



1999

An Essay on Women and Intellectual Property Law: The Challenges Faced by Female Attorneys Pursuing Careers in Intellectual Property

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Kara Hagen, *An Essay on Women and Intellectual Property Law: The Challenges Faced by Female Attorneys Pursuing Careers in Intellectual Property*, 15 SANTA CLARA HIGH TECH. L.J. 139 (1999).

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AN ESSAY ON WOMEN AND INTELLECTUAL PROPERTY LAW: THE CHALLENGES FACED BY FEMALE ATTORNEYS PURSUING CAREERS IN INTELLECTUAL PROPERTY*

By Kara Hagen[†]

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I. INTRODUCTION

Intellectual property law is one of the most challenging, prestigious, and fast-growing practice areas in the law today, particularly in the Silicon Valley. This field of law allows very close, collaborative work with clients in conference rooms, and provides attorneys the chance to use their best adversarial skills in the courtroom. The subject matter varies from very technical, emerging issues to the time-tested symbols and products of everyday life. This essay highlights the special situation faced by female attorneys who pursue careers in the exciting and diverse field of intellectual property. This essay is not intended to further stereotypes or perpetuate gender differences. Rather, it relates the experiences of female intellectual property attorneys and necessarily reflects those perspectives through the societal, cultural, and historical framework upon which they are based.

As other writers note, all women have different experiences, and it is difficult to generalize those experiences into a specific perspective shared by every woman.¹ However, in order to discuss women as a group, some generalizations must be made, even though these generalizations do not apply to all women and may apply to some men. Therefore, the scope of this essay is limited to the issues facing female attorneys as perceived by the attorneys who were interviewed. This essay does not discuss the distinctions between the experiences of women of color and the experiences of other women.² Instead, this essay focuses only on those issues facing attorneys because they are women. It first looks at the current positions of women in the law. Next, this essay compares the challenges facing women in patent prosecution, intellectual property litigation, and trademark law. Finally, this essay concludes with an analysis of some possible solutions to the challenges facing women in intellectual property fields.

1. See Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL'Y 119, 124 (1997) ("It is difficult to justify theoretically an exclusive focus on women's experience as a critical lens . . . [when their] experiences do not necessarily characterize all women and may be shared by members of other groups.").

2. Women of color have to confront and overcome the bias of race, as well as the bias of gender. These issues are complex and often affect women of different races in diverse ways. See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 205-490 (Kimberlé Crenshaw et al. eds., 1995) (explaining the significant role played by race in the legal environment); Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 324 (1995) (citing a study of New York law firms where 94% of male attorneys and 86% of female attorneys are white).

II. METHODOLOGY

This essay uses the perspectives of four women who were interviewed in depth to illustrate the positions of women in intellectual property law. Throughout the essay, many references are made to those interviews, and they are used to narrate the situations faced by women in intellectual property law fields. The interviewees provided views and perspectives on various components of life as intellectual property attorneys based on their own personal views and experiences as well as those of their friends and co-workers. All of the interviews were conducted in Silicon Valley, and the interviewees brought with them the perspectives of the Silicon Valley legal environment. All interviews were conducted with the understanding that the names of the interviewees and their employers would not be used. This enabled the interviewees to provide a very frank, honest, and revealing depiction of life as female attorneys. For clarity and to avoid confusion, the interviewees are referred to by pseudonyms. Sandra is a full-time intellectual property litigator who is single and has no children. Anne is a part-time trademark attorney and a mother of three. Laura is a full-time trademark counsel for a communications company as well as a new mother. Nancy, a part-time partner, works as an intellectual property litigator and is also a mother.³

III. FEMALE ATTORNEYS IN INTELLECTUAL PROPERTY LAW

In 1995 women lawyers represented 23% of all attorneys.⁴ Although that figure signifies notably less than equal representation, the number of women in the legal profession has steadily grown over the years, and is expected to increase with each graduating class of law students. Since the 1987-1988 academic year, women have comprised over 40% of all first-year law students, and for years that numbers are available, have continued to make up roughly half of all graduating law students.⁵ If this level of enrollment continues, by the year 2010 it is estimated that women will comprise 40% of the legal profession.⁶

3. Sandra was interviewed in person at her office on October 3, 1997. The other attorneys were interviewed over the phone: Anne on January 12, 1998; Laura on January 21, 1998; and Nancy on January 22, 1998.

4. The statistics included in this essay are based on national surveys unless otherwise specified. See BARBARA A. CURRAN & CLARA N. CARSON, *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990s* 4 (1994) (projecting figures for 1995).

5. See BARBARA A. CURRAN, AMERICAN BAR ASSOCIATION, *WOMEN IN THE LAW: A LOOK AT THE NUMBERS* 6 (1995) [hereinafter *A LOOK AT THE NUMBERS*].

6. See *id.*

As the number of women in the profession has increased, so has the number of women in private practice.⁷ In 1980, more than half of female attorneys, 56%, were employed in private practice.⁸ By 1991 that number had jumped to include over two-thirds of female attorneys, or 70%, working in private practice.⁹ Even though many women head for private practice, the representation of female attorneys is not equally distributed throughout all levels of the profession.¹⁰ In 1991, women accounted for only 10% of all partners.¹¹ By 1995, nearly one quarter of all attorneys were women.¹² However, in 1994 the percentage of women partners had only slightly increased from the 1991 figures, to 13% of law firm partners.¹³ In addition, it is often only the largest firms that employ women or count women among their partners.¹⁴ As of 1991, only 39% of law firms employed female lawyers and only 26% of law firms could boast at least one female partner.¹⁵

There may be fewer partners who are female because female attorneys as a group tend to be younger than their male counterparts. The average age of female attorneys in 1991 was thirty-six years old, in contrast to an average age of forty-three years old for men.¹⁶ This age difference can be explained by the fact that approximately 80% of all women attorneys entered the profession after 1970.¹⁷ Among states, California has been ranked as the state with the most lawyers,¹⁸ and California is close to the national average both in terms of the percentage of female attorneys and in the average age of attorneys.¹⁹

7. *See id.* at 18.

8. *See id.*

9. *See id.*

10. *See id.* at 26.

11. *See id.*

12. *See* COMMISSION ON WOMEN IN THE PROFESSION, AMERICAN BAR ASSOCIATION, BASIC FACTS FROM WOMEN IN THE LAW: A LOOK AT THE NUMBERS 1 (1995) [hereinafter BASIC FACTS].

13. *See id.* at 3.

14. *See* A LOOK AT THE NUMBERS, *supra* note 5, at 23 ("Over 95% of firms with more than fifty lawyers had at least one female partner in 1991. In contrast, less than one-fifth of two-lawyer and three-lawyer firms had female partners.").

15. *See* A LOOK AT THE NUMBERS, *supra* note 5, at 21.

16. *See* CURRAN & CARSON, *supra* note 4, at 23.

17. *See* BASIC FACTS, *supra* note 12.

18. *See* CURRAN & CARSON, *supra* note 4, at 45.

19. *See id.* at 23, 46 (finding that in 1991, 23% of all attorneys in California were women. The national average for 1991 was 19.8%); CURRAN & CARSON, *supra* note 4, at 24, 46 (finding that the percentage of female attorneys in private practice in California in 1991 was 77.1% and the national average for that year was 69.6%).

Just as the number of women in law is increasing, so is the number of women in intellectual property fields, according to the interviewees. The experiences of those women attest that some areas of intellectual property, however, have many more female attorneys than do other areas of intellectual property.

This essay divides the legal world of intellectual property into three general categories: patent prosecution, intellectual property litigation, and trademark law. These categories do not represent the entire field of intellectual property law, but intellectual property law is divided into these three categories for the purpose of this essay to mirror the division of intellectual property into practice groups within law firms as well as the division between practices described by the attorneys who were interviewed.

There seem to be fewer female attorneys in patent prosecution and intellectual property litigation than in trademark law, based on the experiences of those interviewed. Two interviewees work in trademark departments where women are the majority. In contrast, the two attorneys practicing patent prosecution and intellectual property litigation stated that female attorneys are the minority in their law firm departments. The experiences related by the interviewees outline several reasons for the difference in women's representation within the intellectual property practice areas. These reasons include the requisite technical education and experience necessary for the practice, the proactive or reactive nature of the work, and the relationship between the attorney and the client. First, the situation facing women in patent law is analyzed. This is followed by a discussion of women in intellectual property litigation, and is concluded with an examination of women in trademark law.

A. The Limited Number of Women in Patent Prosecution

The women interviewed attest that men outnumber women in patent law practice. In Sandra's patent and intellectual property litigation firm, there are fifty-four men and nineteen women practicing law. Women comprise approximately one quarter of all attorneys as a result of a plan to specifically target women and bring them into the firm. This situation is not standard for patent firms. According to the interviewees, generally there are fewer female patent attorneys than trademark attorneys and women account for between zero and ten percent of all patent attorneys in their firms. One interviewee revealed that her friend, a patent attorney with at least nine years of experience, has never worked with another female patent attorney. The answer to the

puzzle of why there are so few female attorneys in patent law departments might lie in the requirements to practice in the field.

Patent law, when used in this essay, refers only to the prosecution of patents. The term encompasses only those attorneys who are certified to practice before the United States Patent and Trademark Office. The explanation for why there are so few women in patent law may lie the fact that there are strict requirements for entry and practice before the Patent and Trademark Office (the "PTO").²⁰ To practice before the PTO, attorneys must pass the Registration Examination, more commonly referred to as the Patent Bar.²¹ However, to qualify to take the Patent Bar, the attorney must either have a Bachelor's degree in a recognized technical subject, or a Bachelor's degree and proof of scientific and technical training equivalent to that received for a Bachelor's degree in one of the recognized technical fields.²²

Few women earn technical degrees that qualify for the patent bar, keeping the number of women eligible to be patent attorneys small. In 1989, 39% of all science and engineering degrees were awarded to women.²³ However, that figure includes fields with high percentages of women graduates, such as math, psychology, and the social sciences, which are not recognized by the PTO as technical subjects.²⁴ Accordingly, the percentage of women who earn Bachelor's degrees in technical fields recognized by the U.S. is much less than the above figure.²⁵ By far, the life sciences have attracted the greatest percentage of

20. See PATENT AND TRADEMARK OFFICE, U.S. DEPARTMENT OF COMMERCE, GENERAL REQUIREMENTS FOR ADMISSION TO THE EXAMINATION FOR REGISTRATION TO PRACTICE IN PATENT CASES BEFORE THE U.S. PATENT AND TRADEMARK OFFICE 1-4 (1997).

21. See *id.*

22. See *id.* at 2-3 (listing the included Engineering fields approved as areas for technical degrees: Aeronautical, Agricultural, Biomedical, Ceramic, Chemical, Civil, Computer, Electrical, Electrochemical, Engineering Physics, Geological, Industrial, Mechanical, Metallurgical, Mining, Nuclear, and Petroleum. The recognized technical fields include: Computer Science, Biology, Biochemistry, Botany, Electronics Technology, Food Technology, General Chemistry, Marine Technology, Microbiology, Molecular Biology, Organic Chemistry, Pharmacology, Physics, and Textile Technology).

23. See COMMITTEE ON WOMEN IN SCIENCE AND ENGINEERING, NATIONAL RESEARCH COUNCIL, WOMEN IN SCIENCE AND ENGINEERING: INCREASING THEIR NUMBERS IN THE 1990s, at 18 (1991) [hereinafter INCREASING THEIR NUMBERS].

24. See PATENT AND TRADEMARK OFFICE, *supra* note 20, at 2.

25. See INCREASING THEIR NUMBERS, *supra* note 23 (In 1989, women accounted for 29.7% of all physics degrees, 30.7% of all computer and information science degrees, and only 13.6% of all engineering and engineering technologies degrees.).

women.²⁶ Half of all life science degrees, which include many technical majors recognized by the PTO, were awarded to women.²⁷

In addition to acquiring the required background and training, Patent attorneys must also pass the rigorous Patent Bar. The Patent Bar, administered by the U.S. Patent and Trademark Office is designed:

to test . . . knowledge of patent law and U.S. Patent and Trademark Office rules, practice, and procedure; . . . [as well as the] ability to properly analyze factual situations and properly apply the patent laws and U.S. Patent and Trademark Office rules, practice, and procedure such as would be required to render valuable service to patent applicants in the preparation and prosecution of their patent applications.²⁸

The Patent Bar is notorious for passing only a small percentage of those who take the test. Recent pass rates have hovered between 30 and 40%.²⁹ Overall, the prerequisite of a technical degree for the Patent Bar and the low pass rate contribute to keeping the number of female patent prosecutors very small.

B. The Limited Number of Women in Intellectual Property Litigation

Just as there are fewer women than men in patent practice, the women interviewed state that there are fewer women than men in intellectual property litigation. Nancy, an intellectual property litigator for ten years, says there are very few female litigators in intellectual property law. Only in the past year or so has Nancy actually appeared against female opposing counsel. Previously, she was consistently the only female attorney in front of the bench. Often the judge and the op-

26. See INCREASING THEIR NUMBERS, *supra* note 23. Technical majors in the life sciences recognized by the U.S. PTO include Biology, Biochemistry, Botany, General Chemistry, Microbiology, Molecular Biology, and Organic Chemistry. See PATENT AND TRADEMARK OFFICE, *supra* note 20, at 2.

27. See INCREASING THEIR NUMBERS, *supra* note 23 (citing that women received 50.2% of all life science degrees conferred in 1989). Women are also clustered in the life sciences for graduate degrees in the same manner they are for Bachelor's degrees. See INCREASING THEIR NUMBERS, *supra* note 23. In addition, very few women hold Ph.D.s in the physical science or engineering fields. See PAULA RAYMAN & BELLE BRETT, PART I, PATHWAYS FOR WOMEN IN THE SCIENCES 9 (1993).

28. PATENT AND TRADEMARK OFFICE, *supra* note 20, at 4.

29. See U.S. Patent and Trademark Office, *August 1997 Exam Results* (visited Jan. 30, 1998) <<http://www.uspto.gov/web/offices/dcom/olia/oed/aug97ex.htm>> (providing the pass rate for the August 1996 Registration Examination at 35%). However, the pass rate for the reformulated August 1997 exam was extremely high with 58% of those taking the exam passing. See *id.*

posing party mistook Nancy for a paralegal. During those times, Nancy felt that male opposing counsel saw her as less qualified because of the low level of representation of women in intellectual property litigation. She does not get that same feeling now, because she has ten years of experience under her belt, and a low bar number which attests to that fact.³⁰

Sandra, a five year intellectual property litigator, shares many of Nancy's views on the position of women in intellectual property litigation. Sandra left her previous law firm because a senior partner would not support her when a client refused to be represented by a woman. Sandra is now practicing at a litigation and patent firm with a relatively high percentage of women – approximately one-quarter of the attorneys are women. Her new firm seeks to hire and promote women, and Sandra plans to remain in this supportive environment. Although having more women around helps, Sandra has still noted times when she is treated differently. "There are times when you just get left out of things because you are a woman. For example, you will never be asked to take a client to a ball game, and aren't invited with the rest of the guys to go out after work and have a drink." Although things are changing, attorneys still feel they are left out of the total law firm experience because of their gender. There are still many obstacles for women who, as Sandra puts it, "dare to trespass" into the former boys' club of intellectual property litigation.

Unlike patent prosecution, however, the obstacles for women entering intellectual property litigation are not a result of special requirements. No specific technical or scientific training is necessary before an attorney may litigate. A litigator arguably only needs to be able to understand the subject matter of the lawsuit well enough to explain it to the court and to argue how the law applies to the relevant facts.

Intellectual property litigation, unlike patent prosecution and trademark law, is very reactive. As one interviewee explained, "Your clients call you up and say 'Oh my God, we have been sued.'" In this adversarial and reactive environment, some women may feel unwelcome or not as good simply because there are fewer women in this field. Until there are more female intellectual property litigators appearing before the court and for their clients, women will continue to

30. In California, bar numbers are issued sequentially. Therefore, those with smaller bar numbers are those attorneys who have been practicing the longest. Conversely, those with larger numbers are those attorneys who have most recently been admitted to the California Bar. In California, bar numbers are included on many court documents.

battle the existing stereotypes and attitudes that have kept women out of this field. In this reactive environment, Nancy tries to collaborate with her clients, but is very adversarial with the opposition. Nancy sees her job as that of a problem-solver. She is an avid advocate, and her clients expect her to get results. This necessitates differences in how intellectual property litigators deal with clients as opposed to how other attorneys in intellectual property fields deal with their clients.

C. The Large Number of Women in Trademark Law

The areas of law characterized under the heading 'trademark law' for the purposes of this essay include copyright law and advertising law. Copyright and advertising issues have many overlapping concerns with trademark law and are often addressed together. Further, from the client's perspective, trademark, copyright, and advertising law often work together to achieve the desired level of exploitation of the intellectual property.

All of the interviewees responded that even though there are fewer women than men overall in their workplaces, in the trademark department of their law firm or business, women outnumber men. One interviewee, Anne, works in a trademark practice group that is almost entirely comprised of women. In contrast to the low percentage of women partners in law firms overall, in this trademark practice the majority of senior partners are women. Laura, a part-time trademark attorney with a corporation, also works in a department where there are many women. Laura estimates that approximately fifty percent of all attorneys in her department are women.

Sandra's medium-sized patent and intellectual property litigation firm recently started a trademark practice area. A female junior partner was chosen to head the trademark practice, and another woman was selected to work with her. In this particular office, there are approximately fifty-four male attorneys and eleven female attorneys, with roughly nineteen male partners and four female partners. Even though there are many more men than women in the firm, the firm selected women to head and staff its trademark division. There are few statistics tracking the number of women in the different intellectual property fields, but the female attorneys who were interviewed feel that women outnumber men in the practice of trademark law. The distribution of women in trademark practice groups supports this sentiment.

The perspectives of the trademark attorneys who were interviewed illustrate that in the practice of trademark law, women do not feel as though men surround them. This perception reveals the level of secu-

urity and confidence felt by women trademark attorneys when working in their field. The interviewees responded that they feel more secure in their positions as a result of being among several women in their departments.

D. Intellectual Property Attorneys and Client Interaction

1. Participatory Model of Client Interaction

One of the reasons so many female attorneys choose trademark law may be the role played by the attorney when interacting with the client.³¹ As explained by the attorneys who were interviewed, trademark law places a great deal of focus on the client, whereas intellectual property litigation focuses on the factual situation. Many aspects of trademark law involve close interaction with the client. Anne says that often the attorney must guide and counsel her client on the selection and best use of the mark. She may also need to help her client in the development and application of a marketing plan and a plan for challenging competing uses of the mark. As described by Nancy, in intellectual property litigation, the attorney is more involved with the application of legal analysis and unearthing facts than with actual client interaction. In litigation, often the opposing party and the court dictate the legal avenues and the client must accept those choices.

Taken as a whole, trademark law as described by the women who were interviewed is very proactive. This aspect of trademark law fosters an atmosphere in which the attorney and the client work together to achieve the same goal. In contrast, the attorneys who were interviewed see intellectual property litigation as very reactive and the attorney-client relationship as oriented away from the attorney-client interaction and toward the subject of the litigation.

Although there are more women in trademark law than in patent prosecution, the women interviewed explained that there is a similar lawyer-client relationship in both areas. Both areas are proactive and are geared toward avoiding litigation. However, patent prosecution revolves more around the patent application than around the client. These practical differences in the attorney-client relationship between trademark law and patent prosecution alone do not explain why there

31. The comparison of the type of attorney-client interaction found in the different intellectual property fields is not included to explain why there are more women in trademark law than in patent prosecution or in intellectual property litigation, but is instead included as a possible factor for the distribution.

are more women in the former than in the latter. For patent prosecution, it appears that the biggest factor excluding women from the area is the requirement of a technical degree.³²

The type of lawyer-client relationship dominant in the practices of trademark law and patent prosecution is the participatory model of attorney-client interaction.³³ Douglas E. Rosenthal, in a discussion of the roles of lawyers and clients, proposes a model where the client is on equal status with the attorney and "participates actively in the professional relationship."³⁴ The participatory model benefits the relationship by furthering not only communication and interaction between the client and the attorney by virtue of shared control and decision making powers, but also by furthering the objectives of the client – getting better results.³⁵ This creates a more satisfied client.³⁶ When working with their clients, all of the interviewees described their interactions as fitting within the participatory model. This type of interaction is favored by the trademark attorneys who were interviewed, and may be an additional factor explaining why there are more female trademark attorneys and why there are fewer female intellectual property litigators.

2. Characteristic and Communication Differences between Men and Women

The proactive side of the law is described by Nancy as being concerned with avoiding litigation and protecting the client from risk of loss in the case where litigation is unavoidable. Some women may prefer this type of law because it draws on the skills which are perceived to be typically possessed by women.³⁷ Although many conclusions concerning the preference of attorney roles are based on stereotypes, they are not included to perpetuate generalities. They may provide some insight into the prevalence of women in trademark law, a participatory field of law, and the lower number of women in intellectual property litigation. The reasons why a woman may prefer a partici-

32. See *supra* Part III A.

33. See GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 473-74 (2d ed. 1994) (citing DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 1-28 (1974)), (discussing a model of interaction between the attorney and the client that is similar to the type of interaction described by the attorneys who were interviewed).

34. *Id.* Traditionally the relationship between the lawyer and the client is not one of equality, but rather one of dependence on the attorney for her skill or knowledge. See *id.* at 473.

35. See *id.* at 473-74.

36. See *id.*

37. See Note, *Why Law Firms Cannot Afford to Maintain the Mommy Track*, 109 HARV. L. REV. 1375, 1383 (1996).

patory model of interaction with her clients may originate from some of the historically, culturally, and societally perceived differences between men and women. Cooperation, accommodation, nurturance, and a tendency to avoid confrontation rank as perceived characteristics of historical and cultural models of femininity.³⁸ In contrast, perceived historical and cultural masculine characteristics include competition, aggression, decisiveness, and hierarchical organization.³⁹ According to these traits, women may prefer, or be more comfortable with a participatory type of relationship.⁴⁰ Men, on the other hand, would seem to be more comfortable with the historical relationship of the client as dependent on the attorney.⁴¹

The finding that society has taught women to view things in terms of relationships and to understand events contextually supports the idea that women may prefer a legal environment which has a basis in shaping relationships and getting to know the client and the client's overall needs.⁴² The women interviewed feel more comfortable in proactive types of fields. The combination of historical and cultural guidance, familiarity, and the reality of access to this area of law may work together to explain why there are more women in trademark law than other types of law.⁴³ The experiences of Anne and Laura support the idea that women may enjoy or feel more comfortable with trademark law because of the type of attorney-client interaction involved. This may be because of personal preference or may be based more on historical, societal, or cultural shaping.

38. See CAROL L. PHILPOT ET AL., *BRIDGING SEPARATE GENDER WORLDS* 111-112 (1997).

39. See *id.*

40. "Typically, women use language to provide understanding and support . . . [and] use tag questions to encourage further discussion. . . . They tend to support the positions of others, listen attentively and empathically, wait to be invited to speak, and do not interrupt. In reaching a decision, women prefer consensus to the use of hierarchical power. . . . [T]hese communication patterns reflect women's desire to connect and their fear of offending others. . . ." *Id.* at 115-116.

41. See generally *id.*

42. See DEBORAH M. KOLB, *HER PLACE AT THE TABLE: GENDER AND NEGOTIATION* 140 (Mary Roth Walsh ed. 1997).

43. "Women usually have had more relationship and communication skills because their position as the dependent and subservient gender has required that they develop these skills for survival." PHILPOT ET AL., *supra* note 38, at 114. The relationship and communication skills enjoyed by women may be a reason why there are more women in the proactive area of Trademark law, where there is a great deal of emphasis placed on communication between the attorney and the client.

3. Fewer Existing Male Power Structures

There are other explanations to support the high numbers of women in trademark law relative to the numbers of women in other areas of law. Other reasons may be the sudden and rapid growth of trademark law in many firms and the lack of an existing male power structure.

According to the interviewees, intellectual property law is a booming practice area.⁴⁴ Palo Alto and Menlo Park – located in California's Silicon Valley – are the most desirable new addresses for national and east coast law firms to include on their letterhead. Intellectual property practice is rapidly gaining interest and its own foothold in many firms.⁴⁵ As a result, women have the opportunity to grow along with these practice areas. In many situations, a trademark practice is new to the firm. As was the case with Sandra's firm,⁴⁶ the woman who heads the new trademark practice group did not have to directly compete with an existing male structure. The interviewees believe that expanding practices benefit women who are given the opportunity to grow along with their intellectual property practices. Two of the interviewees, one who has been practicing for five years, and the other for nine, grew into the practice of trademark law along with their firms. As more and more firms add intellectual property groups, women will have greater opportunities to move into higher positions within their firms.

IV. SOLUTIONS TO THE CHALLENGES FACED BY FEMALE INTELLECTUAL PROPERTY ATTORNEYS

*[W]hat to do about the fact that women have an ability men still lack, gestating children in utero.*⁴⁷

A. Changing Overall Policies

One of the biggest challenges facing female attorneys comes not from specific acts of hostility or discrimination, but rather from the overall climate of the law firm. The firm climate can often be the deciding factor in determining whether women feel they are successful in

44. See also Katharina L. Zanders, *Conspicuous Absences: Practice Area Reveals Paucity of Women Attorneys Among Group Heads*, 16 NO. 9 OF COUNSEL 1, 16-17 (1997).

45. See *id.*

46. See *supra* Part III C.

47. CATARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 222 (1989).

their careers. Certainly, all of the interviewees who identified themselves as successful credited their firms with being supportive and helpful. In fact, those women who left previous firms cited the basic climate of the firm as the primary reason they decided to leave. The women did not feel comfortable working for a firm which was not supportive of both their professional and personal goals. Several women mentioned feeling as though they were somehow less of a lawyer than their male counterparts as a result of the attitudes of their law firms. The atmosphere of the firm itself can thus be an important factor in developing the self esteem of women attorneys.

The general climate of the firm is also a big factor for women conducting their first job search. "The major concern for women considering private practice is what the climate of the firm is for women," says Roberta Kaskel, assistant dean for career services at the University of Maryland Law School. "They know that the decision they make at graduation about a job may affect any decision they might make five or ten years from now about having a family. The male students only want help comparing firms on the nature of the work and the salary potential."⁴⁸

A solution to changing the overall climate of a firm can be found in a reflection on how the written policies pertaining to child leave, flexible work time, and evaluation processes actually function at the firm.⁴⁹ All of the interviewees responded that they felt their firms had good maternity leave policies, and that the application of these policies in practice was often more flexible than the policies appeared in writing. The written policies are important, but for women, it is how those policies are put into practice that really makes the difference.

Creating opportunities is not simply a matter of adopting gender neutral policies. Many employment procedures appear to be objective: evaluation processes, sexual harassment policies and equal employment opportunity policies all work on paper. In practice, these methods often fail because latent bias and stereotypes cannot be tackled through written directives alone.⁵⁰

When writing policies, the drafters should take into consideration exactly why they are writing the policies. Looking specifically at the needs of women and how they will benefit from firm policies may re-

48. LORRAINE DUSKY, *STILL UNEQUAL: THE SHAMEFUL TRUTH ABOUT WOMEN AND JUSTICE IN AMERICA* 151 (1996).

49. See COMMISSION ON WOMEN IN THE PROFESSION, AMERICAN BAR ASSOCIATION, *UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR* 19 (1995).

50. *Id.*

sult in not only better policies for women, but also greater understanding of the reasons behind the policies, and more effective implementation of those policies. Careful drafting may also lead to a reapportionment of the burdens traditionally placed on women.

Recognizing social and biological differences between men and women may risk perpetuating stereotypes, but refusing to recognize them will unjustly ignore burdens disproportionately imposed on women to the advantage of men, will require women to "do it all," and thus will set up the average woman for failure. That is, ignoring differences benefits a few superwomen at the top but makes life more difficult for the average woman juggling an ordinary job and family, with fewer benefits and lower pay than the average man has.⁵¹

Well-written policies, then, are those which recognize the basic differences between men and women while providing benefits and support for all women. However, careful drafting and implementation alone are not enough. Firms must recognize that women and men are different, and that equality means presenting different people with the same opportunities. Thus for men and women to be equal, each must have the same opportunities. In the fields of patent prosecution and intellectual property litigation especially, opportunities which are available to men must be made available to women on the same scale and in the same scope through the recognition that men and women are different.

B. Flexibility and Support at Home and at the Office

Another challenge facing female attorneys is that of spending time with and taking care of their families while maximizing their career potential. This challenge is one faced by women in all types of careers. "The average woman . . . will experience pregnancy about twice in her working career."⁵² Three of the interviewees gave birth to one or more children during their legal careers and expressed that it was very difficult for them to be both full-time mothers and full-time intellectual property lawyers. However, they found a solution to balancing their career and family interests. The solution involves a combination of support at the office from colleagues, support staff, and from a flexible work schedule and support at home from spouses, nannies, and cleaning services.

51. FEMINIST JURISPRUDENCE 22-23 (Patricia Smith ed., 1993).

52. *Id.* at 22.

Flexibility and support at work really help women achieve their professional and personal goals. Two of the interviewees work part-time. Anne, a trademark attorney and mother of three, works three days a week. She must make those days count and work efficiently in order to bill seven to eight hours per day.⁵³ Nancy is a part-time litigator and a mother of three who typically works four days a week. Nancy does not consider herself to be part-time, as she works much more than the traditional twenty hours per week. Rather, she considers herself to be eighty percent of full-time and bills approximately thirty hours each week. However, as a litigator, there are times when she works much more, for example, when a case goes to trial. She finds that as a less than full-time employee, she cannot handle as many cases and relies on the support of management to keep her case load down.

Although Anne and Nancy work harder as part-time attorneys than they did as full-time attorneys, their part-time status does create some negative perceptions. Neither Anne nor Nancy broadcasts to clients her part-time status. Although they both feel it is a personal matter and not a professional one, neither attorney wants her clients to think of her as less committed simply because she allots more time and preference to her family obligations than does the typical male attorney. Both women feel that even though female attorneys are generally accepted in the practice of intellectual property law, typically in the legal profession part-time female attorneys are not accorded the same level of respect as full-time female attorneys.

Law firms benefit from part-time employees, beyond gaining a satisfied, happy, and fulfilled worker. Firms can save money using part-time attorneys because they tend to incur fewer overhead expenses, freeing up both office space and support staff.⁵⁴ Two of the attorneys interviewed intimately understand this concept, as other attorneys use their offices on the days when they are not there.

In addition to receiving support through flexible working schedules, assistance and understanding from their law firms, coworkers, and support staff, the interviewees have also hired people to help with the cleaning and have used nannies to gain support at home. In our society, "the vast majority of housework is still relegated to the [woman] in the family,"⁵⁵ and now the woman is relegating the housework to someone else. The interviewees value their time too highly to spend so

53. At Anne's firm, full time attorneys bill an average of 2,000 hours per year.

54. See Anee McKim, Comment, *The Lawyer Track: The Case for Humanizing the Career Within a Large Law Firm*, 55 OHIO ST. L.J. 167, 182 (1994).

55. PHILPOT ET AL., *supra* note 38, at 137.

much of it cleaning, and would rather spend it either working or with their families. Although all of the women received some support and help from their husbands, in reality husbands take on household and family responsibilities much less frequently than women do.⁵⁶ However, men do face many obstacles imposed by society when it comes to undertaking familial obligations.

[B]eing an involved father is not an easy task in our culture. Businesses may not look kindly on a man or a woman who puts the family first. Interruptions to the workday due to the illness of a child or attendance of a school conference are frowned on if the employee is a woman, but intolerable for a man. . . . [E]mployers and colleagues alike consider men who prefer to be involved in the daily activities of their children at the expense of their work schedules as "slackers" or otherwise ridicule them. . .⁵⁷

Therefore, society seems to impose the greatest burden on couples who desire to share childrearing responsibilities equally. As Anne sees it, the delegation of childcare and household tasks to women is not going to change any time soon: "This is not going away. It is a societal thing." All of the other interviewees agree with this sentiment and wish that as a whole society could be changed. Until law firms decide to apply their policies in such a way as to allow men the opportunity to go part-time and take care of their children or to take paid leave for the birth of a child without the current stigma attached to such activities, women will still have to figure out how to handle a career and a family with only twenty-four hours in a day.

Law, a very strenuous career, demands a great deal of time from attorneys. Women bear the brunt of the responsibility for raising the children and taking care of the household.⁵⁸ This shouldering of responsibility marks the greatest difference between male and female lawyers. The real question lies in how women can be presented with the same opportunities to succeed and grow in the legal field as those typically presented to men, even though women are typically responsible for households and families. It is this question that law firms must answer in order to accord women equal opportunities to grow as attorneys.

56. PHILPOT ET AL., *supra* note 38, at 137-140.

57. *Id.* at 142-143.

58. *See generally id.* at 137-41; Note, *supra* note 37, at 1375.

C. Support from Female Mentors

One of the challenges facing female attorneys is that of being left out of office support systems which encompass much of the learning and training which goes on from day-to-day.⁵⁹ A solution to this problem can be found in female mentors. Mentors support attorneys by providing the experience and knowledge a young attorney needs to grow and develop. A mentor may take many forms, from someone the mentee can consult about legal theories or troublesome clients, to a person who champions her legal career and actively searches out challenging new assignments and projects to develop her skills. Women seem to be less likely to develop a good relationship with a more senior attorney who can help train them in the ways of the law. By making more deep professional relationships within their department, women can show by example that women do belong in the fields of patent law and intellectual property litigation, thereby making the road easier for those who have just begun their careers.

Many of the interviewees stated that they did not have a mentor, yet when they discussed their relationships with people in their departments and around the firm, it became apparent that most of the women looked to other attorneys for professional guidance and support. During the interview, Anne did not mention having a specific female mentor, but does feel as though she receives support from her colleagues, all but one of whom are women. Laura identified her mentors as more akin to confidantes, people willing to give her the benefit of their experiences. One important aspect of 'mentoring' especially appreciated by Laura, is the availability of other women as resources. Laura says that women are finally "getting it" when it comes to networking. Other women often call Laura when they are trying to get background information about a client, a new trend in the law, or the latest news on who is hiring. In fact, during her last job search, Laura secured many interviews either directly or indirectly through her female contacts. Shortly before she moved to her new job, she received a few phone calls from women who wanted to make sure they kept her in their network and did not lose track of her.

Sandra, another intellectual property litigator, having been successfully mentored herself, makes sure that she is a mentor for at least one of her firm's summer associates each year. She was paired with a female associate last summer, and really enjoyed being able to answer

59. See Amy Saltzman, *Woman Versus Woman: Why Aren't More Female Executives Mentoring Their Junior Counterparts?*, U.S. NEWS & WORLD REP., Mar. 25, 1996, at 50.

questions, give advice, and discuss the workings of the firm with a young associate. Sandra herself has had good mentoring relationships with both men and women, but she says that for her, a female mentor adds that little bit extra to the mentoring experience, no matter what stage she is at in her professional development.

Although women benefit from having a mentor relationship, it does not seem as though many women partners are actively engaged in mentoring other women.⁶⁰ One reason for this may be the relative powerlessness of women partners when compared to male partners.⁶¹ In a study for the Committee on Women in the Profession for the Association of the Bar of the City of New York, female partners who were interviewed on the subject indicated that a lack of "political clout" limited their effectiveness as mentors.⁶² Other reasons provided by women in the same study as to why they did not choose women as mentors were the political costs of being allied with female mentors as well as the unavailability of female mentors.⁶³ The women who were interviewed for this essay sometimes hesitate to approach older women for assistance and guidance, because they are uncertain as to whether the women would be helpful or would agree to be a mentor.

Women, one or two generations ago, were stereotyped as trying to have it all.⁶⁴ These "wonderwomen" wanted a career as well as a family, and were unwilling to make any concessions in their careers in order to have it all.⁶⁵ This "do everything" attitude results in some conflicts between older women attorneys and younger ones. "Older women brand as unrealistic their younger colleagues' belief that law firms should change to accommodate the reality of working caregivers. Young lawyers think older women were too willing to sacrifice either their careers or their personal goals. . . ."⁶⁶ The result of this debate is that tensions exist between women of different ages, resulting in misperceptions, missed opportunities, and fewer opportunities for women to be mentored by women. Laura, in discussing how many of her friends assist each other through networks, stated that "there are still

60. See Elizabeth K. Ziewacz, *Can the Glass Ceiling be Shattered?: The Decline of Women Partners in Large Law Firms*, 57 OHIO ST. L.J. 971, 983 (1996).

61. See Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 353 (1995).

62. See *id.*

63. See *id.*

64. See Saltzman, *supra* note 59, at 50-52.

65. See *id.*

66. Epstein et al., *supra* note 61, at 299.

some unhelpful women out there.” Laura looks to older women who are “those that see you are below them, extend a hand, and say let me help you.”

In general, mentoring relationships help female attorneys advance within their careers and attain more satisfaction while doing so. These connections also provide support for women who need to ease their work load in order to try to balance their career and family. In the fields of patents and intellectual property litigation, mentors help female attorneys succeed and grow in their fields. Since there are fewer women in these fields, establishing such relationships will not only help women gain exposure within the firm, but will also pave the way for acceptance of more women in the future.

IV. CONCLUSION

Women in intellectual property fields of law do not have an easy solution for the attainment of success and equal opportunities. For the most part, our society is still biased toward thinking of women as wives and mothers, and not as patent prosecutors or intellectual property litigators. There are some changes which can be effected within the structure of the law firm to help women succeed in the fast-growing and exciting field of intellectual property law. Women can find mentors to teach and guide them throughout their careers. Law firms can rewrite their policies concerning issues which matter most to women to make certain that the policies themselves, as well as the way in which they are applied, present equal opportunities for success and achievement to both women and men. Law firms need to realize that female and male attorneys are different, and incorporate these differences into equal opportunities that are given to all attorneys. All of the interviewees agree that what they really want from their law firms is an equal opportunity to work hard, succeed, and achieve fulfillment not only as attorneys, but also as women. It is time for law firms to heed the call and provide the opportunities for all women to succeed as women and as attorneys.