

Integrity in a Changing Profession: Issues of Diversity and Inclusion*

Fiona M. Kay
Department of Sociology
Queen's University
Kingston, Ontario, Canada
K7L 3N6
E-mail: kayf@post.queensu.ca

28 November 2005

*I wish to acknowledge the financial support of the Social Sciences and Humanities Research Council of Canada, the Law Foundation of Ontario, and the Law Society of Upper Canada. I thank Tara Carnochan for valuable research assistance. This paper was presented in October 2005 at the Chief Justice of Ontario's Advisory Committee on Professionalism, Fifth Colloquium on the Legal Profession, titled, "Honour, Integrity and Professionalism in the Legal Profession," hosted at Queen's University, Kingston, Ontario. The views expressed in this paper are those of the author and do not necessarily reflect the views of the Law Society of Upper Canada.

Introduction

I would like to start my talk with two admissions. First, neither professional integrity nor policy analysis are among my areas of research. As a sociologist, I study patterns of career mobility and theoretical explanations of disparities in earnings, promotions, job satisfaction, job exits, and mentorship, among other variations in law practice. The focus of this work has often been on gender, and more recently on ethnic/cultural diversity, but not with an emphasis on either professional responsibility nor policy reform.

Two days before the conference Jacques Ménard, the moderator of today's session, phoned me to discuss the theme of the "Diversity Panel" (officially titled, *Integrity in a Changing Profession*). I am grateful for this telephone call. I had been thinking of a changing profession in terms of growing diversity of gender and ethnic/racial composition. But another way of seeing a changing profession is in terms of diversity of practice settings. Much academic research, media attention, fictional television shows, and even law students' anticipations, are based on a particular image of what it means to be a lawyer. Typically that image is one of lawyers working in law firms, often large law firms. Yet, as a report published this past year by the *Sole Practitioner and Small Firm Task Force* of the Law Society of Upper Canada reveals, sole practitioners and firms of five or fewer make up approximately 52% of lawyers in private practice in Ontario and 94% of all firms in the province.¹ These lawyers provide the vast majority of lawyer services outside of Toronto and in non-urban areas of Ontario; legal aid services throughout the

province; and virtually all legal services available in languages other than English and French.² And interestingly (for the conceptualization of a changing profession that I had in mind), solo practice and small firms are the most likely to include lawyers from diverse backgrounds able to address the cultural, linguistic, and community needs of Ontario's diverse population.³ This intersection between diversity of practice settings and growing demographic diversity in the profession seems tremendously important to our understanding of what it means to practice law with 'honour' and 'integrity' in a changing profession.

Yet, diversity in a changing legal profession is open to even broader interpretation. The Canadian Bar Association's *Futures Report*⁴ published in August of this year correctly identifies these broader changes. Most notably, the report highlights a "fragmentation of the professional culture" into a series of sub-groups, associated with demographic characteristics and also other factors such as area of practice, type of workplace, and location. Three demographic influences are of note: the rapid influx of women to the profession, growing ethnic/racial/culture diversity, and inter-generational differences in attitudes and expectations. These trends place greater emphasis on the need for improved work/family balance, recognition and accommodation of gender and diversity differences, and a desire to expand practice and career options. The report also

¹ *Final Report of the Sole Practitioner and Small Firm Task Force* (Toronto: Law Society of Upper Canada, 2005) [hereinafter *Sole Practitioner and Small Firm Task Force*].

² *Sole Practitioner and Small Firm Task Force*, 6.

³ *Sole Practitioner and Small Firm Task Force*, 6.

speaks to other changes in practice: a shift to alternative price models, use of alternative processes (e.g., alternative dispute resolutions), technology and commercialization; as well as: access to justice and legal aid, and opportunities and challenges provided by Aboriginal self-government and non-adversarial mechanisms (e.g., collaborative justice models). Understanding the multiple sources of diversity of demographic composition and diversification of law practice is a formidable task.

The focus of my talk today will rest with issues of gender and ethnic/racial diversity. Specifically, I will highlight results from a recent survey of Ontario lawyers. The more detailed findings are published in a report to the Law Society of Upper Canada titled, *Diversity and Change*.⁵ Of course, I welcome discussion on a broader range of diversity issues in practice. Professor Paton asked that I develop the talk around three themes. I have chosen the following: (1) areas of disparity and progress in professional work contexts (primarily statistical analyses); (2) perceptions of inequalities and discrimination (with an emphasis on anecdotes or qualitative accounts); and (3) policy strategies and incentives (with a healthy dose of speculation).

In preparing this paper, I came across one particularly influential publication on professional integrity. This is Deborah L. Rhode's recent book, *In the Interest of Justice: Reforming the Legal Profession* (2000). In this book, Professor Rhode makes two claims.

⁴ *Crystal Clear: New Perspectives for the Canadian Bar Association* (Ottawa: Canadian Bar Association, 2005).

The first is that lawyers, individually and collectively, need to assume greater responsibility for the consequences of their professional actions, for the performance of the legal system, and for the effectiveness of professional regulatory processes. A second, and related claim, is that the public ought to demand greater accountability from the legal profession, and to assume a greater role in overseeing its conduct and the delivery of legal services.⁶ Rhode's scholarship resonates strongly in the policy implications I will discuss toward the end of this paper.

Investigating Diversity Issues in the Contemporary Profession of Law

As our understanding of racism increases, the words used to describe racism evolve. The term used most recently is "racialized" communities. This term is used extensively by legal experts on critical race theory and in the Canadian Bar Association's report, *Racial Equality in the Canadian Legal Profession*.⁷ The CBA report states "racialized" refers to:

...persons whose social experiences may be determined by their presumed membership in a race. It identifies their vulnerability to different treatment or the denial of rights or privileges by individuals and institutions who believe that race should factor into their decision-making.⁸

⁵ Fiona M. Kay, Cristi Masuch and Paula Curry. *Diversity and Change: The Contemporary Legal Profession in Ontario* (Toronto: Law Society of Upper Canada, 2004).

⁶ See also Deborah L. Rhode, "Law, Lawyers, and the Pursuit of Justice." (2002) 70 *Fordham Law Review* 5 at 1544 – 1562 [hereinafter Rhode, *The Pursuit of Justice*].

⁷ Joanne St. Lewis & Benjamin Trevino (Co-Chairs), Racial Equality in the Canadian Legal Profession. Report 1. *The Challenge of Racial Equality: Putting Principles into Practice* (Ottawa: C.B.A., 1999); Joanne St. Lewis & Benjamin Trevino, Report 2. *Virtual Justice: Systemic Racism and the Canadian Legal Profession*. Presented to the Council of the Canadian Bar Association by the Working Group on Racial Equality in the Legal Profession (Ottawa: Canadian Bar Association, 1999) [hereinafter St. Lewis & Trevino, *Challenge of Racial Equality*]

⁸ St. Lewis & Trevino, *Challenge of Racial Inequality*, *supra* note 7.

In this survey, participants were asked to identify themselves using nine categories (See Table 1): (1) Caucasian, European Canadian; (2) African-Canadian, Black Canadian; (3) Indian Subcontinent Canadian (Indo-Canadian); (4) East-Asian Canadian (Japanese, Korean); (5) South-East Asian Canadian (Vietnamese, Cambodian, Thailand, Philippines); (6) Aboriginal (First Nations, Métis, and Inuit); (7) Biracial or Multiracial Canadian; (8) Bicultural or Multicultural Canadian; and (9) Other. This selection was designed to offer a wide range of possible responses consistent with contemporary human rights language and with the opportunity for respondents to self-identify.

However, statistical analyses required that we amalgamate these groups so that numbers are sufficiently large to enable the computation of statistical tests of significance and measures of association. Therefore, categories two through nine were recoded into a single group called ‘racialized community members’, while category one (Caucasian, European Canadian) was recoded as a ‘non-racialized community.’ This coding is consistent with prior studies and allows for comparison with the *Final Report on Equity and Diversity in Alberta’s Legal Profession*,⁹ a recent large-scale survey of equity and diversity in the Alberta context.

⁹ Merrill Cooper, Joan Brockman, & Irene Hoffart. 2004. *Final Report on Equity and Diversity in Alberta’s Legal Profession* (Calgary, Alberta: The Law Society of Alberta) at vi [hereinafter Cooper, Brockman & Hoffart, *Final Report on Equality and Diversity*].

Research Methodology

The survey was designed with a sample of Ontario lawyers, stratified by year of call to include equal representation of lawyers called to the bar between 1998 and 2003, and prior to 1998. This disproportionate stratified sampling scheme was devised to ensure an oversampling of recent calls to the bar where there is the greater ethnic and racial diversity. In recent years the legal profession has become more diversified as growing numbers from racialized communities have entered the profession. This sample of lawyers represents the first cohort with a significant number of individuals from racialized communities among its ranks.

The survey was distributed in April 2003. Surveys were mailed to a random stratified sample of 5,000 lawyers, and completed and returned by 1,754 respondents for a response rate of 35%. A total of 91 surveys were undeliverable. In addition, several surveys were not completed due to lawyers' being appointed judges (1 case), no longer registered as members of the Ontario Bar (2 cases), no longer residing in Canada (3 cases), and death (1 case). When these cases are excluded, the adjusted response rate is 36%.¹⁰

¹⁰ This response rate is consistent with or superior to other recent surveys of the legal profession. For example, the survey of the profession conducted by the Alberta Law Society in 2003 received a response rate of 13% among active members. The authors of the report describe this rate of response as "high by industry standards" (See Cooper, Brockman, & Hoffart. *Final Report on Equity and Diversity*, *supra* note 9 at 15). Another survey, conducted in Alberta in 1994 by Professor Jean Wallace at the University of Calgary, received a rate of response of 39%. See Jean Wallace, "Work-to-nonwork conflict among married male and female lawyers" (1999) 20 *Journal of Organizational Behavior* at 797-816.

Findings:

Demographics

Table 1 shows the ethnic/cultural diversity of this sample according to the first language spoken by lawyers as well as their ethnic identification. English was the most prominent first language (82%), followed by French (9%), and another language (9%). The most common category of self-identification was Caucasian and European Canadian (85%), followed by “other” (7%), and bicultural or multicultural Canadian (3%). Less than 1.5% of lawyers chose each of the following categories: African-Canadian/Black Canadian (0.9%), Indian Subcontinent Canadian (1.3%), East-Asian Canadian (1.4%), Southeast-Asian Canadian (0.1%), Aboriginal (0.8%), and biracial or multiracial Canadian (1.0%).

Table 1: Ethnic Cultural Diversity

First Language Spoken	N	%
French	163	9.3
English	1,432	82.0
Another language	152	8.7
Total	1,747	100.0

Ethnic Identification	N	%
Caucasian, European Canadian	1,472	84.5
African-Canadian, Black Canadian	15	0.9
Indian Subcontinent Canadian (Indo-Canadian)	22	1.3
East-Asian Canadian (Japanese, Korean)	24	1.4
Southeast-Asian Canadian (Vietnamese, Cambodian, Thailand, Philippines)	2	0.1
Aboriginal (First Nation, Métis, & Inuit)	13	0.8
Biracial or multiracial Canadian	18	1.0
Bicultural or multicultural Canadian	50	2.9
Other	125	7.2
Total	1,741	100.0

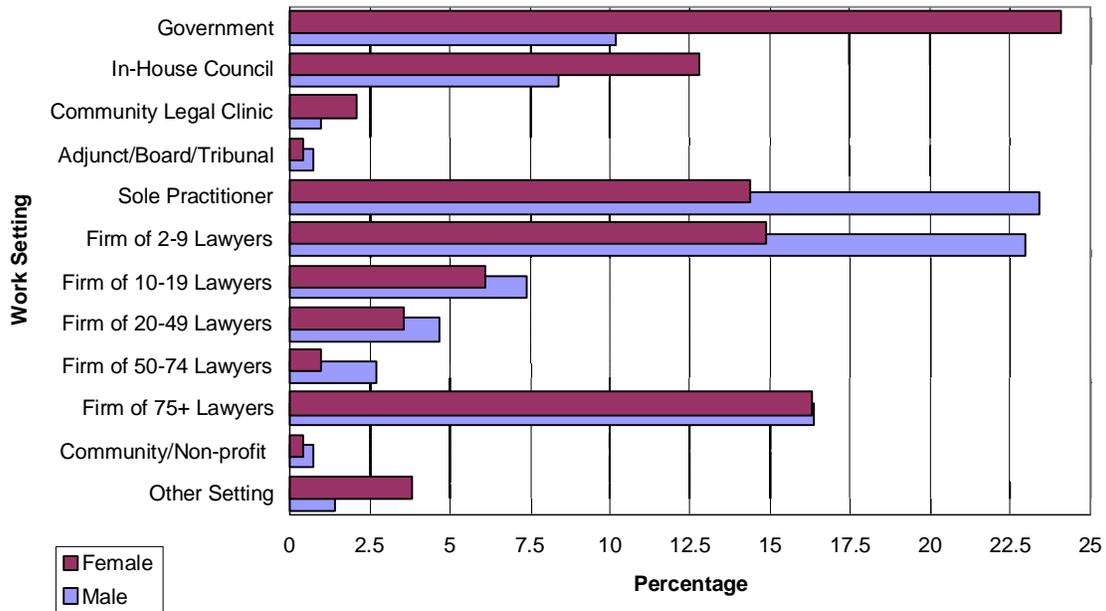
Lawyers were also asked if they considered themselves to be members of an under-represented community by virtue of their ethnicity or cultural background, race, religion or creed, disability, or sexual orientation (see Table 2). The largest percentage of respondents (75.6%) did not view themselves as members of under-represented communities. The most commonly cited under-represented communities were based on ethnicity or cultural background (10.2%), religion or creed (8.8%), and race (5.0%).

Table 2: Under-Represented Communities (N=1,718)

Do you consider yourself to be a member of an under-represented community?	Yes		No	
	N	%	N	%
Yes, by virtue of my ethnicity or cultural background	175	10.2	1,542	89.8
Yes, by virtue of my race	86	5.0	1,632	95.0
Yes, by virtue of my religion or creed	152	8.8	1,566	91.2
Yes, due to a disability	12	0.7	1,705	99.3
Yes, by virtue of my language	49	2.9	1,668	97.1
Yes, due to my sexual orientation	41	2.4	1,676	97.6
No, I do not consider myself to be a member of a minority group	1,299	75.6	419	24.4

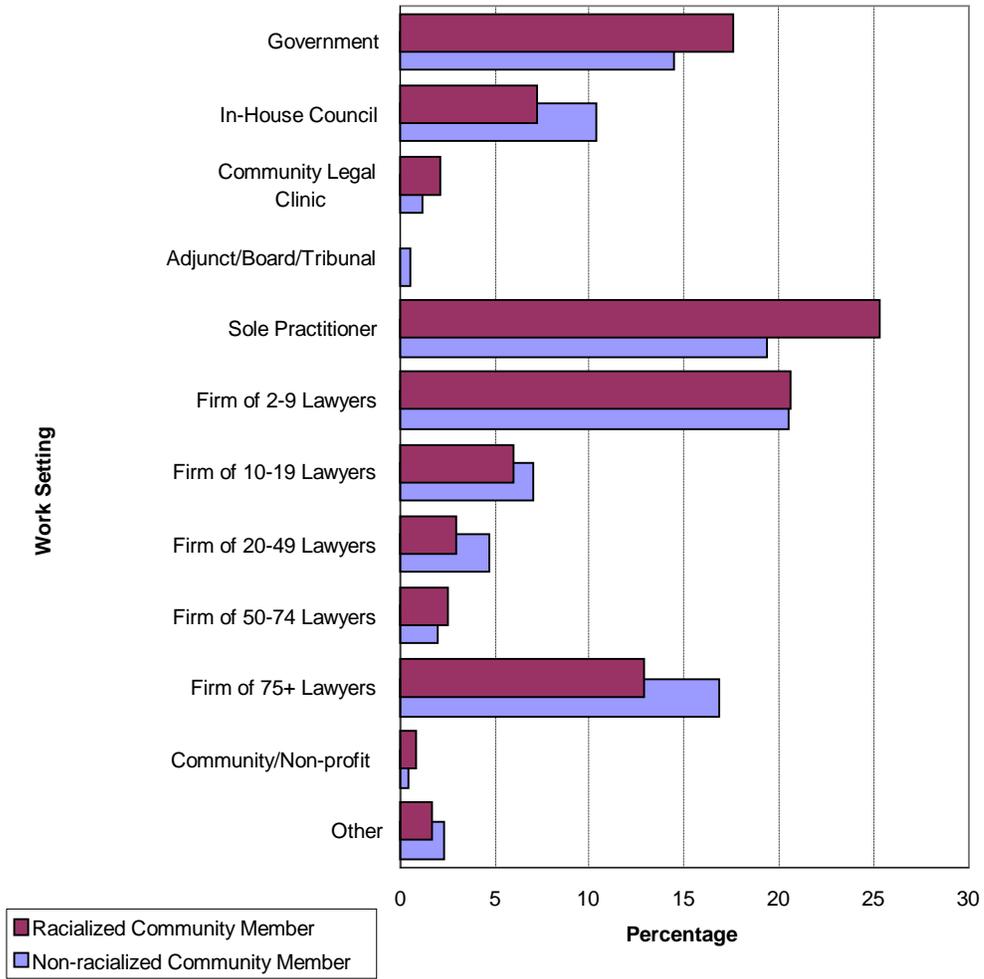
Figure 1 examines the percentages of men and women practising law across various work settings. Women lawyers are more likely to work in government (24% of women compared with 10% of men), or to be employed as in-house counsel (13% compared with 8%). In addition, women are slightly more likely than men to describe their professional position as other than the categories listed (4% compared with 1%). A higher percentage of men work as sole practitioners (23% of men compared with 14% of women) and in small firms of 2 to 9 lawyers (23% versus 15%). For both men and women, representation was greater in small firms (less than 10 lawyers) and in large firms (75 or more lawyers) than in mid-sized firms of 10 to 74 lawyers. Approximately 16% of all lawyers work in large firms of 75 or more.

Figure 1: Work Settings by Gender



Racialized communities remain under-represented within the profession as a whole. A total of 233 lawyers identified themselves as people of racialized communities (15% of the sample), while 1,303 lawyers (85%) identified as non-racialized communities. Yet, interestingly, the work settings of lawyers of racialized and non-racialized communities differ only slightly (See Figure 2). In government work settings, where employment equity policies have been implemented, 18% of racialized lawyers are employed on staff. Twenty-four percent (24%) of racialized lawyers work in community legal clinics and 22% of racialized community lawyers are employed by community and non-profit organizations. Furthermore, racialized lawyers are more likely to work in small law firms (less than ten lawyers) and in the large law firms (over fifty lawyers) than in mid-sized firms (of ten to fifty lawyers).

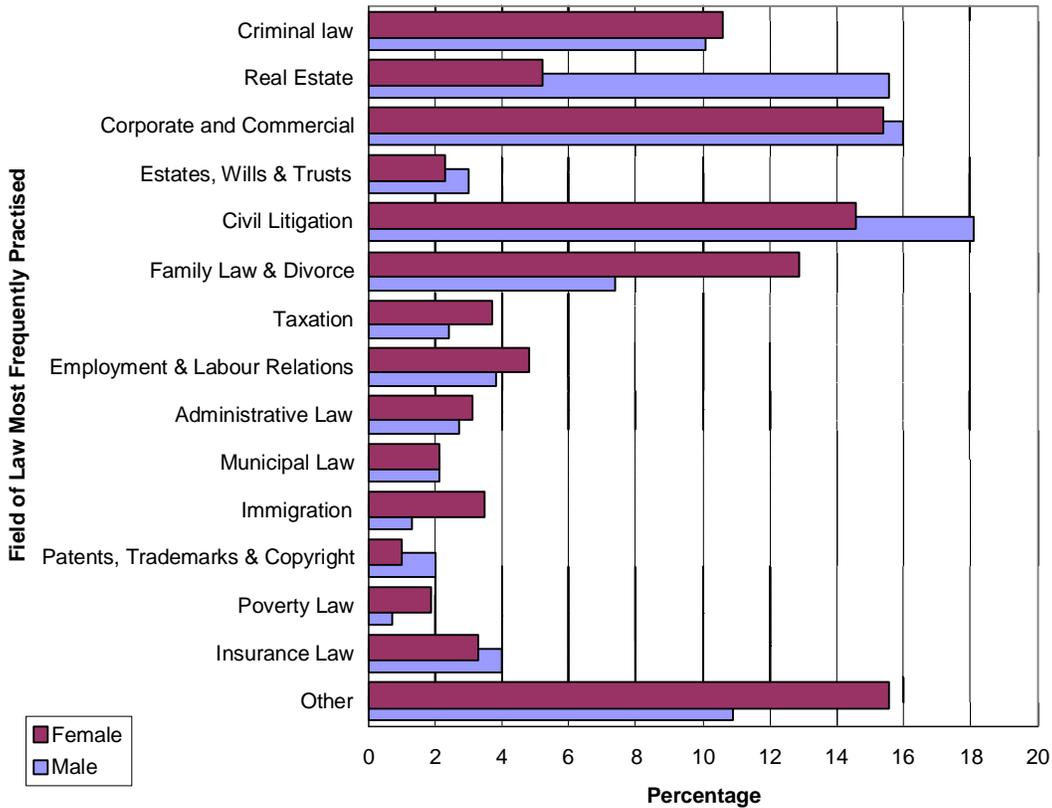
Figure 2: Work Settings by Racial/Ethnic Background



Fields of Law Practised

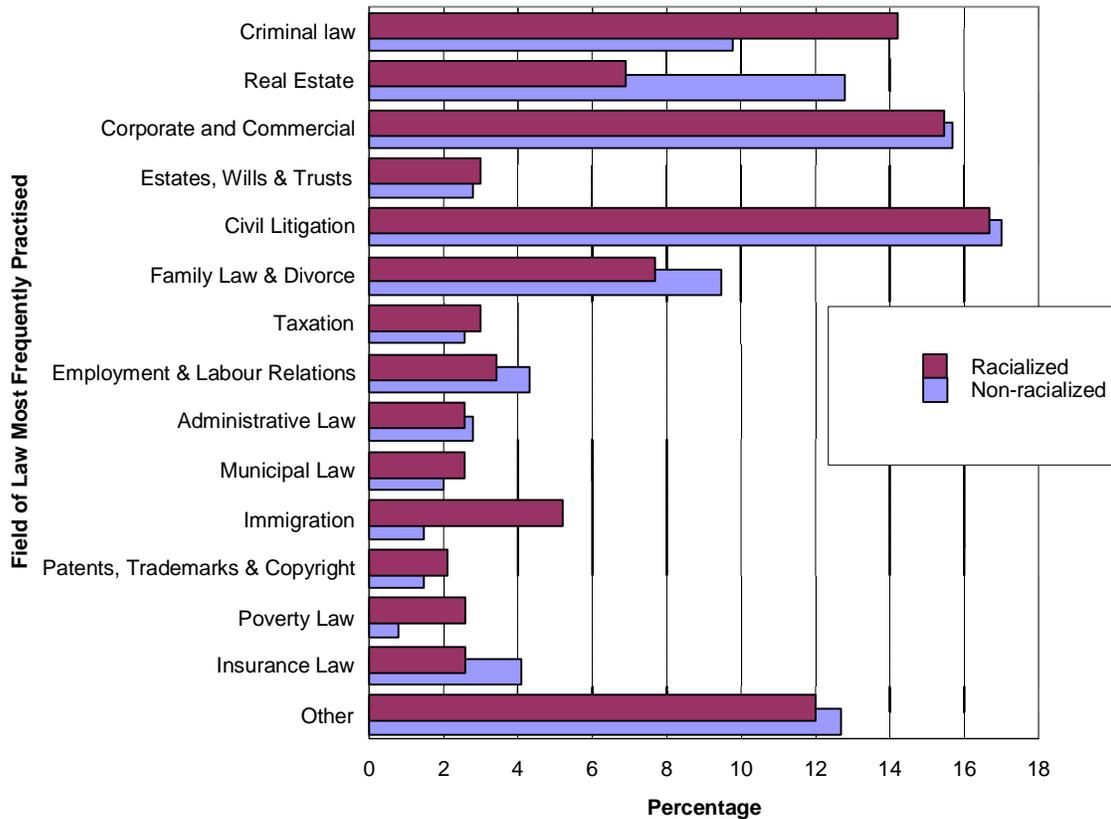
With regard to areas of law practised, a number of differences occur along gender lines (see Figure 3). Women are more likely than men to practise family or divorce law (13% compared with 7%), and fields classified as “other” (16% compared with 11%). In contrast, men are much more likely than women to practise real estate law (16% compared with 5%). Males are also slightly more likely to practise civil litigation than their female counterparts (18% compared with 15%) ($p < .001$). Men and women are equally likely to practise in the areas of administrative law (3%), municipal law (2%), corporate and commercial law (16% of men compared with 15% of women), and criminal law (10% of men compared with 11% of women).

Figure 3: Fields of Law by Gender



Racial and ethnic diversity also influences which fields of law a lawyer will practise (Figure 4). Non-racialized and racialized lawyers have approximately the same likelihood of practising civil litigation (17%), and corporate and commercial law (16%). However, racialized lawyers are slightly more likely to practise criminal law (14%, compared with 10% of non-racialized lawyers), immigration law (5% compared with 2%), and poverty law (3% compared with 1%). Meanwhile, non-racialized lawyers are more likely than lawyers of racialized communities to practise real estate (13% compared with 7%).

Figure 4: Fields of Law by Racial/Cultural Identification



Earnings

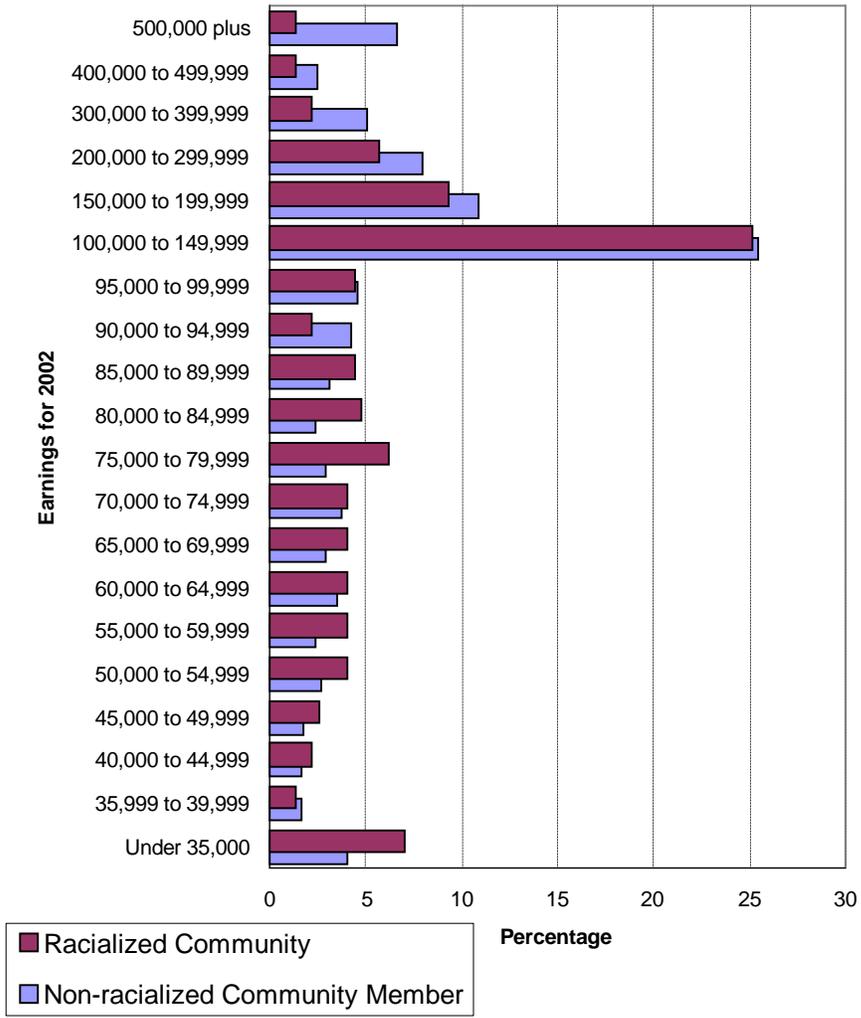
Women remain less likely than their male colleagues to enter the highest salary ranges. Approximately 33% of men and only 17% of women earned salaries above \$150,000. On the other hand, women were more highly represented in the lower income categories under \$90,000. Some, but unlikely all, of this disparity may be attributed to the higher representation of women among newer entrants to the profession and among part-time employment.¹¹

¹¹ Fiona Kay & John Hagan, “The “Persistent Glass Ceiling: Gendered Inequalities in the Earnings of Lawyers” (1995) 42 *British Journal of Sociology* 2 at 279-309; John Hagan, “The Gender Stratification of Income Among Lawyers” (1990) 68 *Social Forces* 3 at 835-55; Barry Adam & Doug Baer, “The Social

The pattern observed among members of different racialized/ethnic communities parallels gender disparities in earnings: lawyers of racialized communities are more likely than non-racialized lawyers to report earnings in the income brackets under \$90,000 (See Figure 5). It is noteworthy that racialized community lawyers are more highly represented in the lowest income levels of under \$35,000. In sharp contrast, non-racialized lawyers are more highly represented among income levels over \$150,000. Overall, racialized lawyers remain conspicuously absent from the higher income levels ($p < .05$).

Mobility of Women and Men in the Ontario Legal Profession” (1984) 21 *Canadian Rev. of Soc. and Anth.* 1 at 21-45.

Figure 5: Earnings by Racial/Ethnic Identity



Private Practice: Hours, Clientele, and Partnership

Next we examine three aspects of private practice: hours, clientele, and partnership. The survey asked respondents to report the number of hours worked per weekday and weekend. Both men and women work, on average, nine hours per weekday, whether in private or non-private practice. Gender differences emerge only when it comes to hours worked on weekends by non-private practitioners. In non-private practice, men work an average of 3 hours per weekend compared with 2 hours for women.

In private practice, significant differences emerge between racialized and non-racialized community members and the hours worked (see Table 3). Interestingly, it is the racialized community lawyers that work the longer hours. On average, members of racialized communities work 9.44 hours per weekday, compared with 8.92 hours per day among members of non-racialized communities. Lawyers of racialized communities also work more hours than those from non-racialized communities on the weekend (4.74 hours compared with 3.56 hours).

Table 3: Hours Worked by Private Practitioners by Racial/Ethnic Identity

	Non-Racialized Community		Racialized Community		t-value of Difference
	Hours ^a	N	Hours	N	
Average Number of Hours Worked Each Weekday	8.92 (2.089)	899	9.44 (2.276)	160	-2.71**
Average Number of Hours Worked Each Weekend	3.56 (3.140)	897	4.74 (4.277)	159	-3.32**

** p<.01

^a Standard deviations are in brackets beneath mean averages.

When it comes to non-private practice, no statistically significant differences surface, with lawyers across communities working, on average, 8.8 hours weekdays and 2.7 hours on the weekend. I also examined gender and racial/ethnic comparisons across the number of hours billed and hours dedicated to pro bono and to Legal Aid. There were no statistically significant gender differences in either billables or the time devoted to Legal Aid cases.¹² In contrast, there are statistically significant gender differences in the hours devoted to pro bono legal work. Men spend more time on pro bono work. Men dedicate, on average, 110 hours annually to pro bono work per year compared with 61 hours by women.

The number of hours devoted to billables, pro bono, and Legal Aid work by racial/ethnic identity also reveals interesting contrasts and parallels. The slight differences among the billable hours of racialized and non-racialized lawyers (1,427 compared with 1,385 hours, respectively) proved to be statistically insignificant. Yet, lawyers of racialized communities devote more hours, on average, to Legal Aid than non-racialized

¹² Men billed, on average, 1,409 hours per year, while women billed, on average, 1,464 hours. For hours devoted to Legal Aid men claimed, on average, 113 hours compared with 167 hours reported by women.

lawyers and this difference is statistically significant (233 hours compared with 109 hours).

Clientele

Clientele responsibilities were analyzed based on the amount of contact lawyers have with clients and the percentage of work representing corporate or other clients. There were no statistically significant differences between men and women and the types of clients they represent. However, racialized lawyers spend a greater *percentage of their time* (62%), relative to non-racialized lawyers (55%), representing clients other than corporate or institutional clients.

Partnership

Men continue to dominate among partnership positions: 63% of men working in law firms are partners compared with only 35% of women. The gender difference in partnership status is sizeable and statistically significant ($p < .001$). However, to study the relationship between partnership status and gender it is necessary to consider tenure or years of experience. Therefore, bar admissions are divided into three separate cohorts: lawyers called to the bar from 1996 to 2002 (32% of the sample), lawyers called to the bar from 1989 to 1995 (18%), and prior to 1989 (50%). Gender differences are most striking among lawyers called to the Ontario Bar between 1989 and 1995, a cohort that would likely have already passed the time of partnership decisions. In this seven-year cohort, 75% of men compared with only 53% of women were partners in 2003. The gender

disparity in partnerships was highlighted by many women lawyers in our study; these women frequently commented on the consequences of having children on one's partnership prospects:

As a mother, the main challenge I have is balancing my career with my family life. In order to achieve the balance, women in my profession often find they have to abandon certain goals, such as partnership. In a firm of [approximately 130] lawyers, we have only 4 female equity partners. None of those four women made partner after she had children. Two of them don't have children and the other two only had children after making partner. Equality of the sexes is something we like to pay lip service to but it does not exist. (Case # 0075: female, associate in a large law firm)

I also examined partnership status among people from racialized communities. Only 40% of lawyers of racialized communities are partners. In sharp contrast, 58% of all non-racialized lawyers are partners in law firms. The disparity in partnership status across ethnic/racial background is also statistically significant ($p < .001$). When year of call to the bar is taken into account, the most striking disparities appear among more senior cohorts of bar admissions (those called to the bar prior to 1989). Among lawyers with at least 15 years of practice experience, 81% of non-racialized community members are partners compared with 65% of racialized community members. Yet, among the most recent cohort, lawyers called to the bar between 1996 and 2002, differences between racialized and non-racialized lawyers appear small and statistically insignificant. At this stage of practice, many law firm associates have yet to receive the invitation to join partnership circles. However, even among relatively junior lawyers, there is an awareness of inequities for racialized communities striving to reach partnership in law firms. As two lawyers, one an associate and the other a partner, commented:

I hope that I will be able to recommend to my children to into the practice of law. At the moment, if I were to do it over, I would train to be a medical doctor. The hours and hierarchical separation between small and large law firms as reflective in salary and work quality differential makes the practice of law less motivating and enjoyable. However, the goal of attaining partnership at larger firms remains out of reach for most visible minority lawyers. (Case #2904: female associate in a small law firm)

The difficulties that visible minorities have in moving “up the ladder” in traditional firms continues. This is compounded by minorities hitting the “glass ceiling” with client promotion. Therefore, more minorities are entering ethnic-based practices. (Case #0090: male partner in a small law firm)go

Workplace Support and Benefits

Among the most common themes expressed by lawyers in our study was that of a lack of workplace support to accommodate family responsibilities. Several lawyers commented on the stigma associated with maternity leaves and the pressures on women to return early from maternity leaves to demonstrate commitment to the law firm. As one lawyer stated:

Depends on your gender. Young female lawyers are still having a hard time being accepted into the “boys” social networks. Also, maternity leaves are frowned upon – most women take very short maternity leaves so as to placate the partners. (Case #2652: female lawyer working in an “other” legal setting)

Heavy demands of legal careers and a lack of accommodation to family responsibilities typical of private practice have perhaps resulted in women postponing childbearing. A sizeable proportion of women lawyers in our sample delayed having children. For example, only 25% of men lawyers remained childless compared with 43% of women lawyers. The obstacles to having children while managing a career in law are perhaps

anticipated by women as early as the job interview process. Several women lawyers noted that they experienced questions during job interviews that anticipated employers' reluctance to hire women lawyer who may one day become parents.

Attempts to initiate improved parental leave arrangements require coordinated efforts and encounter considerable resistance; the following two quotes illustrate two sides of this debate. The first is from a woman partner working in a large law firm.

Women are still terribly discriminated against in our industry. In the last 18 months, as a partner, I have had to fight very hard to ensure both our junior associates were paid the same (the rest of the firm wanted to pay a female associate less although she had more experience) and have had to battle out a family leave policy for myself and the junior lawyers. I am continuously surprised by the gender bias of my colleagues and their silent oppression. This is not an industry for wallflower women. We need to make our profession more accommodating to women. (Case #2080: female partner in a large law firm)

The second quote is from a male partner, also working a large law firm.

The policy is generous. It included (I think) parental leave which is ridiculous. Children are parent's responsibility, not the firm. Lawyers should make up their minds if they want to be a lawyer or a mother. Lawyers need a supportive spouse. It is not the firm's responsibility to deal with this issue. (Case #3648: male partner in a large law firm)

I could not help but wonder if these two partners perhaps work in the same law firm.

Discrimination

A number of different questions were used to measure forms of discrimination. These questions inquire about specific instances of exclusion and discrimination experienced by lawyers. It should be noted that these questions offer more specific and personal

experiences of exclusion and discrimination than are included in numerous studies. Often research examines only general patterns of discrimination within the profession. These broader questions (e.g., “Do you think discrimination against ethnic or racial minorities exists in the legal profession?”) tend to illicit larger percentages reporting discrimination, in part, because these questions ask about the pervasiveness of discrimination generally, rather than more specific and personal experiences with discrimination. The questions used in the present study inquire about specific events, and as such, they provide more conservative estimates than questions of a global nature.

To measure forms of discrimination, participants were asked if they were aware of any situation in which they had been denied opportunity to take major responsibility for a case/file either because a client or a colleague had objected to their sex, ethnic, racial or cultural background, disability, language, or sexual orientation. An additional question was included to measure discrimination by gender: “Have you been assigned or referred cases/files because of your sex?”

Women are more likely to state that they had been denied a case/file because clients had objected (18% of women compared with 4% of men). Likewise, women are more likely to report denial of opportunity because someone in their firm objected to them (9% of women compared with 1% of men). Women are also more likely to say that although no one in their firm had objected to them working on a file, this situation had happened to someone else at their firm. Again, women are more likely to say that they had been assigned files because of their sex (33% of women compared with 5% of men). Of

course, these categories assume that lawyers are aware of reasons for the assignment of files; official reasons may mask (however thinly) gendered assumptions:

Although the reason stated for the assignment is not my sex, commercial transaction files are often not assigned to “mothers.” (Case #0075: female associate in a large law firm)

Lawyers of racialized communities are more likely to state that they had been denied opportunity for a case/file, frequently or a few times, because clients had objected (10% of racialized lawyers compared with 4% of non-racialized lawyers). People of racialized communities are also more likely to state that this had happened to them on one occasion. A racialized lawyer in our sample commented on the battle to retain challenging and important files:

It almost happened. I had a high profile file and was told to step aside so a white lawyer could have it. I got to retain the file after I threatened to resign. (Case #2503: female in-house counsel)

Lawyers were also asked about their experiences of specific forms of exclusion and discrimination; for instance, the degree to which they have been assigned tasks beneath their skill level or excluded from social gatherings. These questions are analyzed according to gender and racial/cultural group identity. Measures are scored on a 5-point scale, where 1=never, 2=rarely, 3=occasionally, 4=routinely, and 5=frequently. A higher mean score implies a greater frequency of occurrence.

Table 4 shows experiences of exclusion and discrimination by gender. All of these measures, with the exception of whether or not lawyers experienced rude or inappropriate remarks by clients, reveal statistically significant differences between men and women.

Women perceived the following situations to have happened to them with *greater* frequency than men: (a) assigned tasks you think are beneath your skill experience; (b) not invited to work with particular senior lawyers in your firm or office; (c) excluded from social gatherings; (d) denied work when you expressed an interest; (e) received comments about your physical appearance; (f) experienced derogatory comments about your family status; (g) experienced disrespectful remarks by judges or other lawyers; (h) experienced a lack of support by office/firm staff.

Table 4: Experiences of Discrimination by Gender (Mean and Standard Deviations)

During your career as a lawyer, how often have you:	Men			Women			t-value of difference
	Mean	SD	N	Mean	SD	N	
Been assigned tasks you think are beneath your skill experience?	2.45	.94	1,088	2.74	.89	582	-6.16***
Not been invited to work with particular senior lawyers in your firm or office?	1.62	.94	1,044	2.08	1.13	571	-8.29***
Been excluded from social gatherings?	1.47	.75	1,074	1.84	1.01	584	-7.74***
Been denied work when you expressed an interest?	1.55	.75	1,067	1.82	.92	579	-5.98***
Received comments about your physical appearance?	1.59	.86	1,078	2.10	1.10	585	-9.81***
Experienced derogatory comments about your family status?	1.11	.41	1,081	1.31	.67	587	-6.53***
Experienced disrespectful remarks by judges or other lawyers?	1.70	.80	1,091	2.04	.94	588	-7.37***
Experienced rude or inappropriate remarks by clients?	1.90	.82	1,086	1.94	.84	583	-.90
Experienced a lack of support by office/firm staff?	1.77	.82	1,079	2.00	.98	584	-4.88***

*** $p \leq .001$

Respondents were asked: "How often have you experienced the following events during your career as a lawyer?" Responses were coded on a 5-point scale on which never = 1, and frequently = 5. The higher the

mean response, the more frequently respondents perceived these events as having happened to them.

When we examine the same measures of exclusion and discrimination according to racial/cultural group identity, a very different trend emerges; only one of these differences is statistically significant. Compared with lawyers of non-racialized communities, racialized lawyers experience more often (occasionally, routinely or frequently) disrespectful remarks by judges and other lawyers (26% compared with 21%, $p < .10$).

One possible explanation for the paucity of more sizeable differences is the fact that people of racialized communities within this study are made up of lawyers from a number of different communities, such as African-Canadians, Southeast Asian Canadians, Indo-Canadians, biracial or multiracial Canadians, and Aboriginals. Although these individuals are aggregated for the purposes of statistical analyses, as separate groups they may have very different experiences of exclusion and discrimination. The amalgamation of so many different groups, with differential visibility and numbers within the legal profession, is likely to mask the more extreme experiences of specific communities.

Another possible explanation is that racialized lawyers, on average, may not be aware of specific events occurring to them, such as exclusion from social gatherings or not being assigned particular files. In contrast, women may be more aware of these exclusionary practices because they are more established (greater numbers in recent years) and there is increased awareness today by both men and women of sex discrimination in law practice.

Alternatively, racialized lawyers may simply hold lower expectations of others, and therefore, they may tolerate or dismiss disrespectful comments by clients, other lawyers or judges, as familiar behavior. Finally, these data may suggest lawyers of racialized communities are simply not subject to overt and explicit discriminatory acts (e.g., rude comments, exclusion from social gatherings, and clear denial of opportunities).

And in fact, lawyers participating in the Ontario lawyer survey spoke directly to this issue. Several lawyers explained that discrimination may be seeded much earlier through the entrance requirements to law school, law school courses, the articling phase, and during the interview process. The following two racialized lawyers explain:

You are studying the diversity of career paths among a group of people which is not all that diverse (ethnically, socially, etc.). What this study won't capture is the fact that most diversity is weeded out well before graduation from law school, because of factors such as high tuition, cultural perceptions of law school, and arbitrary barriers to admission to law school such as the LSAT and numerous other barriers. (Case #4987: male associate in a small law firm)

I believe that being a visible minority, or having a name that implies minority status had affected my ability to even acquire interviews in private sector firms. Many individuals/classmates with similar marks, education, [and] volunteer experience in law school acquired interviews with prestigious firms whereas I was being given interviews only at government and/or legal clinic type firms. (Case #3747: male lawyer working in a community or non-profit organization)

Other lawyers suggested discrimination may be more subtle, less identifiable, yet consequential nonetheless.

If you love the practice of law and are white and smart – nothing (except maybe finding a good place to service your SUV) is an obstacle. If you are

not white then things might be rougher – but I have only an anecdotal sense of that. (Case #1078: male lawyer working in a community or nonprofit organization)

Overall the practice of law is a good profession although I would not push it on my son. Women and visible minorities generally face additional challenges in the private sector, as the model upon which work is valued is not conducive to the individual values of the person. In other words, the value of family and lifestyle which is generally of primary importance to these groups is not recognized as being of any value to the organization. This will never change as the market is driven by services and the competition is inherent within the marketplace. To put it another way – it is a business.

Unfortunately, those within these groups that are eventually pushed out to the fringes of the practice of law or non-traditional practice of law lose out. The biggest loss however, is to the firms themselves and the general public as the core values that drive these individuals are the same values that would make them effective lawyers. There is so much that could be gained for all involved, if the model of the practice of law embraced the primary needs of those within the profession. It is doubtful that any firm would be bold enough to take such a step in this direction as it would require a courage and corporate resolve that currently does not exist among the old and new generations of lawyers. The bottom line is that discrimination is alive and well in the practice of law, it is just that now it is so subtle that even those that are being discriminated against don't see it – but it is there. You just need to look hard enough. (Case #3568: male government lawyer).

Racialized Lawyers' Perception of the Profession

These observations by lawyers from racialized communities prompt us to ask lawyers more generally about workplace satisfaction and perceptions of the profession. The questionnaire asked lawyers to score a number of job qualities based on their level of agreement or disagreement.¹³ Lawyers of non-racialized communities were more likely to state that: the benefits are good; job security is good; they are rewarded reasonably given

the market for legal services; and, the work allows them to balance career and family. Meanwhile, lawyers from racialized communities were more likely to state that their workload is too heavy but by practising law, they are making a difference to people's lives.

Conclusions and Consequences

The Ontario legal profession continues to be characterized by an under-representation of women and racialized groups. Forty-four percent of the profession's lawyers are women and approximately fifteen percent of lawyers self-identify as members of under-represented communities by virtue of race, ethnicity or culture. Patterns of gender inequality persist in the profession: women are more likely to work in government than private practice and to work in particular fields of law. Women are under-represented in law firm partnerships and the higher incomes. Yet, women in private practice bill at equivalent levels to men and share similar clientele responsibilities. A lack of support to accommodate family responsibilities (adequate maternity leave and flexible hours) resonated among the concerns of many lawyers, both women and men, in our study. Women reported exclusion from opportunities to work on important files and with senior lawyers, as well as experiencing a range of discriminatory behaviors. Full gender equality is not yet on the legal profession's horizon.

¹³ Answers were coded along a five-point scale (1=strongly disagree, 2=agree, 3=neutral, 4=agree, 5=strongly agree).

Interestingly, racialized lawyers appear to work, on average, longer hours in private practice, as well as to dedicate more time to Legal Aid. Racialized lawyers are also less likely to be made partners in law firms and are notably absent from the higher income levels of the professional hierarchy. Differences also permeate the fields of law and sectors of the profession where racialized lawyers are likely to find work. Racialized lawyers reported experiencing disrespectful remarks by judges and other lawyers, yet they did not identify overt tactics of exclusion and discrimination. Rather, they tended to describe the nature of bias and discrimination as more subtle and at times systemic. Not surprisingly perhaps, racialized lawyers reported lower levels of job satisfaction.

Yet, despite entrenched inequalities and barriers to entry and advancement in law, women and racialized lawyers have made inroads to the upper echelons of the profession and have been instrumental in effecting change. The politics of espousing non-discrimination, access, and equality for the under-represented groups as core values of the profession creates its own tide for internal transformation and behavioral changes that cannot be fully thwarted, despite efforts of resistance. As Richard Abel notes, “...symbolic politics postpones the need to deliver by making a promise that is costly to revoke and can always be invoked. If ideological transformation has anticipated behavioural change, it remains a constant goad to action.”¹⁴

POLICY: WHAT IS TO BE DONE?

Professional Integrity And Sources of Discontent

Deborah Rhode's American research suggests similar concerns regarding professional integrity and sources of dissatisfaction in the profession. As Rhode observes,

Commercialism and incivility are increasing; collegiality and collective responsibility are in decline. The priority of profits and the resulting sweatshop schedules have squeezed out time for family commitments as well as public service. Equal opportunity remains an aspiration, not an achievement. Race and gender bias are condemned in principle but often overlooked in practice... Many have lost connection with the ideals of social justice that first led them to a legal career. There is, in short, some room for improvement.¹⁵

Research also suggests that for many lawyers legal practice has not lived up to their expectations of contributing to the social good, and this lack of contribution is an important source of career dissatisfaction.¹⁶ This leads us to a broader consideration of the casualties of contemporary profit orientation in law practice.

The Casualties of a Dominant Profit Orientation

A. Lack of Recognition Pro Bono and Legal Aid Work

¹⁴ Richard Abel. 2003. *English Lawyers Between Market and State: The Politics of Professionalism* (Oxford: Oxford University Press).

¹⁵ Rhode, *Pursuit of Justice*, 1556.

¹⁶ ABA Young Lawyers Div. Surv., Career Satisfaction 19 (2000); ABA Young Lawyers Div. Surv., Career Satisfaction 11 (1995).

Many firms refuse to count pro bono activity toward billable hour requirements or to value it in promotion and compensation decisions.¹⁷ Failure to acknowledge such contributions is gravely shortsighted. First, for young lawyers, voluntary public service can provide valuable training, contacts, and courtroom experience. The work also lends enhanced purpose and meaning to professional lives.¹⁸ And, as the recent *Report of the Sole Practitioner and Small Firm Task Force of the Law Society of Upper Canada* reveals, there are serious concerns in Ontario about affordable legal services, particularly the legal aid system which falls short of providing access to all those in need and offers inadequate financial compensation to lawyers who represent legally-aided clients.¹⁹ This impact is perhaps most profoundly felt among sole practitioners and small firm lawyers, realms where both women and racialized groups (equality seeking groups) more often work.

B. Lack of Available Mentors

Another casualty of the predominantly profit-oriented law practice is that of mentoring relationships. Experienced lawyers, under growing pressure to generate business and augment billable hours, may lack sufficient time and incentive to train and advise junior colleagues. Lack of mentoring frustrates associates and even hastens departures from the practice of law. Those most likely to leave the profession are those whose race, gender,

¹⁷ Cynthia Fuchs Epstein. "Stricture and Structure: The Social and Cultural Context of Pro Bono Work in Wall Street Firms" (2002) 70 *Fordham L Rev.* at 1689, 1694-96; Rhode, *The Pursuit of Justice* 1554-5; Deborah L. Rhode. "The Profession and its Discontents." (2000) 61 *Ohio State Law Journal* 4 at 1347-1360 [hereinafter Rhode, *The Profession and its Discontents*].

¹⁸ Am. Bar Ass'n. Young Lawyers Division, *Career Satisfaction* 11 (1995).

¹⁹ *Report of the Sole Practitioner and Small Firm Task Force*, 8.

ethnicity or sexual orientation imposes additional obstacles to mentoring relationships. This selective attrition process further compromises professional commitments to diversity and equal opportunity within the legal profession.²⁰

C. Inertia through Policy and Research

Law societies and bar associations have responded admirably with task forces, working groups, committees, surveys, published reports, policy development, and the implementation of educational programs. However, much of this effort can be criticized as long on policy recommendations while short on strategies for enacting effective policies or monitoring levels of progress.²¹ Research is needed that explores how the profession functions *in practice* and that evaluates the impact of various reform strategies.²²

Ironically, the process of data collection and report generation has created significant obstacles to further change. A widespread perception exists that barriers are crumbling, women and minorities are moving up promotional ladders, and equal opportunity has been substantially achieved. Whatever racial or gender differences remain are therefore attributable to individual variations in preferences and competencies. As

²⁰ Rhode, *The Profession and its Discontents*, 1335.

²¹ Carrol Seron. "Is 'In the Interests of Justice' in the Interests of Lawyers? A Question of Power and Politics." (2002) 70 *Fordham Law Review* 1849, 1855; Susan Sturm, "Constructing the Practices of Accountability and Professionalism: A Preliminary Comment on 'In the Interests of Justice'" 70 *Fordham Law Review* at 1903.

²² Rhode, *Pursuit of Justice*, 1559.

Deborah Rhode observes, this ‘no problem’ problem has itself become a central problem.²³

Strategies for Progress

A. Different Perceptions of Discrimination

Significant progress will require a clear understanding of the different perceptions of the problem and the challenges involved in addressing these dynamics. An appropriate starting point is competing definitions of discrimination. To many, discrimination implies overt intentional prejudice. As Deborah Rhode observes,

Less egregious conduct may pass unnoticed among those who don’t need to notice because it doesn’t affect their lives. And much of what they do see – demeaning assumptions, inadvertent slights, petty harassment – will seem like isolated instances, not institutionalized patterns. The legal landscape may look different to lawyers are on the receiving end of repeated forms of bias, however unintended. ... For lawyers with these experiences, the problem has less to do with intentional discrimination than with unconscious stereotypes, unacknowledged preferences, and workplace policies that are neutral in form but not in practice.²⁴

Subtle and systemic forms of discrimination and exclusion are more difficult to isolate and sanction. Yet, their detrimental consequences for legal careers are undeniable. Changing the culture of workplaces will require acknowledgement of how more inclusive environments can benefit all lawyers, their clients, and the quality of legal services. For example, David Thomad and Robin Ely, in a *Harvard Business Review* article, argue that

²³ Rhode, *The Profession and Its Discontents*, 1349.

²⁴ Rhode, *The Profession and its Discontents*, 1335.

adequate representation of lawyers from different cultural backgrounds and with contrasting experiences is critical for success in an increasingly diverse marketplace.²⁵ Moreover, tactics that promote equal opportunity for women and minorities can improve the quality of life for all lawyers.

B. Improved Approaches to Managing Human Resources

Another important strategy is the education of lawyers in managerial positions. Although there is much fury that the profession is “lost,” “in crisis,” and in a steep “decline” toward a business mentality void of professional ideals;²⁶ the reality is many lawyers fail to incorporate effective business management strategies. Law schools offer few, if any, courses on technological, financial, and human resource aspects of operating a law practice. Managing lawyers seldom receive formal training in personnel issues and research on employment satisfaction is under-utilized. The research literature identifies several conditions that are likely to yield professional fulfillment (and organizational commitment): tasks that individuals view as challenging and rewarding, a degree of autonomy and control over work; sufficient time for personal, public service, and family commitments, and supportive collegial work environments. Lawyers with managerial responsibilities require information about how to enhance the conditions of their practice setting – and hence increased productivity and retention of legal talent.

²⁵ David A. Thomas & Robin J. Ely. “Making Differences Matter: A New Paradigm for Managing Diversity.” (1996) *Harv. Bus. Rev.* Sept.-Oct. at 79, 83.

²⁶ See generally, Anthony Kronman, *The Lost Lawyer* (1993); Sol. M. Linowitz, *The Betrayed Profession* (1994); Deborah L. Rhode “The Professionalism Problem” (1998) 39 *Wm. & Mary L. Rev.* at 283, 284n.3

C. Balanced Lives and Bottom Lines

Alternative working arrangements (e.g., part-time hours, flexiplace, telecommuting), humane working hours, and childcare assistance (e.g., parental leaves, childcare benefits, daycare facilities) can boost bottom lines, reduce excessive recruitment and retention costs, along with lawyers' disproportionate rates of stress, substance abuse, and health problems. Current law firm attrition rates alone demonstrate a compelling business case for more balanced lives. Law firms pay a heavy price through disrupted client and collegial relationships. The costs are heavier still when one considers the loss of legal talent that occurs when junior lawyers depart for other firms and workplaces offering greater flexibility and supports. Firms forfeit investments made in aggressively recruiting the most promising legal talent and in fostering professional development and integration to firm-specific culture.

There is no shortage of promising proposals. The A.B.A., Law Societies, and C.B.A. have produced a wealth of research studies, recommendations, and numerous model policies to address such issues as flexible, compressed or reduced schedules, short-term leaves, and parental leaves. However, employers need to ensure alternative arrangements work effectively for lawyers. Concerted efforts need to minimize resentment among colleagues by ensuring broad availability of alternative arrangements while

(1998); Lisa G. Lerman "The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity." (2001) 30 *Hofstra L. Rev.* 879-921.

preventing unreasonable allocations of work. This effort requires innovation and adaptability. The C.B.A. and Law Societies should monitor the satisfaction of employees on alternative schedules, the effects on colleagues, and the willingness of lawyers to use or accommodate such schedules. Systematic information needs to be collected on comparative promotion and attrition rates of full and part-time lawyers. Committees or supervisors will need to take initiatives to ensure adequate compensation, work assignments, and advancement opportunities for lawyers on alternative schedules.²⁷ Law schools also have a responsibility to educate and empower students to demand balanced lives as they launch their legal careers. Law societies and bar associations should pressure employers to provide working conditions conducive to balanced lives and quality legal work, and offer assistance to those with managerial responsibilities. Margaret Russell has argued that we need more effective strategies for the inclusion of issues of diversity throughout the curricula.²⁸ The same is true for issues of professional responsibility.²⁹

D. Diversity and Equal Opportunity

Other strategies should focus *directly* on diversity and equal opportunity. Many employers still need policies and channels for raising diversity-related concerns. Many workplaces lack formal mentoring programs that ensure support for women and minorities. Yet, toward the aims of hiring, retention, and professional advancement of under-represented groups, an increasing number of organizations have made use of

²⁷ Deborah L. Rhode “Balanced Lives for Lawyers.” (2002) 70 *Fordham Law Rev.* 6 at 2219.

²⁸ Margaret M. Russell. “McLaurin’s Seat: The Need for Racial Inclusion in Legal Education.” (2002) 70 *Fordham L. Rev.* at 1825.

diversity training and consultants. However well-intended, these strategies sometimes serve as “substitutes rather than as catalysts for change.”³⁰ Significant progress requires more than programs, it requires that lawyers *act* on recommendations. The expression applies, “don’t mistake motion for action.”

Law societies and bar associations have travelled a considerable distance through the development of model policies, rules of conduct, training materials, equity officers and departments within law societies, and continuing legal education programs targeting diversity issues.³¹ Greater effort should focus on the evaluation of the efficacy of these initiatives and the identification of specific strategies that prove most successful. Law societies and the C.B.A. can also work in partnership with law schools to address issues concerning the quality of professional life. Deborah Rhode suggests more attention needs to be focused on assisting solo and small firm practitioners to develop financially viable

²⁹ Rhode, *Pursuit of Justice*, 1561.

³⁰ Rhode, *The Profession and its Discontents*, 1335.

³¹ See Bicentennial Implementation Status Report and Strategy (Toronto: Law Society of Upper Canada, 2004); Promoting Dialogue, Creating Change: Equity and Diversity in the Legal Profession. Report on Equity Initiatives and Resources in the Legal Profession. (Toronto: Law Society of Upper Canada, January 2003); American Bar Association, Promoting Professionalism 61-2 (1998); Example policies at the Law Society of Upper Canada include: *New Rule of Professional Conduct dealing with sexual harassment* (1992); *New Rule of Professional Conduct dealing with discrimination* (1994); *Reduction in Annual Fee for Members Who are on Maternity, Paternity, or Parental Leave* (1992). Model policies include: *Recommended Personnel Policy Regarding Employment-Related Sexual Harassment* (1992); *Recommended Personnel Policy Regarding Employment-Related Sexual Harassment for Small Law Firms* (1994); *Guide to Developing a Policy Regarding Flexible Work Arrangements* (2003); *Guide to Developing a Policy Regarding Workplace Equity in Law Firms* (2003); *Preventing and Responding to Workplace Harassment and Discrimination: A Guide to Developing a Policy for Law Firms* (2002); *Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities; Legal Developments and Best Practices* (2001); *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements* (2001); *Gender Orientation and Gender Identity: Creating an Inclusive Work Environment, A Model Policy for Law Firms and other Organizations* (2004).

ways to meet the needs of under-served communities.³² Law schools and continuing legal education courses addressing the fuller diversity of practice settings are also needed if we are to improve the conditions of work for all lawyers and the reputation of law practice.

Finally, systematic information needs to be made available to students and practitioners about where and how to find diversity-friendly workplaces. Collaborative efforts could build best practice standards to evaluate legal employers on dimensions such as diversity, workplace supports/benefits, ethical practices, and pro bono programs. This recommendation for monitoring firms and other organizations who employ lawyers was made over a decade ago in the Canadian Bar Association's *Task Force on Women in the Legal Profession*.³³ Legal employers are presently ranked in a number of publications in terms of size, profitability, and salaries. They need greater incentives to compete on other levels.³⁴

Changes in law practice along these lines identified today require fundamental changes to the legal culture.³⁵ Current levels of professional dissatisfaction³⁶ and challenges of demographic and broader diversity suggest serious reassessment is on the table. Certainly, central to professional integrity, responsibility and reputation, is a commitment to principles of social justice and equality of opportunity both within the

³² Rhode, *The Profession and its Discontents*, 1335.

³³ Canadian Bar Association, *Task Force on Women in the Legal Profession* (Ottawa: C.B.A., 1993).

³⁴ Rhode, *Profession and its Discontents*, 1359.

³⁵ Rhode, *Profession and its Discontents*, 1359.

practice of law and the *profession* of law. The agenda represents realistic aspirations. As Deborah Rhode observes, “Lawyers have been at the forefront of every major movement for social justice” in recent history. The contemporary challenge is to direct those efforts toward meaningful reform and inclusivity within the legal profession itself.³⁷

³⁶ John Heinz et al., “Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar.” (1999) 74 *Ind. L. J.* at 735, 736.

³⁷ Rhode, *Pursuit of Justice*, 1561-2.