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WBA

WOMEN'S BAR  
REVIEW

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## ARTICLES

- 3 WBA Corporate Partner:  
O'Brien & Levine Court Reporting  
Solutions
- 4 WBA Corporate Partner:  
Herbert H. Landy Insurance Agency
- 5 President's Message
- 6 Get Ready for Gala!
- 7 Gala: Thank You to Our Sponsors
- 8 Women Lawyers in Partnership and  
Leadership Positions
- 11 Neil Gorsuch: A Threat to Women's  
Rights
- 14 Legislative Policy Committee:  
Member Comments
- 15 Women Lawyers Leading Cases in the  
Courtroom
- 18 Fall 2017 Legislative Updates
- 19 Communications Committee

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## PRESIDENT'S MESSAGE

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**Michele Liu Baillie**  
WBA President

**T**HIS year is different. Coming into 2017, we saw a 2016 presidential campaign peppered with messages of strife, division, racism, misogyny, xenophobia, and homophobia. We've since watched the unfolding of a political and social climate that continues this tone, with an overreaching travel ban, refusals to clearly condemn the hatred and violence in Charlottesville, a transgender military ban, etc. Events during and since the election bring into light a view held by some that had been in the shadows – a view that sees freedoms and opportunities as shrinking and finite – where, not only is there not enough to go around, but where those less “entitled” or “deserving” are favored. A view that sees the sharing of freedoms as barriers to prosperity, instead of catalysts for the creation of opportunities for everyone. These are jarring reminders that those who are against inclusion live among us. The WBA stands against these forces, through our empowerment of women, our advocacy, and our support of allies in promoting tolerance, understanding, and equality.

As challenging as our times may be, we have also witnessed a tremendous coming-together of communities and individuals – many who have never seen themselves as overtly “political” yet now feel compelled to act (out) and speak (up). A large contingency of WBA members took part in the Women's March on January 21st. In March, we held a Women's Advocacy Summit, which brought together experts from across the spectrum to speak about workplace discrimination, interpersonal violence, hate crimes and discrimination, and reproductive rights. In June, we organized a conference to promote women lawyers leading cases in the courtroom. We continue to advocate at the State House for the lifting of the welfare cap on kids, for equal pay, for fair treatment of pregnant workers, for paid family and medical leave, for full access to health care for women, and against female genital mutilation and other violence against women. We take these actions because we know that women

attorneys are looking for ways to engage with others on the issues that matter to them.

This has been the mission of the WBA since its founding in 1978. Our mission statement, a deceptively simple single sentence, states in its first part, “to achieve the full and equal participation of women in the legal profession.” Through our rich programming, committees, and advocacy, the WBA continues to promote a strong network of women lawyers in the Commonwealth. We could have ended our mission statement there, after all, we are the Women's Bar. However, it would have been incomplete. Our mission statement continues to include a commitment to a “just society.” The WBA understands that realizing equality is a collaborative process, requiring the work of many. The small differences we each make in our daily lives collectively move us forward.

As women lawyers, we are uniquely qualified to ensure that our nation remains a country ruled by laws. We advocate for the fair and equal application of law that protects those who are vulnerable and holds those in power accountable. We advocate for a diverse bench with judges who will act as an independent check on those in the executive and legislative branches. We advocate for the passage of laws and the adoption of best practices that remove barriers and level the playing field for everyone, regardless of gender, race, ethnicity, religion, sexual orientation, country of origin, political view, or social-economic status.

In 2018, the WBA will celebrate its 40th anniversary. The consistent presence of the WBA will have spanned the existence of eight Massachusetts governors and seven U.S. presidents. Regardless of what unfolds in our political and social climate, the WBA will continue to be here – fighting for the full and equal participation of women lawyers and fighting for a just society. This alone gives me great cause for optimism.

**Join us.**

# GET READY FOR GALA!

The WBA is thrilled to remind all members and friends that our annual Gala is coming up on November 28, 2017 at the Copley Marriott. We expect between 700 and 900 attendees, including attorneys from all practice settings, judges, legislators, government officials, and business leaders. It is not only our biggest fundraising and networking event of the year, but also an opportunity for people throughout the Massachusetts legal community to come together to support the organization's work in promoting women in the profession and in working for a just society.

We ask all of our members to encourage their firms or organizations to be Gala sponsors. After all, we need the support of law firms, corporations and other local organizations to provide women with networking, resources, and professional development opportunities to help them succeed. In 2017 more than ever, our agenda is ambitious. We are undertaking legislative and advocacy efforts to protect the most underserved members of our society. We ask you to request your organization's support of the Gala and to be sure that your friends, colleagues and business contacts attend the event.

One of the highlights of the WBA Gala is the opportunity to recognize women who have broken ground in the profession, much like Lelia J. Robinson, the first woman admitted to practice law in Massachusetts. This year, the WBA is honoring Hon. Margot Botsford (ret.) and Hon. Geraldine Hines (ret.), two pioneers who have, among many other accomplishments, served the Commonwealth as Supreme Judicial Court Justices.

Hon. Margot Botsford recently retired as an Associate Justice (March 15, 2017) of the Supreme Judicial Court (SJC), having served almost ten years in that position. At the time of her appointment on Sept. 4, 2007, Justice Botsford was only the fifth woman to sit on the SJC since it was established in 1692. Prior to this appointment, Justice Botsford served as an Associate Justice of the Superior Court for eighteen years. Prior to her appointment to the bench, Justice Botsford served as an assistant attorney general and an assistant

district attorney, and also practiced law in the private sector. Justice Botsford received her Bachelor of Arts degree from Barnard College, graduating magna cum laude and Phi Beta Kappa in 1969. In 1973, she earned a Juris Doctor degree from Northeastern University School of Law, and in 2007, a Master's Degree in Public Administration from Harvard University's John F. Kennedy School of Government. After graduating from law school, she served as Law Clerk to Massachusetts Supreme Judicial Court Justice Francis J. Quirico.

Hon. Geraldine Hines served as an Associate Justice on the SJC starting in 2014, becoming the first African American woman justice in the Court's 322 year history. She retired from the SJC in August, 2017. Prior to her appointment to the SJC, Justice Hines served on the Massachusetts Appeals Court from 2013-2014 and on the Massachusetts Superior Court from 2001-2013. She graduated from Tougaloo College in 1968 and received her Juris Doctor degree from the University of Wisconsin Law School in 1971. After law school Justice Hines worked as a staff attorney at the Massachusetts Law Reform Institute, litigating prisoners' rights cases, and practiced criminal law at the Roxbury Defenders Committee. She also completed an MIT fellowship researching policy initiatives to address the issue of police misconduct in communities of color, and served as co-counsel in *Commonwealth v. Willie Sanders*, a highly publicized trial of a black man accused of raping eight women. From 1979-1982 she served as a staff attorney at the Harvard University Center for Law and Education before entering private practice in 1982. Justice Hines was a founding member of the first law firm founded by women of color in New England, Burnham, Hines & Dilday.

We look forward to hearing Justices Botsford and Hines reflect on their careers and, of course, to seeing you at the Gala!



**HON. MARGOT BOTSFORD  
(RET.)**



**HON. GERALDINE HINES  
(RET.)**



# Women's Bar Association Gala November 28, 2017



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*Looking forward to seeing you there!*  
-Michelle LaBillie  
WBA President

# Women Lawyers in Partnership and Leadership Positions:

## LAW FIRM INITIATIVES TO NARROW THE **GENDER GAP**

BY KATHLEEN BERNEY

**R**ecent research regarding the numbers of men and women working as attorneys indicates that, despite women and men attending law school and entering the legal workforce in equal numbers, the “gender gap” is still alive and well—particularly for more senior lawyers working in law firms. Today, women and men are essentially evenly represented in the early stages of a career in private practice: for the last 15 years, women have comprised approximately 50 percent of law school graduates, and make up 48.7 percent of summer associates and 45 percent of associate level attorneys.<sup>1</sup> However, the number of women attorneys in senior and leadership level roles drops dramatically as these lawyers progress in their career; currently, women make up only 18 percent of equity partners and 32 percent of non-equity partners.<sup>2</sup> Moreover, women attorneys make less money overall than their male colleagues, earning 89.7 percent of the median weekly earnings of male lawyers.<sup>3</sup> The disparity in compensation for men and women equity partners is also stark: women in these roles typically earn just 80 percent of the compensation earned by their male counterparts.<sup>4</sup>

Why does this matter? While there are many reasons increased diversity is important, one answer points to the business case for greater diversity and inclusivity: studies have shown that increased diversity saves companies and law firms money by improving employee engagement—the desire of employees to come to work “wanting to be valued and to add value”—which in turn, enhances employee retention, collaboration, and productivity.<sup>5</sup> Further, engaged employees have increased average revenue 11 percent more than the

1 Stiller, Rikleen, Lauren (2015). Women Lawyers Continue to Lag Behind Male Colleagues. *Report of the Ninth Annual NAWL Survey on Retention and Promotion of Women in Law Firms*, 3.

2 This data is based on attorneys who graduated law school in or after 2004. Stiller, Rikleen, Lauren (2015). Women Lawyers Continue to Lag Behind Male Colleagues. *Report of the Ninth Annual NAWL Survey on Retention and Promotion of Women in Law Firms*, 1, 3.

3 2015 Bureau of Labor Statistics, <https://www.bls.gov/cps/cpsaat39.html>; American Bar Association—Commission on Women in the Profession (2017). *A Current Glance at Women in the Law*, 6.

4 2015 Bureau of Labor Statistics, <https://www.bls.gov/cps/cpsaat39.htm>. American Bar Association—Commission on Women in the Profession (2017); *A Current Glance at Women in the Law*, 6.

5 Roellig, Mark (2011). “WHY” Diversity and Inclusion are Critical to the Success of Your Law Department, 5, n.21. Retrieved from <https://www.massmutual.com/~media/files/why-diversity-and-inclusion-is-critical-to-the-success-of-your-law-department.pdf>.



industry average when compared to non-engaged employees<sup>6</sup>. Also compelling from a business perspective: clients are showing more and more that they care about working with law firms with a strong record of diversity and inclusion. Indeed, companies have begun telling the law firms they hire that they no longer merely want a diverse team of lawyers working on their matters, but that they require it. For example, in 2017, both Hewlett Packard and Facebook began requiring that approximately one-third of the attorneys working on their matters were women and ethnic minorities, and began requiring the firms they work with to show that they are actively creating “clear and measurable leadership opportunities for women and minorities” or risk having payment of legal bills partially withheld<sup>7</sup>. Notwithstanding the many other reasons to increase diversity in the legal field, in today’s legal market, it would be foolish for a law firm to ignore the direct impact diversity (or, lack of diversity) has on its bottom line.

Many organizations and individual attorneys are working to address this problem. In June, the WBA hosted a half-day conference entitled Women Lawyers Leading Cases in the Courtroom, in which panelists and attendees examined the disparity between men and women lawyers in senior leadership roles, including judgeships, general counsels, and equity partners at law firms, as well as the disparity between the number of men and women serving as lead counsel for class action lawsuits and as first chair at trials<sup>8</sup>. In 2016, the National Association of Women Lawyers (“NAWL”) launched its “One-Third by 2020 Challenge,” in which it challenged the legal profession to increase the representation of women lawyers in the positions of general counsel, law school dean, equity partner, and as lateral hires, and to increase overall diversity of the legal profession with respect to women, women of color, and LBTQI attorneys<sup>9</sup>.

However, change will require the active participation of legal employers, including

6 Roellig, Mark (2011). “WHY” Diversity and Inclusion are Critical to the Success of Your Law Department, 5, n.21. Retrieved from <https://www.massmutual.com/~media/files/why-diversity-and-inclusion-is-critical-to-the-success-of-your-law-department.pdf>.

7 Russell-Kraft, Stephanie (2017). Companies Use Diversity Data to Hold Law Firms Accountable. *Bloomberg Law BigLaw Business*. Retrieved at <https://bol.bna.com/companies-use-diversity-data-to-hold-law-firms-accountable/>.

8 See also Alvaré, Dana (2017). Vying for Lead in the “Boys’ Club,” Understanding the Gender Gap in Multidistrict Litigation Leadership Appointments. Retrieved from Temple University Beasley School of Law at <https://www2.law.temple.edu/csj/publication/mdl-study/>.

9 The NAWL Challenge, <http://www.nawl.org/p/cm/ld/fid=593>

law firms. Many law firms are making great strides—as demonstrated by gender diversity initiatives at three of the firms that made Law360’s 2017 list of “Best Law Firms for Women.”<sup>10</sup> Ropes & Gray, Wilmer Cutler Pickering Hale and Dorr, and Morgan, Lewis & Bockius.<sup>11</sup> To compile its report, Law360 surveyed the gender demographics at over 300 law firms that have 20 or more attorneys based in the United States. The firms listed above had an aggregate workforce of at least 40 percent female lawyers. In addition, Ropes & Gray and WilmerHale also made the Law360 “Ceiling Smashers” list of law firms with the highest ratio of female to male equity partners<sup>12</sup>.

### Ropes & Gray – The Women’s Forum

According to Amanda McGrady Morrison, who began her career with Ropes & Gray as a first-year associate, and is now a partner in the M&A practice group, the firm supports its female attorneys through its Women’s Forum, which was created in 1996. The Forum offers mentoring circles, panels, discussions, and training for the firm’s female attorneys on both business and career development, including how to navigate critical career junctures, such as moving from a mid-level to senior level associate, and watching TED talks on how to build business and other topics. The Women’s Forum also sponsors a grant program called “We are the Future,” which subsidizes entrepreneurial activities undertaken by the firm’s women lawyers, including speaking at a conference or sponsoring a client lunch.

Each firm’s office has mentoring circles sponsored by the Women’s Forum composed of women attorneys at varying career stages who work in a variety of practice areas. These women engage in open and candid discussions, as well as social and professional networking events to connect with peers, industry leaders, and experts

10 Violante, Christina (2017). The Best Law Firms for Female Attorneys. Retrieved from Law360 Website at <https://www.law360.com/articles/945879>. In compiling its Glass Ceiling Report, Law360 excluded any firm that had below-average female representation at any level of the firm, and then ranked the rest based on their percentage of female attorneys both at the non-partner and partner level.

11 Law360 Glass Ceiling Report. Retrieved at <https://www.law360.com/articles/946586>.

12 Rodriguez, Natalie (2017). The Best Law Firms for Female Partners. Retrieved from Law360 Website at <https://www.law360.com/articles/945767>. Wilmer Hale ranked fourth on the Ceiling Smashers list of firms with 600+ attorneys, with 25.1 percent female equity partners; Ropes & Gray ranked fifth with 25 percent female equity partners. Law360 opted to capture only equity partnership numbers explaining that the nonequity tier “too often can serve as a career detour rather than a steppingstone for female attorneys.”

to address a number of key career topics, including networking, marketing, and career and business development opportunities. Much like the NAWL’s “One-Third by 2020 Challenge,” Ropes & Gray’s Women’s Forum recently implemented a strategic plan called “2020 Vision,” which sets objective goals for greater diversity by the year 2020 and lays out a strategy for developing and retaining female talent, increasing the number of women in leadership roles, and tracking progress against those goals.

For Ms. Morrison, the number of women in both partnership and leadership roles at Ropes & Gray was one of the factors that attracted her to the firm. As she explains, the firm has a formal assignment system for associates that factors in diversity along with career advancement opportunities for associates. For example, junior associates are provided with client-facing opportunities.

### WilmerHale – The Woman’s Leadership Initiative

According to Nimesh Patel, WilmerHale’s Director of Diversity & Inclusion, most large law firms do a fairly good job of hiring diverse entry-level candidates. However, law firms differentiate themselves based on how successful they are in developing and retaining diverse candidates, including women, as they become progressively senior lawyers. Mr. Patel attributes gender disparity in part to implicit biases. He explains that everyone has unconscious biases, and training in the workplace is necessary to address those biases. He observes further that “true change” occurs when members of the legal community examine the systemic biases within the overall recruitment and evaluation process for lawyers.

Mr. Patel identifies two key WilmerHale initiatives designed to help promote women lawyers to leadership positions: a career advancement program (“CAP”) for all attorneys with practice-specific benchmarks and a formal mentorship program to support meeting those benchmarks, and a practice management program (“PMP”) that provides client exposure and access, and strategic attorney assignments that develop the skills needed to advance an attorney’s career. In addition, the firm has established the Women’s Leadership Initiative (WLI) to promote the retention and advancement of its female attorneys. The WLI provides WilmerHale’s female lawyers with professional development and training opportunities, one-on-one mentoring, and network building with peers, firm alumni, and firm clients.

As another example of a movement

towards “true change,” Mr. Patel identified WilmerHale’s participation in the 2016 Women in Law Hackathon hosted by the Diversity Lab in collaboration with Stanford Law School and Bloomberg Law. The Hackathon was a “Shark Tank”-style competition that sought to create innovative ideas and solutions to boost the retention and advancement of experienced women in law firms<sup>13</sup>. For the Hackathon, 54 partners from large U.S. law firms worked together (virtually) in teams of six from January to June 2016. Each team also included two experts and a Stanford Law School student. The teams then presented their ideas live to a panel of judges at the pitch event at Stanford Law School. One of the winning ideas was the Mansfield Rule, a partnership between 30 large law firms and the Diversity Lab<sup>14</sup>. The Mansfield Rule, named after Arabella Mansfield, the first woman admitted to the bar in the United States, is akin to the NFL’s Rooney Rule, which requires every NFL team to interview at least one minority candidate for its head coach positions<sup>15</sup>. Law firms that sign up for the Mansfield Rule pledge to affirmatively consider women and attorneys of color—at least 30 percent of the candidate pool—for leadership roles, equity partner promotions, and lateral hires. WilmerHale has signed on to the Mansfield Rule to continue its commitment to the retention and promotion of women and people of color.

### **Morgan Lewis & Bockius – The ML Women’s Initiative**

Jami Wintz McKeon is the first woman chair of Morgan Lewis & Bockius in the firm’s history (and only one of a handful in BigLaw across the country). She began her career with Morgan Lewis in 1981 as a first-year associate, was promoted to partner, then to chair of the firm’s litigation practice, and again, in 2014, to the chairman position. As one of only a handful of women litigators in the 1980’s and 1990’s, she experienced first-hand the challenges of condescending or sexist remarks from both opposing counsel and even judges. Ms. McKeon shared how back then, the unsaid messages to her and other female lawyers was to “not stand out,” to not discuss her family life, and to learn to fit in and “be one of the guys.” At the same time, Ms. McKeon never felt held back at Morgan Lewis, where she has had dozens of male mentors at the firm over the years, and also was a mother of four children while working her way up the ranks.

<sup>13</sup> Women in Law Hackathon. Retrieved from <http://www.diversitylab.com/hackathons/>

<sup>14</sup> Women in Law Hackathon. Retrieved from <http://www.diversitylab.com/hackathons/>

<sup>15</sup> Women in Law Hackathon. Retrieved from <http://www.diversitylab.com/hackathons/> After implementing the Rooney Rule, the number of diverse NFL coaches has doubled.

As chair, Ms. McKeon views diversity—the representation of both women and people of color up through the partner and firm management level—as a business imperative for Morgan Lewis, as well as for all law firms in today’s legal market. Clients today demand excellent legal service, collaboration and diversity from a law firm<sup>16</sup>. Clients want to meet the firm’s top associates (indeed, clients enjoy mentoring up-and-coming associates), and expect to see women and people of color among those associates.<sup>17</sup> A firm that cannot deliver on that will not generate new business. In Ms. McKeon’s mind, the notion of diversity is not about women competing with men for business, nor is it merely law firms teaching women how to network, or expecting them to go out and find clients by themselves. Instead, it boils down to access and, again, collaboration. The law firm that collaborates by asking its male partners how the firm as a whole can work together to better service its clients, and to expose its associates to those clients, will win more business from clients demanding excellence and diversity. As Ms. McKeon notes, “It’s all about relationships, it’s all personal, and it’s all about developing the ability to build them.”

The key gap in law firms, according to Ms. McKeon, is not in the hiring of women lawyers, but creating exposure to leadership opportunities to retain women and to foster their development and success. As Ms. McKeon explains, women are not necessarily demanding work-life balance from law firms—although this is certainly a component of what any good firm must offer to retain its top lawyers. Women seek access to opportunity at their firms. Ms. McKeon launched and leads the ML Women’s Initiative to address this gap, and to provide a forum that brings together its women lawyers, clients (including C-Suite clients), external experts and Morgan Lewis alumni across a shared industry or practice, to discuss a topic specific to women, leadership, and the power of women as consumers. Morgan Lewis is also participating in the Diversity Lab to pilot the Mansfield Rule and to commit to the goal that women and minorities comprise 30 percent of candidates for firm leadership and governance roles.

<sup>16</sup> BTI Consulting Group (2017). Clients Name the Law Firm with the Best Collaboration. Retrieved from BTI Consulting Group Website at <https://www.bticonsulting.com/themadclientist/clients-name-the-law-firms-with-the-best-collaboration>.

<sup>17</sup> BTI Consulting Group (2017). The Law Firms with the Best Associates. Retrieved from BTI Consulting Group Website at <https://www.bticonsulting.com/themadclientist/the-law-firms-with-the-best-associates>.

With regard to work-life balance programs, Morgan Lewis offers its employees a telecommute program that allows certain associates to work from home two days a week. In line with other large firms, Morgan Lewis also offers generous maternity policies, as well as ramp-on and off programs to meet associates at different stages of their careers. Finally, Ms. McKeon staunchly advocates that we each recognize our own implicit bias. She notes, “There is no question implicit bias exists, and it is not specific to lawyers, or to women . . . how we shake hands, where a person went to school, how they look . . . to pretend it doesn’t exist is silly.” Morgan Lewis has long offered implicit bias training to its partners and to firm clients.

The programs and approach that Ms. McKeon is currently driving at Morgan Lewis have produced positive results. Morgan Lewis tied for sixth place (out of the top 10) in Law360’s Glass Ceiling Report.

In conclusion, the numbers make it clear that law firms have their work cut out for them to develop effective strategies and programs to address the gender gap in the retention, promotion, and compensation of women attorneys. The more willing law firms are to acknowledge, confront, and take risks to remedy the gap, the more likely it is that change will eventually occur. Achieving this parity with men will not happen overnight. The WBA intends to remain focused on this important issue and will support its members as they seek the promotions and compensation they deserve.

*Kathleen Berney earned her J.D. magna cum laude through the evening program at Suffolk University Law School while working full time for Raytheon Company. She was admitted to the bar in 2016 and began her legal career as in-house Litigation Counsel in the Office of the General Counsel at Raytheon. She is currently clerking for Justice Peter Sacks of the Massachusetts Court of Appeals.*

## NEIL GORSUCH: A Threat to Women's Rights

By Brianna Sullivan

When the Senate Republican leadership refused to take a vote on President Obama's Supreme Court nominee, Merrick Garland, they did so with the hope that it would be Donald Trump winning the White House in November 2016 and choosing a nominee with a clear conservative agenda. To the horror of many, that is exactly what happened. While Justice Neil Gorsuch testified that he had made "no promises" as to how he would rule on any particular issue, his time on the bench in the United States Court of Appeals for the Tenth Circuit had provided ample opportunities to glean where his judicial philosophy lies when it comes to women and reproductive rights.

Perhaps the clearest example of Justice Gorsuch's attitude toward reproductive rights (and the priority of religious beliefs over many social justice issues) is found in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013). In *Hobby Lobby*, the Plaintiffs were closely-held, for-profit companies that operated according to "Christian principles." The Plaintiffs argued that regulations requiring employer-sponsored health care plans to include no-cost contraceptive coverage violated the sincerely-held religious beliefs of their corporate directors under the Religious Freedom Restoration Act. Specifically, the Plaintiffs objected to sponsoring coverage for "drugs or devices that can have the effect of destroying a fertilized human egg." *Hobby Lobby*, 723 F.3d at 1152 (Gorsuch, J., concurring). In his concurring opinion, Justice Gorsuch explained that the Green family, who operates Hobby Lobby stores, would be "the human actors who must compel the corporations to comply with the [contraceptive coverage] mandate." *Id.* Further, Justice Gorsuch found that the Greens, as individuals, sincerely believed that certain types of contraception are morally wrong and that this made them "complicit" in the destruction of human fertilized eggs based on their religious

principles:

As the Greens describe it, it is their personal involvement in facilitating access to devices and drugs that can have the effect of destroying a fertilized human egg that their religious faith holds impermissible. And as we have seen, it is not for secular courts to rewrite the religious complaint of a faithful adherent, or to decide whether a religious teaching about complicity imposes "too much" moral disapproval on those only "indirectly" assisting wrongful conduct. Whether an act of complicity is or isn't "too attenuated" from the underlying wrong is sometimes itself a matter of faith we must respect.

*Id.* at 1153–54 (emphasis in original). Thus, Justice Gorsuch allowed the religious beliefs

of directors of a corporation that partially subsidizes a health insurance plan to override the reproductive rights of company employees—based solely on the potential that a female employee who chooses to use contraception may one day have an egg fertilized that is prevented from implanting



due to the contraceptive device.<sup>1</sup> To conclude that this action (i.e., the potential “destruction” of a fertilized egg) requires the Greens to lend “an impermissible degree of assistance to the commission of what their religion teaches to be a moral wrong” (*id.* at 1154) stretches the definition of “assistance” beyond rational meaning. More telling is that Justice Gorsuch’s characterization of the use of a particular contraception as “wrongful conduct,” by extension, also characterizes a woman exercising her right to choose a method of birth control most appropriate for her body and her needs as “wrongful conduct.”

In two other cases, Justice Gorsuch has also demonstrated his interest in extending religious freedom at the expense of individual, personal reproductive choices. In *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), he joined in the dissent, which objected to the majority’s denial of a *sua sponte* motion for an en banc rehearing of the denial of a preliminary injunction. The dissent in *Little Sisters* came down against reproductive

1 The prevention of implantation is just one possible way that the “objectionable” intrauterine devices work; and each of emergency contraceptive pills, Ella and Plan-B works by preventing the release of an egg. See Ella website, [www.ellanow.com](http://www.ellanow.com); Plan B One Step website, [planbonestep.com/about-plan-b-one-step/how-does-it-work.aspx](http://planbonestep.com/about-plan-b-one-step/how-does-it-work.aspx). The Court notes that “[t]here is an ongoing medical debate as to whether some of the contraceptive methods relevant to this case act by preventing implantation or fertilization. This is relevant because Hobby Lobby and Mardel object to forms of contraception that prevent uterine implantation, but they do not object to those that prevent conception. For purposes of this appeal, however, there is no material dispute. Both the government and the medical amici supporting the government concede that at least some of the contraceptive methods to which the plaintiffs object have the potential to prevent uterine implantation. Some of our colleagues suggest this debate extends only to intrauterine devices, not Plan B and Ella. See Briscoe Op. at 1164. Whatever the merits of this argument, we need not wade into scientific waters here, given the above-noted agreement that some of the challenged devices function in a manner that Hobby Lobby and Mardel find morally problematic.” *Hobby Lobby*, 723 F.3d at 1123 n.3 (emphasis added and omitted) (some internal citations omitted). It is important to note that the two “objectionable” IUDs have only the potential to function by preventing implantation or fertilization. For example, the Mirena device works in a combination of ways: preventing sperm from entering the uterus, inhibiting sperm from reaching or fertilizing the egg (not “morally wrong” according to the Greens), or thinning the uterine lining to prevent implantation. See Understanding Mirena, “How does Mirena work to prevent pregnancy?”, <https://www.mirena-us.com/q-and-a/>.

rights in a challenge to the Affordable Care Act’s process for seeking exemption from the contraceptive coverage mandate on grounds of unduly burdening religious freedom. See *Little Sisters*, 794 F.3d at 1208–20. Then, in *Planned Parenthood Ass’n of Utah v. Herbert*, 839 F.3d 1301 (10th Cir. 2016), Justice Gorsuch again dissented to the denial of a *sua sponte* request for an en banc review of a reversal of the denial of Planned Parenthood’s request for a preliminary injunction. In *Planned Parenthood*, the court was asked to prevent the Utah Governor from suspending funding for the organization pending a trial on the merits relating to an order to defund Planned Parenthood because of alleged illegal selling of fetal tissue. Again, neither party requested a rehearing; yet, as Judge Briscoe wrote in her concurrence, the court took “an unusual procedural step” in making “an untimely *sua sponte* request for an en banc poll” especially where the parties entered into a stipulation for a preliminary injunction following the court’s original ruling in favor of Planned Parenthood. *Planned Parenthood*, 839 F.3d at 1302. Judge Briscoe’s concurrence goes on to describe the numerous ways that Justice Gorsuch’s dissent reframes the issues to serve his agenda of defeating reproductive rights. *Id.* at 1303–6.

At his Senate confirmation hearing, Justice Gorsuch’s obtuse responses to simple yes-or-no questions about his legal philosophy as it applies to abortion and contraceptive use made clear his true opinions. He refused to state whether he would uphold or seek to overturn *Roe v. Wade*, 410 U.S. 113 (1973) (which protected a woman’s access to abortion), stating only that he “would tell you that *Roe v. Wade*, decided in 1973, is the precedent of the United States Supreme Court . . . all of the other factors that go into analyzing precedent have to be considered.”<sup>2</sup>

Similarly, at his confirmation hearing Justice Gorsuch was presented with text from his book opposing assisted suicide, entitled *The Future of Assisted Suicide and Euthanasia*, in which he said “the intentional taking of human life by private persons is always wrong” and asked how he could square that belief with legal abortion.<sup>3</sup> He replied that “the Supreme Court of the United States has

2 Matt Flegenheimer et al., Seven Highlights from the Gorsuch Confirmation Hearings, N.Y. TIMES, Mar. 21, 2017, available at <https://www.nytimes.com/2017/03/21/us/politics/neil-gorsuch-confirmation-hearings.html>.

3 Matt Ford, Gorsuch: *Roe v. Wade* Is the ‘Law of the Land’, THE ATLANTIC, Mar. 22, 2017, available at <https://www.theatlantic.com/politics/archive/2017/03/neil-gorsuch-confirmation-hearing/520425/>



.....  
**“Justice Gorsuch has also demonstrated his interest in extending religious freedom at the expense of individual, personal reproductive choices”**

.....

**“Justice Gorsuch’s past decisions and his evasiveness at his confirmation hearings give good reason for advocates of women’s reproductive rights to be concerned.”**

held in *Roe v. Wade* that a fetus is not a person for purposes of the Fourteenth Amendment” and that this holding is the “law of the land.”<sup>4</sup> He refused to say whether he would like to see that changed.

When asked at his confirmation hearing about the Supreme Court decisions in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (which protected a married woman’s right to access to birth control, and was extended to unmarried individuals by *Eisenstadt v. Baird*, 405 U.S. 438 (1972)), Justice Gorsuch was equally evasive. He refused to express agreement or disagreement with the result, stating only that it was precedent and he did “not see a realistic possibility that a state would pass a law attempting to undo that or that a court of the United States would take such a challenge.”<sup>5</sup> (Editorial note: was a hint of lament in that statement?). Even when presented with the testimony of Justice Samuel Alito and Chief Justice John Roberts, who unequivocally agreed with the outcome in *Griswold* and *Eisenstadt* in their respective confirmation hearings, Justice Gorsuch still refused to state whether or not he agreed with the rulings in those cases.

Justice Gorsuch’s past decisions and his evasiveness at his confirmation hearings give good reason for advocates of women’s reproductive rights to be concerned. While in theory he is replacing a justice with similar views (Justice Antonin Scalia), Justice

4 *Id.*  
5 Video, Senate Confirmation Hearings, Day 2, available at <http://bit.ly/U8Ys7n>.

Gorsuch’s appointment in the face of future retirements of more progressive judges could eventually shift the balance of the court to a conservative lean. Such a shift would toss much of the progress we have made for women’s reproductive freedom overboard. For this reason, we must stay vigilant and continue to protect the rights we worked so hard to secure over the past 50 years.

*Brianna Sullivan is an Associate Attorney at Beham Hamblen, LLP, in Woburn, where she focuses her practice on defending businesses from liability suits, including slip and falls, motor vehicle negligence, and liquor liability, and contract disputes. She serves as the North Shore Regional Member of the WBA Board of Directors and is a past Editor of the Women’s Bar Review.*



## Member Comments



**Get Involved! The Legislative Policy Committee is always looking for new members. Are you passionate about policy and advocacy, and issues important to women? Join us!**

I have been involved in legislative policy as it relates to family law for a number of years. The WBA has done such an excellent job in its efforts to pass legislation that I wanted a chance to expand my family law legislative experience and play a role in promoting new policy in a variety of different areas. I look forward to being an active member of this committee and supporting important legislative initiatives.

- Gayle Stone-Turesky

After moving across the country from California to Boston, and while waiting for approval of my application to the Massachusetts Bar, I was looking for a way to get involved in the local legal community. The WBA's Legislative Policy Committee (LPC) seemed like a good opportunity. The committee is comprised of a welcoming group of women who collectively have an impressive amount of policy experience, and share the common goal of fighting for the rights and dignities of women and girls in Massachusetts. Less than a year after joining the LPC, the benefits I've gained as a member have exceeded all my expectations. Not only have I learned the details and nuances of Massachusetts' legislative process, but I've gained valuable lobbying experience. As a member of the committee, I've researched policy issues, drafted legislative testimony, collaborated with state-wide coalitions, helped develop lobbying strategies, and solicited stakeholder support for the committee's legislative agenda. In the midst of a political climate that could easily inspire feelings of hopelessness and helplessness, I am grateful to the LPC for giving me the opportunity to meaningfully engage with the community and to stand up against injustices and inequalities facing women and children today.

- Kate Symmonds

To get involved, please contact Legislative Policy Committee co-chair Krina Patel (krina.c.patel@gmail).



Left to Right: Mark Roellig (MassMutual), Raquel Webster (National Grid), Kate O'Leary (General Electric), Karen Morton (Liberty Mutual) and Ellen Farrell (Toyota in North America).

## EVENTS

# June 2017:

## WOMEN LAWYERS LEADING CASES IN THE COURTROOM

On June 8, 2017 the WBA, in conjunction with the Massachusetts Academy of Trial Lawyers, Asian-American Lawyers Association of Massachusetts, Boston Bar Association, Massachusetts Bar Association, Massachusetts Black Women Attorneys, Massachusetts Black Lawyers Association, and the South Asian Bar Association of Greater Boston, hosted a half-day conference entitled Women Lawyers Leading Cases in the Courtroom. Over 155 attendees registered for the event, which was held at the Moakley Federal Courthouse.

WBA President Michelle Liu Baillie served as the emcee for the conference and she was joined by the co-chairs of the event: Chief Judge Patti Saris of the U.S. District Court for the District of Massachusetts and Chief Justice Judith Fabricant of the Massachusetts Superior Court. After welcoming everyone, Judge Fabricant specifically urged more women to apply to the bench.

The remainder of the day was divided into panels. The first panel, which offered empirical data on women lawyers as lead counsel, was led by Stephanie A. Scharf of Scharf Banks Marmor LLC, Dana Alvaré, a research fellow at Temple University's Beasley School of Law, and Galina Davidoff, PhD, Litigation Conflict Resolution Consultant. Ms. Scharf co-authored the report, "First Chairs at Trial--More Women Need Seats at the Table." Ms. Scharf based her report on data collected from the Northern District of Illinois, which has a case mix that is representative of the nation. The statistics are grim. The percentages of women as lead trial counsel are low across the board. The numbers only slightly improve when women are government lawyers. Ms. Alvaré, wrote "Vying for Lead in the 'Boys Club:' Understanding the Gender Gap in Multidistrict Litigation Leadership Appointments." Ms. Alvaré's report examined a more narrow practice area than Ms. Scharf's report, but her results were similarly disheartening. Women who practice plaintiff's side multidistrict litigation face, despite their experience, the politics of a "Boys Club" comprised of male lawyers. Equally problematic is that judges continue to approve leadership roles based on recommendations from "experienced MDL practitioners" who are almost exclusively men.

After hearing the data, Dr. Davidoff then discussed jurors' perceptions of women trial lawyers. It turns out, Dr. Davidoff shared,

that juries do not like aggression from men or women and women are often reviewed higher by mock juries than their male counterparts. Dr. Davidoff's presentation, was described by one attendee as "worth the price of admission" to the conference.

After hearing the data and jury perceptions, a distinguished panel of in-house counsel explored how they (aka the "client") can insist on having women on trial teams. The panel was moderated by Mark Roellig, Chief Technology and Administrative Officer at MassMutual and included Ellen L. Farrell, Assistant General Counsel, Product Law, Toyota in North America, Karen V. Morton, Senior Vice President and Deputy General Counsel, Corporate Litigation at Liberty Mutual, Kate O'Leary, Global Executive Litigation Counsel, General Electric Corporation, and Raquel Webster, Senior Counsel, National Grid. They discussed strategy for how to increase women as lead counsel. They reported to attendees that in-house counsel care immensely about the lack of diversity among trial teams and are working within their organizations to affect change among their outside counsel whether through demanding diversity in RFPs or seeking out women trial lawyers to add to their approved counsel lists.

A panel of experienced trial lawyers then offered tips and strategies for becoming lead trial counsel. The panel was moderated by Michelle Pierce, Co-chair of Litigation



*Hon. Patti Saris, Chief Judge, U.S. District Court for the District of Massachusetts*



*Hon. Judith Fabricant, Chief Justice, Massachusetts Superior Court*



# WBA

## Women's Bar Association



*Michele Liu Baillie, WBA President*

Practice at Donoghue, Barrett & Singal, P.C. Panelists included Lisa Arrowood, Partner at Arrowood LLP, Mayeti Gametchu, Assistant Regional Director, Securities and Exchange Commission, Boston Office, the Honorable Nancy Gertner, Judge, United States District Court, District of Massachusetts (ret.), Senior Lecturer, Harvard Law School, Joan Lukey, Partner and Practice Group Leader, Choate, Hall & Stewart LLP, and Maureen Mulligan, Partner, Peabody & Arnold LLP. Across the board, panelists agreed that mentors were the key to their success and they each described how they seek to mentor the next generation.

After a mid-afternoon refreshment break sponsored by the Boston Bar Association, and an afternoon kickoff from Deborah L. Johnson, President, Massachusetts Black Women Attorneys, a panel of up-and-coming trial attorneys described the current climate and how they have gained trial experience or positioned themselves to take the next step to try their first case. The panel was moderated by Pamela Berman, Partner, Bowditch & Dewey LLP and panelists were Kimberly A. Dougherty, Managing Partner, Boston Office, Andrus Wagstaff, P.C., Heather M. Gamache, Partner, Prince Lobel Tye LLP, Elizabeth A. Kayatta, Associate at Arrowood LLP, Sa'adiyah K. Masoud, Associate at Nutter McClennen & Fish LLP, and Scarlett M. Rajbanshi, Associate, Peabody & Arnold LLP. Attorney Dougherty confirmed from her experience in multidistrict litigation practice that the "boys club" is real and a major obstacle for

women. The panelists also provided other tips for advancing to lead counsel which included agreeing to opportunities to take depositions, argue motions, or to participate in trials regardless of workload. Most notably, the panel discussed that many women delay trying to be lead counsel, because they perceive themselves as inexperienced, regardless of the validity of that belief.

The final panel of the conference was a lively View From The Bench. Moderated by the Honorable Barbara Lenk, Associate Justice of the Supreme Judicial Court, the panelists included the Honorable Heidi Brieger, Associate Justice of the Massachusetts Superior Court, the Honorable Allison D. Burroughs, Judge, United States District Court for the District of Massachusetts, the Honorable Denise J. Casper, Judge, United States District Court for the District of Massachusetts, and the Honorable Janet L. Sanders, Associate Justice, Massachusetts Superior Court. The judges confirmed the lack of women trial lawyers who appear before them. They reported that the Federal court and the Business Litigation Session in Suffolk County are especially dominated by men, but in other Superior Courts - Lowell was one example mentioned, more women trial lawyers appear. The judges also shared how they are seeking to increase roles for women in the courtroom including through developing standing orders aimed at increasing courtroom opportunities for women and through using their own

discretion. For example, Judge Brieger described how she uses her discretion to try to appoint women in cases needing a discovery master. The judges also discussed how they, as judges, can exert pressure on firms and clients to include more diversity in trial teams, including, but not limited to shaming those law firms and clients. The panelists also described their route to the bench, which included private practice, state level prosecutorial experience and federal prosecutorial experience.

Carol A. Starkey, President of the Boston Bar Association closed the Conference before attendees and panelists enjoyed a reception sponsored by O'Brien & Levine Court Reporting Solutions and Herbert H. Landy Insurance Agency.

After the conference, WBA President Michele Liu Baillie noted: "The Women Leading Cases conference brought together an amazing group of lawyers from different backgrounds, practice areas, and career paths. We were all there to work toward the common goal of increasing the number of women lawyers that sit first chair in court cases. It was one of many examples of how the WBA serves its mission for the full and equal participation of women in the legal profession."

*Kate Isley is on the WBA Board of Directors and also a Co-chair of the WBA Communications Committee. She is an Assistant Attorney General in the Massachusetts Attorney General's Office.*

### **1. Act to Lift the Cap on Kids, S34 (DiDomenico)/Act Relative to the Well Being & Care of a Child, H85 (Decker)**

The WBA testified on this bill in front of the legislature's Joint Committee on Children, Families & Persons with Disabilities at its public hearing on May 16, 2017. The bill is still being reviewed by the Committee. The WBA is a member of the Lift the Cap on Kids Coalition advocating for the bill.

### **2. Act Establishing a Family and Medical Leave Insurance Program, S1048 (Spilka) /H2172 (Gordon)**

The WBA testified on this bill in front of the legislature's Joint Committee on Labor & Workforce Development at its public hearing on June 13, 2017. The bill is still being reviewed by the Committee. Concurrently, advocates have drafted a ballot question to appear on the 2018 ballot. A signature drive is underway to qualify the ballot question to appear on the 2018 ballot should legislation stall. The WBA is a member of the Raise Up Coalition advocating for the bill.

### **3. Act Advancing Contraceptive Coverage & Economic Security in our State (ACCESS), S499 (Chandler)/H536 (Haddad, Scibak)**

The WBA testified on this bill in front of the legislature's Joint Committee on Financial Services at its public hearing on October 3, 2017. The WBA is a member of the Coalition for Choice advocating for this bill as well as other reproductive health related bills.

### **4. An Act Establishing Civil and Criminal Penalties for Female Genital Mutilation, S1466 (Chandler)/H2873 (Peake)**

The WBA testified on this bill in front of the legislature's Joint Committee on the Judiciary at its public hearing on October 17, 2017.

### **5. Civil Legal Aid Services: Massachusetts Legal Assistance Corporation (MLAC) Budget Line Item 0321-1600**

The FY18 State Budget level-funded this line item at \$18 million, which was \$5 million below the \$23 million that advocates requested. The WBA is a member of the Equal Justice Coalition that advocates for increased funding for this line item. Their next Walk to the Hill - when hundreds of attorneys storm the State House in support of funding for civil legal aid - is slated for Thursday, January 25, 2018, when the FY19 budget process begins.

If you are interested in getting involved with the Legislative Policy Committee, please contact co-chair Krina Patel (krina.c.patel@gmail.com).



## **Fall 2017 Legislative Update**

The 2017-2018 Massachusetts two-year legislative session is in full swing. Even though the bulk of the legislative activity is expected to occur in 2018, the WBA enjoyed an early legislative achievement. On July 27, 2017, Governor Charlie Baker signed the Massachusetts Pregnant Workers Fairness Act into law as Chapter 54 of the Acts of 2017. The Act amends Massachusetts' anti-discrimination statute, Massachusetts General Laws, Chapter 151B, to include explicit protections for pregnancy and pregnancy related conditions. Pursuant to the Act, employers will be required to provide pregnant workers with reasonable accommodations, including but not limited to, the need to express breast milk for a nursing child, or, demonstrate that providing this accommodation would present an undue hardship to the employer's program, enterprise, or business. The WBA is part of the Pregnant Workers Fairness Act Coalition – a group of advocacy, labor, and legal organizations that backed the bill. The WBA and the Coalition's efforts will now be focused on implementation of the Act including educating individuals, employers, and health care providers about the law and rights granted under the law. The Massachusetts Commission Against Discrimination (MCAD) will also be assisting with these efforts.

## COMMUNICATIONS COMMITTEE

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**Kate Isley, Communications  
Committee Co-Chair**

### **Kate Isley**

Kate Isley is an Assistant Attorney General in the trial division of the Massachusetts Attorney General's Office. Kate worked in private practice for nine years at two law firms and focused her practice on civil litigation. Kate is on the Board of the Women's Bar Association and is Co-chair of the WBA's Communication Committee. Kate is also active on the WBA's Legislative Policy Committee. She can be reached for WBR comments and suggestions at [kate.isley@gmail.com](mailto:kate.isley@gmail.com).

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### **Cathy Lizotte**

Cathy Lizotte is a Co-Chair of the WBA's Communications Committee. She is a Senior Assistant Corporation Counsel in the City of Boston's Law Department, where she advises city officials on a wide range of matters including legislation, election law, land use, and the sharing economy. She can be reached for WBR comments and suggestions at [cath2007@gmail.com](mailto:cath2007@gmail.com).



**Cathy Lizotte, Communications  
Committee Co-Chair**