

MEMORANDUM

To: Advisory Committee on Rules
From: Carolyn Koegler
Re: # 2016-009. Rule of Professional Conduct 8.4. Harassment and
Discrimination.
Date: October 2, 2017

Attached please find an article from the September 2017 ABA Journal entitled, "Pay Up: Female Lawyers are Working for Income Fairness – by Suing their Firms." Attorney Joshua Gordon asked me to distribute this article to you. He notes that in addition to the issues raised in the article, in the context of the rules proposal, it also raises the issue of whether pay discrimination would become an ethics violation.

#2016-009



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FEATURES

Pay Up: Female lawyers are working for income fairness—by suing their firms

SEPTEMBER 2017

BY STEPHANIE FRANCIS WARD ([HTTP://WWW.ABAJOURNAL.COM/AUTHORS/20/](http://www.abajournal.com/authors/20/))

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Photo of Traci Ribeiro by John R. Boehm.

Traci Ribeiro is single and has no children. Practicing law, the Chicago insurance-defense attorney has said, gives her significant joy.

“It’s what I do for fun. So the usual defenses firms use for not paying women fairly, they couldn’t use those with me even if they wanted to,” the Sedgwick partner said last November, shortly after she filed an Equal Pay Act lawsuit against the firm.

The lawsuit initially was filed in the Superior Court of California in San Francisco, where Sedgwick was founded. The firm won motions to move the complaint to federal court and compel arbitration, based on the firm’s partnership agreement. By April the parties had reached a provisional settlement, according to a federal court filing; and David Sanford, Ribeiro’s lawyer, said that neither he nor she would comment on the case further. On Aug. 3, a receptionist with Sedgwick’s Chicago office told the *ABA Journal* that Ribeiro was no longer with the firm.

Ribeiro is one of two female partners and three former partners who have sued their law firms in the past two years, charging gender discrimination in compensation. All are represented by Sanford, a Washington, D.C.-based employment lawyer, and claim that male partners with comparable or inferior performance earned more than they did.

The lawsuits’ allegations aren’t surprising, but the fact the women came forward is. Although statistical data repeatedly shows that women at large law firms earn less than their male counterparts and have fewer leadership opportunities, regardless of work experience and practice areas, suing for gender discrimination continues to be seen as career suicide for someone who does not want to leave big-firm life or feels she can’t afford to.

Sanford, who has also brought gender discrimination actions against Greenberg Traurig and Howrey (which folded in 2011), said in November he was representing 12 different lawyers charging gender discrimination against their firms. Most of the matters, he said, are not public, but those that are get significant media attention.

“That makes it seem like a new thing, but it’s not for me or my firm,” Sanford said. “What I have observed is that there is an increasing groundswell in interest and support for this kind of action. When courageous people step forward and shine a spotlight on pay and promotions practices in the workplace, a lot of people take note.”

Law firm disputes frequently go to arbitration, and almost all of the agreements require confidentiality, says Merrick Rossein, an employment professor at the City University of New York School of Law. He’s also a member of the American Arbitration Association’s national panel for employment resolution.

“I’ve had a number of different cases, but I’ve certainly seen more gender and age discrimination cases than other cases,” Rossein adds. “One of the patterns in terms of gender is that women complain early on that they didn’t have the same type of mentoring as men and weren’t assigned cases which would lead in a direction where they could be

seen in the firm as fully contributing associates. And certainly the very competitive firms are based on old male models. Some of that has been eliminated, but it's still there in too many firms."

Two of Sanford's clients claim they were frequently assigned underutilized associates who often lacked the legal skills of those paired with male partners. All say law firm management was significantly or exclusively male, and the firms had a culture that favored men over women.

"Early on, it became apparent to me that women were perceived to be treated as second-class citizens," says Kerrie Campbell, who in August 2016 filed an employment discrimination lawsuit against now-merged Chadbourne & Parke. She continued to practice with the law firm until April, when she was expelled by the partnership. Seventy partners voted in favor of the expulsion, Law360 reported, and hers was the only vote in support of her staying. (Norton Rose Fulbright announced its merger with Chadbourne (http://www.abajournal.com/news/article/norton_rose_and_chadbourne_complete_merger) on June 30.)

SUE BUT STAY

The choices faced by female lawyers in such situations don't provide much appeal: Stay silent and see no change. Leave and hope for better opportunities elsewhere. Or sue, facing repercussions no matter whether they leave or stay for the legal battle.

"Should I have gone to another firm and hoped not to expect the same thing? I don't know if that's going to be the case, so why not just fight it. It's about fairness first and foremost," Ribeiro said in November. "As long as they keep letting me have staff, then I keep making them money. So it's not in their best interest to push me away."

Ribeiro, who in her lawsuit claimed to be Sedgwick's third-highest business generator, sought class action status, but no one had joined her by the time the case settled. Campbell's lawsuit, which now includes Norton Rose, was filed in the Southern District of New York and also seeks class action status. Its other plaintiffs are Mary Yelenick, a former partner who is now of counsel at the firm, and Jaroslawa Z. Johnson, who previously was managing partner of Chadbourne's Kiev, Ukraine, office.

The third lawsuit, filed May 12 against Proskauer Rose, has a Jane Doe plaintiff. The U.S. District Court for the District of Columbia filing, which does not seek class action status, alleges that in addition to the Equal Pay Act, Proskauer violated the Family and Medical Leave Act.

The Proskauer partner joined the law firm in 2013 and claims she was told that if she generated at least \$7 million in revenues a year, she would be paid more than \$3 million annually, according to her complaint. That didn't happen, her lawsuit says, and she was rebuffed after expressing an expectation to earn at least \$2.75 million.

Last year, Proskauer paid a new male partner about 65 percent more than the plaintiff, though his client originations were only 63 per-cent of what she had, according to the suit. The filing mentions another male partner who earned 40 percent more than she did. She and the man had approximately the same amount of client originations, but she had more than twice as many billable hours, the complaint states.

Interestingly, Kathleen McKenna—an employment partner in Proskauer’s New York City office—represents Chadbourne in the gender discrimination lawsuit filed by Campbell. That’s unusual, says Ariana Levinson, a labor and employment professor at the University of Louisville’s Louis D. Brandeis School of Law.

“Maybe [the plaintiff] realized she had a case against Proskauer when she was working on or heard from colleagues about the Chadbourne case,” Levinson says. “I would think Proskauer might complain that they were targeted by David Sanford in an effort to pressure them not to defend these types of cases, but I haven’t heard anything like that yet.”

According to the Proskauer partner suing the firm, colleagues became increasingly hostile after her compensation complaints, and things got worse when she stepped down as first-chair in a trial one month before it started due to a family emergency.

Like Ribeiro, the Proskauer partner has an arbitration clause in her contract. Sanford, who would not comment on the client’s identity, maintains the arbitration clause does not apply to her situation. The lawsuit claims she was diagnosed with severe hypertension, a heart valve condition and esophagitis. She is seeking more than \$50 million in damages.

“The hostile, discriminatory and retaliatory treatment she has faced at work made her sick. The harm she has suffered is part of the compensatory damages we are seeking,” Sanford says.

In a statement about the lawsuit, Proskauer asserts that the median compensation for male and female equity partners is almost identical before the firm considers other factors, like specialty and experience. It also states that out of 49 partners in the plaintiff’s department, she’s been among the top five earners.

“She claims it is unfair that she was 18th in client originations among equity partners, yet only 32nd in compensation for 2014-2016,” the statement reads. “Here’s what she is not telling you—in that same three-year period, she ranked 32nd in revenue generation and 134th in realization among all partners, which reflects the lower profitability of the revenue for which she claims credit. In 2016, she ranked 40th in revenue generation and 165th in realization.”

Released May 15, the statement also claims the plaintiff’s lawsuit is “riddled with situations that never occurred.” And it notes that the woman has worked with different law firms. Like Ribeiro and Campbell, the Proskauer plaintiff is a lateral partner.

“The plaintiff left each of her two prior firms after just four years and just completed her fourth with ours,” the statement reads. “That might be her view of partnership. It is not ours.”

Proskauer filed a summary judgment motion in June, arguing that the plaintiff is an equity partner, not an employee.

Read more ... (http://www.abajournal.com/magazine/article/female_lawyers_suing_pay_fairness/P1)

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Photo of Kerrie Campbell by T.J. Kirkpatrick.

GOOD IDEA?

If female law partners think they are being treated unfairly, bringing legal action may not be the best way to advocate for themselves, says Lauri Damrell, an employment partner with Orrick, Herrington & Sutcliffe in Sacramento, California. Damrell, whose clients include law firms, advises getting as much feedback as possible and being self-reflective.

“If you have concerns early on, talk with mentors and understand the reasons for their decisions,” she says. “Don’t get to the point where you feel like you’re on your last rope.”

“To say that there’s not discrimination out there is foolish,” Damrell says, “but I’ve also seen instances where the employee bringing the claim had some issues where they were not self-aware.”

Even if someone is an excellent attorney, she adds, that does not mean the person would be the best partnership choice for a law firm.

“What is valuable to one firm may not be valuable to another, depending upon their mix of lawyers, practice areas, clients, geography and so many other factors,” Damrell says. As far as partnership and promotions, “it’s really hard to write down and specify criteria. Part of the decision is the right mix. You might be a great candidate, but the firm doesn’t need someone in your lane.”

But figures quoted by the ABA Commission on Women in the Profession in its 2017 report *A Current Glance at Women in the Law*

(https://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf) (PDF) show more than lane choice may be involved.

The fact is that in October 2015, the National Association of Women Lawyers and the NAWL Foundation reported after a study of the 200 largest law firms that 30 firms’ responses showed a typical female partner earned 80 percent of what a typical male partner did, the commission points out. The commission also notes 2015 figures from the U.S. Bureau of Labor Statistics showing female lawyers’ weekly salary was 89.7 percent that of male lawyers, up 6.7 percentage points from the previous year.

That being said, it seems that all law firms need partners with significant business, and the three plaintiffs claim they have or had that. Some of them claim they had significantly more business than many male partners, yet were compensated similarly as men who had less business than they did. The NAWL found no firms reported having a female as the highest earner.

Ribeiro, formerly a special counsel at the Chicago insurance-defense firm BatesCarey, joined Sedgwick in 2011 as a contract partner. A client suggested the move, and in 2012 she was promoted to nonequity partner.

That same year, Ribeiro discovered that female associates who worked for her earned \$40,000-\$50,000 less than comparable males at the firm. She brought that to management’s attention in September 2012 and advocated for raises on the women’s behalf.

“What really stood out was that the women were more profitable, had higher hourly rates and billed more hours than the men,” she said.

Later that year, Ribeiro discovered she, too, was underpaid.

“I could tell that the men who had no business made almost the same as me,” said Ribeiro, who suspected that sticking up for her female associates had something to do with her alleged compensation discrepancy.

According to the lawsuit, the head of Ribeiro’s practice group stated at a November 2016 equity partner meeting that Ribeiro “needed to learn to behave.”

“And in order to teach her to behave, [that lawyer] recommended lowering Ribeiro’s compensation for the year,” the lawsuit states. It goes on to assert that he labeled her as a problem employee, although he never had any personal interactions with her.

Sedgwick did not respond to interview requests.

According to the complaint, no other equity partners made efforts to correct the group leader’s behavior. However, a female equity partner did tell Ribeiro that based on generated revenue, she should have received significantly more compensation.

Between 2012 and 2015, Ribeiro said, she tried to work with the firm regarding her compensation and continued to pursue an equity partnership. In 2015, she met with the recently elected chair of the firm. When she shared concerns about what she saw as unfair treatment, the complaint says, he implied that it was her fault that she had not yet made it to equity partnership.

He did not have suggestions about what she could specifically do to improve, according to the lawsuit, but did ask if her caseload could keep less productive partners in the California offices busy.

The lawsuit, which sought \$200 million in damages, compares Ribeiro to the plaintiff in *Price Waterhouse v. Hopkins*, a landmark suit in which plaintiff Ann Hopkins claimed she was denied partnership at the accountancy firm due to sex discrimination because the firm saw her as not fitting its idea of what a woman should look or act like. In 1989, the U.S. Supreme Court found that the Title VII ban on sex discrimination includes treatment of those who don’t conform to gender norms.

‘ENOUGH IS ENOUGH’

Shortly before Ribeiro contacted the Equal Employment Opportunity Commission, Sedgwick promoted one person to equity partner. The lawyer was male, and Ribeiro suspected that he had less than 10 percent of the revenues that she did.

“Ribeiro is decisive and assertive. Those skills enable her to obtain successful client outcomes, which resulted in her being entrusted with additional client engagements,” her lawsuit states. “But because she is a woman, Sedgwick’s male leadership perceives her as a second-class citizen who should be kept in her place.”

“It’s gotten to the point where some of us are willing to say enough is enough,” said Campbell, the former Chadbourne partner suing the firm, who was first interviewed in October, before she was expelled from the partnership.

“I’m bringing the lawsuit because I think discriminatory treatment needs to stop,” she said in a subsequent interview in July. “Many women who have been treated unfairly do not try to seek a remedy because it is difficult. But nothing will change if people do not stand up.”

Campbell, a former Collier & Shannon partner who handles disparagement cases for consumer safety product companies, joined Chadbourne in 2012 after her old law firm merged with Manatt Phelps & Phillips. She brought with her 20-plus clients, according to the complaint, and in 2014 generated more than \$5 million in collections for the firm.

Like Ribeiro, Campbell said the firm saw her business generation as a coincidence. Based on the offer letter when she joined, Campbell said, she expected to earn annual compensation of at least \$750,000 plus a merit bonus.

“What I actually received was far less than expected,” said Campbell, describing Chadbourne’s compensation system as “vague, murky and confusing.”

Chadbourne based partner compensation on a points system determined by the five-member management committee, according to a court memo filed by Campbell’s lawyers in support of her request for collective action. Until recently the committee had no female members, and the points awarded are determined by anticipated revenues. The committee routinely overvalues male partners’ anticipated contributions, according to Campbell’s complaint. It also alleges that female partners frequently are awarded a low number of points, while men who are equally or less productive receive higher point values.

In the court memo, Campbell’s lawyers assert that the average base pay for Chadbourne’s female partners in 2016 was 21 percent less than their male counterparts. Also, the filing argues that for 2015, only 28 percent of the female partners received merit bonuses. Comparatively, 44 percent of the male partners received bonuses that year.

Campbell claims that she demonstrated the ability to generate more than \$2 million in revenues when she joined Chadbourne in 2014, based on her collections at Manatt, and for that she was awarded 500 points. Campbell asked that her points be increased to 850.

Read more ... (http://www.abajournal.com/magazine/article/female_lawyers_suing_pay_fairness/P2)

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According to the lawsuit, Andrew Giaccia, then Chadbourne's managing partner and now vice chair of the U.S. management committee at Norton Rose, claimed Campbell's 2014 revenues were a "fluke," and told her that she was "no Andrei Baev." Baev, who was a new lateral partner, was guaranteed 1,350 points by the law firm for two years, according to the complaint.

A project finance and corporate transactions attorney who worked in the firm's London and Moscow offices, Baev left in May to join Reed Smith. According to Campbell's lawsuit, Baev's total collections since he became a partner were about \$101,000. That equaled approximately 2 percent of Campbell's contributions to firm revenue.

"Nevertheless, under Chadbourne's male-dominated leadership and compensation system, Baev has easily made many hundreds of thousands of dollars more than Campbell," the complaint states.

Baev says, "The information about my collections is far from being correct, as [is] most of the other information provided in the complaint by Ms. Campbell, as it was denied by the firm in the firm's response to the complaint." He says that Campbell "provided not completed and twisted information to make her personal point without disclosing other relevant parts."

Baev notes transactional work, with fees collected after a deal is completed, sometimes takes several months to close. “My practice in nature is very different from Ms. Campbell’s practice,” he says.

Baev adds that, “although the exact numbers are confidential, my total collection of legal fees from the matters that I originated for the firm in 2014-2016 exceeded the collections of Ms. Campbell on her originated matters for the same period of time.”

Campbell said that when she joined the law firm, she had the impression that there was only a one-tier partnership. Then she discovered that besides setting compensation, the management committee could hire and promote partners without the general partnership’s knowledge.

“I don’t for one second believe that I have ever been an equity partner. I am nothing more than an employee who was told what to do,” Campbell said. “The management committee hides information from the general partnership, refuses to disclose financial decisions and all compensation decisions are made in secret.”

ATMOSPHERE OF CHANGE

Campbell was asked to leave the firm in 2016, according to her complaint. The stated reason was that her practice did not fit with its strategic direction. It was suggested that she’d be a “partner in transition” and leave as soon as possible. “The management committee decided to ‘incentivize’ Campbell’s speedy ouster,” the complaint says, by making her salary at the firm that of a first-year associate.

Campbell stuck around instead. She tells the *ABA Journal* that after she filed, the partners in her hall moved to a different part of the floor. Few if any would speak to her after she was asked to leave.

“I have the distinct impression that no one wants to be in the elevator with me,” she said in October. “We are in the business of handling disputes every day. We show professionalism and work through our problems. I feel like this is the opposite of how professionals should conduct themselves.”

Chadbourne tells a different story. In its answer to Campbell’s complaint, it alleges she didn’t generate the revenue that she claims. The November 2016 filing details a high-net-worth client she brought to the firm who allegedly

refused to work with her due to dissatisfaction with how she handled a previous matter. He did agree to work with a male Chadbourne partner, according to the court filing, and the matter brought in approximately \$1.5 million. Campbell had previously estimated the work would generate \$2.1 million and received credit for the amount in 2014, according to the law firm.

In a statement sent to the *ABA Journal*, Chadbourne denies all claims that Campbell made against the firm:

“No business purpose could be served by deliberately undermining or underpaying a lateral partner,” the statement says. “In fact in the past, Chadbourne has asked other partners—many of whom are male—to transition from the firm when they did not deliver on their business objectives. Much of what this case reflects is the legal profession’s ongoing struggle with lateral hiring as it is well-known that a large number of laterals do not succeed.”

Various motions in the action are pending before the court, Sanford says. In June, Chadbourne lost its pre-discovery motion for summary judgment.

While some question whether filings like Campbell’s will be successful, others think they might have a good chance, given case law and the changing structures of law firm partnerships. Over the years, federal courts have held that some workers with a partner title are actually employees under Title VII of the Civil Rights Act because they don’t control the operations of the firm and have their pay and tasks set by others.

In 2002, the 7th U.S. Circuit Court of Appeals at Chicago found that a group of Sidley & Austin partners who brought an age discrimination claim against the firm were unlikely to be considered employers under federal law, given that a 36-member committee controlled the firm. The opinion notes that the firm had 500 partners, and only those already on the committee could elect others to the group. The lawsuit settled in 2007 for \$27.5 million.

“In this new structure of law firms, where you have a lot of different classes of citizens, from the outside it looks like someone is a partner. From the inside, you need to know what that means,” says Stewart Schwab, an employment professor at Cornell Law School. “If you can show that the male partners are making a lot more money than the female partners, I think those will be good claims.”

According to the National Association of Women Lawyers survey, men account for 82 percent of law firms' equity partnerships.

Still, if someone wants to continue practicing law in a large-firm setting, suing for gender discrimination is risky, Rossein says.

"I'm always concerned about people being able to move on with their careers," the CUNY law professor says. "It's hard to give good advice, but maybe the best advice to give people is the advice to move on."

Alternatively, the promotion of such fears could be a way to keep people from suing, according to Sanford. Francine Friedman Griësing, his client who sued Greenberg Traurig, now has her own litigation firm. Her law firm website lists 14 other attorneys. Similar clients have gone in-house or joined different law firms, Sanford says, and some have become mediators and expert witnesses.

"It's a big world, there are a lot of opportunities, and people within the law who are talented and well-trained can do a lot of things," Sanford says.

ON HER OWN

Campbell is the primary income earner in her family, and she and her husband have six children. Complicating things are partnership contributions Campbell made to Chadbourne before she was expelled. They totaled more than \$200,000, and she took out a loan to make the payments. The contributions have not been returned, according to Sanford.

"It's resulted in a financial disaster for me and my family," Campbell says. "There are payment terms that have extended into years, and I've got these contract agreements to pay interest."

By July, Campbell had opened her own law firm in Washington, D.C.

Levinson, the University of Louisville law professor, suspects that when a female partner enters arbitration with a firm regarding employment discrimination, the word gets out—despite confidentiality clauses—particularly among other law firms thinking about hiring the partner.

"There's code speech, like 'not a team player' or 'can't get along with staff.' Or 'doesn't go to lunch with us every week,'" Levinson says. "There's all kinds of things they can say to signal that someone is a troublemaker, and people know."

Damrell agrees. “We’re still in a culture where people will judge, and I think the judgment around bringing a lawsuit is gender blind,” she says.

But clients may **see** things differently. According to both Campbell and Ribeiro, theirs have been supportive.

“They know me, and they know how hard I work and how accessible I am. They have no doubt that I am not being paid equally,” said Ribeiro in November, adding that when her lawsuit got media mention, clients often checked in to see how she’s doing.

“My answer is ‘OK,’ but I’d rather be practicing law with no distractions.”

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