

**ADOPTED****AMERICAN BAR ASSOCIATION****NEW YORK STATE BAR ASSOCIATION****REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

1 RESOLVED, That the American Bar Association encourages law firms to develop  
2 initiatives to provide women lawyers with opportunities to gain trial and courtroom  
3 experience;

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5 FURTHER RESOLVED, That the American Bar Association encourages members of  
6 the judiciary to take steps to ensure that women lawyers have equal opportunities to  
7 participate in the courtroom;

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9 FURTHER RESOLVED, That the American Bar Association encourages corporate  
10 clients to work with outside counsel to ensure that women lawyers have equal  
11 opportunities to participate in all aspects of litigation'

12  
13 FURTHER RESOLVED, That the American Bar Association encourages corporate  
14 counsel, together with outside counsel, to work with alternative dispute resolution  
15 providers and professionals to encourage the selection of women lawyers as neutrals.



## REPORT

I. Introduction<sup>1</sup>

During the last two decades, much has been written and discussed about whether women attorneys appear in court with the frequency expected given their numbers in the legal profession. The Commercial and Federal Litigation Section of the New York State Bar Association is a preeminent bar group focused on complex commercial state and federal litigation. The Section counts among its former chairs a substantial number of prominent women litigators from both upstate and downstate, prosecutor and an attorney in private practice, a former President of the New York State Bar Association who is recognized as one of New York's top female commercial litigators and also serves as a mediator and arbitrator of commercial disputes, a former federal and state prosecutor who now is a partner in a large global law firm, an in-house counsel at a large non-profit corporation, and senior partners in large and mid-size private law firms located both upstate and downstate. With the full support and commitment of the Section's leadership, these women alumnae Section chairs met and formed an *ad hoc* task force devoted to the issue of women of the apparent dearth of women who serve as arbitrators and mediators in complex commercial and international arbitrations and mediations (collectively referred to herein as Alternative Dispute Resolution ("ADR")).

The task force sought to ascertain whether there was, in fact, a disparity in the number of women attorneys versus male attorneys who appear in speaking roles in federal and state courts throughout New York. Toward that end, the task force devised and distributed a survey to state and federal judges throughout the State and then compiled the survey results. As discussed below, based on the survey results, the task force found continued disparity and gender imbalance in the courtroom. This report first details recent studies and research on the issue of gender disparity in the legal profession, then discusses how the court survey was conducted, including methodology and findings, and concludes with recommendations for addressing the disparity and ensuring that women attorneys obtain their rightful equal place in the courtroom. This report further details the task force's findings with respect to the gender gap in the ADR context.

Even before the Report was adopted by the New York State Bar Association on November 4, 2017, it received resounding approval and support from both Bench and Bar nationwide.<sup>2</sup> Articles praising the Report and discussing its findings have appeared in

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<sup>1</sup> This report is a summary of the full report approved by the New York State Bar Association. The Report can be accessed in its entirety at <http://www.nysba.org/WomensTaskForceReport/>. The report was prepared by the Task Force on Women's Initiatives of the NYSBA Commercial and Federal Litigation Section: Hon. Shira Scheindlin (ret.), Carrie H. Cohen, Tracee E. Davis, Bernice K. Leber, Sharon M. Porcellio, Lesley F. Rosenthal, and Lauren J. Wachtler.

<sup>2</sup> For example Judge Jack Weinstein of the Eastern District Federal Court has issued a Court rule urging a more substantive role for women attorneys on cases he is hearing. "*A Judge Wants A Bigger Role for Female Lawyers. So He Made a Rule*," New York Times, August 23, 2017; Chief Judge Dora L. Irizarry of the Eastern District is in the process of amending her rules in a similar fashion, and Judge Henry J. Nowak of the Erie County Supreme Court implemented rules in his courtroom designed to allow multiple attorneys to argue different points in cases he hears. "*Rule Changes Underway in Eastern District to Support*

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the New York Law Journal, the New York Times, and Forbes Magazine, among others.

## II. Survey: Methodology and Finding

The task force's survey began with the creation of two questionnaires drafted by the task force.<sup>3</sup> The first questionnaire was directed to federal and state judges throughout New York. This questionnaire was designed to be an observational study that asked judges to record the presence of speaking counsel by gender in all matters in their courtrooms occurring between approximately September 1, 2016 and December 31, 2016. The second questionnaire was directed to various ADR providers asking them to record by gender both the appearance of counsel in each proceeding and the gender of the neutral conducting the proceeding.

The study surveyed proceedings in New York State at each level of court—trial, intermediate, and court of last resort—in both state and federal courts. Approximately 2,800 questionnaires were completed and returned and included New York's Court of Appeals, all four Appellate Divisions, and Commercial Divisions in Supreme Courts in counties from Suffolk, Onondaga and Erie. The United States Court of Appeals for the Second Circuit compiled publicly available statistics, and survey responses were provided by nine Southern District Judges (including the Chief Judge) and Magistrate Judges and District and Magistrate Judges from the Western and Northern Districts of New York.

The results of the survey are striking:<sup>4</sup>

- Women attorneys represented just 25.2% of the attorneys appearing in commercial and criminal cases in courtrooms across New York.
- Women attorneys accounted for 24.9% of lead counsel roles and 27.6% of additional counsel roles.
- The most striking disparity in women's participation appeared in complex commercial cases: women's representation as lead counsel shrank from 31.6% in one-party cases to 26.4% in two-party cases to 24.8% in three-to-four-party cases and to 19.5% in cases involving five or more parties. In short, the more complex the case, the less likely that a woman appeared as lead counsel.
- The percentage of women attorneys appearing in court was nearly identical at the trial level (24.7%) and at the appellate level (25.2%).

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*Diversity*" New York Law Journal, August 23, 2017.

<sup>3</sup> Each questionnaire is included in [Appendix A](http://www.nysba.org/WomensTaskForceReport/) of the full report, available at <http://www.nysba.org/WomensTaskForceReport/>.

<sup>4</sup> Survey results in chart format broken down by Court are included in [Appendix B](http://www.nysba.org/WomensTaskForceReport/) of the full report, available at <http://www.nysba.org/WomensTaskForceReport/>.

The statistics are slightly worse downstate (24.8%) than upstate (26.2%).<sup>5</sup>

- In New York federal courts, women attorneys made up 24.4% of all attorneys who appeared in court, with 23.1% holding the position of lead counsel. In New York State courts, women made up 26.9% of attorneys appearing in court and 26.8% of attorneys in the position of lead counsel.
- One bright spot is public interest law (including criminal matters), where women lawyers accounted for 38.2% of lead counsel and 30.9% of attorneys overall.
- However, in private practice (including both civil and criminal matters), women lawyers only accounted for 19.4% of lead counsel.

In sum, the low percentage of women attorneys appearing in a speaking role in courts was found at every level and in every type of court: upstate and downstate, federal and state, trial and appellate, criminal and civil, *ex parte* applications and multi-party matters. Set forth below is the breakout in all courtrooms—state, federal, regional, and civil/criminal:

#### **A. Women Litigators in New York State Courts**

The view from the New York Court of Appeals is particularly interesting. The statistics collected from that Court showed real progress—perhaps as a result of female leadership of that court, now headed by Chief Judge Janet DiFiore and past Chief Judge Judith S. Kaye, as well as the fact that the Court has had a majority of women judges for more than ten years. Of a total of 137 attorneys appearing in that Court, female attorneys made up 39.4%. This percentage held whether the women were lead or second chair counsels. In cases in which at least one party was represented by a public sector office, women attorneys were in the majority at 51.3%. Of the appearances in civil cases, 30% were by women attorneys. The figure in criminal cases was even higher—women attorneys made up 46.8% of all attorneys appearing in those cases.

Similarly, women attorneys in the public sector were well represented in the Appellate Divisions, approaching the 50% mark in the Second Department. The picture was not as strong in the upstate Appellate Divisions, where, even in cases involving a public entity, women were less well represented (32.6% in the Third Department and 35.3% in the Fourth Department). Women in the private sector in Third Department

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<sup>5</sup> The task force recognizes that the statistics reported herein may have been affected by which Judges agreed to participate in the survey and other selection bias inherent in any such type of survey. Thus, it is possible that there is a wider gap between the numbers of women versus men who have speaking roles in courtrooms throughout New York State than the gap demonstrated by the task force's study.

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cases fared worst of all, where they represented 18% of attorneys in the lead and only 12.5% of attorneys in any capacity versus 36.18% of private sector attorneys in the First Department (for civil cases).

While not studied in every court, the First Department further broke down its statistics for commercial cases and the results are not encouraging. Of the 148 civil cases heard by the First Department during the survey period for which a woman argued or was lead counsel, only 22 of those cases were commercial disputes, which means that women attorneys argued or were lead counsel in only 5.37% of commercial appeals compared to 36.18% for all civil appeals. Such disparity suggests that women are not appearing as lead counsel for commercial cases, which often involve high stakes business-related issues and large dollar amounts.

## **B. Women Litigators in Federal Courts in New York**

Women are not as well represented in the United States Court of Appeals for the Second Circuit as they are in the New York Court of Appeals. Of the 568 attorneys appearing before the Second Circuit during the survey period, 20.6% were female—again, this number held regardless of whether the women were in the lead or in supporting roles.

The Southern District of New York's percentages largely mirrored the sample overall, with women representing 26.1% of the 1627 attorneys appearing in the courtrooms of judges who participated in the survey—24.7% in the role of lead counsel.

The figures from the Western District of New York fell somewhat below those from the Southern District of New York, again mirroring the slightly lower percentages of women attorneys' participation upstate in state courts as well: 22.9% of the attorneys appearing in the participating Western District of New York cases were women, and 20.8% of the lead attorneys were women.

## **C. Women Litigators: Criminal & Civil; Private and Public**

As has been noted in other areas, women attorneys are better represented among lawyers in criminal cases (30.9%) than in civil cases (23.2%), regardless of trial or appellate court or state or federal court. Similarly, women made up 39.6% of the attorneys representing public entities—such as the state or federal government but just 18.5% of lawyers representing private parties in civil litigation.

All these survey findings point to the same conclusion: women attorneys in speaking roles in court account for just about a quarter of counsel who appear in state and federal courts in New York. The lack of women attorneys with speaking roles in court is widespread across different types of cases, varying locations, and at all levels of courts.<sup>6</sup>

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<sup>6</sup> The survey did not include family or housing courts. Accordingly, the percentage of women in speaking

## D. Women in Alternative Dispute Resolution

The view from the world of ADR is slightly more favorable to women, although more progress is needed. Two leading ADR providers gathered statistics on the proceedings conducted by their neutrals. In a sample size of 589 cases, women were selected as arbitrators 26.8% of the time and selected as mediators about half the time (50.2%). In a small sample size of two cases, women provided 50% of the neutral analyses but they were not chosen as court referees in either of those two cases.<sup>7</sup>

## III. Going Forward: Suggested Solutions

The first step in correcting a problem is to identify it. To do so, as noted by this report and the ALM Intelligence study referenced above in its “Gender Diversity Best Practices Checklist”—the metrics component—firms need data.<sup>8</sup> Suggesting solutions, such as insisting within law firms that women have significant roles on trial teams or empowering women attorneys to seek out advancement opportunities for themselves, is easy to do. Implementing these solutions is more challenging.<sup>9</sup>

### A. Women’s Initiatives

Many law firms have started Women’s Initiatives designed to provide women attorneys with the tools they need to cultivate and obtain opportunities for themselves and to place themselves in a position within their firms to gain trial and courtroom experience.

One suggestion is that leaders in law firms—whether male or female—take on two different roles. The first is to mentor women attorneys with an emphasis on the mentor discussing various ways in which the woman attorney can gain courtroom experience and eventually become a leader in the firm. The second is to provide “hands on”

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roles who appear in those courts may be higher, especially in family court as that area of the law tends to have a greater percentage of women practitioners. See Vivian Chen, *Do Women Really Choose the Pink Ghetto?; Are women opting for those lower-paying practices or is there an invisible hand that steers them there?*, The American Lawyer (Apr. 26, 2017) <http://www.americanlawyer.com/id=1202784558726>.

<sup>7</sup> A 2014 Study indicated that for cases with between one and 10 million dollars at issue, 82% of neutrals and 89% of arbitrators were men. “Gender Difference in Dispute Resolution Practice Report or the ABA Section of Dispute Resolution Practice Snapshot Survey (Jan. 2014)”. A 2017 article examining gender difference in dispute resolution practice put it “the more high-stakes the case, the lower the odds that a woman would be involved.” Noah J. Hanft, *Making Diversity Happen in ADR: No More Lip Service*. 257 N.Y.L.J. 56 (Mar. 20, 2017)

<sup>8</sup> Daniella Isaacson, ALM Intelligence, *Where Do We Go From Here?: BigLaw’s Struggle With Recruiting and Retaining Female Talent* (Apr. 2017) at 12; see also Meghan Tribe, *Study Shows Gender Diversity Varies Widely Across Practice Areas*. The Am Law Daily (Apr. 17, 2017) <http://www.americanlawyer.com/id=1202783889472/Study-Shows-Gender-Diversity-Varies-Widely-Across-Practice-Areas>.

<sup>9</sup> A summary of the suggestions contained in the report are attached hereto as [Appendix C](#). Many of the suggestions for law firms contained in this report may be more applicable to large firms than small or mid-size firms but hopefully are sufficiently broad based to provide guidance for all law firms.

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experience to the women attorneys at the firm by assigning them to work with a partner who will not only see that they go to court, but that they also participate in the courtroom proceedings. Women attorneys should have the opportunity early in their careers to conduct a deposition—not just prepare the outline for a partner. The same is true of defending a deposition.

It is important that more experienced attorneys help women attorneys learn how to put themselves in a position to obtain courtroom opportunities. This can be accomplished, at least in part, in two ways. *First*, women attorneys from within and outside the firm should be recruited to speak to female attorneys and explain how the woman attorney should put herself in a position to obtain opportunities to appear in court. *Second*, women from the business world should also be invited to speak at Women's Initiative meetings and explain how they have achieved success in their worlds and how they obtained opportunities.

## **B. Formal Programs Focused on Lead Roles in Court and Discovery**

Another suggestion is that law firms establish a formal program through which management or heads of litigation departments seek out junior women associates on a quarterly or semi-annual basis and provide them with the opportunity to participate in a program that enables them to obtain the courtroom and pre-trial experiences outlined above. The establishment of a formal program sends an important signal within a firm that management is committed to providing women with substantive courtroom experience early in their careers.

Management and firm leaders should be encouraged to identify, hire, and retain women attorneys within their firms. Needless to say, promoting women to department heads and firm management is one way to achieve these goals. Women are now significantly underrepresented in both capacities.<sup>10</sup>

## **C. Efforts to Provide Other Speaking Opportunities for Women**

In addition to law firms assigning women litigators to internal and external speaking opportunities, such as educational programs in the litigation department or speaking at a client continuing legal education program, firms should encourage involvement with bar associations and other civic or industry groups that regularly provide speaking opportunities.<sup>11</sup>

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<sup>10</sup> Lauren Stiller Rikleen, *Women Lawyers Continue To Lag Behind Male Colleagues*, Report of the Ninth Annual National Association Of Women Lawyers National Survey on Retention and Promotion of Women in Law Firms (2015).

<sup>11</sup> It is noteworthy that, as of January 1, 2017, women comprise nearly 36% of the New York State Bar Association's membership but comprise only 24% of the Commercial and Federal Litigation Section's membership.



## D. Sponsorship

Although law firms talk a lot about the importance of mentoring and how to make busy partners better at it, they spend very little time discussing the importance of, and need for, sponsors:

Mentors are counselors who give career advice and provide suggestions on how to navigate certain situations. Sponsors can do everything that mentors do but also have the stature and gravitas to affect whether associates make partner. They wield their influence to further junior lawyers' careers by calling in favors, bring attention to the associates' successes and help them cultivate important relationships with other influential lawyers and clients—all of which are absolutely essential in law firms. Every sponsor can be a mentor, but not every mentor can be a sponsor.

As Sylvia Ann Hewlett, founding president of the Center for Talent Innovation (formerly Center for Work-Life Policy), explained in a 2011 *Harvard Business Review* article “sponsors may advise or steer [their sponsorees] but their chief role is to develop [them] as leader[s]”<sup>12</sup> and “‘use[] chips on behalf of protégés’ and ‘advocate for promotions.’”<sup>13</sup>

## E. Efforts by the Judiciary

Members of the judiciary also must be committed to ensuring that women attorneys have equal opportunities to participate in the courtroom. When a judge notices that a woman lawyer who has prepared the papers and is most familiar with the case is not arguing the motion, that judge should consider addressing questions to the woman.

All judges, regardless of gender, should be encouraged to appoint more women as lead counsel in class actions, and as special masters, referees, receivers, or mediators. Some judges have insisted that they will not appoint a firm to a plaintiffs' management committee unless there is at least one woman on the team. Other judges have issued orders, referred to earlier in this report, that if a woman, minority, or junior associate is likely to argue a motion, the court may be more likely to grant a request for oral argument of that motion. Judges should be encouraged to amend their individual rules to encourage attorneys to take advantage of these courtroom opportunities. *All* judges should be encouraged to promote and support women in obtaining speaking and leadership roles in the courtroom.

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<sup>12</sup> Sylvia Ann Hewlett, *The Right Way to Find a Career Sponsor*, Harv. Bus. Rev. (Sept. 11, 2013) <https://hbr.org/2013/09/the-right-way-to-find-a-career-sponsor>.

<sup>13</sup> Kenneth O.C. Imo, *Mentors Are Good, Sponsors Are Better*, American Bar Association Law Practice Magazine (Jan./Feb. 2013) ([http://www.americanbar.org/publications/law\\_practice\\_magazine/2013/january-february/mentors-are-good-sponsors-are-better.html](http://www.americanbar.org/publications/law_practice_magazine/2013/january-february/mentors-are-good-sponsors-are-better.html)).

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## F. Efforts by Clients

Clients also can combat the gender disparity in courtrooms. Insistence on diverse litigation teams is a growing trend across corporate America. Why should corporate clients push for diverse trial teams? Because it is to their advantage to do so. After all, their employees and their customers are likely to be half female.

Additionally, the context surrounding a trial—including the venue, case type, and courtroom environment—can affect how jurors perceive attorneys and ultimately influence the jury's verdict.<sup>14</sup> Consciously or not, jurors assess attorney “[p]ersonality, attractiveness, emotionality, and presentation style” when deciding whether they like the attorney, will take him or her seriously, or can relate to his or her persona and arguments.<sup>15</sup> Because women stereotypically convey different attributes than men, a woman attorney actively involved in a trial may win over a juror who was unable to connect with male attorneys on the same litigation team.<sup>16</sup> Many corporate clients often directly state that they expect their matters will be handled by both men and women.

For example, in 2017, the General Counsel for HP, Inc. implemented a policy requiring “at least one diverse firm relationship partner, regularly engaged with HP on billing and staffing issues” or “at least one woman and one racially/ethnically diverse attorney, each performing or managing at least 10% of the billable hours worked on HP matters.”<sup>17</sup> The policy reserves for HP the right to withhold up to ten percent of all amounts invoiced to firms failing to meet these diverse staffing requirements.<sup>18</sup>

## G. Alternative Dispute Resolution Context

The dialogue that has begun amongst ADR providers and professionals involved in the ADR process is encouraging. One important step that has been undertaken is the Equal Representation in Arbitration pledge—attested to by a broad group of ADR stakeholders, including counsel, arbitrators, corporate representatives, academics, and others—to encourage the development and selection of qualified female arbitrators.<sup>19</sup> This pledge outlines simple measures including having a fair representation of women on lists of potential arbitrators and tribunal chairs.<sup>20</sup>

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<sup>14</sup> Ann T. Greeley & Karen L. Hirschman, “*Trial Teams and the Power of Diversity*,” at 3 (2012).

<sup>15</sup> *Id.* at 5.

<sup>16</sup> *Id.*

<sup>17</sup> Jennifer Williams-Alvarez, *HP, Mandating Diversity, Will Withhold Fees From Some Firm*, Corporate Counsel (Feb. 13, 2017) <http://www.corpcounsel.com/id=1202779113475/HP-Mandating-Diversity-Will-Withhold-Fees-From-Some-Firms>.

<sup>18</sup> *Id.*

<sup>19</sup> See *Take the Pledge*, Equal Representation in Arbitration, <http://www.arbitrationpledge.com/pledge> (last visited Mar. 31, 2017).

<sup>20</sup> *Id.*

#### IV. Conclusion

Unfortunately, the gender gap in the courtroom and in ADR has persisted even decades after women comprised half of law school graduates. The federal and state courts in New York are not exempt from this phenomenon. There is much more that law firms, corporate counsel, and judges can do to help close the gap.

The active dialogue that continues today is a promising step in the right direction. It is the task force's hope that this dialogue—and the efforts of all stakeholders in the legal process—will help change the quantitative *and* qualitative role of women lawyers.

Respectfully submitted,

Sharon Stern Gerstman  
President, New York State Bar Association  
February 2018

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## GENERAL INFORMATION FORM

Submitting Entity: New York State Bar Association  
Submitted By: Sharon Stern Gerstman, President

**1. Summary of Resolution.**

The resolution encourages law firms, members of the judiciary, corporate clients, and alternative dispute resolution providers to provide women lawyers with opportunities to gain trial experience, participate in the courtroom and all aspects of litigation, and be selected as neutrals.

**2. Approval by Submitting Entity.**

This report was approved by the New York State Bar Association House of Delegates on November 4, 2017.

**3. Has this or a similar Resolution been submitted to the House or Board previously?**

No.

**4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

February 1995: Oppose bias and discrimination based on race and gender that prevent multicultural women from gaining full and fair participation in the legal profession, and actively support efforts to eradicate such bias and discrimination.

88A121: Recognize that persistence of overt and subtle barriers denies women the opportunity to achieve full integration and equal participation in the work, responsibilities and rewards of the legal profession; affirm the fundamental principle that there is no place in the profession for barriers that prevent the full integration and equal participation of women in all aspects of the legal profession; and call upon members of the legal profession to eliminate such barriers.

Neither policy would be affected by adoption of this proposal.

**5. If this is a late Report, what urgency exists which requires action at this meeting of the House?**

N/A.

**6. Status of Legislation. (If applicable.)**

N/A

**7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates:**

It is anticipated that the report would be disseminated widely and promoted to law firms, the judiciary, corporate counsel, and ADR providers.

**8. Cost to the Association. (Both indirect and direct costs.)**

None.

**9. Disclosure of Interest.**

N/A

**10. Referrals.**

Business Law Section  
Commission on Women in the Profession  
Conference of Chief Justices  
Judicial Division  
Law Student Division  
National Association of Bar Executives  
National Conference of Bar Presidents  
National Judicial Conference  
Section of Dispute Resolution  
Section of Litigation  
Solo, Small Firm and General Practice Division  
Young Lawyers Division

**11. Contact Name and Address Information. (Prior to the meeting.)**

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**12. Contact Name and Address Information. (Who will present the report to the House.)**

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## EXECUTIVE SUMMARY

### **1. Summary of the Resolution.**

The resolution encourages law firms, members of the judiciary, corporate clients, and alternative dispute resolution providers to provide women lawyers with opportunities to gain trial experience, participate in the courtroom and all aspects of litigation, and be selected as neutrals.

### **2. Summary of the issue which the Resolution addresses.**

Even after several decades in which women comprise approximately 50% of law school graduates, there is a serious gender gap among lawyers in the courtroom and in ADR settings.

### **3. Explanation of how the proposed policy position will address the issue.**

This policy is needed for the ABA to undertake efforts to encourage law firms, the judiciary, clients, and ADR providers to address gender disparity in the courtroom and in ADR settings.

### **4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.**

No minority or opposing views have been identified.