, or to injure the success of any use of the Series or any program, ABC may, upon written notice to Artist, immediately

122. *Id.*
123. *Id.*
124. *Id.*

terminate the Term and Artist's employment hereunder.[125]

c. Scale Talent Engaged for New Program

Employee shall act at all times with due regard to public morals and conventions. If at any time Employee commits any act which shall be an offense involving moral turpitude or which brings Producer or Employee into public disrepute, contempt, scandal, or ridicule or which insults or offends the community or which reflects unfavorably upon Producer or any sponsor or licensee of the Series, then notwithstanding any other terms or conditions hereof, Producer shall have the right to terminate the Term without any further obligation to Employee.[126]

3. Motion Pictures

a. "A"-List Talent

If Talent should, prior to or during the term hereof or thereafter, fail, refuse, or neglect to govern Talent's conduct with due regard to social conventions and public morals and decency, or commit any act which brings Talent into public disrepute, scandal, contempt, or ridicule or which shocks, insults or offends a substantial portion or group of the community or reflects unfavorably on any of the parties involved, then Studio may, in addition to and without prejudice to any other remedy of any kind or nature set forth herein, terminate the Agreement at any time after the occurrence of any such event.... Studio shall not invoke its rights [hereunder] if the only act subjecting Talent to contempt or ridicule, etc. relate solely to Talent's sexual preference or political or religious beliefs or philosophy as expressed in public.[127]

b. Above-the-Line Talent

The artist agrees to conduct himself with due regard to public conventions and morals and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency or prejudice the producer or the motion picture industry in general.[128]

c. Cole

The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend

125. Nader v. ABC Television, Inc., 330 F.Supp.2d 345, 346 (S.D.N.Y. 2004)
126. Provision based on contracts negotiated by or with participation of author.
127. *Id.*
128. *Id.*

to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general.[129]

d. Lardner

That the artist shall perform the services herein contracted for in the manner that shall be conducive to the best interests of the producer, and of the business in which the producer is engaged, and if the artist shall conduct himself, either while rendering such services to the producer, or in his private life in such a manner as to commit an offense involving moral turpitude under Federal, state or local laws or ordinances, or shall conduct himself in a manner that shall offend against decency, morality or shall cause him to be held in public ridicule, scorn or contempt, or that shall cause public scandal, then, and upon the happening of any of the events herein described, the producer may, at its option and upon one week's notice to the artist, terminate this contract and the employment thereby created.[130]

e. Scott

At all times commencing on the date hereof and continuing throughout the production or distribution of the pictures, the producer will conduct himself with due regard to the public conventions and morals and will not do anything which will tend to degrade him in society or bring him into public disrepute, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or public morals or decency or prejudice the corporation or the motion picture industry in general; and he will not willfully do any act which will not willfully [sic] his capacity fully to comply with this agreement, or which will injure him physically or mentally.[131]

B. ELEMENTS OF AN EFFECTIVE MORALS CLAUSE

1. Term

Buyers should consider the period that talent's compliance with the morals clause is necessary. Some clauses, such as 1(b), 2(a) and 3(a), require what amounts to a warranty of past good conduct. 1(b) and 3(a) also require talent comply with the morals clause after the term of the agreement.

---

129. Loew's, Inc. v. Cole, 185 F.2d 641, 645 (9th Cir. 1950)
130. Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844, 851 (9th Cir. 1954).
131. Scott v. RKO Radio Pictures, Inc., 240 F.2d 87, 90-91 (9th Cir. 1957).

2. Potential Harm to Buyer

Buyers should consider broadening prohibited conduct to include acts which "may tend to" bring about any unwanted effects. Numerous clauses, such as 2(b), 3(b), 3(c) and 3(e) proscribe acts that may have the potential to bring about harm. This allows risk-averse buyers to terminate talent when improper conduct causes no actual injury, protecting buyers from injury caused by any future misbehavior of talent.[132] Additionally, in litigation, it allows a factfinder to look at the circumstances both subjectively *and* objectively; termination is proper when buyers can prove either.[133]

3. Interests Protected

Buyers should consider prohibiting conduct prejudicial to the interests of certain related parties (i.e., advertising agencies, sponsors, retail outlets, licensees, distributors and network affiliates).[134] Such language, as in 2(b) and 2(c), duplicates the buyer's common-law protection against conduct prejudicial to its own interests, but extends this protection to third parties not covered by talent's common-law duties.[135]

4. Reservations or Limitations of Rights

Buyers should consider including language in the morals clause (or elsewhere in the contract) reserving all legal rights and remedies not expressed in the talent agreement, in order to preclude talent from claiming waiver of the implied morals clause, as in 1(b) and 2(a).[136] Also, buyers should avoid unnecessarily limiting their rights under the morals clause by granting talent a right to cure, because the consequences these clauses seek to prevent (i.e. public disrepute) cannot be sufficiently cured by talent.

5. Prohibited Conduct

Buyers should carefully consider the language used to describe the prohibited conduct, which is generally a product of forceful negotiation between buyers and talent.[137] Buyers prefer expansive, subjective language, such as in 2(b) and 3(e), while talent prefer narrow, objective language, as in 1(a).[138] Deals are struck at all points on the spectrum, with top talent and those engaging aggressive and seasoned

---

132. Interview with Williams-Fauntroy, *supra* note 119.
133. *Id.*
134. *Id.*
135. *See Scott*, 240 F.2d at 87-88.
136. *See Lardner*, 216 F.2d at 850-51.
137. Telephone Interview with Jeffrey Googel, Agent, William Morris Agency, in New York, NY (Jan. 21, 2005).
138. *Id.*

representatives often successfully restricting or eliminating the morals clause.[139] Such restrictions may include termination only upon conviction of a felony or public reporting of an illegal offense involving moral turpitude. On the other end of the spectrum, improper acts may be defined as those which disregard social conventions, public morals or decency; bring the talent or buyer into public disrepute, hatred, scorn, contempt, ridicule, scandal or degradation; insult, offend or shock the community; involve moral turpitude or violate laws.

Depending on the specific business needs of the buyer, or the risk presented by talent, exclusion of specific prohibited conduct may be a deal-breaker.[140] For example, language may appear even in the highest-level talent agreement prohibiting the talent from appearing in adult media (such as in 2(a), where, for example, a buyer presents a wholesome image to the public) or prohibiting alcohol abuse (such as in 1(b), where a buyer may have a close connection with vehicles or alcohol).

C. COMPARING THE ELEMENTS

Clause	Term	Potential Harm to Buyer	Interests Protected	Reservations or Limitations of Rights
1(a)	None specified	Not included	None specified	None
1(b)	"Has not . . . is not now . . . and will not during the term . . . "	Included	-Advertiser	-Remedies expressed are not exclusive
1(c)	None specified	Not included		

139. *Id.*; Interview with Williams-Fauntroy, *supra* note 119.
140. Interview with Williams-Fauntroy, *supra* note 119.

Clause	Term	Potential Harm to Buyer	Interests Protected	Reservations or Limitations of Rights
2(a)	"past or present"	Not included	-Program -Company -Producer	-Termination must be, "within a reasonable period of time of such information becoming public or coming to Network's attention" -Termination may be, "under any of the terms or provisions hereunder, or by reason of any legal right on the part of either party"
2(b) (*Nader*)	None specified	Included	-ABC -Program sponsors -Sponsor's advertising agency -Stations broadcasting or scheduled to broadcast a program -Any licensee of ABC -The Series	-Written notice to artist required -Determination of whether conduct is improper is reserved to ABC
2(c)	"at all times"	Not included	-Producer -Series sponsors and licensees	
3(a)	"prior to or during the term hereof or thereafter"	Not included	"any of the parties involved"	-Reservation of, "any other remedy of any kind or nature set forth herein"

Clause	Term	Potential Harm to Buyer	Interests Protected	Reservations or Limitations of Rights
3(b)	None specified	Included	-Producer -The motion picture industry in general	
3(c) (*Cole*)	None specified	Included	-Producer -Motion picture, theatrical or radio industry	
3(d) (*Lardner*)	None specified	Not included	-Producer -Business in which the producer is engaged	-One week's notice to talent required
3(e) (*Scott*)	"commencing on the date hereof and continuing throughout the production or distribution of the pictures"	Included	-Corporation -Motion picture industry in general	

Clause	Prohibited Conduct
1(a)	-Felonious act involving moral turpitude under federal, state, or local laws
1(b)	-Accusation of or conviction for any crime (other than minor traffic violations, but including felony, crime of moral turpitude, morals offense or drug charge) -Using illegal drugs or abusing alcoholic beverages -Receipt of treatment for drug or alcohol abuse -Acts considered offensive or shocking to Advertiser's customers or the general public -Not disclosing to Advertiser any situation, event, legal or personal matter which if made public might cause Advertiser a public relations issue
1(c)	-Public reporting of allegations or accusations that Talent has engaged in conduct that is generally viewed by the public as highly offensive and reprehensible from a legal or moral perspective

Clause	Prohibited Conduct
2(a)	-Disregarding social conventions or public morals or decency -Act tending to degrade Talent, Program, Network or Producer -Act bringing Talent, Network, Producer or Program into public disrepute, contempt, scandal or ridicule -Insubordination -Dishonesty -Intoxication -Participating in any "adult" media (determined by Network)
2(b) (*Nader*)	Commit any act or do anything which might tend to bring Artist into public disrepute, contempt, scandal, or ridicule
2(c)	-Disregarding public morals and conventions -Act which shall be an offense involving moral turpitude -Act which brings Producer or Employee into public disrepute, contempt, scandal, or ridicule -Act which insults or offends the community
3(a)	-Disregarding social conventions and public morals and decency UNLESS relating solely to sexual preference or political or religious beliefs or philosophy as expressed in public -Act bringing Talent into public disrepute, scandal, contempt, or ridicule -Act which shocks, insults or offends a substantial portion or group of the community
3(b)	-Disregarding public convention and morals -Act tending to degrade him in society -Act tending to bring him into public hatred, contempt, scorn or ridicule -Act tending to shock, insult or offend the community or ridicule public morals or decency
3(c) (*Cole*)	-Disregarding public conventions and morals -Act tending to degrade him in society or bring him into public hatred, contempt, scorn or ridicule -Act tending to shock, insult or offend the community or ridicule public morals or decency
3(d) (*Lardner*)	-Offense involving moral turpitude under federal, state or local laws or ordinances -Conduct offending against decency or morality -Act causing him to be held in public ridicule, scorn or contempt -Act causing public scandal
3(e) (*Scott*)	-Disregarding public conventions and morals -Act tending to degrade him in society -Act tending to bring him into public disrepute, contempt, scorn or ridicule -Act tending to shock, insult or offend the community or public morals or decency

The Washington Post

Style

NBC News faces skepticism in remedying in-house sexual harassment

By Sarah Ellison April 26

NBC News Chairman Andy Lack had barely slept. Late the night before, he had walked from the art deco headquarters of NBC Universal in Midtown Manhattan to the Upper East Side to fire his most famous employee and longtime friend, "Today" show co-host Matt Lauer.

Early the next morning, Lack was back in the office, holding a series of meetings to try to explain to shell-shocked employees what precipitated such an unprecedented move. The week had started with a detailed and serious complaint Monday evening from an NBC staffer about Lauer's inappropriate sexual behavior toward her. A day later, Lauer was gone. In the following morning's meetings on Nov. 29, Lack took pains to point out that the complaint about Lauer was the first of its kind in the anchor's more than 20 years with the network.

Others disagree.

During her last year on the "Today" show, in 2012, Lauer's co-host Ann Curry said she approached two members of NBC's management team after an NBC female staffer told her she was "sexually harassed physically" by Lauer. "A woman approached me and asked me tearfully if I could help her," Curry recalled recently, in her first public comments about the episode. "She was afraid of losing her job. . . . I believed her."

The woman, she said, implored Curry not to reveal her name to anyone, and she obliged. But Curry specifically named Lauer as a person of concern. "I told management they had a problem and they needed to keep an eye on him and how he deals with women," she said.

The NBC staffer confirmed to The Washington Post that she went to Curry with her complaint. She spoke on the condition of anonymity because she fears retaliation.

Curry declined to name the management officials she says she approached. An NBC spokesman said the company has no record of her warning and added that there was no mention of it in Lauer's personnel file. NBC noted that Lack was not at the network at the time.

Curry, who left NBC in 2015, has a non-disclosure agreement with the company and has been reluctant to talk publicly about her experiences at the network. NBC removed Curry from her role as co-host of "Today" in June 2012 amid foundering ratings and acrimony with Lauer.

Curry, who in an interview said there was "pervasive verbal sexual harassment at NBC," worked on "Today" for 15 years, most of that time as a news reader, and co-anchored alongside Lauer in 2011 and 2012.

In the news business, "I think people generally did not care" about women's stories of sexual harassment, said Soledad O'Brien, who worked at NBC for 12 years, went on to CNN for another decade and now runs her own production company. "I don't think that people who were victims would feel particularly supported by going to someone and asking for help, whether that person was in HR or that person was a colleague."

O'Brien added that she did not experience sexual harassment at NBC but said that within the industry, "People were mostly concerned they would lose their jobs if they complained. I think those concerns were valid."

Matt Lauer is not the only prominent anchor at NBC who allegedly sought inappropriate relationships with younger women. Linda Vester, a former NBC correspondent, told The Post that legendary anchor Tom Brokaw made unwanted advances toward her on two occasions in the 1990s, including a forcible attempt to kiss her. Vester was in her 20s and did not file a complaint.

Brokaw denied anything untoward happened with Vester. "I met with Linda Vester on two occasions, both at her request, 23 years ago, because she wanted advice with respect to her career at NBC," he said in a statement issued by NBC. "The meetings were brief, cordial and appropriate, and despite Linda's allegations, I made no romantic overtures towards her, at that time or any other."

Another woman, who spoke on the condition of anonymity, also told The Post that Brokaw acted inappropriately toward her in the '90s, when she was a young production assistant and he was an anchor. He said no such incident happened.

NBC acted quickly to dismiss Lauer, but it is facing a wave of internal and outside skepticism that it can reform a workplace in which powerful men such as Lauer were known to pursue sexual relationships with more junior women. In interviews, 35 current and former NBC staffers said that while some of these relationships were consensual, some were not. Twelve women interviewed said they were sexually harassed but did not report it.

Three of the 12 told The Post about sexual advances from Lauer. One woman said that the anchor exposed himself in his office and asked her to touch him, and a second said he had sex with her in the middle of the day in his office — alleged incidents that have not been previously reported. A third woman told The Post that Lauer gave her a sex toy, as first reported by Variety at the time he was fired.

Lauer denies abusive actions

Three former NBC staffers, who support Lauer but would not speak for attribution, say that Lauer's relationships with women were consensual. Lauer told two people who worked with him, and who spoke on the condition of anonymity, that his relationships at work were nothing more than evidence of a troubled marriage. But NBC News chairman Lack, in memos to staff, described Lauer's behavior as "reprehensible" and "appalling."

In a statement to The Post Wednesday, Lauer said, "I have made no public comments on the many false stories from anonymous or biased sources that have been reported about me over these past several months . . . I remained silent in an attempt to protect my family from further embarrassment and to restore a small degree of the privacy they have lost. But defending my family now requires me to speak up.

"I fully acknowledge that I acted inappropriately as a husband, father and principal at NBC. However I want to make it perfectly clear that any allegations or reports of coercive, aggressive or abusive actions on my part, at any time, are absolutely false."

Scores of companies across various industries are grappling with how to end the sort of harassing behaviors that have been highlighted in the rapid rise of the #MeToo movement. The star factories of media organizations such as NBC, CBS and PBS have come under scrutiny by the movement.

"The question is, did the company take reasonable measures to prevent this type of behavior," said Deborah Rhode, a gender expert and director of the Center on the Legal Profession at Stanford Law School. "What did they know, and what did they do?"

Brokaw, now 78, who left the anchor chair in 2004, addressed the topic of sexual harassment while appearing on a panel on MSNBC in December. He was talking about U.S. Senate candidate Roy Moore of Alabama and Sen. Al Franken (D-Minn.), who had just resigned.

He said the culture needs to decide "where are the lines about all of this, because it's not going away. . . . Not easy to arrive at these conclusions because so many of them are subjective. It's in the minds of the violator or the recipient, or even the people who are on the left or the right. But I do think we need to have a healthier, well-defined dialogue, if you will, and I'm not sure how we launch into it."

At NBC News, officials viewed the prompt firing of Lauer as sending a clear message. In a memo to staff in December, Lack said a review was already underway to determine "why this was able to happen, why it wasn't reported sooner, and what we can do to make employees feel more empowered to report unacceptable behavior."

NBC also pledged to conduct a "culture assessment" that involved small groups of employees gathering with a facilitator from parent company NBC Universal to solicit anonymous feedback on how employees feel about their work environment, whether they are comfortable raising concerns, and what might prevent employees from coming forward.

The company did not hire an outside firm to conduct the investigation — a step many other companies have taken — but it did bring in a sexual harassment training firm to conduct in-person trainings on workplace behavior and sexual harassment prevention. Lack promised to share publicly the results of their findings, "however painful," at the conclusion of the review. That was five months ago. No announcement has yet been made about the findings, but the network said the review is nearing its conclusion.

Other missteps

By the time Lauer was fired last year, NBC was already smarting from a series of missteps that have put it on the wrong end of some of the nation's biggest news stories. NBC News held back the "Access Hollywood" video in which Donald Trump talks about groping women. (The video first appeared on the website of The Washington Post.) Similarly, NBC did not air Ronan Farrow's investigation of Harvey Weinstein, which later ran as a bombshell in the New Yorker, accompanied by audio that had previously been in NBC News's possession for months.

When Lauer was fired abruptly, many inside the building said they were surprised that the action came so swiftly given his vaunted status.

In one of Lack's meetings the morning after Lauer's firing, according to a person briefed on it, an employee expressed incredulity that NBC could have thoroughly investigated allegations against the "Today" show host in a single day.

In response, Lack offered details about the complaint. He said that the improper relationship with Lauer started at the Sochi Olympics, which took place in 2014, and it continued in New York. One NBC staffer who attended a meeting with Lack that morning said that Lack provided the Sochi detail and timing to underscore that the complaint hadn't been for a mere flirtation, but rather was an offense that went on for months. Another executive noted that Lack wanted employees to know that the complaint was for recent behavior, not for historical misdeeds.

Whatever its intention, the briefing also accomplished something else: It dramatically narrowed the circle of women who could have made the accusation against Lauer. With that one detail, the guessing game inside NBC accelerated. Who was she? What had happened? What could have been so serious to have warranted the firing of NBC News's most valuable name?

"My client came forward in good faith to her employer with the promise of confidentiality — something that took tremendous courage," said lawyer Ari Wilkenfeld, who represents Lauer's accuser. "Almost immediately, NBC broke that confidentiality by revealing specific details of her complaint without her consent, and has in fact disclosed information which led many to deduce her identity."

But the NBC spokesman said the network has "protected the employee's anonymity all along" and noted, "There were several hundred female NBC employees in Sochi."

Hours after Lack's initial memo to staff on the firing, Variety published an article on Lauer anonymously quoting women who said they had approached NBC management about Lauer's behavior toward them and that they had reported his behavior to senior management. Following the publication of that story, NBC clarified Lack's statement to say that NBC's "current management" had not ever received a complaint about Lauer's alleged misconduct.

But Lauer's alleged behavior with women had become tabloid fodder years before. The National Enquirer had assigned a team to follow him in hopes of catching him in a compromising position. (A National Enquirer spokesman said the paper does not comment on its investigative reporting.) A former colleague noted that that level of scrutiny outside the building made Lauer more likely to carry on affairs inside the building and when he traveled internationally.

Only one of Lauer's accusers who worked at NBC has been willing to speak publicly, even though several other women have made complaints behind the scenes. The one public face, Addie Zinone, a former production assistant on "Today," said she had a consensual but damaging one-month relationship with Lauer in 2000. She was 24, and he was in his 40s. She first told her story to Variety and repeated it, in detail, to The Post.

Zinone recently asked pointedly: "Where are the other victims, and why haven't they come forward?"

The answer might be evidenced by looking at Zinone's inbox, where she has received scores of messages from strangers castigating her for speaking out. (Others were supportive.) But the answer also lies in the fear cited by two of the women who spoke about Lauer to The Post: They feared retaliation at NBC if they spoke out publicly. (Zinone said she left NBC shortly after the relationship with Lauer.)

A former colleague of Lack's from his time before NBC said that when questioned about Lauer's rumored extramarital affairs, Lack responded, "He just loves people. He genuinely loves people." Lack, through a spokesman, denied saying this, calling it "a ridiculous statement."

Allegations against Brokaw

Linda Vester, who began a promising career with NBC News in the early 1990s, can still recount alleged incidents with Tom Brokaw from nearly 25 years ago that anger her to this day. She said she did not report them to management out of fear of retribution. Even if such incidents are reported through internal channels, she told The Post, NBC is not willing to hire an outside arbiter.

"I am speaking out now because NBC has failed to hire outside counsel to investigate a genuine, long-standing problem of sexual misconduct in the news division," said Vester, now 52.

A Fulbright student fellow who had pursued graduate studies in Arabic and the Middle East, Vester had reported for NBC from Saudi Arabia and Kuwait during the first Gulf War. She was hired in the 1990s to work on "Weekend Today," based in Washington, the lowest-ranking correspondent at the least-important program.

One day in January 1994, Vester remembers being in New York on assignment, staying at the Essex House, the regular hotel for NBC staff. As she was preparing to return to Washington, she received a "top line" message from Brokaw, the managing editor and anchor of "NBC Nightly News." Top lines were short internal messages within NBC's system that allowed staff to communicate easily with one another.

At the time, Brokaw was the network's biggest star. Lauer had just started as the news reader on the "Today" show. NBC News's new president, Andy Lack, was not a year in the job.

Vester said Brokaw asked her where she was staying and what she was doing that night. "I replied that I had checked out of my hotel and was going to catch the last shuttle back to D.C. before the coming snowstorm," Vester remembered recently. Every correspondent's travel and hotel plans were kept in a group file available to anyone on NBC News's computer system.

Brokaw wrote back that that wasn't a good idea, Vester said. "My gut told me his intentions were not good," she wrote in her diary later that night, and which she supplied to The Post. So she called her best friend and mentor at the network, a producer in the Washington bureau, who has corroborated to The Post the principal aspects of Vester's account.

Vester said Brokaw wrote that it would be better for Vester to stay in New York. They could have a drink.

Vester, at a loss, replied, "I only drink milk and cookies," according to her diary.

"It was the only thing I could think of at the time, hoping the reference to milk and cookies would make him realize I was 30 years his junior and not interested," Vester said in an interview. In her diary she wrote that her final note to Brokaw was, "There is nothing I would like more than a good chat — a great talk with someone I admire. But if appearances are a concern . . . that's valid."

Vester said, "I was trying to suggest that if he was worried that what he was suggesting might look wrong, it *was* wrong." Vester's friend, who spoke on the condition of anonymity because she signed a non-disclosure agreement when she left NBC, urged Vester to sign off quickly from the system to limit further communication.

As the snow began, she missed the last shuttle, stranding her in New York. She returned to Essex House and updated her whereabouts. In her diary entries, made around 3 in the morning after the encounter, she wrote, "Once in my room . . . I received three phone calls. One from a friend, another from a source; the third was Tom Brokaw. He said to order milk and cookies and he was coming over."

Vester said she was terrified that if she refused to meet with him, "my career at NBC would be over before it even got going." She called her producer friend, who agreed to stay on the phone with her.

Soon, Vester heard a knock on the door. The friend in Washington told Vester to call her back in 30 minutes or she would alert the front desk to come to her room. Vester said she opened the door, and Brokaw walked past her and sat on the sofa in her suite.

Brokaw has a distinctly different recollection of the evening. He remembered being invited over to Vester's room that evening, a characterization that Vester rejects, as does the friend who was on the phone with Vester that night.

"What do you want from me?" Vester said she asked him. She recalled him looking at her with mild exasperation. "An affair of more than passing affection," Brokaw told her.

"But you're married," she said. "And I'm Catholic."

Then Brokaw patted the sofa next to him, she said, while she sat down on the opposite end of the couch. She brought up a sexual harassment case that had been uncovered at NBC just recently, to try to signal she was not interested in what she felt was about to happen.

Brokaw leaned over, "pressed his index finger to my lips and said, 'This is our compact,' " she wrote in her diary at the time. "My insides shook. I went completely cold."

Then, "very quickly," Vester said later in an interview, Brokaw put his hand behind her neck and gripped her head. "Now let me show you how to give a real kiss," he said, in Vester's recollection, and jerked her head toward him. She remembers tensing her neck muscles and using all her strength to wriggle free and stand up. She wrote, "I said 'Tom . . . I don't want to do that with you."

Brokaw sat silent for a few minutes, then finally said, "I think I should go." Vester nodded vigorously.

The next day, Vester said, she and Brokaw spoke, and he attempted to make the interaction seem consensual. Vester didn't agree. Later, she met with another friend who corroborated in an interview that Vester was "rattled" by the episode and "disappointed" in what had happened given her respect for Brokaw.

A second incident unfolded in London more than a year later, Vester said. She saw no way to extract herself from being in Brokaw's company because she feared alienating the anchor, she said, but again warded off his advances.

"Linda has shown incredible courage and conviction coming forward to share the details of her experiences working at NBC," said her attorney, Ari Wilkenfeld, who also represents the initial Lauer accuser. "She does so at her own expense and peril. She wants nothing for herself."

Vester, who later worked at Fox News and left the business, said she has no intention of filing a legal claim against Brokaw or NBC.

A second woman, a former production assistant at NBC News who spoke on the condition of anonymity, said that Brokaw stopped her in the hallway just as she arrived for work. It happened in the mid-1990s, and she was wearing her winter coat. He beckoned her into a small enclave to the side of the hallway.

The production assistant, then 24, had been looking for a more permanent role as a researcher on one of NBC's shows. He took her hands in his and commented on how cold they were, the woman recently recalled. "He put my hands under his jacket and against his chest and pulled me in so close and asked me, 'How is your job search going?' "

She looked up at the man she had habitually called "Mr. Brokaw," and mumbled a reply, she said. Then he said, in her recollection, "Why don't you come into my office after the show and let's talk about it."

She said the implication of his invitation was clear, and that he was inviting her to his office for more than advice. She never went to his office and left the network shortly after the incident. Like Vester, she did not report it.

How to investigate

Rhode, the Stanford scholar, said that even without formal complaints, higher-ups have a responsibility for workplace conditions. But they are rarely the right people to investigate wrongdoing.

"If there was this kind of information circulating in the hallways, a good investigator could find that out," she said. "The reason that experts think the best practice is to hire outside investigators is those people will be much more likely to be disinterested and appear disinterested. They don't have an ongoing relationship with a company that may have a desire to protect their reputation and keep the dirty linen out of public view."

Ann Curry said she understands reticence to report harassment.

"This is one of the problems when we talk about corporations with an HR department being under leadership of someone who might or might not be accused," she said. "How are they going to complain about it if they are accusing someone who is overseeing the department that is supposed to protect them?"

The ultimate question, Curry added, is: "Do you have a system that allows those who feel they have been victimized to air their complaints without fear they will lose their jobs? I don't know a company that does."

Correction: A previous version of this story stated that NBC News had possession of video relating to Harvey Weinstein. It was audio.

1097 Comments

Sarah Ellison is a staff writer based in New York for The Washington Post. Previously, she wrote for Vanity Fair, the Wall Street Journal and Newsweek, where she started as a news assistant in Paris.
Follow @sarahlellison

The New York Times

Women Rally on Cannes Red Carpet to Highlight Gender Inequality

By Farah Nayeri

May 12, 2018

CANNES, France — Eighty-two women working in the film industry swarmed the red carpet at the Cannes Film Festival on Saturday to denounce the gender inequality in their field.

Why 82? Because in the 71 festival competitions since 1946, only 82 movies by female directors have been in contention for prizes. This compares with a total of 1,645 films by male directors. Only one movie by a female director, "The Piano" by Jane Campion, has ever won the festival's top prize, the Palme d'Or.

The 82 women — who included the French filmmaker Agnès Varda and the actresses Salma Hayek and Marion Cotillard — appeared on the red carpet for the premiere of "Girls of the Sun" by Eva Husson. Ms. Husson is one of three female directors among the 21 Palme d'Or contenders this year.

As songs including "Woman" by Neneh Cherry blared from the loudspeakers, the 82 women in evening dress walked up the carpeted staircase, then turned around to face the crowd.

Cate Blanchett, this year's competition jury president, and Ms. Varda took to the microphone to voice the protesters' concerns. Ms. Varda said, "Women are not a minority in the world, and yet our industry says the opposite. We want this to change."

In an interview as she left the red carpet, Ms. Hayek described the event as a historic moment and "an important part of the conversation." She added that as a producer, she was already seeing change in the appetite for projects by and about women.

Asked to comment on the shortage of films by women at the festival, Ms. Hayek said, "You cannot say it's only the fault of Cannes." Describing it as "a complicated equation," she added, "Not that many women are making their films because they're not being financed or green-lit or distributed." It was the responsibility of the "entire industry" and not just one festival, she said.

Hours before the red-carpet march, Ms. Husson said the decision by the organizers of the festival to allow the women's march to coincide with the premiere of her movie — the story of a group of female fighters in Iraqi Kurdistan taking on ISIS — was a clever move to highlight their inclusion of a film with a mostly female cast and crew in the lineup. She described the selection of her film for the competition as "political."

The force behind today's march, the collective 5050 in 2020, provided statistics on its website to support the women's assertions. These findings showed that out of a total of 2,066 directors in France who had made one or more films between 2006 and 2016, only 23 percent were women. A breakdown showed that the figure rose to 29 percent when it came to documentaries, but was only 4 percent for animation films.

The team running the Cannes Film Festival has been fending off complaints about women's representation for a few years now.

At the April 12 news conference in which he unveiled this year's competition lineup, the festival's artistic director Thierry Frémaux was asked to comment on the small number of films by women on the roster. "The movies that were selected were chosen for their quality," he replied, adding that there would "never be positive discrimination" at the Cannes Festival.

He noted that on this year's jury there were five women and four men.

Mr. Frémaux did acknowledge, however, that there had been a gender disparity in the selection committees that choose which films make it into the festival. He said two members of last year's jury — the actress Jessica Chastain and the director and actress Agnès Jaoui — had asked him about the makeup of those committees.

"The committees were not balanced," he said. "We saw to it that they were." The festival did not respond to requests for details on the steps taken.

Correction: *May 13, 2018*

A previous version of this article misstated the name of the film by Jane Campion that won the Palme d'Or. It is "The Piano," not "The Piano Teacher."

A version of this article appears in print on May 13, 2018, on Page A4 of the New York edition with the headline: Women (82 to Be Exact) Protest Disparity at Cannes

The Washington Post

Wonkblog

Starbucks chairman opens up about company's race failures — and says its bathrooms are now open to all

By Tracy Jan May 10 at 6:35 PM

Starbucks Chairman Howard Schultz said Thursday that the company will now open its bathrooms to everyone, regardless of whether a purchase has been made, following the arrest of two African American men who had asked to use the bathroom at one of its downtown Philadelphia coffee shops.

Schultz, speaking at the Atlantic Council in Washington hours before he was slated to receive a business leadership award, said the company is changing its policy, after weeks of controversy, because it wants everyone — customer or not — to feel welcome at Starbucks.

"We don't want to become a public bathroom, but we're going to make the right decision a hundred percent of the time and give people the key," Schultz said, "because we don't want anyone at Starbucks to feel as if we are not giving access to you to the bathroom because you are less than."

He said that Starbucks previously had a "loose policy" that only customers should be allowed to use the bathrooms but that it was up to each store manager's discretion.

Schultz spoke candidly for nearly 20 minutes about the company's failures over race, from its short-lived "Race Together" campaign in 2015 to last month's arrest of two black men waiting for a business associate.

"We were absolutely wrong in every way, the policy and the decision [the store manager] made," he said. "It's the company that's responsible."

In the days after the Philadelphia arrests, a video surfaced of another incident in Torrance, Calif., posted in January, showing a black man claiming he was denied access to a bathroom while a white man was given the entry code. Neither man was a paying customer.

The coffee chain is slated to close more than 8,000 U.S. stores on the afternoon of May 29 for racial bias training, which Schultz characterized Thursday as the "largest training of its kind" on "one of the most systemic subjects and issues facing our country."

In the weeks since the Philadelphia Starbucks incident, police have been called on African Americans for golfing too slowly, working out at a gym, shopping for prom, napping in a dorm, and renting an Airbnb — all because white people felt uncomfortable.

Schultz said the anti-bias training will mark the beginning of an "entire transformation" of how Starbucks employees are trained and will be part of a documentary by Stanley Nelson, who made the "Freedom Riders" documentary about the civil rights movement. The curriculum, which is being developed with the NAACP Legal Defense Fund and others, will be made available for use by other companies, Schultz said.

"I think it's fair to say that most people have some level of unconscious bias based on our own life experience," he said. "So there's going to be a lot of education about how we all grew up, how we see the world and how we can be better."

Schultz had flown to Philadelphia to personally apologize to Rashon Nelson and Donte Robinson and said he and his team stayed for days to figure out the best response, including quickly demonstrating contrition on social media and national television.

He had been scheduled shortly afterwards to appear in Montgomery, Ala., at the opening of the National Memorial for Peace and Justice and at a town hall at Morehouse College in Atlanta, but said he had been advised to cancel because of concerns he would not be treated well. He attended both events.

"It was tough," Schultz said. "As a white person, a Caucasian person, I felt the pain and I felt the concern that young African Americans have, especially young African American men have, about the opportunities in America."

Schultz said Starbucks, as a corporation, has a responsibility to address issues of race in the United States, given the national divisions over the killings of African Americans.

"We can all remember with horror and shame what we witnessed as Americans in watching Trayvon Martin and Eric Garner and others be murdered," he said.

He said he was inspired by those events and subsequent protests to hold unscripted company-wide meetings throughout the country for employees to speak openly about "race, racial divide and unconscious bias" and share their experiences, concerns and personal pain, as well as their own biases, without fear of retribution.

"One young woman stood up and said: 'My family were members of the KKK, and this is language I heard my whole life. I didn't know it was wrong,' " Schultz said. "And we heard African Americans talk about the fact that they feel all the time that they are not being valued and the system, the playing field is not equal."

From those conversations sprung the 2015 campaign in which baristas were instructed to scrawl the words "Race Together" on millions of tall-, grande- and venti-size drinks.

"We know this is the third rail. We know how difficult it is," Schultz said. "But let's have the moral courage to try and elevate the conversation."

He said his board spent 2½ hours discussing how risky — yet necessary — the campaign would be. With Starbucks in nearly every community in the United States, the impact could have been "incredible," he said. "So we leaned into it."

The company was unprepared for the backlash. He said within two hours, the initiative had been "hijacked" on social media by hate and by anonymous people who "stole the narrative."

So he ended the campaign.

"We did not shut it down because we thought we were wrong to do it," he said. "We shut it down because we thought our people were going to be in danger. And that's a whole other issue with regard to the systemic issue and the divide in the country."

Tracy Jan covers the intersection of race and the economy for The Washington Post. She previously was a national political reporter at the Boston Globe. Follow @TracyJan

CBS/AP / *May 9, 2018, 11:30 AM*

After Matt Lauer firing, NBC internal investigation finds no culture of sexual harassment in news division

Last Updated May 9, 2018 12:13 PM EDT

NEW YORK -- NBC has concluded in an internal investigation ordered last fall after Matt Lauer's firing that it doesn't believe there is a culture of sexual harassment in its news division. The network also said that more needs to be done to ensure employees know how to report complaints about misconduct and not fear retaliation.

To that end, NBC News Chairman Andy Lack said Wednesday that he's creating a way for employees to make such complaints to a figure outside the company.

Lauer, the former "Today" show host, was fired in November after it was found he had an inappropriate sexual relationship with another much more junior NBC employee. Three additional women subsequently made complaints about Lauer.

A report on the investigation's findings says 68 people were interviewed in the probe, which aimed to determine whether news division leadership "addresses inappropriate workplace behavior promptly and appropriately" and if there is a need to improve when it comes to workplace climate and the willingness of employees to come forward with concerns. Those interviewed had been identified by investigators as "possibly" having relevant information.

It also outlined events leading up the investigation, saying a woman emailed someone in Human Resources on November 22 of last year with a "serious concern to report." In a subsequent interview, the woman claimed Lauer had engaged in inappropriate sexual behavior with her on several occasions in 2014 in the workplace, the report states.

Days later, on November 28, Lauer admitted in an internal interview to "engaging in sexual activity with the complainant," according to the report. He was fired, and within the next two weeks, NBCUniversal received information about three more women who claimed Lauer "engaged in inappropriate sexual behavior" with them in the workplace in 2007, 2001 and 2000.

The report on the findings, which was shared by NBC News, states:

"We found no evidence indicating that any NBC News or Today Show leadership, News HR or others in positions of authority at the News Division received any complaints about Lauer's workplace behavior prior to November 27, 2017. All four women who came forward confirmed that they did not tell their direct manager or anyone else in a position of authority about their sexual encounters with Lauer. Current and former members of NBC News and Today Show leadership, as well as News HR, stated that they had never received a complaint about inappropriate workplace behavior by Lauer, and we did not find any contrary evidence."

"The investigation team does not believe that there is a widespread or systemic pattern of behavior that violates Company policy or a culture of harassment in the News Division."

"A number of individuals interviewed said that Lauer could be flirtatious, would frequently make jokes, some with sexual overtones, and would openly engage in sexually-oriented banter in the workplace."

"Most witnesses had positive things to say about Lauer's demeanor in the workplace. Lauer also was described as a very private person who acted as a friend and professional mentor to both men and women alike over decades at the Today Show."

"Although the witnesses interviewed were generally aware of official Company channels to raise workplace issues, a number of them said they had concerns about reporting inappropriate workplace conduct to News HR, including: a lack of familiarity with News HR representatives; a fear of retaliation; a belief that complaints cannot or will not be kept confidential; and a lack of a private environment in which to raise issues, because News HR sits in glass-walled offices among other News Division employees. Similar concerns regarding a lack of anonymity and fears of retaliation were raised about reporting complaints directly to management."

The report also said investigators looked into a "button" in Lauer's office. Variety reported in November that Lauer had a button under his desk that allowed him to lock the office door from the inside. Two women who said they were sexually harassed by Lauer told Variety this "allowed him to welcome female employees and initiate inappropriate contact while knowing nobody could walk in on him."

"According to the NBCUniversal facilities team, the button is a commonly available feature in executive offices in multiple NBCUniversal facilities to provide an efficient way to close the door without getting up from the desk," the NBC report states. "The button releases a magnet that holds the door open. It does not lock the door from the inside."

NBC has received some criticism for not allowing outside investigators to look into its workplace culture.

In January, in her first television interview since leaving NBC, former "Today" show host Ann Curry spoke out about Lauer's firing and the climate at NBC during her time there.

"I can say that I would be surprised if -- if -- many women did not understand that there was a climate of verbal harassment that existed. I think it'd be surprising if someone said that they didn't see that. So it was p -- a verbal -- sexual --," she said on "CBS This Morning."

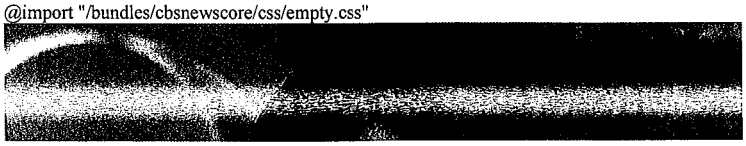
"She just said that verbal sexual harassment was pervasive," "CBS This Morning" co-host Norah O'Donnell said.

"Yeah," Curry replied.

"At -- at NBC at the time when you were there?" O'Donnell said.

"I don't wanna cause more pain. But no, I'm -- you are asking me a very direct question. I'm an honest person. I wanna tell you that it was. Yes. Period," Curry replied.

@import "/bundles/cbsnewscore/css/empty.css"



Popular on CBS News

01 Concerns mount as lava threatens flammable liquids in power plant
36925 views

02 7 dead in what may be Australia's worst mass shooting in 22 years
27237 views

03 Cindy McCain tweets about White House aide accused of mocking John McCain
26562 views

04 SpaceX scrubs launch of its first "block 5" Falcon 9
16675 views

05 Teen learns fate in fatal stabbings of parents, 3 siblings
11510 views

From "60 Minutes"

 Is shock therapy making a comeback?

 The problem with prescription drug prices

 Saving the orphans of war

 Into the wild with Thomas D. Mangelsen

 How one college predicts those at risk of dropping out

 CRISPR: Revolutionizing biomedicine

 The Gates Scholars

 Seaweed farming and its surprising benefits

 Untangling the Facebook data scandal

 Inside MIT's "Future Factory"

After he was fired, Lauer apologized.

"There are no words to express my sorrow and regret for the pain I have caused others by words and actions. To the people I have hurt, I am truly sorry....as I am writing this I realize the depth of the damage and disappointment I have left behind at home and at NBC," Lauer said in a statement.

"Some of what is being said about me is untrue or mischaracterized, but there is enough truth in these stories to make me feel embarrassed and ashamed," Lauer said. "I regret that my shame is now shared by the people I cherish dearly... repairing the damage will take a lot of time and soul searching and I'm committed to beginning that effort. It is now my full time job."

play VIDEO
Trump hails progress with North Korea

Most Shared on CBS News

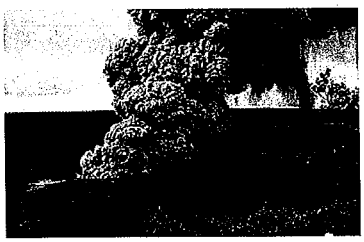

Democrats in tough reelection battles distance themselves from Washington


EPA reconsiders banning paint stripper chemical linked to dozens of deaths


France: Europe isn't U.S. "vassal," should trade with Iran


CTM Spotify Playlist: May 11, 2018


Starbucks overhauls bathroom policy after racial firestorm



54 PHOTOS
Volcanic eruption in Hawaii

"I want him to burn in hell": Man sentenced to death in rape, murder of Fla. girl, 8

Maryland deputy fatally shoots groundhog as it crosses road, video shows

LET'S GO PENS: Game 6 Recap | Pens Vs. Caps In Round 2 | Round 2 Begins Thursday | More Pens News

Starbucks To Close All Nationwide Stores For Racial-Bias Training

April 17, 2018 at 1:55 pm **Filed Under:** Starbucks

PITTSBURGH (KDKA/CBS) — Starbucks says it will be closing more than 8,000 company-owned stores in the U.S. to conduct racial-bias education towards preventing discrimination in their stores.

In a press release the company says:

All Starbucks company-owned retail stores and corporate offices will be closed in the afternoon of Tuesday, May 29. During that time, partners will go through a training program designed to address implicit bias, promote conscious inclusion, prevent discrimination and ensure everyone inside a Starbucks store feels safe and welcome.

The training will be provided to nearly 175,000 employees across the country and will become part of the onboarding process for new employees the company said.

"I've spent the last few days in Philadelphia with my leadership team listening to the community, learning what we did wrong and the steps we need to take to fix it," said Starbucks CEO Kevin Johnson via press release. "While this is not limited to Starbucks, we're committed to being a part of the solution . Closing our stores for racial bias training is just one step in a journey that requires dedication from every level of our company and partnerships in our local communities."

The training comes just days after an incident at a Philadelphia Starbucks store where two black men were arrested after store employees called 911 to say they were trespassing.

Officials have said police officers were told the men had asked to use the store's restroom but were denied because they hadn't bought anything and they refused to leave. They were arrested for alleged trespassing, although the men claim they were in Starbucks for a business meeting and were waiting for someone.

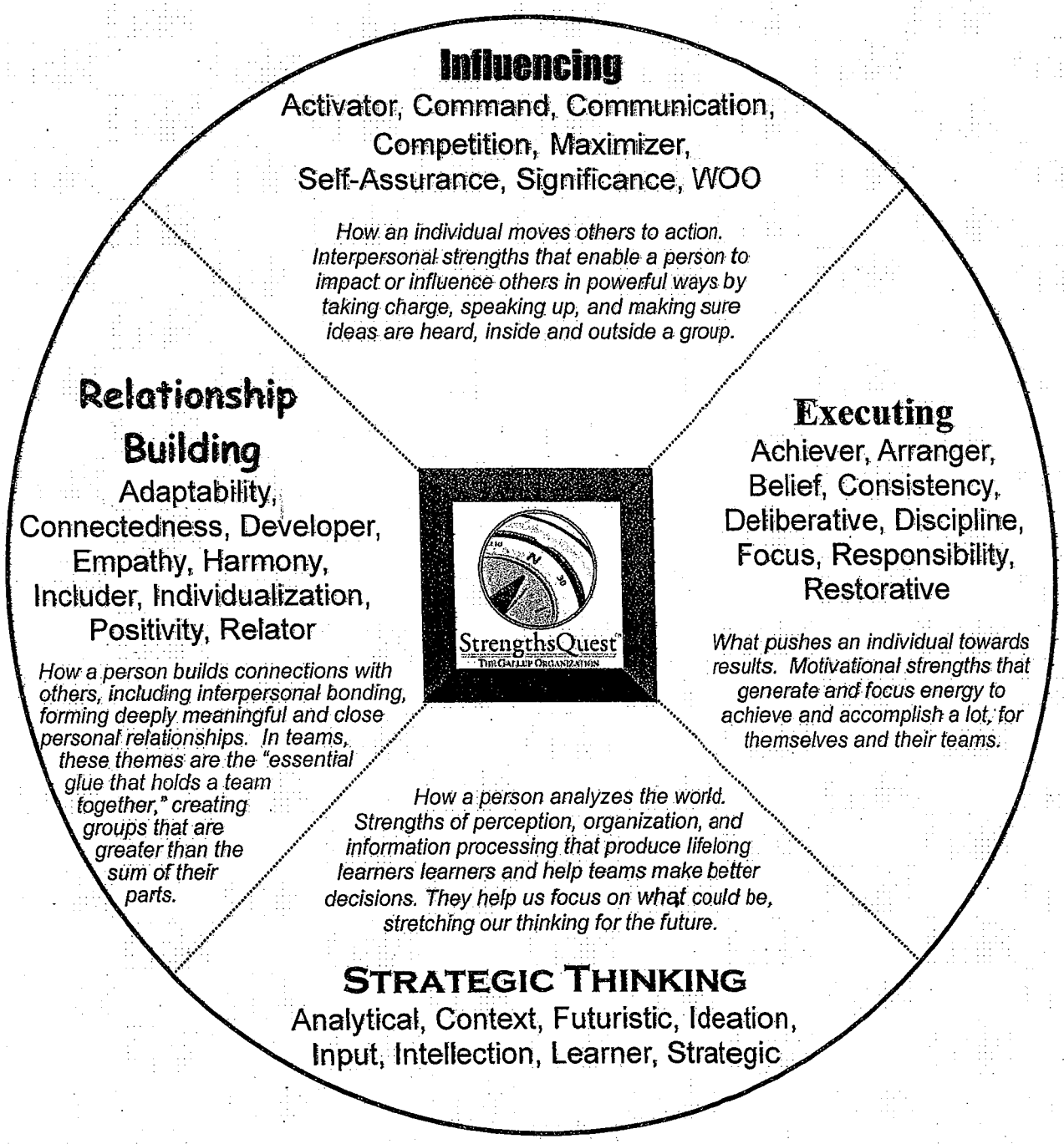
"The company's founding values are based on humanity and inclusion," said executive chairman Howard Schultz, who joined Johnson and other senior Starbucks leaders in Philadelphia to meet with community leaders and Starbucks partners. "We will learn from our mistakes and reaffirm our commitment to creating a safe and welcoming environment for every customer."

MOST VIEWED

1. Crews Remove Controversial Stephen Foster Statue From Schenley Park
2. Feds Take Down Major Cocaine Trafficking Organization
3. 'It's Just Shocking': Injured Borics Stylists, Customers Face Long Road To Recovery
4. Everything Must Go: Shuttered Coraopolis Hotel Opens Liquidation Sale To Public
5. 'Tick Explosion' May Be Coming This Summer, Expert Warns
6. After Searching For More Than 40 Years, Authorities Say Ex-Cop Is Golden State Killer
7. Apparent Vape Stick Fire Prompts Evacuations At IUP Dorm
8. Officials: SUV Crashes Into Parked Vehicles, Ends Up On Top Of Them
9. New Kennywood Events To Mark 120th Anniversary
10. Ultimate Summer Vacation! WOW Air To Pay You To Move To Iceland, Travel The World

Strengths Domains

Teams should be well-rounded precisely because we, as individuals, are not.



From Strengths Based Leadership, Rath and Conchie, 2008, Gallup, Inc.

Clifton StrengthsFinder® THEMES

ACHIEVER®	People exceptionally talented in the Achiever theme work hard and possess a great deal of stamina. They take immense satisfaction in being busy and productive.
ACTIVATOR®	People exceptionally talented in the Activator theme can make things happen by turning thoughts into action. They are often impatient.
ADAPTABILITY®	People exceptionally talented in the Adaptability theme prefer to go with the flow. They tend to be "now" people who take things as they come and discover the future one day at a time.
ANALYTICAL®	People exceptionally talented in the Analytical theme search for reasons and causes. They have the ability to think about all the factors that might affect a situation.
ARRANGER®	People exceptionally talented in the Arranger theme can organize, but they also have a flexibility that complements this ability. They like to determine how all of the pieces and resources can be arranged for maximum productivity.
BELIEF®	People exceptionally talented in the Belief theme have certain core values that are unchanging. Out of these values emerges a defined purpose for their lives.
COMMAND®	People exceptionally talented in the Command theme have presence. They can take control of a situation and make decisions.
COMMUNICATION®	People exceptionally talented in the Communication theme generally find it easy to put their thoughts into words. They are good conversationalists and presenters.
COMPETITION®	People exceptionally talented in the Competition theme measure their progress against the performance of others. They strive to win first place and revel in contests.
CONNECTEDNESS®	People exceptionally talented in the Connectedness theme have faith in the links among all things. They believe there are few coincidences and that almost every event has meaning.
CONSISTENCY™	People exceptionally talented in the Consistency theme are keenly aware of the need to treat people the same. They try to treat everyone with equality by setting up clear rules and adhering to them.
CONTEXT®	People exceptionally talented in the Context theme enjoy thinking about the past. They understand the present by researching its history.
DELIBERATIVE™	People exceptionally talented in the Deliberative theme are best described by the serious care they take in making decisions or choices. They anticipate obstacles.
DEVELOPER®	People exceptionally talented in the Developer theme recognize and cultivate the potential in others. They spot the signs of each small improvement and derive satisfaction from evidence of progress.
DISCIPLINE™	People exceptionally talented in the Discipline theme enjoy routine and structure. Their world is best described by the order they create.
EMPATHY™	People exceptionally talented in the Empathy theme can sense other people's feelings by imagining themselves in others' lives or situations.
FOCUS™	People exceptionally talented in the Focus theme can take a direction, follow through, and make the corrections necessary to stay on track. They prioritize, then act.

FUTURISTIC® People exceptionally talented in the Futuristic theme are inspired by the future and what could be. They energize others with their visions of the future.

HARMONY® People exceptionally talented in the Harmony theme look for consensus. They don't enjoy conflict; rather, they seek areas of agreement.

IDEATION® People exceptionally talented in the Ideation theme are fascinated by ideas. They are able to find connections between seemingly disparate phenomena.

INCLUDER® People exceptionally talented in the Includer theme accept others. They show awareness of those who feel left out and make an effort to include them.

INDIVIDUALIZATION® People exceptionally talented in the Individualization theme are intrigued with the unique qualities of each person. They have a gift for figuring out how different people can work together productively.

INPUT® People exceptionally talented in the Input theme have a craving to know more. Often they like to collect and archive all kinds of information.

INTELLECTION® People exceptionally talented in the Intellection theme are characterized by their intellectual activity. They are introspective and appreciate intellectual discussions.

LEARNER® People exceptionally talented in the Learner theme have a great desire to learn and want to continuously improve. The process of learning, rather than the outcome, excites them.

MAXIMIZER® People exceptionally talented in the Maximizer theme focus on strengths as a way to stimulate personal and group excellence. They seek to transform something strong into something superb.

POSITIVITY® People exceptionally talented in the Positivity theme have contagious enthusiasm. They are upbeat and can get others excited about what they are going to do.

RELATOR® People exceptionally talented in the Relator theme enjoy close relationships with others. They find deep satisfaction in working hard with friends to achieve a goal.

RESPONSIBILITY® People exceptionally talented in the Responsibility theme take psychological ownership of what they say they will do. They are committed to stable values such as honesty and loyalty.

RESTORATIVE™ People exceptionally talented in the Restorative theme are adept at dealing with problems. They are good at figuring out what is wrong and resolving it.

SELF-ASSURANCE® People exceptionally talented in the Self-Assurance theme feel confident in their ability to manage their own lives. They possess an inner compass that gives them confidence that their decisions are right.

SIGNIFICANCE™ People exceptionally talented in the Significance theme want to be very important in others' eyes. They are independent and want to be recognized.

STRATEGIC™ People exceptionally talented in the Strategic theme create alternative ways to proceed. Faced with any given scenario, they can quickly spot the relevant patterns and issues.

WOO™ People exceptionally talented in the Woo theme love the challenge of meeting new people and winning them over. They derive satisfaction from breaking the ice and making a connection with someone.

BALANCING THE SCALES
WOMEN IN THE LAW

Sharon L. Rowen

BALANCING THE SCALES
WOMEN IN THE LAW

Sharon L. Rowen

From 1916 to Today's "Lady Lawyer"

Today's women law school graduates shake their heads in disbelief when confronted with the cultural norms of women in the workplace 100 years ago. The following excerpts are from a transcript of a discussion and vote in 1916 whether women should be allowed to practice law in Georgia.

Report of Proceedings
33rd Session of The Georgia Bar Association June 3, 1916

> **Mr. Rosser:** Now, this notion that women have got to do everything a man does is all miserable tommyrot. I never would be a success as a mother. I would be a dead failure. ...
> Woman has made civilization; she has maintained morals, she has maintained decency ... but the very second she undertakes to be a man, that very second she will proceed to undo all she has done and render herself impotent for the future.
>
> Gentlemen, let us not open up the gap. Let us not encourage the evil; for it is an evil. ... I never saw a woman in my life, who had a purely logical mind, that ever had a loving husband, and she never will have. ... You have not got time to practice law. Practice on your husbands. "Suppose they have no husbands?" somebody says. Well, they need husbands, and all of them should get one. What is the use of a woman without a husband? The highest, the noblest and the most sacred field of labor for women is not at the bar, but her highest and noblest work has for its object and end this perpetuation of the human race. I am, therefore, opposed to women practicing law. (Applause).
>
> **A Member:** ...The objection I have to the introduction of women is ... first, that you are introducing the disturbing element of sex, which does not make for the administration of justice, and, second, that you are introducing women into a class of work, that unlike medicine or architecture, confronts them with the shame and crime and villainy of humanity, I do not believe in the admission of women to the bar.

The resolution was then put to a vote. Twenty-nine voted in favor of it, and forty-five against it, and the resolution was declared lost. (The decision of the Board of Governors was appealed to the Georgia Supreme Court Ex Parte Hale, 89 SE 216, 145 Ga. 350 (1916), which affirmed the decision and stated "when the statutes of this state are properly construed, a woman by reason of her sex is ineligible to become a member of the bar in this state.")

The blatant bias of 1916 would not be tolerated today. And yet today, while most law firm/corporation leaders tend to dismiss the notion that women are disadvantaged by their gender, only a small percentage can imagine a woman as a senior rainmaker or CEO. For those who smiled at the quaint ideas of those bar members 100 years ago, here is an anonymous comment made in 2014 from a law firm leader talking about women as rainmakers:

> "I don't think women want it as badly as men do. Almost no women do. Of course women want what having business will get you, but they don't want to do what it takes to get the business. Women are not restricted from doing what it takes. They just choose not to."[1]

Two steps forward, One step back

By 1956, four decades after the Georgia Bar determined that women were ineligible to practice law, the environment was a bit better for women in the legal workplace. Many women who worked as secretaries in law offices in the early 1940s went to law school and handled legal matters for their bosses who were in Europe fighting in World War II. By the time the men returned, the genie was not going back into the bottle – women were not going back to their secretarial roles after proving they could easily handle the duties and responsibilities of the legal field. Many law schools began to admit women, but discrimination was open and blatant. For example, Harvard had two teaching buildings in the 1950s, but only one building had a women's bathroom.[2] At the University of Pennsylvania in the 1940s, one of the professors did not call on either of the two women students the entire year.[3]

---

[1] One Size Does Not Fit All, Arin Reeves, (American Bar Association, 2014)
[2] "Balancing the Scales", Ruth Bader Ginsburg video interview 2009.
[3] "Balancing the Scales", Phyllis Kravitch video interview 1994.

Recently, Ruth Bader Ginsburg put it this way: "To today's youth, judgeship as an aspiration for a girl is not at all outlandish. Contrast the ancient days, the fall of 1956, when I entered law school. Women accounted for less than 3 percent of the legal profession in the United States, and only one woman had ever served on a federal appellate court. Today about half the nation's law students are women...women hold more than 30 percent of law school deanships...and serve as general counsel to 24 percent of Fortune 500 companies. In my long life, I have seen great changes."[4]

But, in spite of the fact that women professionals are better off today, there is no doubt that "we haven't reached nirvana yet."[5] When young people graduate from law school, they often have the idea that discrimination and bias has vanished. But it will take additional effort to push past having only a token woman or two in the boardroom. The percentage of women at the top of the profession has not changed much since the American Bar Association started keeping statistics in 2000. In 2000, the percentage of women partners was 14%. In 2016, the percentage of women equity partners is 18%.[6] The same pattern is seen in other countries with similar legal structures, such as the UK, Australia, Canada and New Zealand.[7] It is also the case in Scandinavia, which most people think of as forward thinking in terms of gender equality.[8] This lack of progress over the last two decades has resulted, in part, from implicit bias grounded in the cultural norms of our society – implicit bias in our attitudes toward caregiving, condonation of sexual harassment in the workplace, our attitudes toward women seeking higher levels of leadership and responsibility, and in our attitudes toward what constitutes the right attributes of a leader.

---

[4]Ruth Bader Ginsburg, New York Times, Sunday, October 2, 2016.
[5]"Balancing the Scales", Ruth Bader Ginsburg video interview 2009.
[6] American Bar Association Women in the Profession, 2016
[7] Law Fuel, Editorial, 15 March 2015 http://www.lawfuel.com/newzealand/lack-of-women-law-firm-leaders/
[8] "Balancing the Scales", Nina Henningsen video interview, 2015

From Overt to Subtle: How Implicit Bias Holds Women Back

Women lawyers today do not regularly hear overtly discriminatory remarks in the workplace. The women who get to the top are exceptional. They didn't ride a wave of change. Rather, they forced their way past a tide of obstacles.[9] But more subtle and implied bias continues to hold women back. The perception of what a lawyer "should be" and what a woman "should be" don't always line up in our society, and this conflict allows implicit bias to flourish. The barriers to women's advancement carry the cultural remnants of a traditionally male-dominated culture.

Implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control. Most people are not even aware that they harbor implicit bias. The implicit associations we harbor in our subconscious cause us to have feelings and attitudes about other people based on characteristics such as gender, race, ethnicity, age, and appearance. These associations develop over the course of a lifetime beginning at a very early age.

Listed below are a few key characteristics of implicit biases:

- Implicit biases are **pervasive**. Everyone possesses them, even people with avowed commitments to impartiality.
- Implicit and explicit biases are **related but distinct mental constructs**. They are not mutually exclusive and may even reinforce each other.
- The implicit associations we hold **do not necessarily align with our declared beliefs** or even reflect stances we would explicitly endorse.
- We generally tend to hold implicit biases that **favor our own ingroup**,
- Implicit biases are **malleable**. Our brains are incredibly complex, and the implicit associations that we have formed can be gradually unlearned through a variety of debiasing techniques.[10]

In addition to implicit bias, it is also important to understand the concept of confirmation bias. It is the tendency to search for, interpret, favor, and recall information in a way that

[9] "M&A's Missing Women"; Lizzy McLellan; Law.com; March 27, 2017
[10] "Understanding Implicit Bias"; The Ohio State University Kirwan Institute for the Study of Race and Ethnicity

confirms one's preexisting beliefs or hypotheses, while giving disproportionately less consideration to alternative possibilities. People display this bias when they gather or remember information selectively, or when they interpret it in a biased way. People also tend to interpret ambiguous evidence as supporting their existing position. A series of experiments in the 1960s suggested that people are biased toward confirming their existing beliefs. Later work re-interpreted these results as a tendency to test ideas in a one-sided way, focusing on one possibility and ignoring alternatives.

Think about this example of implicit bias: You are driving with your car windows down, and stop at a stoplight. The car next to you is driven by an African American teenager listening to rap music. At the next stop, you pull up to a car driven by an elderly Caucasian woman listening to opera. At each of these stops, you have an immediate reaction, depending on your own age, race, gender and life experience. Your reaction to each may be positive or negative, but the importance to this discussion is that it is immediate, prior to any rational thought. Your reaction may be negative, despite your rational mind telling you that you are impartial.

Implicit bias is also the lens through which we judge the competence of others in the workplace. Everyone has an immediate reaction to co-workers, supervisors, and people whom you interview, hire and supervise. Depending on your own background, these reactions may be positive or negative toward any particular individual or group. The point is not to label these reactions as "bad" or "good", but to recognize their existence, so that you can move beyond them to help create a more diverse and inclusive work environment.

Implicit bias in the workplace creates barriers for women. According to a new survey of working women by McKinsey & Company and Leanin.org, very few women are in line to become CEO. Fewer women get that critical first promotion. Women are negotiating as often as men, but face pushback when they do. Women get less access to senior leaders and women are less likely to receive feedback.[11] This is due in part to implicit bias of the individuals making decisions about the promotion of female employees.

---

[11] "Study: Why women aren't Getting the Top Jobs", Betsey Guzior, Bizwomen, September 27, 2016

If lessening attrition rates for women is the goal, then questioning how implicit and confirmation bias of both men and women leaders affect the rise of professional women in their organizations is essential. Lawyers are trained to "think like lawyers." They believe that thinking rationally and analytically means they have set aside their existing biases. They see biases in others, but believe they are bias-free and resist the idea that they are not. Statistics tell us that both at large law firms and in corporate America, the people in charge are still predominantly Caucasian males. They, like everyone, judge others through the lens of "The way future leaders of this firm should act is the way I act" – that what is considered natural and normal for movement up the corporate ladder or to attain partnership is "how I do it." Implicit bias in leaders may suggest that the super-charged competitive atmosphere in many firms and corporations is the "right" way to "weed out people who are not natural leaders and rainmakers", even when statistics which link diversity and profitability tell a different story.

Examples of implicit bias against women lawyers are not hard to find.

- Women are told they are too timid, then, when they attempt to be more aggressive, they are told they are too pushy.[12]
- A judge asks a criminal defendant if he needed an attorney, even though his female attorney was standing right next to him at the podium. [13]
- Male partners see mentoring or promoting women associates as a "riskier investment" than promoting males because women are more likely to quit to get married and have a family. [14]
- In 2016, a group of women partners at the law firm of Chadbourne & Parke sued the firm for $100 million because women partners received less compensation than male partners even when they brought in more client revenue. They claimed that the all male management committee at the firm arbitrarily awarded male partners more points, which translate into higher dollar compensation.[15] In 2017, while the lawsuit was ongoing, the firm partners voted to fire the Plaintiff.
- In the Obama White House, women in top advisory positions complained of having to elbow their way into important meetings. And when they got in, their voices were

[12] "Balancing the Scales", video interview of Ellen Tobin, 2015
[13] "Balancing the Scales" video interview of Jennifer McCall, 2015
[14] "Balancing the Scales", video interviews of Ellen Tobin, 2015
[15] "Female Lawyer's Gender-Bias Suit Challenges Law Firm Pay Practices", Elizabeth Olson, The New York Times, September 1, 2016.

sometimes ignored. [16] Women are often interrupted by male peers, as if what the women had to say was not important or worthwhile. Even on the Supreme Court, in 2015, 66% of all interruptions were directed at the 3 women justices, by their male colleagues on the bench and the male attorneys appearing before the Court. And when a justice is interrupted, her ability to influence the outcome of the case is undermined. [17]

- Interns on Capitol Hill are speaking out about sexual harassment on the job. Sexual harassment is about power, and working in "power" professions, including politics and in many areas of the legal and corporate world, often includes dealing with implicit and explicit bias and harassment.
- A judge refuses to postpone a hearing because maternity leave wasn't a good enough excuse.[18]
- "The worst part about being a Biglaw mom is not being taken seriously while pregnant. I felt totally disrespected while I was pregnant – open season for body comments, work evaporated, etc."[19]
- One BigLaw firm identifies every one of their flex-time attorneys (mostly women) by name on their website, allowing clients to see which of the attorneys working on their matters is "only" a part time employee.[20]

As the above examples show, there is a gender backlash for women who aspire to powerful positions. Women who violate what society considers traditional gender roles by occupying a 'man's job' or having a 'masculine personality' are disproportionately targeted for sexual harassment.[21]

Statistics show that implicit bias plays a role in the non-retention of women and non-promotion of women into leadership positions. In 2016, the National Association of Women Lawyers released the Ninth Annual National Survey On Retention And Promotion Of Women In Law Firms. This is the only national study that annually tracks the professional progress of women in the nation's 200 largest law firms by providing a comparative view of the careers and

---

[16] "White House women want to be in the room where it happens", Juliet Eilperin, The Washington Post (September 13, 2016)

[17] Scotus blog; Tonja Jacobi and Dylan Schweers, April 2017

[18] "Judge Refuses to Postpone Hearing because Maternity Leave isn't a Good Enough Excuse";Staci Zaretsky;Above the Law, 2014.

[19] "Pregnant in Biglaw? Here's the Bad News", Kathryn Rubino; Above the Law, January 12, 2017

[20] "Biglaw Firm 'Outs" All of Its Flextime Attorneys on its Website"; Staci Zaretsky; Above the Law; April 17, 2017

[21] "Fear of a Female President", Peter Beinart, The Atlantic, September 2016 .

compensation of men and women lawyers at all levels of private practice, as well as by analyzing data about the factors that influence career progression. The highlights from the survey reveal that progress has slowed to a glacial pace:

- Men continue to be promoted to non-equity partner status in significantly higher numbers than women. Among the non-equity partners who graduated from law school in 2004 and later, 38% were women and 62% were men.
- The compensation gender gap remains wide. The typical female equity partner earns 80% of what a typical male equity partner earns, down from 84% in the first survey. Thus, the gap reported a decade ago has gotten wider. (The pay gap between men and women equity partners averages $95,000 per year.) In England the gender pay gap has been reported as high as 36%.
- Women continue to be under-represented on the highest governance committees. The typical firm has 2 women and 8 men on their highest U.S.-based governance committee, which amounts to about 20% women.
- Women are under-represented on compensation committees, even though law firms that report more women on their compensation committees have narrower gender-pay gaps.
- The typical female equity partner bills only 78% of what a typical male equity partner bills. However, the total hours for the typical female equity partner exceeded the total hours for the typical male equity partner. Even though women are working more hours, less gets billed as their work.
- Lawyers of color represent only 8% of the law firm equity partners. In other words, 92% of BigLaw partners are white. The dual minority status of black female attorneys often makes them a target for many forms of bias. Black women lawyers have less access to networks, unfair performance reviews, and the policies around promotion are not transparent.

Women have not made "appreciable progress" since 2006 in either attaining equity partnership or increasing pay on par with their male colleagues once they become an equity partner. As Bloomberg highlights in NAWL's report: "Women represent 18 percent of equity partners, an increase of two percent since 2006."[22]

Investigating implicit bias and confirmation bias in a neutral, scientific way, both individually and firm/corporation wide, has proven successful in making that firm/corporation more diverse, more inclusive, and significantly more profitable.

---

[22] Chung, Renwei, *7 Highlights from the 2016 Survey on Retention and Promotion of Women in Law Firms* Above the Law, Oct 2015)

Why is the attrition rate for women lawyers so high?

The New York City Bar Report, in its October, 2016 Diversity Benchmarking Report, shows that despite efforts by firms to retain and promote women and minorities, they still face around a 50% higher voluntary attrition rate than white men.[23]

Women currently occupy nearly half of all the seats in American law schools, gaining credentials for a professional career once all but reserved for men. But their large presence on campus does not mean women have the same job prospects as men. New research indicates that female law students are clustered in lower-ranked schools, and fewer women are enrolled in the country's most prestigious institutions.[24]

And bias is by no means limited to entry level or associate positions. A report sponsored by the Philadelphia Bar Association revealed that senior women attorneys continue to have pressures that cause them to "retire" or cut back on their work such as taking care of aging parents, personal health, opportunity to travel and caring for a spouse. Women departing as general corporate counsel cited retirement, moving to other positions within the company, and other personal reasons as factors in departing their positions. The survey confirmed that over time women attorneys do not necessarily retire from practicing law after having attained a leadership position, but instead move to different arenas in which to practice law before ever attaining a leadership position. Most women born in the 1960s, 1970s and 1980s (ranging in ages from 18-47) were employed in extra large law firms. However, many women between the ages of 48 and 67 leave law large firms and become solo practitioners, in-house counsel, work for the federal government, or become judges.[25]

Attrition of women (both Caucasian and minority) in the legal field can in part be traced back to both explicit and implicit bias against women as leaders. This can be clearly seen in at least five categories which disproportionately affect women.

---

[23] Chung, Renwei, *NYC Bar Report Reveals Minorities Have a 60% Higher Attrition Rate*, Above the Law, Oct. 21, 2016

[24] Jones Merritt & McEntee, *The Leaky Pipeline for Women Entering the Legal Profession* November 2016 Research Summary

[25] *Attrition of Senior Women Lawyers: The Leaky Pipeline*(Philadelphia Bar Association) - February, 2009 (report)

First, explicit bias, reflected in sexual harassment being at best tolerated and at worst encouraged, is still rampant at all levels, including against women aspiring to top positions. Lawsuits against employers for sexual harassment are being brought by prominent women lawyers and women in media, business and government. Organizations that are hierarchical or masculine can breed more harassment, and less reporting of it, because gendered power dynamics are a big driver. Training at these workplaces regarding recognizing and reporting sexual harassment has been shown to be ineffective.[26]

Second is the generally held cultural belief that women in our society are responsible for the caregiving needs of a household. It doesn't matter whether that caregiving is for children, parents, spouses, or extended family members. This belief, held by men and women alike, create the impossible choices professional women face in today's America. It is embodied by the phrase "there is no such thing as work life balance".

The third area causing attrition of professional women is the belief that traditional attitudes toward business generation and leadership are "correct", and should be embraced by all employees, regardless of gender or ethnicity, as they advance to senior level management. This implicit bias of "the way I succeeded is the only way" is widely held; even though it has been proven that diverse viewpoints and attitudes in leadership positions are far better for an organization's bottom line. In many organizations, there remains no room for individuals to thrive if they do not conform to the prevailing organizational culture. In a 2017 "Leaky Pipeline" survey, women consistently rated "fit with organization", lack of mentoring and micro-aggressions as reasons for dissatisfaction.[27]

The fourth area causing attrition is the disconnect between our culture's definition of "woman" and definition of "leader." We are still bound to the idea that women are "worker bees" but do not have what it takes to inspire or the leadership skills to successfully lead an organization. Shedding historical and personal stereotypes about what women are intrinsically

---

[26] "It's Not Just Fox: Why Women Don't Report Sexual Harassment" Claire Cain Miller, New York Times, April 10, 2017

[27] GAWL 2017 Leaky Pipeline Study; Dr. Elizabeth Boyd and Dr. Penelope Huang

"good at" and "what they are not good at", and acknowledgement of current leaders that women "have what it takes" is an essential step to stopping the leaky pipeline.

The fifth area are the cultural norms still prevalent in our society that are instilled in both men and women at a very early age. These "norms" have many women believing that they should work hard, be humble, and keep their head down. Too many women choose not to negotiate a raise, apply for a position that they may feel marginally qualified for, or feel they need to step back when they are pregnant because they cannot give the job the attention it deserves. These feelings are often cultural, not intrinsic, but women do not get the necessary perspective, coaching or mentoring that they need to grow and thrive in the corporate or firm environment. Ellen Kullman, the former chief executive of DuPont, says "we are never taught to fight for ourselves…I think we tend to be brought up thinking that life's fair, that you thrive and deliver, and the rest will take care of itself. It actually does work for most of your career. It doesn't work for that last couple of steps."[28]

Work life balance: an impossible goal

The choices made by today's working women are inextricably bound to what has euphemistically been called "work life balance". In a 2011 survey ranking 23 countries from best to worst in work life balance, the United States was ranked last -- 23 out of 23.[29] As a society, we expect mothers but not fathers on the leadership track to step back from career when family issues intervene. Personal life and professional life do not happen in a vacuum; they both happen as part of our cultural community but we don't often think of it that way. When we talk about our professional activities and our professional development, we often think of ourselves as independent humans, and that it is our individual and personal choice to choose career or family, to choose one to the exclusion of the other. How much choice we think we have when we are confronted with a life choice is highly context dependent and is strongly related to what

[28] Maria Makela, Why Women Aren't C.E.O.s, According to Women Who Almost Were, New York Times (July 21, 2017)

[29] "The 23 Best Countries for Work-Life Balance", Derek Thompson, The Atlantic, January, 2012.

we think is appropriate or fair for us to do, what we think we should do, and what we think an ideal man/woman/lawyer looks like. The role identities we take on reflect society within ourselves. As society becomes more complex and more information dense, we take on more and more varied roles within ourselves, as part of our own identities. We set up an ideal person or image, maybe something we have seen in a movie or on TV, or maybe a biography of a person we admire, and use this as a sort of symbol for a person who has perfected this role: and this is how we measure ourselves. This is what we try to measure up to.[30]

In the United States, millennials are more likely than their parents to think that a woman's place is in the home. University of Utah sociologist Dan Carlson says many millennials watched their parents balancing two careers with little institutional support – affordable child care, paid parental leave, flexible and well paid work – and decided it was too stressful. Europe, where affordable childcare and paid parental leave are the norm, has not seen a shift toward more conservative attitudes. There is a continuing trend in Europe toward more gender equality.

The American gender revolution stalled in the mid 1990s. The culture changed broadly in ways that slowed progress for women, and the location of the stall is in the family. Without paid leave and affordable childcare, couples revert to traditional roles, even if it's not what they want.[31] As we see from the comments of 1916, prior to the 1960s our society perceived that, ideally, women needed men to be fulfilled. "Historically, women weren't supposed to need their individual identity to be formed through work, because women were not supposed to have individual identities at all. They melded into their husband's identity when they married. Women's identities have long been relational – daughter, wife, mother – rather than individual. Which is perhaps why today, women finding individual identities tied to their work makes so many people uncomfortable."[32]

---

[30]. "Changing Lives, Resistant Institutions: A New Generation Negotiates Gender, Work, and Family Change" Kathleen Gerson, *Sociological Forum*, Vol. 24, No. 4, December 2009

[31] "Millennials are More Likely Than Their Parents to Think Women's Place is in the Home; Jenny Anderson, QZ.com, March 31, 2017

[32] "Are Women Allowed to Love Their Jobs?"; Jill Filipovic, New York Times, April 28, 2017

Among other factors, the way the media portrays working women during any particular time period has a profound effect on how we think of ourselves. The first generation of powerful "have it all" working women were the young women of the 1970s. That era brought us the "Charlie" commercials from Revlon. The commercial began with Charlie arriving in a New York club on her own, in her own car, throwing her hat to the doorman, carrying a briefcase. The message in that commercial was that women could be everything at once – have a powerful career, a great marriage and be a perfect mother. Women from the 1970s to 1990s bought into that message, and began to consider themselves capable of having it all.[33] Some women succeeded, but many found it impossible within the social framework that existed --the hours expected at work and lack of childcare options at home. The partnership or C-suite track, with its 100+ hour workweek, prohibits any semblance of a normal home life, and yet firms continue to insist that after a (perhaps generous) maternity leave, women return to this grueling work schedule full time. There is generally no option for temporary part-time return to work, and more ominously, no guarantee to be able to return to the partnership track. "We hire them and they are fabulous, talented ladies. But clients don't let you represent them part time. Courts do not let you represent a client part time. And they make choices. And we haven't had enough women who have succeeded at the firm like their male colleagues to be considered for partnership."[34] Most firms discourage women from part-time work when returning from maternity leave, and make it clear that taking the "mommy track" is professionally a track to nowhere.[35] Both men and women fear raising the topics of flex-time, part-time, or work life balance to potential employers. When a woman leaves the office early for family obligations, she is often thought of as "not partnership material." Working mothers report hearing comments such as: "There is no way you can be a good mother while achieving what I aspire."; "Let's face it. It's a man's world."; "The woman always stays home with the child."; "It's hard to do this job with two kids." Although there are a few women who manage to do both, their stories are not

---

[33] Wonder Women: Sex, Power, and the Quest for Perfection, Debora L. Spar (Sarah Crichton Books, 2013)

[34] "Balancing the Scales" Michelle Parfitt video interview 2014

[35] "Balancing the Scales" Therese Stewart video interview 2015.

stories that the majority of women see as realistic for themselves. The women who go right back to work from their hospital bed after giving birth are seen by many partners/CEOs as shining examples of what is possible "if a woman wants it bad enough", but the fact remains that these women are working twice as hard as their male counterparts by having significantly more responsibilities and time commitments at home as well as the time necessary for commitments at work. This is simply unrealistic for most women today.

Organizations would like to believe that child or family care is a "problem" that can be solved by offering longer and longer maternity leave, or agreeing that mothers can work remotely. But the problem with this linear solution is that after maternity leave ends, the children are still there. And working remotely creates other problems, such as lack of visibility, and the facetime often necessary for advancement.

In addition to, or because of, our culture's ambiguity about and its implicit bias against working women, especially in leadership roles, our society has not yet embraced comprehensive family support policies. There is a stark contrast between how working women in the United States and in other advanced industrialized countries with strong family leave and comprehensive family support policies are treated. Due in part to strong caregiving support, in most European nations, for example, women's labor force participation has increased significantly since 2000 instead of faltering.[36] In the United States, there is no federal law mandating paid family leave, including no mandatory maternity leave. That is changing from the ground up, corporation by corporation, law firm by law firm. Sheryl Sandberg, Facebook COO, announcing bereavement leave for Facebook employees, wrote in a recent post "People should be able both to work and be there for their families. No one should face this trade-off. We need public policies that make it easier for people to care for their children and aging parents and for families to mourn and heal after loss. Making it easier for more Americans to be the workers and family members they want to be will make our economy and country stronger. Companies that stand by the people who work for them do the right thing and the smart thing – it helps them

[36]Patricia Cohen, *Why Women Quit Working: It's Not for the Reasons Men Do* (NYT, Economy, Jan 2017)

serve their mission, live their values, and improve their bottom line by increasing the loyalty and performance of their workforce."[37]

The solution to the problem of both women and men feeling it is the woman's obligation to step back from a career path to raise a family must also include changing society's attitudes toward fathers who want to take on a significant share of the time and responsibilities connected to child raising. But the culture of law firms and other large institutions of American society is slow to change. As has been the case with women juggling work and family obligations, many firms still believe that if a father wants to leave the office early to spend time with his family, that he is not really committed to the firm.[38] That attitude is a major influence that keeps gender roles stratified, and does not work benignly in women's favor. "Even when there is a policy on the books, unwritten workplace norms can discourage men from taking leave. Taking extended paternity leave often has long term negative effects on a man's career, like lower pay or being passed over for promotions. And the percentage of companies overall offering paternity leave declined 5% from 2010 to 2014. Most companies are not expanding their maternity, paternity or parental leave policies.[39] Whether or not they are eligible for paid leave, most men take only about a week, if they take any time at all."[40]

Despite wanting to be present for their families, male lawyers often internalize the message that job flexibility is not necessary for them, only for the mother. "So much of men's career psyche is still informed by societal expectations that men are the primary breadwinners. It seems to be the assumption that the woman will bend the career to be present for the children, but not the man."[41] "We are ready for a time that is doing away with many of the rigid conceptions of 'gender' and 'family' that did so much to define the culture of previous

---

[37] Sandberg, Sheryl, Facebook "Sheryl posts", February 8, 2017

[38]" Balancing the Scales" Therese Stewart video interview 2015

[39] "That Fantastaic Parental Leave Policy Sweeping America? It Isn't." Rebecca Greenfield; Bloomberg.com, March 13, 2017

[40] Paternity Leave: The Rewards and the Remaining Stigma, Claire Cain Miller, The New York Times, November 7, 2014.

[41] Law Firms are Learning: Work-Life Balance Isn't Just for Moms; Leigh McMullan Abramson, The Atlantic, September 24, 2015.

generations."[42] And there is an economic case for paternity leave, although the salary gap between men and women means it still usually makes more economic sense for fathers to keep working rather than take time off to raise children.[43] A few countries like Sweden and Iceland have made paternity leave a governmental policy. Getting fathers to stay at home resulted in keeping mothers in the workforce –and women's future earnings rose 7% on average for each month of paternal leave her husband took. In summary, giving men an incentive to take paternity leave appears to do two things for women's careers: It gets them back in the workforce quicker and boosts their long-term earning potential...an important factor in closing the pay gap. "That isn't just good for women, it's good for the economy too...Whether a country needs a bigger workforce now or down the road, encouraging only women to specialize in the business of childcare will doom those plans to failure."[44]

The large attrition rates show that women either cannot or choose not to participate if the choices they are given regarding work/life balance is the only game in town. Many women opt out as a practical matter before they begin their career. For too many women, the cost of returning to a full time career after maternity leave outweigh the benefits, both financially and psychologically. And there are two other pivot points in women's lives where they tend to leave the partnership/C-suite ladder. In their 30s, we see women "focus on how much easier tomorrow would be if they were not enduring the working-mother juggle....in decision-making, we say they're overweighting short-term benefits at the expense of the long-term—that is, their years after age 50, when they'll want to be doing something interesting and challenging out in the world." The third pivot occurs if a woman's career trajectory has carried her to senior leadership. It is remarkable how many women who do make it through in their career quite successfully into their early 50s, retire to sit on boards before they hit the C-suite.[45]

---

[42]"Tim Kaine Embraces his Dadhood, " by Megan Garber, The Atlantic, September, 2016.
[43] "The Economic Case for Paternity Leave" by Gwynn Guilford, the Atlantic, September 24, 2014.
[44] Id
[45]Sellers, Patricia, *What Anne-Marie Slaughter misses about why women still aren't reaching the top, (Fortune, Sept 2015)*

Ultimately, we are all, women and men, wedded to the same narrative, and in order to change the situation, we will have to change the narrative, says Anne-Marie Slaughter, in *Unfinished Business: Women Men Work Family.*[46] At first, she writes, when she encountered the idea that led to her renowned essay in Atlantic magazine in 2012, *Women Can't have it All,* her "knee-jerk reaction was to be skeptical." But that didn't last and at last she concluded that "Men need a movement of their own. Most of the pervasive gender inequalities in our society—for both men and women—cannot be fixed unless men have the same range of choices with respect to mixing caregiving and breadwinning that women do. To make those choices real, however, men will have to be respected and rewarded for making them: for choosing to be a lead parent; to defer a promotion or work part-time or spend more time with their children, their parents, or other loved ones; to take paternity leave or to ask for flexible work hours; to reject a culture of workaholism and relentless face time." In other words, caregiving has to be valued society wide equally with career.

WHY FIRMS AND CORPORATIONS MUST ADDRESS THE ISSUE OF GENDER EQUALITY IN TE EXECUTIVE RANKS

Women are abandoning the partnership and C-suite track, even when firms and corporations want them to stay. But at the same time, organizations continuing to espouse these attitudes do so at their peril. Here are a few examples of how ignoring diversity issues affect law firms and corporations:

- Despite the lack of federal law in this area, many states have passed a Paycheck Fairness Act, and women are suing firms and corporations under those Acts. The California law puts the burden on the defendant employer to demonstrate that any wage gap is due to something other than gender.

- In a settlement of a lawsuit with defendant State Farm Insurance Company, State Farm agreed to, among other items, hire a human resource consultant to review hiring and compensation practices, disclose pay to employees, and change hiring and promotional practices with the goal of increasing representation of women.

[46]Slaughter, Anne-Marie (2015). *Unfinished Business: Women Men Work Family*. New York: Random House.

- There has been a wave of claims of gender discrimination based on parental responsibilities, which now make up a growing number of lawsuits against American employers. Between 2006 and 2015, researchers found that more than 3,000 such cases were decided in state and federal courts, even as overall federal job discrimination claims were declining. More than half have led to compensation.[47]

- HP Inc. legal department has announced as of February 8, 2017, that it will withhold up to 10% of invoiced fees from all US based law firms that do not meet diversity requirements in staffing matters. This policy is being adopted to emphasize the business imperative to make meaningful strides in diversity at partner firms. "To avoid a potential fee cut, firms must field at least one diverse firm relationship partner, regularly engaged with HP on billing and staffing issues, or at least one woman and one racially/ethnically diverse attorney, each managing at least 10% of the billable hours working on HP matters."[48]

- Data from the New York Bar Association in 2011 shows it costs firms approximately $500,000 to $700,000 to train each new associate over a 3 year period. That is money lost in the revolving door of mass attrition by women and minorities.

- The ABA Model Rules now include harassment or discrimination on the basis of race or sex as professional misconduct.

People today are often unaware of the social causes which explain men's over-representation and women's underrepresentation in the most powerful and prestigious social roles. Our own cultural biases lead us to believe certain things about the personal attributes of the people in these roles. These beliefs then contribute to the maintenance of the perceived gender differences.[49] At a certain point, the belief that a woman's primary career obstacle is herself becomes conventional wisdom, for both men and women. Instead of blaming the systems that women work and live in for their failure to gain equality at work, we blame the women themselves – and women internalize and shoulder that blame.[50]

---

[47] The Revolt of Working parents, Alexia Fernandez Campbell, The Atlantic, January 12, 2017
[48] ALM Morning Minute, Law.com, February 15, 2017
[49] Slaughter, Ann-Marie "Why Women Still Can't have it All", The Atlantic, July-August 2012
[50] "Stop Blaming Women for Holding Themselves Back at Work" by Lisa Miller, The Cut, December 1, 2014.

A report for marketing and public relations company Weber Shandwick conducted by KRC Research in 2013 and titled "Gender Equality in the Executive Ranks: A Paradox" outlines the "push forces" – a range of factors supporting women's advancement – and the "pull forces" – those factors that prevent organizations from achieving gender equality. That study found that men and women executives have very different views on what is keeping women back and what is moving them forward. For example, the study found that the #1 ranked tipping point to gender equality, according to men, was stakeholder pressure. That is, public pressure from shareholders, clients, the media and the public. On the other hand, women believed that the tipping point in gender equality would be laws to ensure equal pay for men and women who do the same job. 76% of women non C-level executives were very interested in attaining a C-level position, but as of 2015, only 12.5% of senior leaders in the world's top 100 companies are women.

The study's findings include some interesting findings on the competing interests which slow down the progress of women executives and partners:

Push forces – pushing society toward gender equality:

1.Mainstream and social media are interested in gender equality and demand it of large organizations

2. The war for talent deepens, and organizations need to recruit women leaders

3. Women are demanding it, and millennials expect it of the organizations in which they would accept employment

4. Stakeholder pressure

Pull forces - pulling away from gender equality:

1. C-Suite Focus is elsewhere, increasing profitability, leading and motivating employees, engaging with shareholders and customers, and managing risk
2. Gender pipeline fatigue caused by years of promises accompanied by extremely slow progress
3. The glass ceiling remains intact, which is exacerbated by the fact that informal networks and communication styles favor male candidates.
4. Unequal pay undercuts motivation

Numbers are important. The number of women in the executive ranks must reach a tipping point. "Only when women wield power in sufficient numbers will we create a society that genuinely works for all women. That will be a society that works for everyone."[51]

The Economic Case for Diversity

A diverse team of lawyers or executives is a business necessity in today's world. Many corporations are advancing diversity and inclusion efforts to leverage the intrinsic value of diversity, and are increasingly insisting on diverse teams from outside law firms. Organizations with more diverse leadership improve market share and are more likely to capture new markets. And diverse teams engage in better decision making.[52]

The ABA Section of Litigation's article by Sheryl Axelrod titled "Banking on Diversity and Inclusion as Profit Drivers – the Business Case for Diversity," in June of 2014 states "The data is in and it's unassailable: diversity and inclusion are enormously profitable."

Texas Wall Street Women has an excellent summation of the business case for gender diversity,[53] and is routinely updated with new research. A few points from their Board Brief:

- Single sex teams generally do not make the best decisions. There is of course less conflict in them, but they tend strongly to peacefully and easily reach mundane and unimaginative outcomes. Novel and complex tasks are better addressed by diverse teams, even when the qualifications of the diverse teams are objectively lower.

- Teams with more women score higher than teams with no women or with fewer women, even where the individual competencies of the members are lower on the team with more women.

- Furthermore, companies with more women in senior positions have a higher retention rate, and a better corporate image. Companies with more women at the top have better organizational and financial performance, higher operating margins and market cap.

In the face of these statistics, implicit bias still creates significant barriers for women as

---

[51] "Why Women Still Can't Have it All", Ann-Marie Slaughter, The Atlantic, July/August 2012.
[52] Nalty, Kathleen; Going All-In on Diversity and Inclusion, The Law Firm Leader's Playbook (2015)
[53] Texas Wall Street Women, "Board Brief: why gender diversity matters"

they approach the top tiers of the legal profession. The whole notion of certain personality traits being deemed "leadership traits" is unfairly holding women back. As reported by Lauren Rivera in the October, 2016 American Sociological Review, she sent fake resumes, varying details to see which ones interested hiring managers for elite jobs – those who become the gatekeepers and who become top earners. Resumes with men's names were viewed as resumes of people who would be more committed to their careers and a better fit for that law firm's culture. For the same resumes with women's names, the women were viewed as being less committed, that they were secretly looking for a husband, or biding time before leaving their career. Hiring managers often do not recognize this bias and appear to be unaware of what they are doing. Many firms and corporations now consider business development to be the most critical factor in being promoted to equity partner or the C-suite.

The ability to develop business within traditional firm models is a great obstacle for women's success in those firms. While most firms actively tout an active commitment to advancing women at all levels, they also adhere tightly to the use of traditional business development strategies, strategies that are unequivocally failing to capture the strengths of talented women in these firms.[54] Most reward two things: closing the sale and getting the credit for the sale. But it is in exactly these areas where implicit bias works against women. Women are more successful in certain aspects of business development (networking, establishing relationships, delivering excellence in client service); but these activities are not rewarded.

"Women tend to view power horizontally—it's about impacting many things broadly—vs. climbing the ladder, which is generally more of a turn-on to men. Oprah Winfrey commented 'Power is the ability to impact with purpose,' It's a definition that many women covet."[55] But it is not one that fits with the uber-competitive world of corporate or legal America, where individual self promotion is still the norm. Many women, as it turns out, have an inherent aversion to self-promotion: Dr. Reeves' research uncovered that "tooting your own horn" is very

---

[54] Id.

[55] Sellers, Patricia, *What Anne-Marie Slaughter misses about why women still aren't reaching the top, (Fortune, Sept 2015)*

difficult—if not impossible— for many women. Women tended to view self promotion as "bragging," and cited traditional social norms which call for women to be humble and modest. These women adhered to the view that their hard work would "speak for itself," and, eventually, they would be noticed and rewarded for their efforts and loyalty. Needless to say, this is often not a successful strategy.

Our current business development model is by and large, based on a single superstar idea.

> " The perspectives on business development as articulated by different leaders of professional service firms are starkly consistent with each other on what successful business development looks like (individual credit/big clients/clients = power), how it is done independently/visibly/competitively), and who is more likely to succeed at it (assertive men). .....This one size leads to a firm's succeeding through the output of a few superstar business developers instead of succeeding as a firm, a cohesive unit that works together to grow together. In our global hypercompetitive market where the supply-demand equation no longer favors professional service firms, dependence on a few superstars without teams is not a good strategy for any firm's long-term success, especially if you want to transcend survival and thrive in a sustainable way"[56].

At present, it is still the norm, and many law firm managers are not losing sleep when women lawyers fly the coop, because they feel that what counts is who's bringing in the big bucks.[57] In the long term it may be shortsighted to put so much emphasis on revenue partners generate, but at this moment in history, it is still often the truth.[58] However, corporations, both public and private, are feeling pressure from the public to diversify the top tiers of leadership. This public demand to see the businesses they use move toward diverse leadership is indicative of a large societal shift in perception, as is the recent resignations of corporate board members and CEOs because of public outrage over sexual misconduct or lack of diverse leadership. Change is coming, and the organizations that do not change with it are doomed to failure. At present, often the desire to change is limited to words, but not very much action. But the stated desire to

---

[56]One Size Never Fits All: Business Development Strategies Tailored for Women (and Most Men),(American Bar Association, 2014)

[57]Vivia Chen, "Do Firms Care When Women Bolt?" Law.com (Feb 9, 2017

[58] Paola Cecchi-Dimeglio, "What It Costs When Talent Walks Out the Door", The American Lawyer, 2016

address the diversity imbalance may give way to real change if peoples' wallets depend on it.[59]

What can we do?

One of the themes running through Balancing the Scales is the question of choices, of context, of things done apparently one person at a time, but which take place in a particular context and at a place and time which shapes that choice. We don't make decisions in a vacuum, the things that happen to us don't happen in a vacuum. It has taken all of us to get to where we are and it will take all of us to progress past our current limitations as it relates to gender equity.

Our ideas about who should be doing what in terms of career and family, about what women should do and what men should do, are not only individual ideas. Our ideas as a society also have a social function: they justify the social division of roles, and the current position of men and women in relation to each other.[60]

Society is organized around a private world of home, family, and domestic work (still mostly seen as the province of women), and a public world of business, politics, and organizations (still mostly seen as the province of men). This division, like our division of the world into work and the private sphere, are derived primarily from the needs and demands of the notions of work developed during and rooted in the Industrial Revolution.[61]

This collective "change of mind" is not a new concept. *".. changing our culture requires more than laws. Cultures change one heart, one soul, one conscience at a time."*[62]

Ruth Ginsburg talks about the groundbreaking gender equity cases she worked on and argued before the Supreme Court in the 1970s, such as Reed v Reed and Frontiero v Richardson. In the oral argument in *Richardson*, she told the Supreme Court justices "Sex, like race, is a visible, immutable characteristic bearing no necessary relationship to ability." In 2009, she stated that the court in *Reed* and *Frontiero* was "ready to listen" to the arguments "as they had

---

[59] David Perla and Sanjay Kamlani, Diversity in the Legal Profession: The More Things Change, the More They Stay the Same – Until They Don't; Above the Law; May 16, 2017

[60]. *The Theoretical Importance of Love;* William J. Goode; American Sociological Review, Vol. 24, No. 1 (Feb., 1959), pp. 38-47.-

[61]Rosser, *Women, Science, and Myth: Gender Beliefs from Antiquity to the Present* (ABC-CLIO, 2008)

[62] George Bush, announcement of presidential candidacy, 1999

not been a generation before".[63] In 1978, she said "Men need the experience of working with women who demonstrate a wide range of personality characteristics, they need to become working friends with women."[64]

In order to assess how to change a culture where both men and women believe it is appropriate for women, but not men, to step back from a career to raise a family, here are questions to consider:

- Why do we as a culture (men and women alike) think it is acceptable for a woman to step back from pursuing a full career when raising a family, but men are not expected nor offered the opportunity to do so?
- Why is the definition of "success" in America often based on the social beliefs and identities of Caucasian males and what can we do about it?
- What can we do individually and collectively to break down cultural stereotypes and facilitate a national conversation about gender equality for everyone, including equality in the opportunity to pursue a partnership track or other powerful position?
- What can we do to work towards an understanding that a full life for all of us, which can include career and family obligations, can only be reached when we are able to change our common beliefs about roles and responsibilities?

RAMP UP DIVERSITY AND INCLUSION IN YOURSELF AND IN THE WORKPLACE

Everyone has blind spots. Every individual makes judgments and decisions based in part on implicit bias and confirmation bias. Recognizing your own blind spots is the first step to making changes in yourself, your career, and your workplace. There are many diversity and inclusion training manuals and books which provide detailed and step by step analysis of how to change an individual bias or a corporate culture. But the general principles can be easily remembered by the acronym **RAMP UP**.

- Recognition and appreciation of differences
- Access to situations which enhance career opportunities

---

[63]Ruth Bader Ginsburg, Balancing the Scales video interview, 2009.

[64] Remarks at the 25th anniversary of women at Harvard Law School, 1978.

- Meaningful mentorship
- Promotions recognizing different styles of leadership
- Under-represented groups are found in equal numbers at all levels
- Programs about diversity and inclusion are engaged in and embraced by firm leaders.

What can we do as individual employees to have a more inclusive workplace?

Here are some specific examples of what an individual can do:

- A male who makes a specific effort to notice how the women around him are treated and to recognize his own implicit bias will see things he never noticed before.
- Oppose your own and other's stereotypical thinking.
- Expose yourself to counter-stereotypical models and images.
- Actively doubt your objectivity.
- Cultivate relationships that involve people with different social identities.
- Walk in others' shoes and find commonalities with colleagues who have different social identities.

For women who believe that implicit bias is keeping them from deserved promotions, or that they need to make that "impossible choice" between career and family, here are some suggestions:

- Focus on your strengths, not weaknesses, success rather than failure, and self-sufficiency rather than dependence on others to promote your interests.
- Use your personal strengths, not the way others have done it, in building your career.
- Learn negotiation techniques, and use them when you are interviewing or asking for a promotion. The research shows that often, "women don't ask". A promotion will not necessarily be offered if you don't ask for it, and a salary offer is the only game in town unless you start the conversation to negotiate the amount.
- Develop business generation activities that you genuinely enjoy. Don't buy into someone else's idea of generating business that does not feel comfortable to you. Trying to fit into a mold in which you are not comfortable will make you appear awkward to others and will make you personally unhappy. "Added value" to your employer does not come from "losing yourself." The added value comes from bringing diverse experiences and

perspectives.[65]

- If possible, refer business and ask for business from other women. This is more comfortable and natural for many women lawyers.

- Speak up in meetings and everywhere when you think that you or other women are being ignored or disregarded, speak up at evaluations and reviews about your accomplishments. Do it respectfully, but do not stay silent.

- Focus on your long term goals. Don't get sidetracked by small annoyances with how you are being treated differently. Work long term to change the big items.

- Don't automatically assume it will be you rather than your spouse or another family member who will step back from their career track because of caregiving responsibilities. Make a conscious decision after a full discussion about balancing your needs and your family's needs with both your family and your employer.

- Ask your employer about going part time for a period of time due to family obligations, but getting a guarantee that if you return to full time within a certain period, you can return to the partnership track.

- Find a mentor. Most professional women still report that they did not have a mentor, male or female. But informal mentoring has proven to be more effective than mentoring programs.

<u>What can we do as firms/corporations</u>?

In 100 years, our societal constructs will look as contrived as the constructs of the men who met in 1916 and rejected a woman's application to practice law on the basis that women were not equipped to practice law. Our faith that we understand how things work can serve now, as it did in 1916, as a justification of gender inequalities in the social structure.[66]

Just having more women in prestigious and powerful occupations does to some degree all by itself contribute to the change in traditional gender stereotypes as well as to their breaking down.[67] This can be seen in the Federal government's commitment to diversity in hiring, which

---

[65] Erica Edwards O'Neal, Vice President for inclusion and diversity at New York City Economic Development Corp.

[66]"Sex, Schemas, and Success: What's Keeping Women Back?"Valian, Virginia. Academe 84(5) (1998).

[67]<u>Women as Mentors: Does She or Doesn't She? A Global Study of Businesswomen and Mentoring</u>.

has resulted in many areas in a breakup of some of the roadblocks to gender equality.[68] This commitment has however had uneven results as it is implemented unevenly across agencies. Traditionally male-dominated agencies, such as the FBI, ATF, and Homeland Security, have not made the same advances and have very few women in leadership or senior positions, which can compromise their effectiveness.[69]

Embarking on an inclusiveness initiative is a pivotal decision for an organization. To be successful, it eventually requires the participation of everyone in the organization to be fully successful. The following reasons can make decision makers understand why diversity and inclusiveness are important:[70]

- Increasing competitive edge, innovation, creativity
- Maximizing profits
- Better Recruiting
- Lower Attrition and Reduced Turnover Costs
- Greater Productivity and Engagement
- Reduced Liability
- Moral and ethical equity – it's the right thing to do

The effectiveness of a corporate or firm Diversity and Inclusion policy is determined by its leaders taking personal responsibility for diversity and inclusion efforts. Reforms cannot be seen as a "women's issue." It must be seen as an organizational priority. Leaders who do make efforts to accommodate a variety of thinking and communication styles are more respected and more effective, overall, because they are able to tap each person's potential.[71]

The problems faced by women staffers in the Obama administration is a useful example of a solution that was developed by women "on the ground" but can be used by organizations at

---

[68] Choi, S., Diversity and Representation in the U.S. Federal Government: Analysis of the Trends of Federal Employment.

[69] Goldman, Adam, "*Where Are Women in F.B.I.'s Top Ranks?*" (*New York Times*, 22 Oct 2016)

[70] Center For Legal Inclusiveness, "Beyond Diversity: Inclusiveness in the Legal Workplace", Manual

[71] Jane Hyun and Audrey S. Lee, Flex: The New Playbook for Managing across Differences (New York, NY: Harper Collins Publishers, 2014)

every level. As a result of being systematically ignored at meetings, a group of staffers adopted a meeting strategy they called "amplification": When a woman made a key point, other women would repeat it, giving credit to its author. This forced the men in the room to recognize the contribution — and denied them the chance to claim the idea as their own.[72] And it worked. This group, with colleagues at the Office of Science and Technology Policy collaborated with dozens of Federal agencies, companies, investors, and individuals about their science and technology workforces. They consistently found a commitment to bringing more diversity, equity, and inclusion to their workplaces; but also found that the same people who want to create high-performing, innovative teams and workforces do not know the steps and solutions that others are already effectively using to achieve their diversity, equity, and inclusion goals. In order to help accelerate this work, they compiled insights and tips into an Action Grid designed to be a resource for those striving to create more diverse, equitable, and inclusive science and technology teams and workforces.[73] Use this guide and other resources to lessen attrition and keep your workplace diverse and inclusive.

One of the tasks of leadership is to improve the organization. Organizations have a distinct learning curve, somewhat different from the learning curve of an individual. Many firms and corporations struggle to find an effective blueprint for learning and making progress toward improvement in the diversity arena. Often leaders do not know how to approach organizational learning to make systemic changes in diversity and inclusion numbers. There is no magic bullet for improving attrition rates and increasing diversity. Real progress takes an investment of time, resource and attention. But undertaking change in the areas of diversity and inclusion is as important to success as strategizing, risk management and fiscal responsibility. True leaders understand that change is not episodic but continuous and is essential for continued success.[74] "Action learning" for organizations has proven to be effective once it has been adapted to suit the

---

[72] Juliet Eilperin, *White House women want to be in the room where it happens,* (Washington Post, Women in Power, Sept 2016)

[73] MEGAN SMITH AND LAURA WEIDMAN POWERS, Raising the Floor: Sharing What Works in Workplace Diversity, Equity, and Inclusion (obamawhitehouse.archives.gov/blog Nov 2016)

[74] Gephart,Martha and Marsick, Victoria, Strategic Organizational Learning, Springer Press (2016)

business needs, culture and context of each organization.[75]

Here are some specific examples of what firm leaders can do to make their diversity and inclusion efforts more effective:[76]

- Make sure that fathers are not penalized or ridiculed by his peers for wanting to take on some of the childcare, leaving more career options open for the mother to spend less time at home and more time in the office at a time in her career when that office time makes a difference.

- Create an atmosphere where reporting sexual harassment does not result in retaliation. Authorize more people throughout the organization to receive complaints; hire an ombudsman. The best way to avoid sexual harassment and ensure that it is reported when it happens is to bake it into company culture from the top leaders on down.[77]

- Give mothers and others who want to or have to step back due to family issues a chance to return without penalty. Keep in mind the time and money the firm put into training that person, and that she might feel she has no choice but to quit if she can't step back for a period of time.

- Ban the word "bossy" Implicit bias against female leaders leads to female leaders being penalized for being "too assertive". Women, on average, are disparaged more than men for identical assertive behaviors. Women are particularly penalized for direct, explicit forms of assertiveness, such as negotiating for a higher salary. [78]

- Do not rely solely on training and workshops, on education of the people in the workforce. These approaches, while they do not seem to do any harm, do not seem to do very much good either. Research looking at whether diversity programs and workforce diversity are in any way correlated, seems to find that there is basically no relationship.[79]

- Think about how your firm/corporation attracts new employees, and about the screening and interview stage. We are used to thinking of a particular kind of person in a particular

---

[75] O'Neil, Judy and Marsick, Victoria, Understanding Action Learning, American Management Association Press (2007)

[76] Nalty, Kathleen, Going All-In on Diversity and Inclusion, The Law Firm Leader's Playbook; self published (2015)

[77] "It's Not Just Fox: Why Women Don't Report Sexual Harassment", Claire Cain Miller; NY Times, April 10, 2017

[78] Melissa Williams, "Banning 'Bossy'", Emory Magazine, Autumn 2016

[79] Kalev, Dobbin, Kelly, "Best Practices or Best Guesses?" American Sociological Review ,Vol. 71 (August 2006).

kind of job, and this can lead to reinforcement of the status quo.[80] Firm business development models must be broadened and developed to include methods with which women are more comfortable – for example, reimbursement for entertaining at home rather than inviting potential clients to sports events or other venues which may not be of interest. Business development models cannot be a "one size fits all", it must be broadened to include models which work for all genders.[81]

- Make mentoring a common practice. The more ingrained mentoring is in the organization, the more likely women are to be mentors and to accept mentorships.

- Encourage everyone in senior positions to mentor others in the organization. The research is clear that informal mentoring from top individuals has much better results than formal mentoring programs. Women who expect themselves to be able to "do it all" feel they don't have to time to reach out to help younger women or to spend the time to create policies and facilitate gender equality in our own firms. They are just too busy. And then we wonder why there are so few women partners, why these young women don't stay.

- Include diversity and inclusiveness on every leadership meeting agenda. If it is not a priority at the top, it won't be a priority for employees.[82]

- Firm leaders must actively engage in diversity and inclusion events. Do not leave it to others. Even valid reasons for not attending are noticed by employees and understood as "this is not important."[83]

- Gain a sufficient knowledge base on diversity and inclusion research and issues so that you can more clearly see the cause of attrition in your organization.

- Champion change in your firm. Expand your viewpoint to embrace "we are all in this together" rather than "this is a problem we need to solve."[84]

- Create an environment where everyone feels that their ideas, thoughts and perspectives are valued and incorporated. Do not promote a culture where everyone feels they must leave identities at the door and assimilate to a narrow definition of success.[85]

- Determine the actual cost of attrition of members of under-represented groups.

---

[80]Bohnet, van Geen, Bazerman, "When Performance Trumps Gender Bias: Joint versus Separate Evaluation".
[81]One Size Does Not Fit All, Arin Reeves, (American Bar Association, 2014)
[82] Kathleen Nalty, Going All-In on Diversity and Inclusion, the Law Firm Leader's Playbook, self published (2015)
[83] Id.
[84] Id
[85] Id

Unwanted attorney separations can cost firms/corporations hundreds of thousands of dollars in lost revenue and re-training. Remember that every associate costs the firm $500,000 to $700,000 for a three year training period.

- Implement a more objective talent management system based on objective criteria. Do not leave promotion decisions to a small non diverse group without putting oversight in place. Companies in other industries set diversity targets – why not law firms or legal departments?

- Planning committees for speaking events should create and foster an inclusive environment in regard to selection of speakers, compensation, and asking specifically whose voices are not represented. Do not use the same female speaker as your company's "token female" speaker at many events.

- Have employees responsible for hiring and promotion in your organization become familiar with the studies which show that identical resumes and briefs get rated higher or lower depending on the name (male or female, Caucasian or minority) on the top due to implicit bias. This implicit bias extends to women and minority evaluators, evaluating the work which appears to be from women and minorities lower than the work which appears to be from Caucasian men.

- Make clear to subordinates that they will be judged on whether they help produce a more diverse work force, including having women and minorities on any final list of candidates for promotions.[86]

Conclusion

The national conversation about gender equality has picked up steam after being relatively dormant for a few decades. It is our obligation to today's young men and women to participate in that conversation, and work toward a real "change of mind" in our society. It is not enough to say "I made it by working within the constraints of the current system, so others can do it too." We need to work to change the system to level the playing field for women who are rising through the ranks. The law in our country has not always treated women fairly or equally, and it is our job as lawyers not only to work to change the law, but also to work to change the hearts and minds of our colleagues and the public. As Dr. Martin Luther King, Jr. stated, "The

[86] Susan Chira, How to Get More Women to Be C.E.O.s, New York Times, July 25, 2017

arc of the moral universe is long, but it bends towards justice." We must continue to work toward justice and full equality for all.