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Are Women More Ethical Lawyers? An Empirical Study

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Patricia W. Hatamyar & Kevin M. Simmons

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ARE WOMEN MORE ETHICAL LAWYERS? AN EMPIRICAL STUDY

PATRICIA W. HATAMYAR* & KEVIN M. SIMMONS⁺

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I. INTRODUCTION

We first noticed a possible “gender gap” in attorney discipline when we ran across the Oklahoma Disciplinary Commission’s annual report for the year 2000.¹ Women currently constitute 27% of Oklahoma attorneys, but 0% of the disciplined attorneys—none of the seventeen named—were women.² Wondering whether the Oklahoma figures were aberrational, we attempted to locate research concerning gender and attorney discipline. But there have been few such studies,³ although “[p]robably no issue in the social sciences receives more attention than the difference between men and women.”⁴

1. *Annual Report of the Professional Responsibility Commission and Professional Responsibility Tribunal, January 1, 2000 through December 31, 2000*, 72 OKLA. B.J. 726 (2001) [hereinafter *Oklahoma 2000 Report*].

2. Gary C. Clark, *Diversity of the Oklahoma Bar Association*, 73 OKLA. B.J. 2227 (2002). Of active Oklahoma attorneys in 2002, 25.43% are female. R. Darcy & Mark Payton, *2002 Oklahoma Bar Association Membership Survey Report*, 73 OKLA. B.J. 3395, 3402 (2002).

3. Three notable studies of gender and attorney ethics, but not disciplinary matters, are RAND JACK & DANA CROWLEY JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* (1989); Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193 (1991), discussed *infra* Part IV.H.4.; and Janet Taber et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209 (1988). To our knowledge, there are also no published empirical studies of gender and legal malpractice, despite one scholar’s assertion that “[l]egal malpractice . . . is . . . , by far, the predominant way in which lawyers are regulated.” Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2601 (1996) (footnotes omitted); cf. RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* 21 (2000) (noting that “availability of statistics on current [malpractice] claims frequency and severity is scarce”). Despite an extensive study of legal malpractice claims in the late 1990s, the American Bar Association did not study any differences in rates of such claims by attorney gender. ABA *STANDING COMM. ON LAWYERS’ PROF. LIABILITY, PROFILE OF LEGAL MALPRACTICE CLAIMS 1996-1999* (2001) [hereinafter *ABA MALPRACTICE PROFILE*] (study-

We thus embarked upon a national study of disciplinary actions decided in 2000. After collecting, coding, and analyzing about 3500 publicly available cases from all fifty states and the District of Columbia,⁵ we conclude that female attorneys are, in fact, disciplined at a significantly lower rate than male attorneys, relative to their respective proportions in the United States attorney population.

This Article presents the primary statistical findings of our study of gender differences in attorney discipline. We examined, with respect to male and female attorneys, the overall rates of discipline imposed, the frequency with which different types of sanctions (such as disbarment and suspension) were imposed, the frequency with which male and female attorneys committed different types of ethical violations (such as incompetence or failure to communicate with clients), and other potentially relevant differences. Through regression analysis, we also attempted to discover if gender was a significant predictor of the severity of a sanction.

Part II describes the methodology used to collect, code, and analyze the observations included in our database. Part III presents the results of our statistical analysis. Part IV discusses, necessarily speculatively, possible factors contributing to the gender differences that were found in the study, with attention to other empirical studies of gender and moral reasoning.

II. METHODOLOGY

A. *How Does One Measure "Ethical" Attorney Conduct?*

In this study, we use the absence of an adverse disciplinary action taken against an attorney as the most convenient proxy for "ethical" attorney behavior. To be sure, avoiding the violation of attorney disciplinary rules (or more specifically, avoiding being punished for the violation) is probably the minimum ethical standard an attorney can uphold.⁶ Nonetheless, the presence or absence of a finding of a disciplinary violation is an objective and available measure of attorney ethics.

ing the number of legal malpractice claims by area of law, number of attorneys in firm, type of activity, disposition of claim, type of alleged error, expense paid, indemnity dollars paid to claimant—but not by gender of attorney).

4. Mike Allen, *Methodological Considerations When Examining a Gendered World*, in *SEX DIFFERENCES AND SIMILARITIES IN COMMUNICATION: CRITICAL ESSAYS AND EMPIRICAL INVESTIGATIONS OF SEX AND GENDER IN INTERACTION* 427 (Daniel J. Canary & Kathryn Dindia eds., 1998) [hereinafter *SEX DIFFERENCES AND SIMILARITIES*].

5. The code book is available on request from the authors.

6. See, e.g., MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 78 (1994) (noting that "formal codes of ethics never aimed at capturing the entire ensemble of understandings that lawyers observe in their dealings with one another, with clients, and with the courts").

Of course, professional standards of attorney conduct are implicated in enforcement models other than disciplinary actions.⁷ However, we have limited our proxy for unethical attorney behavior to disciplinary actions that are proceedings, usually conducted by a state's lawyer disciplinary agency before the state's highest court, "outside the scope of any civil or criminal case" that may have incidentally given rise to the disciplinary claim.⁸

B. *The Sample of Disciplined Attorneys*

The sample⁹ for our study consisted of all attorney disciplinary cases that actually resulted in some kind of adverse sanction in calendar year 2000. Thus, cases that were merely initiated or pending in 2000, rulings on petitions for reinstatement to the bar (whether grants or denials), and findings of no violation (which are very rare in publicly available disciplinary reports) were not included in the database. We also necessarily confined our study to disciplinary actions for which public information was available, since the vast majority of states keep private disciplinary actions confidential.¹⁰ Furthermore, at the time we began our inquiry, calendar year 2000 was

7. *E.g.*, David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 805-09 (1992) (describing four basic models of enforcement of professional standards of conduct for attorneys: disciplinary, liability (malpractice), institutional, and legislative). A normative discussion of the most effective system of attorney regulation, *see, e.g.*, Ramos, *supra* note 3 (advocating legal malpractice claims as the most effective system), is beyond the scope of this Article.

8. *See* Jeffrey A. Parness, *Enforcing Professional Norms for Federal Litigation Conduct: Achieving Reciprocal Cooperation*, 60 ALB. L. REV. 303, 304-05 (1996) (distinguishing between independent disciplinary actions and "proceeding[s]" on lawyer misconduct within a traditional civil or criminal case").

9. Technically this was a "sample" of the population of all attorney discipline cases, although we endeavored to find the "population" of publicly-available discipline cases decided in 2000. *See, e.g.*, DAVID FREEDMAN ET AL., STATISTICS 333 (3d ed. 1991) (defining population as a whole class of individuals and sample as part of a population).

10. Oregon is the only state in which disciplinary proceedings are a matter of public record from the time the initial complaint is filed. *See, e.g.*, Jill Hertz Blaustein, *Attorney Disciplinary Actions: How Public Should They Be?*, LITIG. NEWS, Sept. 2001, at 3 (noting that Oregon maintains open files from the time a disciplinary case is filed); ABA COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, REPORT TO THE HOUSE OF DELEGATES at iv, vi (1991) [hereinafter MCKAY REPORT] (honoring co-chair Robert B. McKay and noting also that Florida's and West Virginia's disciplinary records are public "when a charge is filed or a complaint is dismissed," and recommending that "[a]ll disciplinary records except disciplinary counsels' work product should be public from the time a complaint is made unless a protective order is granted"); *cf.* Jack A. Guttenberg, *The Ohio Attorney Disciplinary Process—1982 to 1991: An Empirical Study, Critique, and Recommendations for Change*, 62 U. CIN. L. REV. 947, 961 (1994) (In Ohio, "the identity of the grievant, the attorney complained of, the nature of the complaint, and the resolution of the complaints are veiled in secrecy."). Thus, one has greater access to disciplinary information about a specific attorney in Oregon, if one asked about the attorney by name, but Oregon's annual compilation of disciplinary cases includes only those cases in which discipline has been ordered. *See, e.g.*, OR. STATE BAR, DISCIPLINARY COUNSEL'S OFFICE ANNUAL REPORT 2000, at 15 & app. D (2001) [hereinafter OREGON 2000 REPORT] (copy on file with author).

the latest full year for which attorney disciplinary information was publicly available.¹¹

We also did not include in the database interim suspensions that were due solely to an attorney's failure to pay dues (or an assessment for client security funds)¹² or to comply with continuing legal education requirements, primarily because not all states report these suspensions publicly. However, interim suspensions on the grounds of a criminal conviction or an affidavit from bar counsel that, for example, "the lawyer's continuing conduct is causing, or is likely to cause, immediate and serious injury to a client or to the public,"¹³ were included.¹⁴ Finally, we did not include judicial discipline or specialized proceedings involving the unauthorized practice of law, on the assumption that these proceedings do not usually involve practicing attorneys.

C. Collecting the Data

1. Reports of Disciplinary Actions

Collecting the data for the chosen year proved much more time-consuming and difficult than we originally expected.¹⁵ Surprisingly,

11. Indeed, several states did not have final disciplinary reports on the year 2000 until late in 2001. *E.g.*, SUPREME COURT OF S.C. COMM'N ON LAWYER CONDUCT, ANNUAL REPORT FOR THE PERIOD JULY 1, 2000 THROUGH JUNE 30, 2001 (2001) (on file with author) (amended Oct. 4, 2001).

12. In Alabama, for example, attorneys may be required to pay an annual fee of \$25 to fund the Client Security Fund, Ala. State Bar Security Fund Rules, and may be intermily suspended for non-payment. ALA. R. DISCIPLINARY P. 8(a), 9(a).

13. *E.g.*, ALA. R. OF DISCIPLINARY P. 20(a).

14. However, if such an interim suspension was followed by final disposition in the same year (such as a resignation), only the final sanction, not the interim suspension, was counted.

15. The lack of readily available statistics on lawyer discipline appears to be a source of wonderment to many of us. *See, e.g.*, Bruce A. Campbell & Ruth A. Kollman, *The Lady or the Tiger? Opening the Door to Lawyer Discipline Standards*, 1 FLA. COASTAL L.J. 231, 232 (1999) (describing their attempt to review discipline imposed on Texas lawyers during 1998 as "a bit of a shock" because, among other reasons, "the data is not maintained in a consistent manner, making it difficult to compile"); Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 6 (1998) (noting difficulty in obtaining "a clear picture of the consistency, efficacy or fairness" of lawyer sanctions); Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 558 (1985) ("[E]mpirical evidence on lawyers' ethics is fragmentary."); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 743 (2001) ("Surprisingly, . . . not a single statistical compilation has ever been published that collects information governing the discipline of prosecutors or that compares the discipline of prosecutors to the discipline of private practitioners."). *But see* COMM. ON RULES OF PRACTICE & PROCEDURE, WORKING PAPERS, SPECIAL STUDIES OF FEDERAL RULES GOVERNING ATTORNEY CONDUCT (Administrative Office of the U.S. Courts, 1997) (containing several compilations of the types of attorney disciplinary violations committed in federal courts, but not including any information on attorney gender).

there is no mandatory national repository of such information at the level of detail we needed to conduct this study.¹⁶

Thus, we had to gather the data state-by-state.¹⁷ Throughout 2001, we contacted the offices of disciplinary counsel in all fifty states and the District of Columbia by letter, telephone, and e-mail, requesting the annual report of the agency, if any, and other available information on disciplined attorneys for the year 2000.¹⁸ We believe we received annual disciplinary reports for 2000 (or some equivalent fiscal year followed by the state) from all states that issue such a report.

We discovered great variation from state to state in the quality and accessibility of publicly available information on attorney disciplinary actions. Although record-keeping has come a long way since an ABA commission lambasted disciplinary agencies in 1970,¹⁹ we do not have perfect confidence that we were able to locate complete re-

16. The American Bar Association's Center for Professional Responsibility occasionally publishes survey data it receives from state lawyer disciplinary agencies. ABA, CTR. FOR PROF'L RESPONSIBILITY, *STANDING COMM. ON PROF. DISCIPLINE, 1998-99 SURVEY ON LAWYER DISCIPLINE SYSTEMS* (2001) [hereinafter 1998-99 SURVEY]; ABA, CTR. FOR PROF'L RESPONSIBILITY, *STANDING COMM. ON PROF. DISCIPLINE, 1996 SURVEY ON LAWYER DISCIPLINE SYSTEMS* (1998) [hereinafter 1996 SURVEY]. These surveys were of limited use for this Article, primarily because no information on attorney gender is requested or reported, but also because the provision of information is voluntary (eleven states did not respond in 1996 and five states did not respond in 1998-1999), and the information sought is aggregative in nature, revealing nothing of the circumstances of individual cases.

The Center for Professional Responsibility also maintains the National Lawyer Regulatory Data Bank, a voluntary compilation of disciplinary records for states and some federal courts. Individual reports on a given state in a given year can be purchased from the Center (\$30 per state per year for ABA members). See ABA Center for Professional Responsibility, National Lawyer Regulatory Databank, at <http://www.abanet.org/cpr/databank.html> (last visited Feb. 12, 2004). However, the reports list only the name of the attorney disciplined and the final disposition. No other pertinent information, such as the attorney's gender (except for what can be gleaned from the first name), what the attorney did that was unethical, the type of case, the existence of aggravating or mitigating factors, or the age of the attorney, is provided. Due to these content limitations, as well as the authors' funding limitations, the only state for which we purchased a report was Connecticut. The report contains this disclaimer: "Because of the voluntary nature of this service, the Data Bank makes no claim that its records represent every public regulatory action taken and reinstatement issued." ABA CTR. FOR PROF'L RESPONSIBILITY, 2000 CONN. LAWYER REGULATORY REPORT 1 (2000) (on file with author). The limited nature of the data kept by the Center for Professional Responsibility is understandable in light of the purpose for which the Data Bank was instituted: to improve interstate enforcement of disciplinary violations by attorneys licensed to practice in more than one jurisdiction. See MCKAY REPORT, *supra* note 10, at 59-60.

17. A comprehensive list of all sources used in compiling the cases that went into the database is available on request from the authors.

18. The ABA maintains a Directory of Lawyer Disciplinary Agencies on its web site. ABA Center for Professional Responsibility, Directory of Lawyer Disciplinary Agencies, at <http://www.abanet.org/cpr/d/disciplinary.html> (last visited Feb. 12, 2004).

19. ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 87 (1970) [hereinafter CLARK REPORT] (honoring the commission's chair, retired Supreme Court Justice Tom C. Clark and decrying inadequate record-keeping by many disciplinary agencies).

records for some of the states.²⁰ Some states' disciplinary counsel prepare comprehensive compilations of all attorney disciplinary actions in the state for the period in question, listing the attorney's name, offenses committed, year of admission to the bar, case disposition, and other pertinent information.²¹ A few states have comprehensive lists of disciplined attorneys on their web sites.²² Other states' disciplinary counsel issue reports giving only aggregate numbers from which no information about individual cases can be gleaned.²³ Some states' disciplinary counsel prepare no annual report.²⁴

In addition, we turned to reports of disciplinary actions in the state bar journals and other practitioner-oriented publications. These also are far from uniform in their reporting of attorney disciplinary actions, ranging from exhaustive reporting of all public discipline²⁵ to sketchy and incomplete examples of disciplinary actions.²⁶ Finally, the courts of many, but not all, states issue opinions in attorney discipline cases, which are available in reporters and electronic databases.²⁷

20. For example, an article in *Texas Lawyer* about the "gender gap" in attorney discipline in Texas reported that there were 159 disciplinary actions in calendar year 2000, 23 of which (or 14.5%) were against women. Brenda Sapino Jeffreys, *Discipline Actions and the Gender Gap*, TEX. LAW., Aug. 5, 2002, at 33 (citing State Bar of Texas as source). For our database, we located 229 attorney disciplinary cases decided in calendar year 2000, of which 38 (or 16.6%) were against women. The difference is most likely attributable to our use of sources in addition to the State Bar of Texas. Our total of 229 cases for 2000 is also closer to what the State Bar of Texas reported as the total number of cases for 2001, which was 233. *Id.* In addition, the Texas Commission for Lawyer Discipline reported 301 cases for a one-year period that included part of 1999. See Campbell & Kollman, *supra* note 15, at 260 (excluding private reprimands or orders for rehabilitation). As another example of a state for which it was difficult to determine the precise number of cases, see the description of the sources used for Connecticut (on file with authors).

21. *E.g.*, STATE BAR OF GA., OFFICE OF THE GEN. COUNSEL, ANNUAL REPORT OF THE GENERAL COUNSEL FOR THE OPERATIONAL YEAR 2000-2001; SUPREME COURT OF N.J., OFFICE OF ATTORNEY ETHICS, 2000 STATE OF THE ATTORNEY DISCIPLINE SYSTEM REPORT (2001) [hereinafter NEW JERSEY 2000 REPORT]; N.Y. STATE BAR ASSOC. COMM. ON PROF'L DISCIPLINE, ANNUAL REPORT ON LAWYER DISCIPLINE IN NEW YORK STATE FOR THE YEAR 2000 (2001) (on file with authors).

22. *E.g.*, ARIZ. STATE BAR, SANCTIONED ATTORNEYS-2000, at <http://www.azbar.org/Discipline/2000.pdf> (last visited Feb. 12, 2004); MASS. BD. OF OVERSEERS, OFFICE OF BAR COUNSEL, DISCIPLINARY DECISIONS AND ADMONITIONS, at <http://www.state.ma.us/obcbbo/decisions.htm> (last visited Mar. 26, 2004); MICH. ATTORNEY DISCIPLINE BD., DISCIPLINED ATTORNEY CHECKER, at <http://www.checker.htm> (last visited Feb. 12, 2004).

23. *E.g.*, N.M. DISCIPLINARY BD. 2000 STATISTICAL REPORT (2001) (on file with authors).

24. For example, the State Bar of Nevada does not issue an annual report regarding the discipline of Nevada attorneys. E-mail from Torri Slaughter, State Bar of Nevada, to Patricia Hatamyar (June 20, 2001) (on file with authors).

25. See, *e.g.*, *Lawyer Disciplinary Actions*, 35 ARK. LAW. 44 (Summer 2000).

26. See, *e.g.*, *From the OCDC*, MO. BAR BULL., May 2000, at 22.

27. See, *e.g.*, *State ex rel. Okla. Bar Ass'n v. Foster*, 995 P.2d 1138 (Okla. 2000).

2. Gender Proportions in Total Attorney Populations

For the numbers of all male and female attorneys nationally and in each individual state, we used the 1995 figures published in 1999 by the American Bar Foundation,²⁸ which were the most comprehensive and recent figures we could find.²⁹ We could not locate any other reports of the number of male and female attorneys in each state.³⁰ Many state bar associations do not maintain these figures, or maintain them based only on voluntary responses.

At first it may appear that we compared apples and oranges, since the disciplinary cases we examined dated from calendar year 2000 while the gender proportions were estimated in 1995. However, the time lag is not as great as first appears.

First, even though the opinions included in the database are from 2000, a good portion of them cover conduct that occurred several years—even more than five years—earlier,³¹ so the comparison is more apples-to-apples than might be imagined. While we did not code the cases based on the year in which the misconduct actually oc-

28. CLARA N. CARSON, *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1995* (1999). Slightly different national figures were also reported in ABA COMM'N ON WOMEN IN THE PROFESSION, *BASIC FACTS FROM WOMEN IN THE LAW: A LOOK AT THE NUMBERS 1* (1995) [hereinafter *BASIC FACTS*] (reporting 896,172 lawyers in the United States in 1995, of which 207,738, or 23%, were women).

29. An August 23, 2002 telephone conversation with the ABA revealed that although a report of 2000 figures is in progress, the study is not complete at the time of this writing. See also E-mail from Jodi Polster, 312-988-6580, to Nancy Cowden (March 12, 2002) (“[T]he latest edition is currently being written but I do not have a publishing date for when it will become available.”).

30. The American Bar Association compiles an annual National Lawyer Population Survey based on state-reported figures, but there were several problems with using these figures. See, e.g., ABA, *NATIONAL LAWYER POPULATION SURVEY STATISTICS (2000)* [hereinafter *2000 POPULATION SURVEY*] (on file with authors). First, we did not obtain a copy of the *2000 Population Survey* from the ABA; the ABA declined to share it with us on the ground that it is “inaccurate.” Telephone conversation of Lee Peoples, with Tracie Moxley, ABA Market Research Department (April 9, 2003) (We obtained a copy from state bar counsel, to whom the ABA sends the completed surveys as a courtesy.). Second, not all states compile statistics based on gender, so the ABA's information is incomplete for our purposes. Third, the *2000 Population Survey* purports to report only the number of attorneys resident in each state. Because we included cases of reciprocal discipline in our database when calculating the number of disciplined attorneys for each state (although we excluded duplicate reciprocals when calculating figures on a national basis), it was more consistent to use the number of all attorneys licensed in each state, rather than merely residents. That said, the percentages by state of male and female attorneys reported in the *2000 Population Survey* are, in most cases, extremely close to the updated percentages we obtained for those same states on our own. See *infra* Table 2, at p. 802.

31. See, e.g., *Discipline*, 8 NEV. LAW. 29 (2000) (order of suspension describing misconduct that occurred as early as 1992); cf. CLARK REPORT, *supra* note 19, at 17 (reporting as one of many problems with the disciplinary system in 1970, “[c]umbersome structures that result in an inordinate time gap between the inception and conclusion of disciplinary proceedings”); MCKAY REPORT, *supra* note 10, at 66 (reporting some improvement in 1991, but still finding “a significant delay in the processing of cases” in a “significant minority of jurisdictions”).

curred (which is not consistently available from the reports), our admittedly unscientific sense is that between the cases that involved conduct occurring in the early 1990s and the cases that involved conduct occurring as late as 1999, there is probably a rough approximation centering on 1995.

Second, the proportion of female attorneys has increased since 1995 in every state for which figures are available.³² Thus, the difference between the percentage of attorneys in 1995 who were female and the percentage of disciplined attorneys who were female (as reported in 2000) is actually smaller than the difference would be if we had been able to use the percentage of all attorneys in 2000 who were female. For example, roughly 12% of the disciplined attorneys in our sample were women. Women made up only 24% of attorneys nationwide in 1995, but that percentage grew to “almost a third of the nation’s lawyers” in 2000.³³ In other words, the true gap between the percentage of female disciplined attorneys and female attorneys generally is probably even greater than we found in our study.

As a checking mechanism, we obtained updated figures for the gender breakdown of the attorney population in nineteen states.³⁴ We conducted some of the statistical analyses using these updated figures. No significant differences in results were apparent when the updated figures were used, which will be discussed at various points below.³⁵

D. Coding the Data

Our code book for the data covered the following pieces of information that might be extracted from the published reports: the state of discipline; the disciplined attorney’s first and last name, gender, age, year of admission to the bar in the state of discipline, and legal position held; the type of violation(s) the attorney committed; the final sanction imposed against the attorney; whether the discipline imposed was reciprocal, and if so, from what state; the existence of a prior disciplinary sanction against the attorney; the type of com-

32. Compare *infra* tbl.3, at p. 803, with *infra* tbl.18, at p. 853. See also, e.g., CONSULTANT ON LEGAL EDUC. TO THE ABA, ANNUAL REPORT 1999-2000, at 21 (2001) (The percent of female law students has increased from 1995 to 1999.), available at <http://www.abanet.org/legaled>.

33. DEBORAH L. RHODE, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 5 (2001). But see 2000 POPULATION SURVEY, *supra* note 30 (indicating in an unofficial report that of the states reporting gender percentages, approximately 27.5% of attorneys are women).

34. The states are Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Mexico, North Carolina, Oregon, Rhode Island, South Carolina, and Texas (on file with authors).

35. See *infra* tbl.2 at p. 802; *infra* tbl.3, at p. 803.

plainant; the type of legal matter in which the violation(s) occurred; and any aggravating or mitigating factors mentioned in the report.

None of the states included all the potential items of information in their reports, and some hardly included any. What could be gleaned from the reports was coded, and if there was no information in the report pertaining to a particular factor, that cell was left blank.³⁶

1. *Determining Gender*

Most of the reports identified the sanctioned attorneys by name but did not explicitly state their gender. We initially coded the attorneys as male or female by using common American assumptions of gender based upon a person's first name.³⁷ On occasion, if a name was unfamiliar, we consulted a "baby name" book.³⁸ We confirmed—and sometimes changed—our initial classification, where possible, by noticing any gendered pronouns used in the available report ("he," "she," "his," or "her"). This method was also employed when the attorney's first name could be used for either a man or a woman (such as Lee, Kelly, or Chris).

This left a relatively small number of attorneys (thirty-four of 3575, or less than 1%) whose gender could not be classified. Their gender was coded as "cannot determine."

2. *Type of Violation Committed*

We developed seventeen different categories of ethical violations to code this variable: competence and diligence; scope of representation; communications with client; fees; confidentiality; conflict of interest; improper management or misappropriation of client or third party funds or property; improper litigation conduct; fraudulent or deceptive activity; improper communications with persons other than clients or tribunals; unauthorized practice of law and other violations of law firms' duties; criminal activity; misconduct related to a disciplinary proceeding involving the same lawyer; and state bar requirements. We also had codes for "other," "not available," and "reciprocal discipline."³⁹

36. Some of the information, such as an attorney's age or year of admission to the bar, might theoretically have been available in sources other than the published disciplinary report, such as *Martindale-Hubbell*, but we did not attempt to locate any information beyond the report.

37. There may be an occasional boy named Sue, but we accepted that risk.

38. BRUCE LANSKY, *THE VERY BEST BABY NAME BOOK IN THE WHOLE WIDE WORLD* (1984).

39. The code book, which is available on request from the authors, provides more detail on each of the categories, including the corresponding Model Rules of Professional Conduct, MODEL RULES OF PROF'L CONDUCT (1983) [hereinafter MRPC], for each, if any.

We developed these codes by starting with the groupings suggested by the articles of the *Model Rules of Professional Conduct*.⁴⁰ We then modified the MRPC groupings to reflect some categories actually reported by most state bar disciplinary agencies, although not explicitly linked to the MRPC.⁴¹ We tested the suitability of the codes by attempting to code hundreds of sample disciplinary reports, and then adjusting the codes to account for problems that arose in application.

If the reporting agency provided a synopsis of the facts leading to discipline, the underlying facts, rather than the particular disciplinary rules the agency invoked, were evaluated to code the violation(s). This was primarily because the reporting agency frequently characterized one item of misconduct as a violation of as many different provisions as could reasonably fit, whereas our goal was to assign only one code to each type of misconduct. Moreover, we wanted to categorize the same conduct consistently across states. If the reporting agency only stated the disciplinary rules violated without describing the underlying violation, we had no choice but to use that characterization in the coding.

We included for each disciplined attorney only the different types of violations he or she committed, not the number of times he or she might have committed that type of violation. For example, if it was reported that an attorney failed to return the phone calls of Client X, Client Y, and Client Z, that would be counted only once, in the category of "communications with client." If it was reported that an attorney failed to return the phone calls of Client X, let the statute of limitations run on Client X's claim, and stole Client X's funds held in trust, that would be counted as three separate violations, one for "communications with client," one for "competence and diligence," and one for "improper management or misappropriation." After some trial and error, we allowed eight columns for types of violations. No attorney in our sample committed more than eight different types of violation (as we classified them).

The reports sometimes list a catch-all violation, such as engaging in acts of moral turpitude, violating or attempting to violate a rule of professional conduct, engaging in conduct prejudicial to the administration of justice, or engaging in conduct adversely reflecting on fitness to practice law. These were not separately coded when the un-

40. We did not include Article 6, Public Service (including pro bono representation), as these provisions appear to be aspirational.

41. For example, many states that classify disciplinary actions by violation have a separate category for "fraud" or "misrepresentation." *E.g.*, ATTORNEY REGISTRATION & DISCIPLINARY COMM'N OF THE SUPREME COURT OF ILL., 2000 ANNUAL REPORT 12 (2001) [hereinafter ILLINOIS 2000 REPORT] ("fraudulent or deceptive activity"); NEW JERSEY 2000 REPORT, *supra* note 21, at 6 ("fraud/misrepresentation") (on file with authors).

derlying conduct was discernible and could be coded in a more descriptive category. They were coded as “other” when there was no further information available.

Inevitably, some misconduct might be classified in more than one category.⁴² For example, lying to a client could just as well be categorized in “communications with client” as in “fraudulent or deceptive activity.” For each such example, we made a decision to call it one or the other and then consistently coded all subsequent instances.⁴³

3. *Sanction Imposed*

The final sanction ordered against the attorney was coded in only one of ten exclusive categories: disbarment (which includes voluntary resignation from the bar if the underlying charges were described in the report); voluntary resignation from the bar with *unspecified* charges pending; interim or indefinite suspension; term suspension; public reprimand; private reprimand; probation; and transfer to disability inactive status.⁴⁴

If the sanction was a term suspension, the length (in months) of that suspension was also noted. To code the suspension length consistently across states, retroactive suspensions were computed prospectively only.⁴⁵

Because states sometimes have different classifications or names for essentially the same sanction, it was necessary for consistency to code according to our definition of the punishment rather than the state’s. For example, although New Jersey issues both “admonitions” and “reprimands,”⁴⁶ both were coded as a “public reprimand” in our database, as we believed that one category for public reprimand and one for private reprimand (whatever they might be called) were sufficient to capture the severity of that level of punishment. All assumptions made to conform any particular state’s classifications are described in the authors’ list of sources.

42. Cf. Levin, *supra* note 15, at 39 (“At times, a lawyer’s misconduct can seemingly fall within two different black-letter standards. . . . [of the ABA Standards for Imposing Lawyer Sanctions].”).

43. In the example given, we decided to code it as “fraudulent or deceptive activity” because many state bar disciplinary offices separately categorize and report “fraudulent or deceptive activities,” *see supra* note 41, and it seems that lying to a client is qualitatively different from failing to return a client’s phone calls.

44. *See, e.g.,* ALASKA BAR ASSOC., 2000 ANNUAL REPORT 24 (2001) (on file with authors) (describing “disability inactive” status as “an incapacitating illness, addiction to drugs or intoxicants, senility, death, disappearance, or judicially declared incompetence of an attorney, rather than actual misconduct by the attorney”). The other two categories were “other” and “not stated,” the incidence of both of which were very rare.

45. For instance, if a disciplinary agency, in an order dated July 1, 2000, entered what it called a “twelve-month suspension” against an attorney, but stated that the suspension was “retroactive to January 1, 2000,” that was coded as a six-month suspension.

46. NEW JERSEY 2000 REPORT, *supra* note 21, at 17-18.

4. *Type of Legal Job Held by the Attorney*

Mindful that female attorneys are more likely to be in solo practice, federal or state government positions, private industry, or legal aid than male attorneys,⁴⁷ we attempted to classify the disciplined attorneys as prosecutors, other types of government lawyers, public defenders, other types of court-appointed attorneys, in-house counsel, bankruptcy trustees, or in private practice. Most disciplinary opinions, however, do not provide sufficient information to reliably perform this classification. We made certain assumptions to increase the number of observations for which we could code this variable, such as an assumption that an attorney found guilty of a trust account violation was in private practice. Nonetheless, most cases are still missing this variable, and we elected not to use the variable in the regressions.

5. *Type of Complainant and Type of Case in Which Violation was Committed*

As women are slightly less likely than men to be in the private practice of law,⁴⁸ we thought that the identity of the complainants (such as a client or a judge), and the type of case (such as domestic relations or personal injury) might prove relevant to explaining any gender difference in disciplinary rates. Unfortunately, as with the attorneys' job types, most disciplinary opinions do not provide this information. We coded those that did and left the cells blank in cases in which no information about these matters could be found. Again, however, with most cases missing these variables, we elected not to use the variables in the regressions.

6. *Prior Disciplinary Actions Against the Attorney and Other Aggravating or Mitigating Factors*

The ABA has promulgated standards, including aggravating and mitigating circumstances, for courts and disciplinary agencies to consider when determining the severity of punishment for ethical viola-

47. BASIC FACTS, *supra* note 28, at 2, 4 (48% of women in private practice in 1991 were solo practitioners, compared to 44% of men; 12% of female lawyers worked in government, compared to 7% of male lawyers in 1991); *see also* RHODE, *supra* note 33, at 23; CARSON, *supra* note 28, at 10.

48. BASIC FACTS, *supra* note 28, at 2 (estimating that 70% and 74% of female and male lawyers, respectively, were in private practice in 1995); CARSON, *supra* note 28, at 10; Barbara A. Curran, *American Lawyers in the 1980s: A Profession in Transition*, 20 LAW & SOC'Y REV. 19, 47 (1986) (In 1980, 55.7% of female lawyers were in private practice, compared to 69.4% of male lawyers.).

tions.⁴⁹ Many states explicitly reference and apply these standards in their written reports or opinions.⁵⁰ For those that did, we coded the factors loosely based on the ABA standards, adding numerous aggravating and mitigating circumstances mentioned in the reports and opinions that were *not* based on the ABA standards. Again, these cells were left blank if the opinion did not explicitly mention any such circumstances, or at least did not characterize such circumstances explicitly as aggravating or mitigating factors in determining punishment.

The existence or nonexistence of any prior disciplinary actions against the attorney was coded in a variable separate from aggravating and mitigating circumstances as a whole. This was because most states do, in fact, mention an attorney's prior disciplinary record, but often do not explicitly characterize it as an aggravating factor. To avoid generating a false number of "no prior discipline" cases, we classified each case in one of three ways: (1) if the opinion mentioned the existence of a prior disciplinary record, this was coded as "yes, has prior record"; (2) if the opinion expressly stated that the attorney had *no* prior disciplinary record, this was coded as "no, has no prior record"; and (3) if the opinion did not mention a prior record one way or the other, the cell was left blank.

Of course, the existence or nonexistence of a prior disciplinary record was not also coded as an aggravating or mitigating circumstance.

E. Eliminating Instances of Reciprocal Discipline

For calculations involving individual states, we used the database consisting of all 3575 cases (counting only, of course, the cases arising in the particular state being calculated). For calculations on a nationwide level, we created an alternate database that eliminated all instances we could find of the same attorney being disciplined in more than one state in the year 2000. For example, if the attorney was first disciplined in New York, and then reciprocally disciplined in New Jersey, we left in the entry from New York and eliminated the entry from New Jersey. The alternate database with "no reciprocals" included 3493 cases.

F. Statistical Methodology

A chi square distribution was performed to examine the statistical significance of gender differences in the overall rate of discipline, the

49. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (1991 & Supp. 1992). For a cogent critique of these standards, including the aggravating and mitigating factors, see Levin, *supra* note 15.

50. For a catalogue of such states, see Levin, *supra* note 15, at 33-36.

types of sanctions imposed, and the types of violations committed. The chi square test is a theoretical sampling distribution that allows one to test the assumption that a sample was drawn from a population with a given distribution. It is used to compare expected to actual values in categorical data to test for statistical differences.⁵¹

For example, a primary research question here was whether male and female attorneys incur disciplinary sanctions in the same proportions as their proportions in the overall attorney population. The null hypothesis for this question is that the percentages of disciplined attorneys who are male and female are equal to the percentages of all attorneys who are male and female, respectively. Since about 77% of all attorneys were male, one would expect, if the null hypothesis were true, that about 77% of disciplined attorneys would be male. In our study, it turned out that 88% of the disciplined attorneys were male.

The chi square test indicates the probability that the difference between the actual and expected values (in this example, 88% and 77%) could have occurred by chance. When that probability is 10% or lower (which is also called a confidence level of 90% or higher), the difference is commonly called statistically “significant.” When that probability is 5% or lower (also called a confidence level of 95% or higher), the difference is commonly called “highly significant.” Given one degree of freedom,⁵² the critical values for the chi square test are 2.71 and 3.84 for significant and highly significant differences, respectively.⁵³

The regression analyses were performed using OLS (Ordinary Least Squares). This procedure seeks to determine whether changes in a given independent variable make a significant contribution to changes in a given dependent variable. Either SAS or SPSS—software packages used to conduct statistical analysis in academia and industry—was used in all calculations.

III. RESULTS

A. Overall Rates of Discipline

There was a highly significant difference in the overall rates at which male and female attorneys were disciplined. There were

51. See, e.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 792 n.268 (1995); Taber et al., *supra* note 3, at 1237.

52. There are $(m - 1) \times (n - 1)$ degrees of freedom when testing independence in an $m \times n$ table. FREEDMAN ET AL., *supra* note 9, at 488. Here, there are two gender categories, male and female, and two disciplinary categories, disciplined and not disciplined. This two-by-two matrix yields one degree of freedom.

53. *Id.* at A-88.

857,931 licensed attorneys in the United States in 1995, of which about 76.4% (655,623) were male and 23.6% (202,308) were female.⁵⁴ As explained above, our “no reciprocals” database consisted of 3493 orders of attorney discipline decided in calendar year 2000 in the fifty states and the District of Columbia.⁵⁵ Eliminating the cases of unknown gender left 3461 cases.

Based on the proportions of men and women in the attorney population as a whole, one would expect that about 2644 of the disciplined attorneys would be male and 817 female.⁵⁶ In fact, 3055 (88.3%) of the disciplined attorneys were male and 406 (11.7%) were female.⁵⁷ In other words, less than half the number of female attorneys that would be expected to be disciplined (based on their proportion of the attorney population) were actually disciplined. The chi square test indicates that the difference between actual and expected numbers is highly significant at a confidence level in excess of 99%.⁵⁸

Tables 1 and 2 and Figure 1 show the overall difference between actual and expected rates of discipline by gender. Table 1 and Figure 1 use the American Bar Foundation figures for the number of male and female attorneys in the population.⁵⁹ Table 2 uses more recent figures on the number of male and female attorneys that we obtained from nineteen states.⁶⁰ The updated figures show an even larger difference between the gender proportions in the overall attorney population (28.2% women) and the gender proportions in the disciplined attorney population (12.1% women). Again, the chi square test indicates that this difference is highly significant at a confidence level in excess of 99%.

54. CARSON, *supra* note 28, at 23.

55. *See supra* Part II.E.

56. The expected number of male disciplined attorneys is $[3461 \times (655,623 \div 857,931)]$, and the expected number of female disciplined attorneys is $[3461 \times (202,308 \div 857,931)]$.

57. If one assumed that all 34 cases of unknown gender were women, and added those cases back, then 87.5% and 12.5% of the disciplined attorneys would have been men (3055/3493) and women (438/3493) respectively.

58. The chi square values are available from the authors on request.

59. CARSON, *supra* note 28, at 23.

60. *See supra* Part II.C.2.

TABLE 1
National Actual and Expected Rates of Attorney Discipline
by Gender

Gender	Number of Attorneys*	Percent of All Attorneys	Expected Number of Disciplined Attorneys	Actual Number of Disciplined Attorneys	Percent of Disciplined Attorneys
Male*	655,623	76.419%	2,644	3,055	88.269%
Female*	202,308	23.581%	817	406	11.731%
Total*	857,931	100%		3,461	100%

*Source: CARSON, *supra* note 28, at 23.

Figure 1
National Percentage of All Attorneys
and Disciplined Attorneys
by Gender

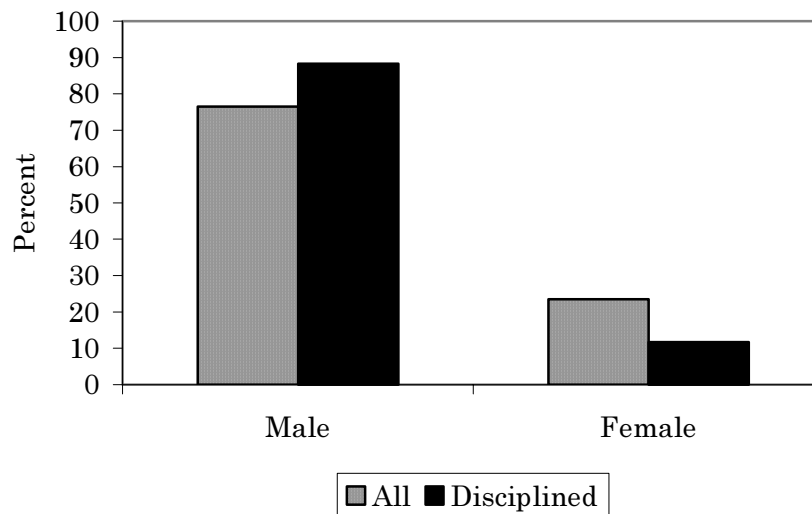


TABLE 2
Actual and Expected Rates of Attorney Discipline by Gender
in Nineteen Updated States

Gender	Number of Attorneys*	Percent of All Attorneys	Expected Number of Disciplined Attorneys	Actual Number of Disciplined Attorneys	Percent of Disciplined Attorneys
Male*	279,589	71.8%	840	1028	87.9%
Female*	109,671	28.2%	330	142	12.1%
Total*	389,260	100%		1170	100%

*Sources: *See supra* Part II.C.2 (on file with authors).

We also compared the actual and expected number of disciplined attorneys by gender for each of the individual fifty states and the District of Columbia based upon the proportion of male and female attorneys in that state.⁶¹ For example, California had 113,173 attorneys, of which 83,286 (73.6%) were male and 29,887 (26.4%) were female. But of California's 449 disciplined attorneys, 378 (84.2%) were male and 68 (15.1%) were female, a difference that is highly significant at a confidence level in excess of 99%.

Table 18 shows that the actual number of disciplined male attorneys exceeded the expected number of disciplined male attorneys (and, correspondingly, the actual number of female disciplined attorneys was less than the expected number of female disciplined attorneys) in all but four states. There was a highly significant difference (at a confidence level in excess of 95%) between actual and expected numbers of attorneys disciplined by gender in twenty-four states and the District of Columbia,⁶² and a significant difference (at a confidence level in excess of 90%) in Iowa.⁶³

In general, the states with a highly significant difference between actual and expected figures included the states with the largest number of lawyers. In fact, Michigan was the only state with more than 100 disciplined attorneys in 2000 for which the difference be-

61. *See infra* tbl.18, at p. 853. Due to its length, it is reproduced at the end of this Article.

62. Chi square greater than 3.841 with one degree of freedom. The states meeting this criterion were Alabama, Alaska, Arizona, California, Connecticut, the District of Columbia, Florida, Georgia, Illinois, Indiana, Louisiana, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia, and Washington.

63. Chi square greater than 2.706 with one degree of freedom.

tween actual and expected numbers of disciplined lawyers by gender was not statistically significant.⁶⁴

We also performed a state-by-state analysis of disciplinary rates by gender in the nineteen states from which we received updated figures for the number of licensed attorneys and the gender proportions thereof. Table 3 shows the results. The difference between actual and expected numbers was highly significant in eleven of the nineteen states and significant in a twelfth state. Again, the differences are more significant in the states with the larger attorney populations.

TABLE 3
State-by-State Comparison of Genders of All Attorneys and Genders of Disciplined Attorneys (Nineteen Updated States)

State	No. of Licensed Attorneys	% (no.) Male Attorneys	% (no.) Female Attorneys	No. of Attorneys Disciplined in 2000	% (no.) of Male Disciplined Attorneys†	% (no.) of Female Disciplined Attorneys
Alaska**	3,515	70.2% (2,467)	29.8% (1,048)	14	92.9% (13)	0% (0)
Arizona**	18,339	71.3% (13,083)	28.7% (5,256)	71	90.1% (64)	9.9% (7)
Colorado**	28,390	70.4% (19,999)	29.6% (8,391)	43	83.7% (36)	14% (6)
Florida**	62,579	71.6% (44,785)	28.4% (17,794)	310	87.7% (272)	11.6% (36)
Georgia**	32,780	70% (22,946)	30% (9,834)	90	89% (80)	10% (9)
Idaho	3,182	79.4% (2,526)	20.6% (656)	6	100% (6)	0% (0)
Illinois**	73,661	70% (51,563)	30% (22,098)	123	92.7% (114)	7.3% (9)
Kentucky	13,484	73.7% (9,936)	26.3% (3,548)	48	77.1% (37)	22.9% (11)

64. In Michigan, the number of expected male disciplined attorneys (101) was lower than the number of actual male disciplined attorneys (105), and the number of expected female disciplined attorneys (25) was higher than the number of actual female disciplined attorneys (21), but the differences were not statistically significant.

State	No. of Licensed Attor- neys	% (no.) Male Attorneys	% (no.) Female Attor- neys	No. of Attor- neys Disci- plined in 2000	% (no.) of Male Disci- plined Attor- neys†	% (no.) of Female Disci- plined Attorneys
Louisiana**	18,678	73.7% (13,767)	26.3% (4,911)	80	88.8% (71)	11.2% (9)
Maine	4,955	70.5% (3,491)	29.5% (1,464)	10	90% (9)	10% (1)
Mississippi*	6,949	79.4% (5,522)	20.5% (1,427)	28	92.9% (26)	7.1% (2)
Montana	2,515	75.6% (1,900)	24.4% (615)	13	92.3% (12)	7.7% (1)
Nebraska	8,445	75.9% (6,412)	24.1% (2,033)	12	75% (9)	25% (3)
New Mexico	6,664	67.4% (4,492)	32.6% (2,172)	4	100% (4)	0% (0)
North Carolina**	12,200	75% (9,150)	25% (3,050)	63	88.9% (56)	11.1% (7)
Oregon**	9,904	71.3% (7,062)	28.7% (2,842)	56	83.9% (47)	16.1% (9)
Rhode Island	5,105	73.6% (3,755)	26.4% (1,350)	5	100% (5)	0% (0)
South Carolina**	10,391	73.5% (7,640)	26.4% (2,751)	57	89.5% (51)	10.5% (6)
Texas**	67,524	72.7% (49,093)	27.3% (18,431)	230	83% (191)	16.5% (38)

Sources for the percentages of male and female attorneys by state: *see supra* Part II.C.2 (on file with authors).

† Percentages may not add to 100% because some attorneys' gender could not be determined from either the disciplinary opinion or the attorney's first name.

* Difference between expected and actual proportions of disciplined attorneys is statistically significant at a confidence level exceeding 90% (chi square test).

** Difference between expected and actual proportions of disciplined attorneys is statistically significant at a confidence level exceeding 95% (chi square test).

B. Types of Punishment

We compared the proportions of men and women incurring different types of sanctions to two groups: first, the population of all licensed attorneys (Table 4 and Figure 2), and second, the sample of all disciplined attorneys (Table 6). Not surprisingly (given the results in the last section), when compared to the total attorney population, the actual number of male attorneys exceeded the expected number (and the actual number of female attorneys was less than the expected number) in each category of sanction, all at differences in rates that were highly significant.⁶⁵ For example, with women comprising 23.6% of the overall attorney population, one would expect 211 women to be disbarred (of the 893 total disbarments). In fact, women only accounted for 86 of the disbarments, or about 40% of the number expected.

TABLE 4
Types of Punishment Incurred by Gender
Compared to Population of All Licensed Attorneys

Sanction	Total No. (%) of Attorneys Incurring Sanction†	Male Expected No. (76.419%)†	Male Actual No. (%)	Female Expected No. (23.581%) †	Female Actual No. (%)
Disbarment (includes resignations)*	893 (26%)	682	807 (90%)	211	86 (10%)
Indefinite Suspension*	355 (10%)	271	316 (89%)	84	39 (11%)
Term Suspension*	1,029 (30%)	786	888 (86%)	243	141 (14%)
Public Reprimand*	778 (23%)	595	689 (89%)	183	89 (11%)
Private Reprimand*	147 (4%)	112	132 (90%)	35	15 (10%)
Probation*	192 (6%)	147	163 (85%)	45	29 (15%)

65. See *infra* tbl.4, at p. 805. We performed the same analysis (type of punishment by gender as compared to all licensed attorneys) using the more recent gender proportions provided by nineteen states. See *supra* Part II.C.2 The difference between actual and expected gender proportions remained statistically significant at a confidence level greater than 95% in all types of sanction except disability inactive (for which the confidence level exceeded 90%).

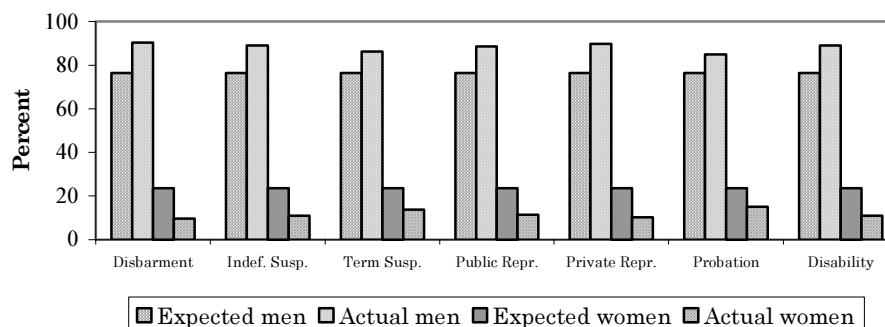
Sanction	Total No. (%) of Attorneys Incurring Sanction†	Male Expected No. (76.419%)†	Male Actual No. (%)	Female Expected No. (23.581%) †	Female Actual No. (%)
Disability In- active*	55 (2%)	42	49 (89%)	13	6 (11%)
Total	3,449††	2,635	3,044 (88%)	814	405 (12%)

† Based on attorney population of 76.419% men and 23.581% women.⁶⁶

†† Does not include 34 attorneys for whom gender could not be determined, nor 12 attorneys whose sanctions were coded as “other” or “not stated.”

* Difference between expected and actual proportions of disciplined attorneys is statistically significant at a confidence level exceeding 95% (chi square test).

Figure 2



We also looked at disbarments (including resignations with disciplinary proceedings pending) in individual states. Table 5 shows the fifteen states in which there was a statistically significant gender difference in disbarment rate.⁶⁷

66. See CARSON, *supra* note 28, at 23.

67. In all the other states, except for Kentucky and West Virginia, the actual number of disbarred male attorneys exceeded the expected number of disbarred male attorneys, but the difference was not statistically significant. In addition, in all the states in Table 5 from which we obtained more recent figures on attorney population and gender proportion (Colorado, Florida, Georgia, Illinois, Louisiana, North Carolina, and Texas), the difference between expected and actual numbers of disbarred attorneys by gender remained statistically significant.

TABLE 5
State-by-State Comparison of Expected vs. Actual Number of
Disbarments† by Gender Compared to Population of
All Licensed Attorneys in State

State	% Male Attorneys	% Female Attorneys	No. of Attorneys Disbarred	% (no.) of Disbarred who are Male	% (no.) of Disbarred who are Female
California**	73.6%	26.4%	163	86% (140)	14% (23)
Colorado**	75.1%	24.9%	12	100% (12)	0% (0)
District of Columbia**	69%	31%	40	85% (34)	15% (6)
Florida**	78.4%	21.6%	66	95% (63)	5% (3)
Georgia**	77.2%	22.8%	22	95% (21)	5% (1)
Illinois**	77.1%	22.9%	41	93% (38)	7% (3)
Indiana*	80.7%	19.3%	14	100% (14)	0% (0)
Iowa**	82.8%	17.2%	1	0% (0)	100% (1)
Louisiana**	79.7%	20.3%	19	100% (19)	0% (0)
New Jersey**	75.9%	24.1%	46	91% (42)	9% (4)
New York**	74.4%	25.6%	108	95% (103)	5% (5)
North Carolina*	78.4%	21.6%	19	95% (18)	5% (1)
Oklahoma*	80.1%	19.9%	11	100% (11)	0% (0)
Pennsylvania**	75.1%	24.9%	33	91% (30)	9% (3)
Texas*	77.6%	22.4%	45	89% (40)	11% (5)

† “Disbarments” here includes resignations from the bar with disciplinary charges pending.

* Difference between expected and actual proportions of disciplined attorneys is statistically significant at a confidence level exceeding 90% (chi square test).

** Difference between expected and actual proportions of disciplined attorneys is statistically significant at a confidence level exceeding 95% (chi square test).

Table 6 shows the results when the expected proportions of male and female disbarments are calculated using the actual gender proportions of only *disciplined* attorneys. There was a highly significant difference in the proportions of men and women being disbarred (with more *men* disbarred than expected) and receiving term suspensions (with more *women* receiving term suspensions than expected). These results were not materially different for the nineteen states providing more recent figures.⁶⁸

Figures 3 and 4 show the distribution of sanctions by gender in our sample. Most notably, while 26% of disciplined men were disbarred, only 21% of disciplined women were disbarred. A larger percentage of disciplined women (35%) than disciplined men (29%) received term suspensions.

TABLE 6
Types of Punishment Incurred by Gender
Compared to Sample of Disciplined Attorneys Only

Sanction	Total No. (%) of Attorneys Incurring Sanction†	Male Expected No. (88.269%) ††	Male Actual No. (%)	Female Expected No. (11.731%) ††	Female Actual No. (%)
Disbarment (includes resignations)*	893 (26%)	788	807 (27%)	105	86 (21%)
Indefinite Suspension	355 (10%)	313	316 (10%)	42	39 (10%)
Term Suspension*	1,029 (30%)	908	888 (29%)	121	141 (35%)
Public Reprimand	778 (23%)	687	689 (23%)	91	89 (22%)
Private Reprimand	147 (4%)	130	132 (4%)	17	15 (4%)
Probation	192 (6%)	169	163 (5%)	23	29 (7%)
Disability Inactive	55 (2%)	49	49 (2%)	6	6 (1%)

68. More men (263) were actually disbarred than expected (249), and more women (61) incurred term suspensions than expected (44). This is significant at a confidence level in excess of 95%.

Sanction	Total No. (%) of Attorneys Incurring Sanction†	Male Expected No. (88.269%) ††	Male Actual No. (%)	Female Expected No. (11.731%) ††	Female Actual No. (%)
Total	3,449		3,044		405

† Does not include 34 attorneys for whom gender could not be determined, nor 12 attorneys whose sanction was coded “other” or “not stated.”

†† Based on 88.269% of disciplined attorneys being male and 11.731% of disciplined attorneys being female.

*Difference between actual and expected number is significant at a confidence level in excess of 95% (chi square test).

FIGURE 3
Types of Sanctions Incurred by Disciplined Men

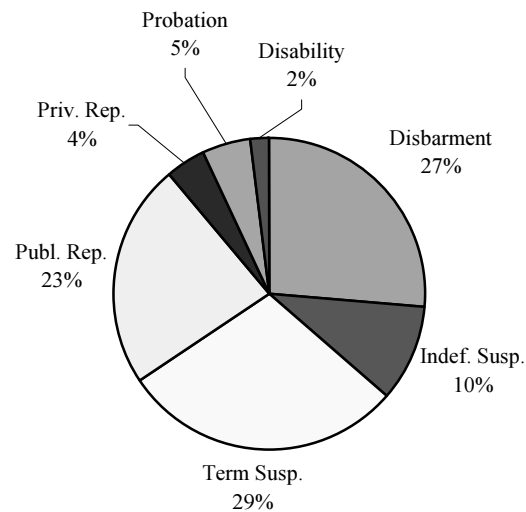
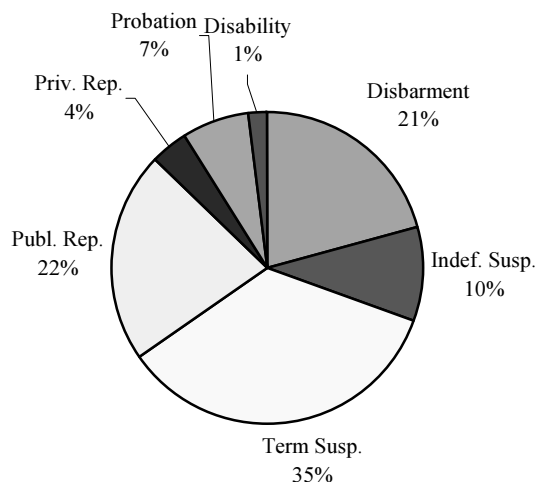


FIGURE 4
Types of Sanctions Incurred by Disciplined Women



C. Types of Violations

Again, we compared the proportion of men and women committing different types of violations to two groups: first, the population of all licensed attorneys (Table 7), and second, the sample of all disciplined attorneys (Table 8).⁶⁹

The results shown in Table 7 are predictable, given the overall gender difference in discipline rates. For almost every category of violation, when compared to all attorneys, the actual number of violations by men exceeded the expected number of violations (and conversely, the actual number of violations by women was less than the expected number), and the difference between actual and expected was highly significant. For example, given an attorney population that is 76.4% male, one would expect that men would have committed 882 of the 1154 total violations of competence and diligence. In fact, men committed 1002 of such violations, 120 more than expected.

Table 8 compares the incidence of actual violations to the gender proportions of the disciplined attorneys only, which were 88.3% male and 11.7% female. Even looking only at disciplined attorneys, the actual number of violations by men involving misappropriation and

69. As explained above, *see supra* Part II.D.2, the violations were not exclusive categories; a single attorney could commit more than one type of violation (up to eight, in fact). Conversely, if an attorney committed the same violation with respect to more than one client, the violation was only counted once for that attorney. Thus, the percentages in Tables 7 and 8 must be interpreted carefully.

criminal activity exceed the expected number by a highly significant amount. For example, of the 798 cases involving misappropriation, one would expect that men would have committed 704 violations (88.3% of 798). In fact, men committed 721 such violations, 17 more than expected. Of the 521 cases involving criminal activity, one would expect that men would have committed 460 violations. In fact, men committed 480 such violations, 20 more than expected.

Surprisingly, again looking only at disciplined attorneys, the actual number of violations by women exceeded the expected number by a statistically significant amount in four categories: competence and diligence, communications with client, fees, and state bar requirements. The first three categories are particularly interesting because the results appear to cast doubt on female attorneys' hypothesized better communication skills and "ethic of care."⁷⁰

TABLE 7
Types of Violations Committed by Gender
Compared to Population of All Licensed Attorneys

Violation†	Total No. of Violations (% of all violations)††	Male Ex-pected No. (76.419 %)‡	Male Actual No. (%)	Female Ex-pected No. (23.581 %)‡	Female Actual No. (%)
Competence or Diligence**	1,154 (17%)	882	1,002 (87%)	272	152 (13%)
Scope of Representation*	93 (1%)	71	79 (85%)	22	14 (15%)
Communications with Client**	933 (14%)	713	801 (86%)	220	132 (14%)
Fees**	403 (6%)	308	340 (84%)	95	63 (16%)
Confidentiality	18 (0%)	14	16 (89%)	4	2 (11%)
Conflict of Interest**	242 (4%)	185	219 (90%)	57	23 (10%)
Mismanagement or Misappropriation of Property**	798 (12%)	610	721 (90%)	188	77 (10%)

70. See *infra* Parts IV.H.3-4.

Violation†	Total No. of Violations (% of all violations)††	Male Ex-pected No. (76.419%)‡	Male Actual No. (%)	Female Ex-pected No. (23.581%)‡	Female Actual No. (%)
Improper Litigation Conduct**	336 (5%)	257	292 (87%)	79	44 (13%)
Fraudulent Activity**	618 (9%)	472	536 (87%)	146	82 (13%)
Other Improper Communications*	101 (1%)	77	88 (87%)	24	13 (13%)
Unauthorized Practice of Law, Other Law Firm Duties**	294 (4%)	225	264 (90%)	69	30 (10%)
Criminal Activity**	521 (8%)	398	480 (92%)	123	41 (8%)
Misconduct in Disciplinary Proceeding**	754 (11%)	576	653 (87%)	178	101 (13%)
State Bar Requirements	58 (1%)	44	46 (79%)	14	12 (21%)
Other	100 (1%)	76	88 (88%)	24	12 (12%)
Not Available	277 (4%)	212	243 (88%)	65	34 (12%)
Reciprocal Discipline**	177 (3%)	135	162 (92%)	42	15 (8%)
Total	6,877	5,255	6,030 (88%)	1,622	847 (12%)

† These are non-exclusive variables in the sense that a single proceeding may involve an attorney who committed more than one type of violation.

†† Cases of unknown gender excluded.

‡ Based on population of all attorneys being 76.419% male and 23.581% female.

* Difference between actual and expected is significant at a confidence level in excess of 90% (chi square test).

** Difference between actual and expected is significant at a confidence level in excess of 95% (chi square test).

TABLE 8
Types of Violations Committed by Gender
Compared to Sample of Disciplined Attorneys Only

Violation†	Total No. of Violations (% of all violations)††	Male Ex-pected No.‡	Male Actual No. (%)	Female Ex-pected No.‡	Female Actual No. (%)
Competence or Diligence*	1,154 (17%)	1,019	1,002 (87%)	135	152 (13%)
Scope of Representation	93 (1%)	82	79 (85%)	11	14 (15%)
Communications with Client**	933 (14%)	824	801 (86%)	109	132 (14%)
Fees**	403 (6%)	356	340 (84%)	47	63 (16%)
Confidentiality	18 (0%)	16	16 (89%)	2	2 (11%)
Conflict of Interest	242 (4%)	214	219 (90%)	28	23 (10%)
Mismanagement or Misappropriation of Property**	798 (12%)	704	721 (90%)	94	77 (10%)
Improper Litigation Conduct	336 (5%)	297	292 (87%)	39	44 (13%)
Fraudulent Activity	618 (9%)	546	536 (87%)	72	82 (13%)
Other Improper Communications	101 (1%)	89	88 (87%)	12	13 (13%)
Unauthorized Practice of Law, Other Law Firm Duties	294 (4%)	260	264 (90%)	34	30 (10%)
Criminal Activity**	521 (8%)	460	480 (92%)	61	41 (8%)
Misconduct in Disciplinary Proceeding	754 (11%)	666	653 (87%)	88	101 (13%)
State Bar Requirements**	58 (1%)	51	46 (79%)	7	12 (21%)

Violation†	Total No. of Violations (% of all violations)††	Male Ex-pected No.‡	Male Actual No. (%)	Female Ex-pected No.‡	Female Actual No. (%)
Other	100 (1%)	88	88 (88%)	12	12 (12%)
Not Available	277 (4%)	245	243 (88%)	32	34 (12%)
Reciprocal Discipline	177 (3%)	156	162 (92%)	21	15 (8%)
Total	6,877	6,073	6,030 (88%)	804	847 (12%)

† These are nonexclusive variables in the sense that a single proceeding may involve an attorney who committed more than one type of violation.

†† Cases of unknown gender excluded.

‡ Based on sample of disciplined attorneys being 88.269% male and 11.731% female.

* Difference between actual and expected is significant at a confidence level in excess of 90% (chi square test).

** Difference between actual and expected is significant at a confidence level in excess of 95% (chi square test).

D. Prior Disciplinary Proceedings and Other Aggravating and Mitigating Factors

As explained earlier,⁷¹ we coded the presence or absence of a prior disciplinary record separately from other aggravating and mitigating factors. The presence or absence of a prior record was mentioned in 924 of the 3,493 cases (exclusive of reciprocals). Table 9 tabulates those cases.

TABLE 9
Prior Disciplinary Record by Gender

	No. (%) of Men	No (%) of Women	Total*
No Prior Record	305 (37%)	41 (40%)	346 (38%)
Has Prior Record	515 (63%)	61 (60%)	576 (62%)
Total	820	102	922

*Includes only those cases where the existence or absence of a prior record was mentioned. Does not include two cases of unknown gender.

71. See *supra* Part II.D.6.

With respect to other aggravating and mitigating factors, it seems reasonable to assume that they are at least implicitly taken into account in most cases. However, most published reports do not explicitly mention such factors. Although we have tabulated the ones that did, the results, set forth in Tables 10 and 11, need to be interpreted with care.

Overall, aggravating and mitigating factors were applied to men and women in proportions roughly equivalent to their proportions of the disciplined attorneys sample. Of all aggravating factors mentioned, 88% were applied to men and 12% to women. Of all mitigating factors mentioned, 87% were applied to men and 13% to women.

Some notable gender differences are discussed where applicable in Part IV, *infra*. Entirely apart from gender considerations, it is interesting that mitigating factors (1161 total) were mentioned far more frequently than aggravating factors (745 total).

TABLE 10
Aggravating Factors Mentioned in Published Reports

Aggravating Factor*	No. Men (% of all men's aggravating factors)	No. Women (% of all women's ag- gravating factors)	Total No.
Pattern of Misconduct and/or Multiple Offenses	168 (26%)	28 (31%)	196
Has Substantial Experience as a Lawyer	102 (16%)	8 (9%)	110
Deceptive Practices or Lack of Candor During Disciplinary Process	80 (12%)	10 (11%)	90
Self-serving, Selfish, and/or Dishonest Motive	68 (10%)	5 (5%)	73
Harm to Client	53 (8%)	11 (12%)	64
No Remorse or Refusal to Acknowledge Wrongful Nature of Conduct	50 (8%)	5 (5%)	55
Indifference to Making Restitution	44 (7%)	11 (12%)	55
Vulnerability of Victim or Prior Friendship with Client	33 (5%)	4 (4%)	37
Conduct Harmed the Administration of Justice	20 (3%)	7 (8%)	27

Aggravating Factor*	No. Men (% of all men's aggravating factors)	No. Women (% of all women's ag- gravating factors)	Total No.
Other (illegal conduct or conduct involving moral turpitude, engaged in misconduct after disciplinary counsel began investigation or while attorney was on probation, failure to comply with court order, attorney through special employment (state bar, district attorney) should have realized conduct was wrong, harm to people other than client, conduct involved client trust account violations)	36 (6%)	2 (2%)	38
Total	654	91	745

* Factors are nonexclusive; an attorney could be subject to more than one. Factors do not include existence of a prior disciplinary record, which was counted separately.

TABLE 11
Mitigating Factors Mentioned in Published Reports

Mitigating Factor*	No. Men (% of all men's mitigating fac- tors)	No. Women (% of all women's mitigating fac- tors)	Total No.
Cooperated with Disciplinary Authorities	213 (21%)	21 (14%)	234
Demonstrated Remorse	127 (13%)	14 (9%)	141
Acted in Good Faith or Did Not Personally Profit	94 (9%)	19 (13%)	113
Restitution, Rehabilitation, Satisfied Conditions	95 (9%)	10 (7%)	105
Mental Health Problems (depression, bipolar, stress, schizophrenia, gambling addiction)	84 (8%)	19 (13%)	103
Provided Positive Character Witnesses or References	82 (8%)	9 (6%)	91
Conduct Did Not Harm Client	52 (5%)	4 (3%)	56

Mitigating Factor*	No. Men (% of all men's mitigating fac- tors)	No. Women (% of all women's mitigating fac- tors)	Total No.
Other Health Conditions of Attorney	38 (4%)	10 (7%)	48
Death, Illness of Close Family Member	31 (3%)	12 (8%)	43
Performs Community Service	34 (3%)	7 (5%)	41
Alcohol or Drug Abuse	38 (4%)	2 (1%)	40
Financial Problems	25 (2%)	7 (5%)	32
Other Penalties or Sanctions Have Been Imposed	22 (2%)	3 (2%)	25
Other (divorce, child or elder care, damage to office, secretarial problems, military service, delay in proceeding, inexperience, retiring, remoteness in time of offense, sole practitioner)	77 (8%)	12 (8%)	89
Total**	1,012	149	1,161

* Factors are non-exclusive; an attorney could have proffered more than one. Factors do not include absence of a prior disciplinary record, which was counted separately.

** Does not include two cases of unknown gender.

E. Matters in Which Attorneys Committed Disciplinary Violations

As Table 12 shows, we were able to determine the types of 2103 legal matters in which the attorneys in our sample violated a disciplinary rule. Note that this is not the same as determining this information for 2103 of the 3493 attorneys in our sample. Many of the reports list, with respect to a single attorney, several different legal matters in which the attorney is found to have violated a disciplinary rule. Thus, for example, if ten attorneys were each found to have neglected five cases (say two criminal matters, two domestic relations matters, and a bankruptcy), that would be fifty legal matters included in this tabulation, but only ten attorneys.

Consistent with reports from many disciplinary agencies,⁷² the types of legal matters in which disciplinary violations were most often found in our sample were domestic relations (20%), personal injury representing the plaintiff (19%), and criminal defense (14%). There were substantial gender differences in two of those categories. A much higher percentage of women (32%) than men (18%) committed a violation in domestic relations cases. In contrast, a much higher percentage of men (15%) than women (7%) committed a violation in criminal cases.

TABLE 12
Types of Legal Matters in Which Attorneys Committed
Disciplinary Violations

Type of Legal Matter	Total No.	% of Total	No. Men	% of Men	No. Women	% of Women
Domestic Relations	423	20%	337	18%	86	32%
Personal Injury, Plaintiff-side*	398	19%	357	19%	41	15%
Criminal Defense	285	14%	267	15%	18	7%
Wills, Probate, Trusts, Conservatorships	212	10%	198	11%	14	5%
General Civil Litigation, Individual Client, Plaintiff-side**	208	10%	176	10%	32	12%
Bankruptcy, Debtor Client	119	6%	99	5%	20	7%
Real Estate Transaction, Individual Client	87	4%	78	4%	9	3%

72. For example, in Oklahoma in 2000, the largest percentage of all formal grievances filed involved criminal practice (23.61%) and family practice (20.74%). *Oklahoma 2000 Report*, *supra* note 1. In Texas, “the criminal-defense area is by far the most prolific for complaints, followed by family law and personal-injury law.” Jeffreys, *supra* note 20; *see also* Campbell & Kollman, *supra* note 15, at 234 (In 1998, the greatest number of complaints against lawyers were filed in the criminal, personal injury, and family law areas.). In Colorado, the most common areas of “inquiries” in 2000 involved domestic relations (26%), civil (13%), and criminal (11%). CO. SUPREME COURT OFFICE OF ATTORNEY REGULATION COUNSEL, 2000 ANNUAL REPORT (2001) (on file with authors). In Oregon, the areas most likely to generate complaints were criminal (35%), domestic relations (15%), and litigation (9%). OREGON 2000 REPORT, *supra* note 10, at 19. Similar percentages existed in 1999. *Id.* at 20.

Type of Legal Matter	Total No.	% of Total	No. Men	% of Men	No. Women	% of Women
Employment Law, Plaintiff-side	58	3%	46	3%	12	4%
General Civil Litigation, Individual Client, Defendant- side**	58	3%	48	3%	10	4%
Immigration	46	2%	39	2%	7	3%
Workers' Compensation	44	2%	41	2%	3	1%
Motor Vehicle Licensing and Violations, Including DUI	32	2%	27	1%	5	2%
All other†	133	6%	120	7%	13	5%
Total	2,103		1,833		270	

* Including medical malpractice and wrongful death.

** Not including the specific types of civil litigation listed separately in this table.

† Includes guardianships (28); general transactional (nonlitigation) work for individual clients (22); all representation of business entity clients, whether litigation (35), real estate (6), or general transactional work (24); social security (7); juvenile (4); bankruptcy representing the creditor (2); personal lawsuits filed by the disciplined attorney (3); personal injury representing the defendant (1); and attorney discipline (1).

F. Gender Was Not a Significant Predictor of Length of Term Suspension

1. Comparison of Means

Of those attorneys receiving a term suspension, the mean suspension length for men was about 1.5 months longer than the mean suspension length for women. The difference, however, is not significant ($Pr = 0.190$): there is a 19.0% chance we would have observed this data if the null hypothesis (men and women receive suspensions of equal length) were true. Indeed, the median term suspension length for both genders was six months.

TABLE 13
Term Suspension Length by Gender

Gender	Number	Mean Term of Suspension (in months)	Standard Deviation	Median Term of Suspension (in months)
Men	887	11.48	13.909	6
Women	142	9.87	11.742	6
Total*	1,029	11.26	13.637	6

* Does not include cases of unknown gender.

2. Regression

We wondered whether, as has been documented in studies of sentencing of female criminal defendants,⁷³ disciplinary authorities might mete out against female attorneys less severe sanctions than against similarly situated male attorneys.⁷⁴ However, the regressions we were able to model from the available data suggest that gender is not a significant predictor of the length of term suspensions.

To analyze whether gender was a significant predictor of the severity of a sanction, we used length of a term suspension as the dependent variable, since it was the only linear variable (number of

73. See, e.g., David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 298-302 (2001) (empirical study of 77,236 federal offenders sentenced under the Sentencing Reform Act of 1984 finding that after controlling for the offense level, criminal history, district, and offense type, men received sentences of 5.5 more months, or 12% longer, than women, which is statistically significant at the .01 level; speculating that “judges observe important individual characteristics that an empirical study cannot consider” or that women are “treated paternalistically in court”); Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 185-90, 216-21 (1994) (reviewing literature and available data suggesting female criminal defendants generally receive lighter sentences than male criminal defendants; possible explanations include a “chivalry/paternalism” bias in women’s favor and judges’ desire not to separate mothers from their children as a result of incarceration).

74. Cf. Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the Metrocourt Study*, 20 HAMLINE J. PUB. L. & POL’Y 211, 256-57 (1999) (asserting that claimants of both genders concede more in mediation with female respondents than with male respondents).

months suspended).⁷⁵ Thus, this analysis included only those cases that resulted in a term suspension.

In the first regression, we selected five independent variables: gender, a prior disciplinary sanction against the same attorney,⁷⁶ number of different types of violations committed by the attorney,⁷⁷ number of aggravating circumstances mentioned in the report, and number of mitigating circumstances mentioned in the report.⁷⁸ Table 14 shows the results.

There were 389 observations that contained information on all the selected variables. The R-Square of the model was 0.06922, meaning that the model explained about 7% of the variance in length of suspension. This does not mean that the model was not meaningful: the probability of rejecting the null hypothesis that the model is not significant was less than 0.01%.

Perhaps the reason the R-Square of this model is relatively low is that the best predictor (probably) of a term suspension length—the circumstances of the particular violation—was not included as an independent variable in this model. We considered trying to rank the types of violations according to some standard of “seriousness,” but it seemed that evaluating, for example, incompetence as less “serious” than commingling was open to criticism.

The state in which the sanction was issued likely affects the term suspension length as well. There appear to be considerable differences across states in how “tough” their respective disciplinary tribunals are.⁷⁹ Even within the same state, similarly situated attor-

75. In theory, to make the full range of sanctions linear, it would be possible to assign some sort of scale to the sanctions to approximate their relative severity—for example, a disbarment could be scaled 1000, an indefinite suspension 800, a term suspension 500 plus the number of months, etc. We decided this would be too arbitrary.

76. Although a prior disciplinary record is one of the aggravating circumstances listed in the ABA standards (and lack thereof a mitigating circumstance), we coded this factor separately from aggravating and mitigating circumstances generally. *See supra* Part II.D.6. Observations in which the report mentions nothing about the presence or absence of a prior disciplinary record were excluded from this analysis.

77. For example, if an attorney was found to have handled two different matters incompetently, and to have commingled funds in one of those matters (or in a third matter), that would be counted as two, not three, violations.

78. If a report mentioned neither aggravating nor mitigating circumstances, or explicitly said there were none, that observation was eliminated from this analysis.

79. For example, California had 163 disbarments of 449 reported disciplinary sanctions in 2000 (36%), whereas New York had 108 disbarments of 237 reported disciplinary sanctions in 2000 (46%). *See supra* tbl. 5, at 807 and *infra* tbl. 18, at 853. In particular, 59% and 17% of New York and California lawyers, respectively, who were found to have mismanaged or misappropriated funds were disbarred. (Data on file with authors.) Indeed, there is probably enough data in our database for a separate study of the differences in punishments for the same offense across states, but it is beyond the scope of this Article. *Cf.* Daniel A. Vigil, *Regulating In-House Counsel: A Catholicon or a Nostrum?*, 77 MARQ. L. REV. 307 (1994) (comparing the disparate responses of the 50 states’ supreme courts to the question of whether an in-house attorney licensed in another state, but not in the forum

neys may be disciplined inconsistently.⁸⁰ This may be, in part, a result of the failure of the *ABA Standards for Imposing Lawyer Sanctions* to provide adequate guidelines for determining the length of a suspension.⁸¹ In other words, sheer arbitrariness undoubtedly accounts for some of the suspension lengths.

That said, the model is still valid. The existence or absence of a prior disciplinary action against the same attorney, the number of different violations committed by the attorney, the number of aggravating factors mentioned in the report, and the number of mitigating factors mentioned in the report were all highly significant predictors of the length of a term suspension. Gender, however, was not a significant predictor.

TABLE 14
Regression Model No. 1
Significance of Certain Variables in Predicting
Length of Term Suspension

Variable	Parameter Estimate	Standard Error	t Value	Pr > t
Intercept	6.430154	1.770672	3.63	0.0003
Gender	-1.12707	1.883535	-0.60	0.5499
Prior Record	3.196340	1.324111	2.41	0.0162
No. Violation Types	1.317133	0.440558	2.99	0.0030
No. Aggra. Factors	1.450383	0.499490	2.90	0.0039
No. Mitig. Factors	-0.79084	0.478702	-1.65	0.0993

The parameter estimate indicates the effect of the variable on term suspension length. For example, if an attorney had a prior disciplinary record, that increased the length of his or her suspension by an average of more than three months. For each additional type of violation the attorney was found to have committed, the length of the

state, engaged in the unauthorized practice of law by rendering advice to the corporation in the forum state).

80. See, e.g., Campbell & Kollman, *supra* note 15, at 241 (concluding, after conducting random sample of Texas actions in 1998, that “the application of discipline was at best uneven” and at worst, “essentially the same conduct yielded widely disparate treatment for the sanctioned lawyers”); Note, Attorney Grievance Commission v. Childress: *Excessive Focus on Mitigating Factors in Attorney Misconduct Case Fails to Preserve Public Confidence in the Legal Profession*, 61 MD. L. REV. 482, 490 (2002) (noting inconsistent application of mitigating factors in Maryland); John D. Fabian & Brian Reinthaler, Note, *An Examination of the Uniformity (Or Lack Thereof) of Attorney Sanctions*, 14 GEO. J. LEGAL ETHICS 1059 (2001) (finding lack of uniformity in suspension lengths for perjury and false statements in the District of Columbia, Florida, and Illinois); Michael Goldman, Note, *Discipline of McLendon and Discipline of Petersen: Adding Chaos to Confusion in Washington Legal Ethics*, 29 GONZ. L. REV. 187 (1993/1994).

81. See, e.g., Levin, *supra* note 15, at 37-38.

suspension was increased by an average of about 1.3 months. For each aggravating factor, the suspension length grew by an average of about 1.5 months. For each mitigating factor, the suspension length decreased by almost one month (0.79 months). The effect of each of these four variables was statistically significant ($\text{Pr} < 0.10$). Finally, the regression indicated that being a woman decreased the length of the suspension by an average of 1.1 months. However, this was not statistically significant ($\text{Pr} = 0.55$).

The second regression attempted to account more fully for the different types of violations committed, as these presumably have the most effect on term suspension length. In the second regression, we selected four of the independent variables used in the first regression—gender, a prior disciplinary sanction against the same attorney, number of aggravating circumstances mentioned in the report,⁸² and number of mitigating circumstances mentioned in the report—and added each of the types of violations as sixteen additional independent dummy⁸³ variables. Table 15 shows the results.

The R-Square of the second model was 0.17471, meaning that the model explained about 17.5% of the variance in length of suspension. Again, the Pr of the model was less than 0.0001.

The second model also indicated that gender was not a significant predictor of term suspension length ($\text{Pr} = 0.5498$). Statistically significant independent variables ($\text{Pr} < 0.1$) were the presence or absence of a prior disciplinary record, the total number of other aggravating factors, the total number of mitigating factors, and the commission of ethical violations involving the scope of representation, conflict of interest, misappropriation, fraud, criminal activity, or misconduct in the disciplinary proceeding.

TABLE 15
Regression Model No. 2
Significance of Certain Variables in Predicting Length of
Term Suspension

Variable	Parameter Estimate	Standard Error	t Value	$\text{Pr} > t $
Intercept	2.56	1.79	1.43	0.1538
Gender	-1.03	1.71	-0.60	0.5498

82. If a report mentioned neither aggravating nor mitigating circumstances, or explicitly said there were none, that observation was eliminated from this analysis.

83. A dummy variable is 1 if relevant and 0 if not relevant.

Variable	Parameter Estimate	Standard Error	t Value	Pr > t
Prior Record**	3.62	1.29	2.8	0.0054
Number of Aggravating Factors**	1.28	0.49	2.63	0.0088
Number of Mitigating Factors**	-1.01	0.44	-2.30	0.0221
Competence, Diligence	-1.07	1.57	-0.68	0.4957
Scope of Representation*	6.19	3.33	1.86	0.0637
Communications with Client	1.60	1.66	0.96	0.3355
Fees	-0.21	1.52	-0.14	0.8904
Confidentiality	11.40	8.39	1.36	0.1751
Conflict of Interest**	4.67	1.96	2.38	0.0179
Misappropriation**	5.53	1.34	4.12	<0.0001
Improper Litigation Conduct	-0.13	1.73	-0.07	0.9423
Fraud**	4.91	1.36	3.61	0.0003
Other Miscommunications	0.46	3.54	0.13	0.8956
Law Firm Duties	1.19	1.76	0.68	0.5000
Criminal**	5.73	2.12	2.70	0.0072
Misconduct in Disciplinary Proceeding**	4.53	1.36	3.33	0.0009
State Bar Requirements	-3.14	3.37	-0.93	0.3521
Other**	7.29	2.98	2.45	0.0147
Reciprocal Discipline	-3.14	3.66	-0.86	0.3913

* Significant at confidence level exceeding 90%.

** Significant at confidence level exceeding 95%.

IV. EXPLORING POSSIBLE REASONS FOR THE DIFFERENCES FOUND

Our study was designed primarily to quantify the incidence, type, and severity of attorney discipline by gender. We found that male at-

torneys had a higher overall discipline rate and incurred more severe sanctions than female attorneys. But these findings alone do not illuminate what causes the differences.⁸⁴ What follows is an exploration, drawing upon some of the literature of sex differences generally, of possible explanations.

A. The Year 2000 Might Not Have Been Representative

Our figures for the percentage of *all* lawyers who incurred public discipline in 2000 are in line with the figures for 1996, 1998, and 1999 reported by the ABA—around 0.3% to 0.4% of all lawyers.⁸⁵ As to the percentage of disciplined attorneys by gender, it is difficult to refute the suggestion—without studying another year's data—that the year 2000 could have been aberrational, because the ABA and most states do not maintain aggregate figures on attorney discipline by gender. Nonetheless, our data purport to reflect the entire population of public attorney discipline matters for the year 2000—some 3575 cases—and we know of nothing to suggest that the use of this particular year injects any type of bias.

We did, however, perform a spot-check of some readily available information in our files or on the internet for time periods other than the year 2000. Illinois, the only state that appears to compile aggregate disciplinary figures by gender, reports that 12% of the lawyers disciplined in the year 2001 were female, while 30% of all Illinois attorneys were female.⁸⁶ A quick count of the first names listed in some other annual reports revealed percentages roughly equivalent to those found in 2000 (Table 16).

84. See DANIEL LITTLE, *VARIETIES OF SOCIAL EXPLANATION: AN INTRODUCTION TO THE PHILOSOPHY OF SOCIAL SCIENCE* 159-60, 177-79 (1991) (showing that a statistical relationship does not, by itself, identify the causal mechanisms that underlie the relationship); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 29-37 (2002) (describing difficulty of making descriptive or causal inferences from statistics).

85. Counting all duplicative "reciprocal" sanctions, but not including 147 private sanctions, our database included 3428 public sanctions in 2000, which would be approximately 0.4% of the 857,931 total lawyers reported in the 1995 American Bar Foundation study, see CARSON, *supra* note 28, at 23, and approximately 0.3% of the 1,147,125 total lawyers reported in a 1999 American Bar Association survey, see 1998-99 SURVEY, *supra* note 16, at 33. The latter survey reports 3906 public sanctions in 1999, *id.* at 37, or about 0.3% of the total lawyers reported in that year. In 1998, there were 4146 public sanctions imposed on 1,098,203 total lawyers, or about 0.4%. See *id.* at 4, 8. The ABA reported 3777 public sanctions imposed on 1,028,999 total lawyers in 1996, again about 0.4%. See 1996 SURVEY, *supra* note 16, at 4, 9.

86. ILL. ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, 2001 ANNUAL REPORT (2001), available at http://www.iardc.org/new_page_2_copy1.htm (last visited Jan. 17, 2004).

TABLE 16
Gender of Disciplined Attorneys in Selected States for
Periods Other than 2000⁸⁷

State	Period Covered	Number of Disciplined Attorneys	Number (%) Male	Number (%) Female
Georgia	5/1/98-4/30/99	86	70 (81.4%)	16 (18.6%)
Indiana	1/1/01-6/30/01	32	29 (90.6%)	3 (9.4%)
New Jersey	1/1/99-12/31/99	239	208 (87%)	22 (9.2%)*
Oklahoma	1/1/02-12/31/02	16	14 (87.5%)	2 (12.5%)

*There were also nine (3.8%) disciplined attorneys in New Jersey in 1999 whose gender could not be determined from their first name.

B. Disciplinary Agencies Might Treat Women Differently than Men

We found that men had a higher rate of discipline overall and were sanctioned more severely than women. Either or both of these might result from different treatment of men and women by disciplinary agencies.

The number of attorneys formally charged with disciplinary violations is a small fraction of the number of initial grievances or complaints received by disciplinary agencies.⁸⁸ Hypothetically, female attorneys could be the subject of initial grievances or complaints at a rate consistent with their proportion of the attorney population, but for some reason not become the subjects of a proportionate rate of

87. The sources for this table are OFFICE OF THE GEN. COUNSEL, STATE BAR OF GA., ANNUAL REPORT 2000-2001; ANNUAL REPORT OF THE DISCIPLINARY COMM'N OF THE SUPREME COURT OF IND. 11-14 (2000-2001); OFFICE OF ATTORNEY ETHICS OF THE SUPREME COURT OF N.J., STATE OF THE ATTORNEY DISCIPLINE SYSTEM REPORT 35-40 (2001); ANNUAL REPORT OF THE PROF'L RESPONSIBILITY COMM'N & PROF'L RESPONSIBILITY TRIBUNAL, JAN. 1, 2002 THROUGH DEC. 31, 2002, at <http://www.okbar.org/gencounsel/prcannual03.htm> (last visited Jan. 17, 2004) (sources on file with authors).

88. For example, according to the ABA, in 1999 attorney disciplinary agencies received 116,922 complaints, but only 6549 lawyers were publicly or privately sanctioned. 1998-99 SURVEY, *supra* note 16, at 33, 37. The McKay Report reported in 1991 that many dismissed complaints either fail to allege unethical conduct or allege only minor infractions, yet still "state legitimate grounds for client dissatisfaction." MCKAY REPORT, *supra* note 10, at xx.

formal disciplinary charges brought by disciplinary boards (we will call this the “charge rate”).⁸⁹

Investigating whether the “charge rate” is lower for women is difficult because in most states, until an attorney is actually disciplined, his or her name is kept confidential.⁹⁰ Further, there is little publicly available information on even an aggregate basis indicating the gender of attorneys against whom grievances are filed (as opposed to discipline imposed).⁹¹ For example, the Oklahoma Professional Responsibility Commission reported that 1428 grievances (against 951 attorneys) were filed in 2000.⁹² No gender statistics of the grievances were reported, nor were individual names published from which one might determine gender.

Illinois appears to be the only state that publicly reports, on an aggregate basis, the gender of attorneys against whom grievances are filed. In Illinois, 16% of the attorney disciplinary investigations docketed in 2000 were against female attorneys.⁹³ However, only 7.3% of the attorneys actually disciplined in Illinois in 2000 were female.⁹⁴ Thus, the Illinois experience provides some evidence of a lower “charge rate” for female attorneys.

If complained-about women are formally charged at a rate lower than complained-about men, it might be because disciplinary board members have a “chivalry” bias in favor of women, such as has been postulated in the field of criminal sentencing.⁹⁵ A chivalry bias might also help to explain why men are disbarred at a higher rate and have a longer mean term suspension than women.

Researchers in the criminal sentencing field cannot document the reasons women receive shorter sentences than men; they can only report the data and speculate about the causes. To the extent that

89. Alternatively, female attorneys could be formally charged at a proportionate rate, but for some reason not ultimately disciplined at that rate, or disciplined privately. There is little publicly available data relevant to this proposition. Some dismissals of formal charges are reported, but we did not include dismissals in our database. Most states maintain attorney confidentiality unless discipline is actually imposed.

90. See *supra* note 10.

91. The ABA tracks the number of complaints received by states' disciplinary agencies but does not report that information by attorney gender (and apparently does not request that the information be supplied that way). See, e.g., 1998-99 SURVEY, *supra* note 16, at 1-4.

92. *Oklahoma 2000 Report*, *supra* note 1, at 727.

93. ILLINOIS 2000 REPORT, *supra* note 41, at 5.

94. See *infra* tbl.18, at p. 853.

95. See *supra* note 73; see also George A. Riemer, *Discipline Task Force: What Is It? What Has It Been Doing? What Will Happen to Its Report?*, 62 OR. ST. B. BULL. 23, 24-25 (May 2002) (47.1% of almost 500 nonrandomly responding Oregon attorneys “felt that there was bias in the disciplinary system,” including, but not limited to, bias based on gender). In contrast, some believe that disciplinary agencies are biased *against* minority attorneys. See Mark Hansen, *Picking on the Little Guy*, ABA J., Mar. 2003, at 30, 32 (also noting studies that have found no bias against minority attorneys).

they postulate a judicial “paternalism” towards women,⁹⁶ the same might be true of disciplinary agencies (although one might quibble with the term “paternalism” when a significant percentage of judges and members of disciplinary boards are women). To the extent that researchers speculate that judges are reluctant to separate mothers from their children during incarceration,⁹⁷ such a concern would not apply to disciplinary proceedings. In the end, Professor Mustard’s comment that the individual circumstances of each case cannot be reflected in statistical aggregation⁹⁸ may be the primary explanation of the gender difference in disciplinary sanctions. But that begs the question of why women would present more generally favorable individual circumstances.

Our data provides only qualified support for the chivalry hypothesis. On the one hand, although men received, on average, slightly longer term suspensions than women, the difference was not statistically significant.⁹⁹ In addition, the regressions on the length of term suspensions, discussed in Part III, *supra*, indicated that gender was not a significant predictor of suspension length. Thus, considering only those disciplined attorneys who received a term suspension, it does not appear that disciplinary boards are easier on women.

On the other hand, male attorneys were either disbarred or voluntarily resigned from the bar with charges pending at a much higher rate than female attorneys. The gender difference in the rate of these severe sanctions was highly significant even looking only at the population of disciplined attorneys rather than the overall attorney population.¹⁰⁰ However, female attorneys received term suspensions at a significantly higher rate than male attorneys, given their respective proportions in the disciplined attorney population.¹⁰¹ It may be that in a situation in which a man would be likely to be disbarred, a disciplinary agency would be more likely to suspend a woman.

If women do have a lower “charge rate” than men, it may be because women who are the subject of grievances respond to disciplinary boards’ inquiries more promptly or persuasively than men. Disciplinary agencies are more likely to prosecute lawyers “who do not cooperate with the bar in the initial stage of its investigation,”¹⁰² and women may be more cooperative.¹⁰³ Interestingly, however, our study indicates that of attorneys reported to have offered factors in mitiga-

96. See Mustard, *supra* note 73, at 298-303; Nagel & Johnson, *supra* note 73, at 185-90, 216-21.

97. Nagel & Johnson, *supra* note 73, at 200-08.

98. Mustard, *supra* note 73, at 301-02.

99. See *supra* Part III.F.1.

100. See *supra* tbl.6, at p. 808.

101. *Id.*

102. See Hansen, *supra* note 95, at 33.

103. See *supra* Part IV.H.2.

tion of discipline, a higher percentage of men (21%) than women (14%) were said to have cooperated with disciplinary authorities.¹⁰⁴

As for relative persuasiveness, “research evidence in psychology and communication [indicates] that men are generally more persuasive than women in a number of situations.”¹⁰⁵ Even if that “general” tendency does not hold true in the attorney discipline context, a very large percentage of complaints are dismissed with little investigation,¹⁰⁶ suggesting that persuasiveness at the initial grievance stage may not be of critical importance.

A limited study of the effects of gender on civil case outcomes in New Mexico offers conflicting insights into the question of the genders’ relative persuasiveness. The study found that men receive slightly *better* outcomes as claimants in both adjudicated and mediated small-claims cases than women.¹⁰⁷ However, “Anglo” women negotiated (in mediation) slightly better outcomes as *respondents* in mediation than “Anglo” men in these cases.¹⁰⁸ These mixed results could support, albeit weakly, the proposition that women fare better than men in informal, negotiated settings where they are in the position of a defendant—such as, perhaps, interactions with a disciplinary agency after a grievance has been made but before formal charges are brought.

C. Men May Be More Likely to Engage in the Types of Legal Practice that Engender More Grievances

If men are more highly concentrated in those areas of law practice or types of law firms that generate more disciplinary complaints, it would not be surprising to see men disciplined more than women. Most states report that the largest percentage of formal grievances involve criminal practice, personal injury practice, or domestic relations practice.¹⁰⁹ Our data confirmed this.¹¹⁰ Why these areas gener-

104. See *supra* tbl.11, at p. 816.

105. Michael Burgoon & Renee S. Klinger, *Gender Differences in Being Influential and/or Influenced: A Challenge to Prior Explanations*, in *SEX DIFFERENCES AND SIMILARITIES*, *supra* note 4, at 257, 271 (“[I]t is clear that men do have a great latitude to select among available means of persuasion; women do not enjoy that same freedom and must carefully select message strategies or risk being ineffective in persuasive attempts.”).

106. RICHARD L. ABEL, *AMERICAN LAWYERS* 147 (1989) (citations omitted).

107. Gary LaFree & Christine Rack, *The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 *LAW & SOC’Y REV.* 767, 778-84 (1996) (In a sample of small-claims cases in Albuquerque, New Mexico in 1990 and 1991, Anglo male claimants had higher mean monetary outcome ratios—the total award or settlement divided by the total amount claimed—than Anglo women in both adjudicated and mediated cases, but the difference was only statistically significant in adjudicated cases, and much of the difference was due to case-specific factors.).

108. *Id.* at 778, 788.

109. See *supra* note 72.

ate the most grievances is unclear.¹¹¹ Certainly, there may just be more such lawyers.¹¹²

There were some interesting gender differences in the limited information our data provided. Of the 2103 legal matters in our database for which it was possible to classify the area of law involved, women handled 12.8% (270) and men handled 87.2% (1833) of the legal matters. Thirty-two percent of the legal matters handled by women were in domestic relations, compared to only 18% of the legal matters handled by men.¹¹³ In contrast, 15% of the legal matters handled by men were in criminal defense, compared to only 7% of the legal matters handled by women. Finally, 19% of the matters handled by men were in personal injury, compared to 15% of the matters handled by women.

When these three categories are combined, however, the gender differences disappear. Fifty-two percent of matters handled by men and 54% of matters handled by women were in domestic relations, personal injury, or criminal defense.

Nonetheless, our data does not show whether, as an absolute matter, men or women practice in these three "problem" areas more. Thus, we cannot say whether men practice more frequently in "problem" areas, leading to a higher rate of discipline.

Attorneys in criminal defense, family law, and personal injury are more likely to engage in private practice as a solo practitioner or with a small law firm.¹¹⁴ Such lawyers are generally less affluent than corporate lawyers, causing some to speculate that they might be

110. See *supra* tbl.12, at p. 818 (Of matters handled by disciplined lawyers in 2000 for which information was available, 20% were in domestic relations, 19% in personal injury, and 14% in criminal defense.).

111. Cf. ABA MALPRACTICE PROFILE, *supra* note 3, at 4 ("Due to a lack of demographic information," the ABA warns that it cannot determine whether any particular area of legal practice, such as personal injury work, generates a disproportionate number of malpractice claims.).

112. See, e.g., Darcy & Payton, *supra* note 2, at 3419 (survey of Oklahoma attorneys shows most commonly-identified "principal areas of practice" are personal injury (34.58%), estate planning and probate (33.28%), real property (33.12%), family law (31.83%), business litigation (24.19%), and criminal law (23.86%)); Manuel R. Ramos, *Legal Malpractice: No Lawyer or Client Is Safe*, 47 FLA. L. REV. 1, 50-52 (1995) (While real estate and personal injury work account for almost 60% of Florida legal malpractice claims, 82% of Florida lawyers list themselves as practicing in those areas, leading the author to conclude that "there is no particular area that appears to be more prone to generating legal malpractice claims.").

113. See *supra* tbl.12, at p. 818.

114. Criminal law, however, is also the domain of prosecutors and public defenders. Numerous commentators have documented the rarity with which prosecutors are disciplined, as compared with private attorneys. See, e.g., Joseph R. Weeks, *No Wrong Without A Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833 (1997); Zacharias, *supra* note 15, at 750-55 ("[M]ost discipline occurs in cases involving the private civil bar.").

more likely “to cut some corners.”¹¹⁵ Critics of the attorney disciplinary system have also suggested a general “permissiveness” on the part of disciplinary boards in favor of “the wealthy and well-known lawyers”¹¹⁶ and against “anti-establishment lawyers.”¹¹⁷

The individual clients that solo and small-firm lawyers serve may be more likely to initiate complaints than corporate clients,¹¹⁸ perhaps owing to the searing personal consequences of these cases, particularly criminal and child custody litigation. Indeed, the twelve most prevalent types of legal matters occurring in our study were matters overwhelmingly involving individual clients: domestic relations, personal injury, criminal defense, wills, and the like.¹¹⁹

Clients, however, do not initiate all attorney disciplinary complaints.¹²⁰ Judges, opposing counsel, opposing parties, third parties, state bar associations, and even attorneys themselves initiate a significant portion.¹²¹

Some evidence suggests that disciplinary actions are instituted against solo and small-firm practitioners more frequently than

115. See, e.g., GLENDON, *supra* note 6, at 33 (“Elite lawyers could [in the past] afford to brush aside temptations that were often overwhelming to hungrier low-status lawyers.”); SHARON TISHER ET AL., BRINGING THE BAR TO JUSTICE: A COMPARATIVE STUDY OF SIX BAR ASSOCIATIONS 103 (1977) (describing, without ascribing to, theory that “[s]crapping for a living, handling small estates, lacking the supervision of senior partners, this attorney presumably succumbs to temptation”); Ramos, *supra* note 112, at 6-7 (citations omitted).

116. TISHER ET AL., *supra* note 115, at 105; see also Levin, *supra* note 15, at 11 n.44 (collecting sources); REPORT OF THE OREGON STATE BAR DISCIPLINARY SYSTEM TASK FORCE, JULY 15, 2002, at <http://www.osbar.org/barnews/monthly/disciplinary.html> (detailing almost 500 non-randomly responding Oregon attorneys; 47.1% felt there was bias in the attorney disciplinary system, and of those, 31.5% felt that the bias was based on the size of the lawyer’s firm). But see *id.* (Regarding Minority Report #1, although there is a perception that the disciplinary process is not fair to small firm lawyers and solo practitioners, it is a misperception.).

117. Martin Garbus & Joel Seligman, *Sanctions and Disbarment: They Sit in Judgment*, in VERDICTS ON LAWYERS 54 (Ralph Nader & Mark Green eds., 1976).

118. See Hansen, *supra* note 95, at 34 (quoting a disciplinary defense attorney who believes “the system is too dependent on client complaints, the overwhelming majority of which come from the clients of solo and small-firm practitioners”); TISHER ET AL., *supra* note 115, at 104 (“The small-time civil or criminal practitioner does a high volume practice with a clientele generally not knowledgeable in the ways of the law and distrusting of lawyers.” Further, the “[t]rue victims of unethical corporate law practice [the stockholder, the consumer, and the general public] . . . are rarely in a position to protest.”).

119. See *supra* tbl.12, at p. 818.

120. See, e.g., OREGON 2000 REPORT, *supra* note 10, at app. A (clients initiated 723 of 1404, or 50%, of complaints in Oregon in 2000); *id.* at app. B (clients initiated 733 of 1353 complaints in 1999). In Rhode Island, of the 161 formal complaints initiated in 2000, 131 (81%) were initiated by clients. 26TH ANNUAL REPORT OF THE DISCIPLINARY BD. OF THE SUPREME COURT OF R.I., JAN. 1, 2000 THROUGH DEC. 31, 2000 (2001), at tbl.3 (on file with authors).

121. E.g., *Favaloro v. Comm’n for Lawyer Discipline*, 13 S.W.3d 831 (Tex. App. 2000) (opposing counsel); OREGON 2000 REPORT, *supra* note 10, at app. A (opposing parties and opposing counsel initiated 23% of complaints in Oregon in 2000); *In re Ailshie*, 532 S.E.2d 607, 608 (S.C. 2000) (self-reported complaint).

against other types of attorneys.¹²² Of attorneys in private practice, women are slightly more likely than men to be solo practitioners.¹²³ But as a whole, women are less likely than men to be in private practice.¹²⁴ It is doubtful that the proportion of women in private practice or solo practice has much, if any, effect on the rate at which female lawyers are disciplined.

Finally, it is possible that more female attorneys than male attorneys work part-time,¹²⁵ which might cause a proportionate reduction in disciplinary complaints. While this may be true, it is estimated that only 3%-4% of all lawyers work part-time.¹²⁶ In addition, the potential effect of more female part-time lawyers would probably be offset by the fact that 6% of male lawyers, and only 3% of female lawyers, are retired or inactive.¹²⁷

D. The Average Age of Female Attorneys Is Less than that of Male Attorneys, and Age Might Correlate Positively with the Incidence of Discipline

States that record the practice experience of disciplined attorneys indicate that a disproportionate number of disciplined attorneys have been in practice more than 25 years.¹²⁸ Female attorneys on average

122. See Rhode, *supra* note 15, at 548 (citing a survey of 1981-82 disciplinary cases in three states which found that about 80% of cases imposing public discipline involved solo practitioners); Hansen, *supra* note 95, at 32. In contrast, two studies of legal malpractice claims have found that solo practitioners were subject to malpractice claims at a disproportionately low rate. Ramos, *supra* note 112, at 42; ABA MALPRACTICE PROFILE, *supra* note 3, at 8 (finding that in 1999, solo practitioners made up 47% of law firms but accounted for only 35% of malpractice claims). If disciplinary actions followed the same pattern, that might account for part of the lower rate in disciplinary actions against women. Professor Ramos questioned that assumption, Ramos, *supra* note 112, at 49-50 ("[L]awyers who face malpractice claims do not disproportionately face disciplinary complaints or disciplinary sanctions."), but also noted that the "worst" lawyers—measured either by those who faced two or more legal malpractice claims between 1988 and 1994 or by those who generated the highest-dollar payments on such claims—were disbarred at a higher rate than Florida lawyers in general. *Id.* at 53, 54 n.323, 58.

123. See, e.g., CARSON, *supra* note 28, at 25 (Of private practitioners, 45.9% of male lawyers and 50.3% of female lawyers were solo practitioners in 1995.); RHODE, *supra* note 33, at 23 (noting that 36% of female lawyers are in solo practice, as opposed to 34% of male lawyers).

124. CARSON, *supra* note 28, at 10 (Seventy-five percent of male lawyers and 71% of female lawyers were in private practice in 1995.).

125. See, e.g., Leslie Anne Miller, *Women in the Legal Profession: Where Are We Now?*, 25 PA. LAW., Jan.-Feb. 2003, at 20, 21 (2002 survey of Pennsylvania Bar Association committee finding that an "overwhelmingly majority of part-time attorneys were women").

126. See Deborah L. Rhode, *Balanced Lives For Lawyers*, 70 FORDHAM L. REV. 2207, 2213 (2002); Jacquelyn H. Slotkin, *Should I Have Learned to Cook? Interviews with Women Lawyers Juggling Multiple Roles*, 13 HASTINGS WOMEN'S L.J. 147, 154 (2002); Joan C. Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 FORDHAM L. REV. 2221 (2002).

127. CARSON, *supra* note 28, at 10 (1995 figures).

128. See, e.g., *Oklahoma 2000 Report*, *supra* note 1, at 729 (23.67% of formal grievances in 2000 filed against attorneys who have been in practice 26 years or more; only

tend to be younger and less experienced than male attorneys. In 1995, only 6% of the lawyers who had been in practice more than 25 years were women, and the median age for American male and female lawyers was 45 and 37 respectively.¹²⁹

Our study indicates that disciplined attorneys on average are older than attorneys generally, and male disciplined attorneys on average are older than female disciplined attorneys. As Table 17 shows,¹³⁰ the median age of the 684 disciplined attorneys in 2000 whose ages were available¹³¹ was 50 for men and 46 for women. The difference in disciplined attorneys' median age by gender is statistically significant.¹³² In addition, of those attorneys in our study for whom the disciplinary agency explicitly considered aggravating factors in determining punishment, a much higher percentage of the men (16%) than the women (9%) were said to have had substantial experience as a lawyer.¹³³

TABLE 17
Age (in Years) of Disciplined Attorneys in 2000

	Number	Mean	Median
Men	581	50.6	50
Women	103	46.4	46

The finding that disciplined attorneys are older than average contrasts sharply with several studies of business ethics that have found that business students and executives become more ethical as they age.¹³⁴ Moreover, an empirical study of legal malpractice actions in

8.88% of formal grievances filed against attorneys in practice 5 years or less); *cf.* ABEL, *supra* note 106, at 154 (study of malpractice claims against California lawyers in the early 1980s showing that "lawyers with more than ten years of experience constitute 57.7 percent of the profession but are the object of 65.5 percent of claims") (citation omitted).

129. CARSON, *supra* note 28, at 5.

130. *See infra*, tbl. 17, at p. 833.

131. The attorney's age was available in only 684 of the 3493 cases (excluding reciprocal discipline cases) in our database. Only California and Texas regularly include the attorney's age in the disciplinary report. Five cases in which the attorney's gender was indeterminate were excluded from this analysis.

132. With a critical value of 1.97 at the 95% confidence level, the t statistic is 5.07 ($Pr < 0.0001$).

133. *See supra* tbl.10, at p. 815.

134. *See* John H. Barnett & Marvin J. Karson, *Managers, Values, and Executive Decisions: An Exploration of the Role of Gender, Career Stage, Organizational Level, Function, and the Importance of Ethics, Relationships and Results in Managerial Decision-Making*, 8 J. BUS. ETHICS 747, 755 (1989); John H. Barnett & Marvin J. Karson, *Personal Values and Business Decisions: An Exploratory Investigation*, 6 J. BUS. ETHICS 371, 375, 377 (1987); Barbara Libby & Vincent Agnello, *Ethical Decision Making and the Law*, 26 J. BUS. ETHICS 223, 230 (2000) ("In general the younger student with less work experience took an ex-

Florida found “[t]hat lawyers who face legal malpractice claims do not necessarily tend to be younger or older, but generally are proportionate to the lawyer population of Florida.”¹³⁵

What could explain the seemingly counterintuitive finding that older attorneys have more discipline problems? True, younger attorneys are required to take ethics in law school¹³⁶ and pass the Multi-state Professional Responsibility Exam, but that is surely an inadequate explanation.¹³⁷ Alternatively, alcoholism is a prominent theme in attorney discipline cases, and one study found that the proportion of “problem drinkers” among lawyers increased after more than 20 years of law practice.¹³⁸ In addition, “[m]en were more likely than women to develop into problem drinkers.”¹³⁹

Interestingly, although the absolute incidence of discipline is positively correlated with age, it does not appear that age is positively correlated with severity of sanction. We did not correlate age with type of sanction generally, but we did correlate age with length of term suspension. Of the 254 observations in our database that included both the attorney’s age and a term suspension length, there is a very slight (.068) positive correlation between age and length of term suspension, but it is not statistically significant ($Pr = 0.282$). In addition, a regression run only on observations from the state of California included age as one of the independent variables.¹⁴⁰ Age was not found to be a significant predictor of length of term suspension.¹⁴¹

tremely utilitarian view. They would do anything to make a sale.”); Diana C. Robertson & Erin Anderson, *Control System and Task Environment Effects on Ethical Judgment: An Exploratory Study of Industrial Salespeople*, 4 *ORG. SCIENCE* 617, 637 (1993) (study of ethical judgment of industrial salespeople finding that “older, more experienced salespeople and sales managers are less likely to suggest cutting ethical corners”); Durwood Ruegger & Ernest W. King, *A Study of the Effect of Age and Gender Upon Student Business Ethics*, 11 *J. BUS. ETHICS* 179, 182-84 (1992) (citing survey of 2196 business students finding older students gave significantly “more ethical” responses to eight out of ten hypothetical ethical business dilemmas).

135. Ramos, *supra* note 112, at 44. However, the same study also noted that older and more experienced lawyers accounted for a disproportionate number of the “top 100 worst lawyers” in terms of dollars paid out in legal malpractice claims. *Id.* at 57 nn.358-59.

136. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 302(b) (2003) *available at* <http://www.abanet.org/legaled/standards/chapter3.html> (last visited May 2, 2004).

137. See ABEL, *supra* note 106, at 143 (citing empirical studies showing that such required courses have no effect on conduct); Manuel R. Ramos, *Legal and Law School Malpractice: Confessions of a Lawyer’s Lawyer and Law Professor*, 57 *OHIO ST. L.J.* 863, 882-84 (1996) (calling the ethics course “the most hated course in the [law school] curriculum”) (footnote omitted).

138. G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 *INT’L J.L. & PSYCHIATRY* 233, 241 (1990) (finding that 18% of lawyers who had practiced 2 to 20 years were problem drinkers, compared to 25% of lawyers who had practiced more than 20 years).

139. *Id.* at 242.

140. The other independent variables were gender, the existence of a prior disciplinary sanction, the number of violations, the number of aggravating factors, and the number of

E. Women Might Have a Lower Substance Abuse Rate, and Women Might Be More Likely to Seek Professional Help for Depression

In 143 of the 3493 cases (exclusive of reciprocals) in our database, the disciplined attorney offered, as a mitigating factor, alcoholism, drug abuse, depression, and other mental health issues.¹⁴² Although these findings do not lend strong support to the oft-asserted claim that alcoholism frequently contributes to attorney discipline,¹⁴³ it is possible that the issue is unspoken in many cases. Assuming that alcoholism does often coincide with discipline, the incidence of substance abuse is higher in men than women, although the gap may narrow as female attorneys age.¹⁴⁴ Our data, however, does not suggest that alcohol abuse contributes to attorney discipline enough to make any possible gender difference in alcohol abuse rates an important factor in the gender difference in discipline rates.

Conversely, women suffer from depression at a higher rate than men.¹⁴⁵ Of attorneys in our study who were reported to have offered mitigating factors, a higher percentage of women (13%) than men (8%) mentioned mental health problems.¹⁴⁶ If depression contributes to disciplinary problems, the higher rate of male discipline is the opposite of what one might expect. Perhaps women are quicker to realize they are in trouble and are less embarrassed about seeking help from either professional or informal sources. Some social science research suggests this.¹⁴⁷ Other researchers suggest that severe de-

mitigating factors. There were 176 observations containing each of these variables. The R Square of this model was 0.157.

141. The p-value of the age variable was 0.36. In addition, the p-value for gender was 0.675.

142. See *supra* tbl.11, at p. 816. According to one author in 1997, "lawyers are currently experiencing a significantly higher level of depression (19%) and substance abuse (15-18%) than individuals in other professions (among the general population, only 3-9% are depressed, and only 10-13% are chemically dependent)." Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1347 (1997) (citations omitted); see also Benjamin et al., *supra* note 138, at 240-41 (finding higher rates of depression and alcohol abuse in attorneys in Washington state than in the general population, but lower incidence of cocaine abuse); Todd Goren & Bethany Smith, Note, *Depression as a Mitigating Factor in Lawyer Discipline*, 14 GEO. J. LEGAL ETHICS 1081 (2001) (stating that alcoholism is higher in attorneys than in population generally, and depression likely is the reason) (citations omitted).

143. See ABA COMM'N ON IMPAIRED ATTORNEYS, AN OVERVIEW OF LAWYER ASSISTANCE PROGRAMS IN THE UNITED STATES 1 (1991); Benjamin et al., *supra* note 138, at 243; Nathaniel S. Currall, Note, *The Cirrhosis of the Legal Profession--Alcoholism as an Ethical Violation or Disease Within the Profession*, 12 GEO. J. LEGAL ETHICS 739, 741 (1999).

144. See Benjamin et al., *supra* note 138 at 243 ("Statistically fewer of new Washington female attorneys reported alcohol problems than did the Washington men.").

145. See *id.* at 242; Douglas Eby, *Gender and Brain Imaging*, at <http://talentdevelop.com/gender.html> (last visited May 2, 2004) ("The incidence of female depression is usually found to be twice as high as the rate for men . . .").

146. See *supra* tbl.11, at p. 816.

147. See Laura K. Guerrero & René L. Reiter, *Expressing Emotion: Sex Differences in Social Skills and Communicative Responses to Anger, Sadness, and Jealousy*, in SEX

pression is a precursor of alcohol abuse, and as the female attorney population ages, the incidence of alcoholism among women lawyers may rise.¹⁴⁸

But our data indicate more depression in female disciplined lawyers than in male disciplined lawyers. Any effect this difference might have on discipline rates would probably be to increase, not decrease the female rate, and hence is of little use in explaining the contrary finding here.

F. To the Extent that Ethical Violations Involve Monetary Gain, Female Attorneys Might Be Less Motivated by Monetary Gain than Male Attorneys

As an observer of the attorney disciplinary gender gap in Texas put it, "It could be that women are less greedy."¹⁴⁹ In fact, several studies have found differences between male and female law students' expressed motivations for attending law school. For example, "male law students are consistently more likely than female law students to admit that a desire to make money motivated their decision to enter the field of law."¹⁵⁰ An unpublished study of law students at the University of Michigan from 1976-1979 showed that "[w]omen law students express much stronger preferences than men to work in substantive areas catering to personal client needs and much less interest in becoming corporate lawyers."¹⁵¹ To be sure, female law stu-

DIFFERENCES AND SIMILARITIES, *supra* note 4, at 344 (finding that "[i]n response to sadness, women report seeking more social support than men," and "men report engaging in more dangerous behavior than women")

148. Benjamin et al., *supra* note 138, at 243.

149. Jeffreys, *supra* note 20.

150. Don S. Anderson et al., *Conservatism in Recruits to the Professions*, 9 AUSTL. & N.Z. J. SOC. 42, 43 (1973) (study of students in professional schools, including law, finding that "Status Concern [concern for security, prestige, and wealth], as an orientation, is more common among men than women students while a Professional Orientation [attraction to the intrinsic features of the profession] is more common among women"); Daicoff, *supra* note 142, at 1360, (citing Taber et al., *supra* note 3, at 1238 (38.7% of male students, compared to 20.6% of female students, reported making money was an incentive for going to law school)); Robert Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 612 (1973) (finding that 54.7% of women law students surveyed said that financial rewards were not important to their decision to enter law school, while only 13.6% of male law students surveyed said that financial rewards were not important to the decision); *see also* Michael Betz et al., *Gender Differences in Proclivity for Unethical Behavior*, 8 J. BUS. ETHICS 321, 322 (1989) (in survey of 213 business students, 14.6% of men, versus 1.8% of women, gave "money and power" as career goals at age 40). *But see* CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 37-42 (University of Illinois Press 1993) (1981) (finding men and women had similar motivations to attend law school); James J. White, *Women in the Law*, 65 MICH. L. REV. 1051, 1069-70 (1967) (reporting, with numerous qualifications, that 30.4% of female lawyers surveyed indicated that "good remuneration" was a "very important" reason they went to law school, while only 14.9% of the male lawyers said it was "very important").

151. ABEL, *supra* note 106, at 96 (citation omitted); *see also* Maury Landsman & Steven P. McNeel, *Do Women Lose Their Idealism in Law School? Gender, Moral Judgment*

dents may just be saying what they think is more acceptable to the listener.¹⁵²

Although weak evidence in either direction, our data on aggravating and mitigating factors produces interesting findings in this regard. In cases where disciplinary agencies explicitly considered aggravating factors, a self-serving, selfish, or dishonest motive was mentioned more frequently in connection with the men (10%) than the women (5%).¹⁵³ Where attorneys explicitly proffered mitigating factors, more women (13%) than men (9%) were said to have acted in good faith or did not personally profit from the wrongdoing.¹⁵⁴

G. Women May Be More Cautious as a Result of Perceived Discrimination

Female lawyers around the country report a significant incidence of gender-based discrimination and incivility against them by judges, court personnel, other lawyers, and clients.¹⁵⁵ It has been suggested that some differences attributed to gender should more accurately be attributed to disparity in power and status.¹⁵⁶ Put another way, “women have a much narrower band width of socially acceptable be-

and Preference for [Certain] Public Interest Law Practice (unpublished working draft, on file with authors) (In three-year study of University of Minnesota law students, beginning female law students ranked the importance of certain public interest jobs significantly higher than beginning male law students. In the second year the difference disappeared, but began to show signs of reappearance in the third year.).

152. Daicoff, *supra* note 142, at 1361 (“[A]ctual motives for both men and women may not differ substantially, but what is socially acceptable for them to report may differ.”).

153. See *supra* tbl.10, at p. 815.

154. See *supra* tbl.11, at p. 816.

155. See, e.g., MARCIA CLARK, WITHOUT A DOUBT 117, 147-48, (1997) (“I know that I have to be tougher and better than the guys I work with.” In O.J. Simpson murder trial, judge addressed defense lawyers as “Mr. Cochran” and “Mr. Shapiro,” and addressed lead prosecutor as “Marcia.”); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE 38-40 (2000); Lilia M. Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts*, 27 LAW & SOC. INQUIRY 235 (2002); Lynn S. Glasser, *Survey of Female Litigators: Discrimination by Clients Limits Opportunities*, in THE WOMAN ADVOCATE: EXCELLING IN THE 90'S, at 59, 66-69 (Jean Maclean Snyder & Andrea Barmash Greene eds., 1996); Sandy Mastro, *Courtroom Bias: Gender Discrimination Against Pregnant Litigators*, 8 WM. & MARY J. WOMEN & L. 155 (2001). For a partial listing of the reports published by task forces that have studied gender bias in more than thirty states and other jurisdictions, see Judith L. Maute, *Writings Concerning Women in the Legal Profession, 1982-2002*, 38 TULSA L. REV. 167, 176-77 (2002), and Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 4 n.5 (1996).

156. See Elizabeth Aries, *Gender Differences in Interaction: A Reexamination*, in SEX DIFFERENCES AND SIMILARITIES, *supra* note 4, at 72-73 (citing studies finding, among other things, that “[h]igh-status and powerful individuals have been found to interrupt more than low-status, less powerful individuals,” that “many of the characteristics attributed to women—interpersonal sensitivity, politeness, use of ‘women’s language’ (e.g., tag questions, qualifications of speech), and so on—are found more often in low-status than in high-status individuals,” and that “[p]eople mitigate their requests when speaking to superiors”).

havior than do men in this society.”¹⁵⁷ Perhaps perceiving that they are under greater scrutiny, or are likely to get less sympathy, female lawyers may be more careful to play by the rules.

H. Due to Innate and/or Socialized Differences, Women May Be Less Likely than Men to Do Things that Make Clients and Others Angry Enough to File a Grievance

We now arrive at the core question: Are the values and behavior of men and women just different? Research on sex and gender¹⁵⁸ differences in behavior offers biological or physiological explanations and social or cultural explanations.¹⁵⁹

1. Biological Differences

To begin with a clear biological difference, men have generally higher testosterone levels than women,¹⁶⁰ and testosterone is associated with increased aggressive behavior:

[T]hroughout the world, men fight more often than women, get arrested for violent crimes more often, [and] shout insults at each other more often Moreover, the highest incidence of violence, as measured by crime statistics, is in men 15 to 25 years old, who have the highest levels of testosterone in the blood. . . . Among men of the same age, those with higher testosterone levels have, on average, slightly higher rates of violent activities and crimes than do other men.¹⁶¹

157. Burgoon & Klinge, *supra* note 105, at 262-63 (citing studies on “language expectancy theory,” or “cultural and sociological expectations about language behaviors that subsequently affect their acceptance or rejection of persuasive messages”).

158. The literature sometimes distinguishes between “sex” differences, which are “attributed to biology,” and “gender” differences, which result from “a social, symbolic construction that expresses the meanings a society confers on biological sex.” Julia T. Wood & Kathryn Dindia, *What’s the Difference? A Dialogue About Differences and Similarities Between Women and Men*, in SEX DIFFERENCES AND SIMILARITIES, *supra* note 4, at 19-20; *cf.* J.E.B. v. Alabama, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting).

159. *See, e.g.*, Laura K. Guerrero & Renée L. Reiter, *Expressing Emotion: Sex Differences in Social Skills and Communicative Responses to Anger, Sadness, and Jealousy*, in SEX DIFFERENCES AND SIMILARITIES, *supra* note 4, at 322-26; Lynda M. Sagrestano et al., *Theoretical Approaches to Understanding Sex Differences and Similarities in Conflict Behavior*, in SEX DIFFERENCES AND SIMILARITIES, *supra* note 4, at 288-91.

160. *See* JAMES W. KALAT, BIOLOGICAL PSYCHOLOGY 303 (6th ed. 1998); *cf.* Anita Sharpe, *Spit Testing May Be Hard to Swallow in the Workplace*, WALL ST. J., Nov. 29, 1993, at A1 (citing study indicating women have about one-fifth the amount of testosterone in their saliva as men, and also indicating attorneys in general have a higher-than-average testosterone level).

161. KALAT, *supra* note 160, at 333 (citations omitted); *see also* ALLAN MAZUR & LEON S. ROBERTSON, BIOLOGY AND SOCIAL BEHAVIOR 56 (1972) (“In general, males are more aggressive than females. . . . ‘Among adults, men commit more homicides, more suicides, and are arrested more frequently for assault and battery. In adolescence, male delinquency is far more frequently aggressive than is female delinquency. . . .’ The difference is fairly general across cultures.”) (citations omitted); DAVID WEISBURD ET AL., CRIMES OF THE MIDDLE

In addition, studies have consistently found that women are better decoders and encoders of nonverbal communication, such as facial expressions, body language, and vocal cues.¹⁶² Women's superiority in this regard has been found to be fairly constant across ages and cultures, suggesting that biological rather than environmental factors are at work.¹⁶³ Explanations range from "sex differences in brain lateralization"¹⁶⁴ to women's relatively limited number of reproductive opportunities compared to men's, giving rise to a greater genetic need for women to successfully parent their offspring.¹⁶⁵

2. Social Science Research on Gender Differences Generally

Women are—perhaps stereotypically—perceived to be better communicators than men.¹⁶⁶ For example, a recent study concluded that female primary-care physicians engage in more "patient-centered" communication than male primary-care physicians.¹⁶⁷ Similarly, studies of gender differences in "comforting strategies" indicate that women are more likely than men to use "person-centered" comforting strategies in response to a distressed individual, and that *both* men and women rate "highly person-centered messages as more sensitive"

CLASSES: WHITE-COLLAR OFFENDERS IN THE FEDERAL COURTS 69-70 (1991) (women commit fewer crimes than men relative to their proportion in the population).

162. See, e.g., JUDITH A. HALL, NONVERBAL SEX DIFFERENCES: COMMUNICATION ACCURACY AND EXPRESSIVE STYLE 27 (1984); Judith A. Hall, *How Big Are Nonverbal Sex Differences? The Case of Smiling and Sensitivity to Nonverbal Cues*, in SEX DIFFERENCES AND SIMILARITIES, *supra* note 4, at 158-59.

163. See Peter A. Andersen, *Researching Sex Differences Within Sex Similarities: The Evolutionary Consequences of Reproductive Differences*, in SEX DIFFERENCES AND SIMILARITIES, *supra* note 4, at 86-89 (citations omitted); cf. KALAT, *supra* note 160, at 136 ("In a part of the temporal cortex important for language functioning, women have a greater density of neurons per volume.") (citation omitted). Other scholars believe that "the mechanisms underlying most behaviors likely have both biological and sociocultural components." Sagrestano et al., *supra* note 159, at 290 (citations omitted).

164. Andersen, *supra* note 163, at 89 ("[M]en have more specialized, lateralized brain functions, whereas women have more symmetrical, integrated brain functions . . . suggest[ing] that the more efficient communication between the brain hemispheres of women enable logical, verbal information to be coordinated with nonverbal information to produce greater intuition and social sensitivity.") (citations omitted); see also Joel Hughes, *Brain Research Finds Gender Link: Med School Team Discovers Sexes Think Differently*, YALE DAILY NEWS, Feb. 16, 1995.

165. Andersen, *supra* note 163, at 89 (citations omitted).

166. It is a mystery why women are not more persuasive than men. See *supra* note 105.

167. Debra L. Roter et. al., *Physician Gender Effects in Medical Communication: A Meta-analytic Review*, 288 JAMA 756 (2002) (surveying, among other things, twenty-six prior empirical studies relating physician gender to physician-patient communication during medical visits, and concluding that "[f]emale primary care physicians engage in more communication that can be considered patient centered," including more questioning, counseling, exploration of emotional concerns, and statements of empathy and encouragement). See also Burgoon & Kingle, *supra* note 105, at 264 (citing several studies finding that female physicians "use more affiliative behaviors than their male counterparts").

than messages that tend to deny or ignore the other's feelings.¹⁶⁸ One study found that about three-fourths of those surveyed, of *both* genders, would rather receive emotional support from a female friend than a male friend.¹⁶⁹ In another study of "goals when dealing with an upset person," both men and women "assigned significantly greater priority to affective goals [such as helping the other person 'work through his or her feelings' or blow off steam] than to instrumental goals [such as solving the problem or giving advice]."¹⁷⁰

Women may, on the whole, be better listeners and easier to be around. At least fifteen studies indicate that women smile more than men in social interaction.¹⁷¹ Men and women also tend to use language differently, with results such as this:

[P]urely on the basis of communicators' language samples, women and men both perceive female communicators to be of a higher social status and more literate, as well as nicer and more beautiful, than males. However, both [men and women] rated males as stronger and more aggressive [judging from their language samples].¹⁷²

One study contends that "a relatively large percentage of men are unwilling to change their attitudes and/or behaviors regardless of the situation," citing studies suggesting that certain types of men are highly resistant to persuasion—for example, men classified as "masculine males" in "traditional" sex roles and persons classified as "cynically hostile" (of which more than 80% were men).¹⁷³

3. Social Science Research on Gender Differences in Morality

Researchers have suggested that women show more "ethical sensitivity"¹⁷⁴ and are more religious¹⁷⁵ than men. Nonetheless, empirical

168. Adrienne W. Kunkel & Brant R. Burleson, *Social Support and the Emotional Lives of Men and Women: An Assessment of the Different Cultures Perspective*, in SEX DIFFERENCES AND SIMILARITIES, *supra* note 4, at 110-11.

169. *Id.* at 112.

170. *Id.* at 113-14. *But see* MARK H. DAVIS, EMPATHY: A SOCIAL PSYCHOLOGICAL APPROACH 58-61 (John Harvey ed., 1996) (stating that studies of gender differences in showing empathy are inconclusive; women surpass men on self-reported measures of empathy, but women do not experience greater physiological response to emotional stimuli than men).

171. *See* Hall, *supra* note 162, at 157-58.

172. Anthony Mulac, *The Gender-Linked Language Effect: Do Language Differences Really Make a Difference?*, in SEX DIFFERENCES AND SIMILARITIES, *supra* note 4, at 142.

173. Burgoon & Klinger, *supra* note 105, at 274-75.

174. Muriel J. Bebeau & Mary Brabeck, *Ethical Sensitivity and Moral Reasoning Among Men and Women in the Professions*, in WHO CARES?: THEORY, RESEARCH, AND EDUCATIONAL IMPLICATIONS OF THE ETHIC OF CARE 144, 155-56 (Mary M. Brabeck ed., 1989).

175. *See, e.g.*, David de Vaus & Ian McAllister, *Gender Differences in Religion: A Test of the Structural Location Theory*, 52 AM. SOC. REV. 472, 472 (1987).

studies of business persons and business students are inconclusive in detecting any significant difference in the ethical judgment¹⁷⁶ or “Machiavellianism”¹⁷⁷ of men and women. But most studies of ethical behavior or “Machiavellianism” in business settings have relied on participants’ responses to hypothetical situations or questions,¹⁷⁸ not their actual behavior at work.¹⁷⁹

176. Compare Jeaneen M. Kidwell et al., *Differences in Ethical Perceptions Between Male and Female Managers: Myth or Reality?*, 6 J. BUS. ETHICS 489 (1987), Robin R. Radtke, *The Effects of Gender and Setting on Accountants’ Ethically Sensitive Decisions*, 24 J. BUS. ETHICS 299 (2000) (finding no significant gender differences between female and male accountants in responses to situations involving ethically sensitive decisions), Robertson & Anderson, *supra* note 134, at 637 (finding gender is not a significant predictor of ethical behavior among industrial salespeople and managers), Marshall Schminke, *Gender Differences in Ethical Frameworks and Evaluation of Others’ Choices in Ethical Dilemmas*, 16 J. BUS. ETHICS 55, 63 (1997) (finding no difference in the “ethical models to which [men and women] personally subscribed,” but finding that women were harsher on other women, and men were harsher on other men, in evaluating others who displayed unethical judgments), and James Weber, *Influences Upon Organizational Ethical Subclimates: A Multi-Departmental Analysis of a Single Firm*, 6 ORG. SCI. 509, 522 (1995) (finding no significant gender difference in ethical decision-making), with Barnett & Karson, *supra* note 134, at 759, Michael Betz et al., *Gender Differences in Proclivity for Unethical Behavior*, 8 J. BUS. ETHICS 321, 324 (1989) (finding that “[m]ale [students] were more than twice as likely to say they would engage in” unethical behavior, such as padding travel expenses or embezzling), Susan C. Borkowski & Yusuf J. Ugras, *Business Students and Ethics: A Meta-Analysis*, 17 J. BUS. ETHICS 1117, 1124 (1998) (concluding after a meta-analysis of forty-seven studies that “the null hypothesis of no relationship between gender and ethical behavior can be rejected,” and that twenty-nine studies reported that females exhibited more ethical attitudes or behavior than males), Gail Eynon et al., *Factors that Influence the Moral Reasoning Abilities of Accountants: Implications for Universities and the Profession*, 16 J. BUS. ETHICS 1297, 1303 (1997) (finding that “gender has a powerful impact” on the moral reasoning abilities of accountants), Libby & Agnello, *supra* note 134, at 230-31, Ruegger & King, *supra* note 134, at 181-82 (survey of 2196 students taking business courses found women significantly “more ethical” than men in responding to six out of ten hypothetical ethical business dilemmas), and Jon M. Shepard & Linda S. Hartenian, *Egoistic and Ethical Orientations of University Students Toward Work-Related Decisions*, 10 J. BUS. ETHICS 303, 308-09 (1990) (finding that women showed significantly more ethical orientations toward work-related decisions than men in three of four vignettes).

177. There is extensive literature in psychology, evolutionary biology, and other disciplines on “Machiavellian intelligence,” or “the idea that intelligence began in social manipulation, deceit and cunning.” Richard W. Byrne & Andrew Whiten, *Machiavellian Intelligence*, in MACHIAVELLIAN INTELLIGENCE II: EXTENSIONS AND EVALUATIONS 1 (Andrew Whiten & Richard W. Byrne eds., 1997). Psychologists have designed so-called “Mach tests” that score test-takers as “high-Machs” or “low-Machs” on the basis of their agreement with statements such as “The best way to handle people is to tell them what they want to hear.” See RICHARD CHRISTIE & FLORENCE L. GEIS, *STUDIES IN MACHIAVELLIANISM* 22 (Leon Festinger & Stanley Schachter eds., 1970). One recent review of the literature asserts that although “[g]enerally, the distributions of Mach scores for male and female participants are broadly overlapping with the mean slightly lower for female participants,” exceptions have been found in studies of business executives, which “show either no gender difference or a reverse difference in average Mach score (i.e., women score higher than men).” David Sloan Wilson et al., *Machiavelliansim: A Synthesis of the Evolutionary and Psychological Literatures*, 119 PSYCHOL. BULL. 285, 293-94 (1996) (citations omitted).

178. For example, many studies use the “Defining Issues Test” (DIT), developed by James Rest using Lawrence Kohlberg’s theory of moral development. See *infra* note 180; JAMES REST, *DEVELOPMENT IN JUDGING MORAL ISSUES* (1979). The DIT poses three or six moral dilemmas to subjects to measure moral reasoning ability. See, e.g., Eynon et al., *su-*

Carol Gilligan, in her seminal work *In a Different Voice*, posited a gendered difference in conceptions of morality, with men generally following a “morality of rights” and women generally following a “morality of responsibility.”¹⁸⁰ The concepts are also called “an ethic of justice” and an “ethic of care.”¹⁸¹ The “morality of rights” emphasizes “separation rather than connection,” considering “the individual rather than the relationship as primary.”¹⁸² In addressing hypothetical situations of moral ambiguity, or in defining morality, male respondents tended to employ a hierarchy of rules emphasizing individual rights, while female respondents considered how the outcome would affect the existing relationships involved in the situation.¹⁸³

pra note 176, at 1297; Richard D. White Jr., *Are Women More Ethical? Recent Findings on the Effects of Gender Upon Moral Development*, 9 J. PUB. ADMIN. RES. & THEORY 459, 467 (1999) (finding that female Coast Guard personnel score significantly higher on the DIT than Coast Guard men).

179. Borkowski & Ugras, *supra* note 176, at 1124 (“Reacting more ethically to fictional dilemmas does not necessarily translate to more ethical behavior when confronted by real-world situations.”); *see also* RHODE, *supra* note 33, at 30 (“Women who have achieved decision-making positions in traditionally male-dominated professions generally have been socialized to follow prevailing practices.”); Libby & Agnello, *supra* note 134, at 232 (“Since this research was done in a classroom setting, some of the students may have been giving the answers that they felt were expected rather than the ones that they really believed.”).

180. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* 22 (1993). This book is critical of Lawrence Kohlberg’s theory of moral development. *See* LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* (1981). Kohlberg developed a six-stage theory of the development of moral judgment based on his empirical study of eighty-four boys. As Gilligan noted: “Prominent among those who . . . appear to be deficient in moral development when measured by Kohlberg’s scale are women, whose judgments seem to exemplify the third stage of his six-stage sequence. At this stage morality is conceived in interpersonal terms and goodness is equated with helping and pleasing others.” GILLIGAN, *supra*. *In a Different Voice* has spawned an enormous amount of literature, including further work by Gilligan herself. *E.g.*, Carol Gilligan & Jane Attanucci, *Two Moral Orientations: Gender Differences and Similarities*, 34 MERRILL-PALMER Q. 223 (1988). For a small sampling of the discussion and sources, *see* EVA FEDER KITTAY & DIANA T. MEYERS, *WOMEN AND MORAL THEORY* (1987); Owen Flanagan & Kathryn Jackson, *Justice, Care, and Gender: The Kohlberg-Gilligan Debate Revisited*, 97 ETHICS 622 (1987); Sara Jaffee & Janet Shibley Hyde, *Gender Differences in Moral Orientation: A Meta-Analysis*, 126 PSYCHOL. BULL. 703 (2000) (an overview of empirical research designed to test or quantify Gilligan’s theory); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL’Y & L. 75, 76-77 & nn.8-9 (1994).

181. *E.g.*, GILLIGAN, *supra* note 180, at 19; Robbin Derry, *An Empirical Study of Moral Reasoning Among Managers*, 8 J. BUS. ETHICS 855 (1989). In a different expression, stereotypical male qualities are “agentic” (self-asserting and independent from other people) and stereotypical female qualities are “communal” (“nurturing, affectionate, helpful, and emotionally expressive”). A. Elizabeth Lindsey & Walter R. Zakahi, *Perceptions of Men and Women Departing from Conversational Sex Role Stereotypes During Initial Interaction*, in *SEX DIFFERENCES AND SIMILARITIES*, *supra* note 4, at 394-95.

182. GILLIGAN, *supra* note 180, at 19.

183. *E.g.*, *id.* at 25-38, 98-100; *cf.* James R. Harris, *Ethical Values and Decision Processes of Male and Female Business Students*, J. EDUC. FOR BUS., Feb. 1989, at 234, 236 (stating that while finding no significant gender differences in ethical values generally of senior business students, highly significant gender differences in the approach to making ethical judgments existed; in evaluating outcomes of ethical decisions, males most often

A “morality of rights” does not necessarily dictate adherence to positive law. For example, presented with the so-called “Heinz dilemma”—whether, to save his wife’s life, a man should steal a drug he cannot afford—a male respondent, using a hierarchy of life-over-property, said the man should steal.¹⁸⁴ Similarly, an “ethic of care” does not imply a disregard of legal rules. Pondering the same “Heinz dilemma,” a female respondent searched for alternative solutions that would prevent the theft, reasoning that the wife would be even worse off if her husband were put in jail.¹⁸⁵ In another example, a female lawyer recounted a dilemma in which opposing counsel overlooked a document that would have helped his client. Although torn by “concern for the person on the other side,” the female lawyer chose “to adhere to the system” and say nothing.¹⁸⁶

While the terms “ethic of justice” and “ethic of care” defy precise definition or measurement, Professor Gilligan’s theory continues to hold the attention of scholars in many disciplines. A variety of instruments have been devised to measure subjects’ “care” and “justice” orientations.¹⁸⁷ It should be noted, however, that many studies have found that females score higher than males, or at least not lower than males, in moral reasoning tests using Kohlberg-type assessment,¹⁸⁸ which Gilligan criticizes as ignoring care considerations.¹⁸⁹

A recent meta-analysis of 113 quantitative studies of moral reasoning found a small difference in “care” reasoning favoring females and a small difference in “justice” reasoning favoring males, but that “73% of the studies that measured care reasoning and 72% of the studies that measured justice reasoning failed to find significant gender differences.”¹⁹⁰ These findings led the researchers “to conclude that, although distinct moral orientations may exist, these orienta-

used an egoist-based, or self-centered, approach, while most females used a utilitarian approach that focused more on a societal view).

184. GILLIGAN, *supra* note 180, at 25-26.

185. *Id.* at 27-28.

186. *Id.* at 135-36.

187. *E.g.*, Linda S. Gump et al., *Cultural and Gender Differences in Moral Judgment: A Study of Mexican Americans and Anglo-Americans*, 22 HISP. J. BEHAV. SCI. 78 (2000) (author designed “Moral Justification Scale” consisting of six dilemmas; females scored significantly higher than males on the “Care” scale and lower than males on the “Justice” scale).

188. *See, e.g.*, Bebeau & Brabeck, *supra* note 174, at 146 (“To date, the literature examining gender differences in moral reasoning as defined by Kohlberg’s theory do not support Gilligan’s claim.”); Sue J. M. Freeman & John W. Giebink, *Moral Judgment as a Function of Age, Sex, and Stimulus*, 102 J. PSYCHOL. 43, 46 (1979) (finding that 14-year-old girls scored significantly higher than 14-year-old boys on Kohlberg-based moral judgment test, although differences were not significant at ages 11 or 17); White Jr., *supra* note 178, at 467 (finding that female Coast Guard personnel score significantly higher on the Defining Issues Test than Coast Guard men).

189. GILLIGAN, *supra* note 180, at 18-22.

190. Jaffee & Hyde, *supra* note 180, at 719.

tions are not strongly associated with gender.”¹⁹¹ However, the authors found that the gender difference for both care and justice reasoning was greater for “self-generated dilemmas” than for “dilemmas in which the content was standardized.”¹⁹² The authors believe that “[t]his finding provides strong support for studies that have found that gender differences in moral orientation are a function of the situation to which individuals are responding.”¹⁹³

That conclusion is borne out by studies finding that professional women use a “justice” rather than a “care” orientation in moral reasoning, suggesting that in the corporate context there is no correlation between gender and the two modes of moral reasoning.¹⁹⁴ It is not clear from the studies, however, whether the female managers are more justice-oriented than women generally (by selection or self-selection) or whether female managers tend toward a care orientation, but “have learned to [use] the [justice] reasoning dominant to the organization.”¹⁹⁵

4. *How Do These Supposed Gender Differences Apply to Attorneys?*

Several legal commentators have attempted to adapt Professor Gilligan’s construct of two distinct moral orientations to attorneys.¹⁹⁶ For example, Professor Carrie Menkel-Meadow suggests that female

191. *Id.* But see Lawrence S. Silver & Sean R. Valentine, *College Students’ Perceptions of Moral Intensity in Sales Situations*, 75 J. OF EDUC. FOR BUS. 309, 312 (2000) (study of college students finding women “more ethically oriented than men”).

192. Jaffee & Hyde, *supra* note 180, at 720.

193. *Id.* (citation omitted); see also James J. Hoffman, *Are Women Really More Ethical than Men? Maybe It Depends on the Situation*, 10 J. MANAGERIAL ISSUES 60, 67 (1998) (finding significant gender differences in most but not all ethical vignettes).

194. Derry, *supra* note 181, at 857. Twenty male and twenty female managers in a Fortune 100 industrial corporation were asked to describe and evaluate an actual moral conflict faced at work and how it was resolved. All but one used primarily “justice” rather than “care” reasoning, leading the author to conclude that “[t]here were no significant statistical correlations between gender and the reported experience of moral conflict, or between gender and the strength of the justice orientation.” *Id.*; see also James Weber & David Wasieleski, *Investigating Influences on Managers’ Moral Reasoning*, 40 BUS. & SOC’Y 79, 96 (2001) (“[G]ender is not a significant factor influencing managers’ moral reasoning in our sample . . .”).

195. Derry, *supra* note 181, at 859.

196. It should be noted that the idea that women are somehow more good and virtuous than men is not without its share of feminist detractors and harkens back to the suffragists’ claim that including women in public life “would . . . purify politics.” DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 14 (1989) (citations omitted); see MONA HARRINGTON, *WOMEN LAWYERS: REWRITING THE RULES* 149 (1994) (“I do not think that women should accept the role sometimes thrust on them of natural carriers of a morally superior approach to professional life.”). While some feminists have argued that the influx of women into the legal profession is beneficial precisely because of their different perspective, others believe that a focus on gender differences only perpetuates inequality. See Carrie Menkel-Meadow, *Portia in a Different Voice: Speculation on a Women’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39, 39 (1985); Menkel-Meadow, *supra* note 180, at 86-87, 111-12 (citations omitted); JACK & JACK, *supra* note 3, at 154.

lawyers might “be more sensitive to clients’ needs and interests, as well as to the needs and interests of those who are in relation to each other, for example, clients’ families, or employees.”¹⁹⁷ Such sensitivity would eschew, at a minimum, violations of professional ethics codes that would harm clients or others.

One study of the class of 1992 at Temple University School of Law was designed to explore whether male law students exhibited more “rights-oriented moral reasoning” and female law students exhibited more “care-oriented moral reasoning.”¹⁹⁸ The study found that at the beginning of the first year of law school, female law students engaged in significantly more “care-oriented moral reasoning” and male law students engaged in significantly more “rights-oriented moral reasoning.”¹⁹⁹ Interestingly, however, by the end of the first year of law school, the female law students’ “care orientation” had declined and “rights orientation” had increased so that “there was no significant difference in the care orientations” and rights orientations of male and female law students.²⁰⁰ Thus, according to this study, the greater female “ethic of care” had evaporated by the end of the first year of law school.²⁰¹

In interviews of over 100 female lawyers, mostly graduates of Harvard Law School, between 1989 and 1991, Mona Harrington found that many interviewees ascribed an “ethic of competition” to the still male-dominated legal culture, especially in litigation, where the adversarial system compels lawyers, “[l]ike football players or armed warriors, . . . to compete with the serious aim of defeating the opposing side.”²⁰² She concluded that in general, female attorneys subscribe more to an “ethic of care” and “tend to shy away from the most adversarial arenas in the law and to gravitate toward those

197. Menkel-Meadow, *supra* note 180, at 86-87 (citations omitted).

198. Janoff, *supra* note 3, at 193. “The study assumed that care and rights thinking are not mutually exclusive perspectives.” *Id.* at 226.

199. *Id.* at 217-26.

200. *Id.* at 229-33.

201. While it is possible that “rights-reasoning women may be the women most likely to attend law school,” that would not explain the Temple University study’s finding of a gender difference in moral reasoning before the students began their law school careers. Menkel-Meadow, *supra* note 180, at 80 n.25; cf. Andrea Kayne Kaufman, *The Logician Versus the Linguist—An Empirical Tale of Functional Discrimination in the Legal Academy*, 8 MICH. J. GENDER & L. 247, 266 (2002) (suggesting that a traditional law school education alienates female law students because it emphasizes “logical intelligence” to the detriment of “concerns of empathy, relational logic, social context, plurality of interests and circumstantial justifications”).

202. HARRINGTON, *supra* note 196, at 10-11, 128-33; see also Jeffreys, *supra* note 20, at 33 (Commenting on the gender gap in attorney discipline in Texas, Larry Doherty, a Texas lawyer, “suggests that women lawyers simply tend to be more ethical because they don’t have ‘warlike, overbearing and unresponsive’ instincts.”).

forms of practice that are most consultative and conciliatory . . . such as securities, antitrust, bankruptcy, and tax.”²⁰³

But even if this is true, an “ethic of competition” is not equivalent to an ethic that is more likely to violate disciplinary rules.²⁰⁴ And in our database, looking solely at the violation category of “Improper Litigation Conduct,” contrary to what one might expect from an over-charged male “ethic of competition,” there were five more actual cases of women in this category than would be predicted based upon the proportion of women in the population of disciplined attorneys, although the difference was not statistically significant.²⁰⁵

If it is true that women are better listeners, better communicators, more understanding of nonverbal cues, more concerned about maintaining relationships, smile more, and are just all-around more “caring” than men, then it would not be startling to discover that female attorneys’ clients are more satisfied than male attorneys’ clients. Clients’ most common complaints to disciplinary agencies involve the attorney’s failure to communicate in some fashion, such as by failing to return phone calls, or failure to take care of the client, such as by neglecting a legal matter or handling it incompetently.²⁰⁶ We can therefore hypothesize that female attorneys communicate with and take care of their clients better than male attorneys, thus generating fewer disciplinary grievances.

Our study cannot support or reject this hypothesis. One could argue that women’s alleged better communication skills and greater level of caring are what contribute to the gender difference in discipline overall. But the data from the study, which include only disci-

203. HARRINGTON, *supra* note 196, at 129, 150. *But see* Catherine M. Lee et al., *Attorneys’ Opinions Regarding Child Custody Mediation and Assessment Services: The Influence of Gender, Years of Experience, and Mediation Practice*, 36 FAM. & CONCILIATION CTS. REV. 216, 223-24 (1998) (finding no support for “[t]he hypothesis that female lawyers would be more favorably disposed to mediation than” male lawyers).

204. *But see* HARRINGTON, *supra* note 196, at 148-50 (linking competitive pressures on big law firms in the 1980s to excesses leading to huge fines paid by two large law firms to the federal government for their alleged “complicity in the illegal activities of [their] client Charles Keating, Jr.”).

205. *See supra* tbl.8, at p. 813.

206. *See supra* tbl.7, at p. 811 (revealing violations involving competence or diligence comprised the largest percentage (17%) of all violations in the database, and violations involving communications with clients comprised the second largest percentage (14%) of all violations in the database); *see also, e.g.*, VA. STATE BAR, 62ND ANNUAL REPORT 1999-2000, at 10 (2001), *available at* <http://www.vsb.org>; VA. STATE BAR, 63RD ANNUAL REPORT 2000-2001 at 11 (2002), *available at* <http://www.vsb.org>; Letter from Norman G. Bastemeyer, Iowa Supreme Court, Ethics Administrator, Board of Professional Ethics and Conduct, to Honorable Arthur A. McGiverin, Chief Justice, Supreme Court of Iowa (June 30, 2000) (on file with authors) (“The ethical violation most often alleged was neglect or incompetence (278) [of 488 complaints], followed by fraud, deceit, dishonesty, or misrepresentation (79) and conflict of interest (60).”); *see also* Levin, *supra* note 15, at 26 & n.121 (citing additional sources).

plined attorneys, have nothing directly to say about women attorneys' communication skills generally.

Further, disciplined female attorneys in 2000 committed far fewer violations related to competence, diligence, and communication than one would expect based on the proportion of women in the entire attorney population (23.6%), and the differences are highly significant statistically.²⁰⁷ But so are the differences between men and women with respect to every kind of violation, not just competence, diligence, and communications with clients.

Looking at the disciplined attorneys *only*, and not the entire attorney population, the results are surprising. If women were more caring and better listeners than men, one might expect to see the incidence of non-diligence and non-communication among female disciplined attorneys to be less than their proportion of disciplined attorneys. But although women make up 11.7% of the disciplined attorneys in our database, women committed 13% of the violations relating to competence and diligence and 14% of the violations relating to communications with clients.²⁰⁸ These differences are statistically significant.

During a workshop, some of our colleagues suggested a difference between "sins of commission" and "sins of omission," with criminal activity, misappropriation, and fraud exemplifying the former, and non-diligence and non-communication exemplifying the latter. Male attorneys were much more likely to commit "sins of commission," while female attorneys were more likely to commit "sins of omission." A possible reason for this disparity could be female attorneys' disproportionate burden of housework and child care, leading to severe time constraints.²⁰⁹ In addition, female attorneys' higher incidence of depression may account for part of the female disciplined attorneys' unexpectedly high frequency of a sanctionable lack of diligence, competence, or communications with clients.²¹⁰

In an important study designed to test Gilligan's theory as applied to lawyers' ethical decision-making, authors Rand Jack and Dana Crowley Jack interviewed thirty-six lawyers in Washington state,

207. See *supra* tbl.8, at p. 813.

208. See *id.*

209. See, e.g., ABEL, *supra* note 106, at 228 (stating women's "primary responsibility for childrearing continues to disadvantage them within the most competitive legal careers"); EPSTEIN, *supra* note 150 at 329-79; Sagrestano et al., *supra* note 159, at 295; ARLIE RUSSELL HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT* 3-4, 6-10 (Penguin Books 2003) (1989); David L. Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family*, 14 *LAW & SOC. INQUIRY* 251 (1989).

210. See *supra* tbl.8, at p. 813; Benjamin et al., *supra* note 138, at 244 (noting "neglect cases tend to arise among lawyers who are procrastinating because they are clinically depressed").

matched by age and gender.²¹¹ The interviews had three parts. First, the attorneys indicated their general moral orientation in response to questions such as, “What does morality mean to you?” and “What makes something a moral problem or dilemma for you?”²¹² In this part of the interview, where participants were least bound by their professional role as attorneys, 77% of the men and 36% of the women had a “rights” orientation, while 64% of the women and 23% of the men had a “care” orientation.²¹³ Second, the attorneys were asked to describe moral dilemmas they had faced in the practice of law and how they had handled them.²¹⁴ Of the thirty attorneys who identified such dilemmas, 77% of the men and 41% of the women had a “rights” orientation, while 59% of the women and 23% of the men had a “care” orientation.²¹⁵

Finally, the attorneys in the Jacks’ study were asked how they would respond to two hypothetical moral dilemmas. In the first, the legal rules governing the attorney’s conduct were clear despite any contrary moral pull.²¹⁶ In the second, the governing legal rules were fuzzier, leaving more room for the expression of any countervailing personal morality.²¹⁷ Women were more likely to express a “care” orientation than a “rights” orientation in response to the second hypothetical, when the professional rules were unclear.²¹⁸ In response to the first hypothetical, when the professional rules were clear, both male and female lawyers responded with a “justice” or “rights” approach.²¹⁹ Thus, Professor Menkel-Meadow commented on the Jacks’ research that “the professional role, legal education, and an under-

211. JACK & JACK, *supra* note 3, at xi-xii. For another summary of the Jacks’ research, see Judith Leonie Miller, *Making Change: Women and Ethics in the Practice of Law*, 2 YALE J.L. & FEMINISM 453 (1990).

212. JACK & JACK, *supra* note 3, at 56.

213. *Id.* at 188.

214. *Id.* at 65.

215. *Id.* at 189.

216. The first hypothetical postulated that the attorney represented a criminal defendant who had confessed to a murder. Although the attorney has no doubt that the defendant had committed the murder and continues to be dangerous, the attorney is also sure that he or she can have the confession excluded. The moral dilemma pitted the attorney’s obligation to suppress the confession against his or her concern for public safety if the client is released. *Id.* at 72-75.

217. The second hypothetical postulated that the attorney, representing a parent in a child custody proceeding, finds a letter containing information that makes the attorney believe the opposing parent would clearly be the better parent. The hypothetical was changed midway through the discussion to add that the letter threatened serious bodily harm to the children. *Id.* at 78-80.

218. *Id.* at 55, 80-81. In response to the second hypothetical, 76% of the men and 50% of the women had a “rights” orientation, while 50% of the women and 24% of the men had a “care” orientation. *Id.* at 190.

219. *Id.* at 75. In response to the first hypothetical, 84% of the men and 72% of the women had a “rights” orientation, while 28% of the women and 16% of the men had a “care” orientation. *Id.* at 190. The difference was not statistically significant.

standing of the norms of the profession could often, if not always, trump gender patterns in moral reasoning.”²²⁰

Does the Jacks’ study offer any insight into the gender difference we found in attorney discipline rates? Perhaps not. The most common disciplinary violations do not involve any morally ambiguous “dilemma” that can be framed in terms of harm to client versus harm to others. Most disciplined attorneys in 2000 broke ethical rules that caused harm to their clients and some type of benefit to, or some indulgence of, themselves. A lawyer should not steal a client’s money. A lawyer should not commit a felony. A lawyer should not allow the statute of limitations to run on a client’s meritorious claim. A lawyer should not fail to return a client’s repeated phone calls. One must strain to imagine how a “care orientation” could lead to a different outcome than a “rights orientation” in these situations. The ethical violations that a lawyer is most likely to be disciplined for do not lend themselves to struggles between a “care orientation” and a “rights orientation.” Violation of these rules offends both.²²¹

The Jacks’ study suggests that when professional rules are clear-cut, male and female lawyers exhibit similar dominant levels of “rights” reasoning—not that female lawyers will follow those rules more frequently than male lawyers. To account for the latter, one is thrown back upon speculation. If the imperative of the “care” perspective is to avoid harm and preserve relationships,²²² perhaps it is female lawyers’ greater “care” orientation that leads them to obey ethical rules with greater fervor, because violation of these rules is likely to cause harm to their clients or others.

5. *Factors Not Accounted for*

Although our study shows a significant gender disparity in rates of discipline, it must be remembered that attorney disciplinary proceedings as a whole involve a very small percentage of active attorneys, male or female. According to ABA figures, less than 0.6% of active lawyers in 1999 received a disciplinary sanction.²²³ A greater

220. Menkel-Meadow, *supra* note 180, at 96.

221. *But see* Menkel-Meadow, *supra* note 180, at 93 (suggesting that the adoption of ethics codes such as the Model Rules of Professional Conduct is itself an example of the “ethic of justice”).

222. JACK & JACK, *supra* note 3, at 6.

223. 1998-99 SURVEY, *supra* note 16, at 33, 37. In forty-six reporting jurisdictions, there were 2643 private sanctions, 3906 public sanctions, and 1,147,125 lawyers with active licenses in 1999. The reason this figure is larger than the 0.3% of lawyers disciplined reported, *supra* note 85, is that it includes private sanctions as well as public sanctions. For the most part, our database did not include private sanctions, because by definition, they are usually not publicly available, and even if reported in some manner, it is usually without the attorney’s name, making it impossible to determine the attorney’s sex. The 0.6% of all lawyers who were disciplined in 1999 is nonetheless, a larger percentage than

percentage of lawyers—over 10%—is the subject of a complaint received by a disciplinary agency,²²⁴ but most complaints are dismissed without the filing of formal charges.²²⁵ This suggests that the vast majority of male and female attorneys similarly adhere to the rules of professional conduct,²²⁶ or that grievances against attorneys in general are greatly underreported and underinvestigated,²²⁷ or both.

Some social science researchers have concluded that the percentage of variance in behavior that can be accounted for or explained by knowledge of a person's sex is generally less than 10%; other factors account for the lion's share of the explanation.²²⁸ There are numerous factors that may contribute to an attorney's commission of disciplinary infractions that the publicly-available reports of disciplinary action did not contain: for example, the law school the attorney attended,²²⁹ the attorney's class rank in that law school (or even the grade received in Professional Responsibility), the attorney's score on

in earlier decades. *See, e.g.*, Garbus & Seligman, *supra* note 117, at 48 (approximately 0.1% of practicing lawyers were disciplined in 1972).

224. 1998-99 SURVEY, *supra* note 16, at 33 (showing in forty-six reporting jurisdictions, there were 116,922 complaints to disciplinary agencies equaling 10.2% of the 1,147,125 lawyers with active licenses in 1999).

225. *Id.* (stating that although 116,922 disciplinary complaints were filed in 1999, only 3717 lawyers were formally charged); *see also* ABEL, *supra* note 106, at 145 ("Starting from a population of complaints that already overlooks most misconduct, the disciplinary process then displays extraordinary lenience."); Levin, *supra* note 15, at 8-9 ("[O]nly about five percent of all complaints [about attorneys] result in any sanctions.").

226. *See* RHODE, *supra* note 33, at 9, 30 (stating "psychological research finds few respects in which men and women consistently differ, and even for those characteristics, gender typically accounts for only a small part of the variation among individuals"); Aries, *supra* note 156, at 67 ("We have tended to overlook the considerable overlap between the behavior of men and women and to misrepresent small differences as mutually exclusive."). In one study of moral reasoning ability, advanced law students scored much higher than average adults in general. In the groups studied, advanced law students ranked behind only moral philosophy and political science doctoral students and seminarians in a liberal Protestant seminary. *See* JAMES REST, DIT MANUAL (1990).

227. *See, e.g.*, Guttenberg, *supra* note 10, at 964 (suggesting the relatively small percentage of attorneys in Ohio who are actually disciplined is a function of lack of enforcement, not lack of ethical transgressions); Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971 (2002) (showing the author's study of lawyer advertising in the San Diego Yellow Pages revealed far more violations of advertising rules than reported disciplinary cases involving advertising). As discussed earlier, it is possible that underenforcement is even more pronounced for women, but there is very little data bearing on this question.

228. *See* Aries, *supra* note 156, at 67-69 (citing numerous studies).

229. *See, e.g.*, Ramos, *supra* note 137, at 884 n.62 ("[T]he better one's law school, the better one's chance of avoiding discipline.") (citing Nancy McCarthy, *Legal Ethics: Just Who Is Responsible?*, CAL. B.J., Oct. 1995, at 27). *But see* Ramos, *supra* note 112, at 32-38 (Showing a study of legal malpractice claims in Florida from 1988-1994 that concludes "[t]he percentage of legal malpractice claims by law school simply mirrors the general percentage of lawyers who graduated from those law schools." In other words, graduates of the "worst" law schools are not disproportionately responsible for generating more malpractice claims.).

the Multistate Professional Responsibility Exam, or the size of the attorney's firm. The reader can undoubtedly imagine several other factors.

Further, although we used our best efforts, it is more than possible that our database is missing cases decided in 2000. In particular, we were concerned that the ABA Survey on Lawyer Discipline Systems for the year 1999 reported 3906 public sanctions—even with the data from six small-population states missing.²³⁰ The 3575 cases we were able to locate for 2000 may represent a miraculous drop in disciplinary actions in the new millennium²³¹ or illustrate what one scholar termed “[i]nadequate record-keeping by many jurisdictions, differing reporting methods, [and] uninformative published opinions.”²³²

V. CONCLUSION

Our study found—consistently with the Oklahoma state report that led us down this path—that female attorneys are disciplined at a much lower rate than male attorneys nationally. Further, even the female attorneys that are disciplined incur generally less severe sanctions than disciplined male attorneys. However, we found that an attorney's gender does not significantly affect the length of a term suspension, suggesting that factors other than gender may influence the severity of a sanction.

None of the possible reasons we considered for the large overall difference in disciplinary rates between men and women provide an entirely satisfactory explanation. First, we are not aware of anything that would make the year 2000 different from other years in the recent past, and indeed an unscientific sampling of other years in selected states shows much the same gender pattern.

Second, the results of the regressions—that gender is not a significant predictor of the length of term suspensions—tend to suggest that disciplinary boards are not “soft” on women. It is possible, though, that disciplinary boards do not initiate formal charges against women at the same rate as against men, as some limited information from Illinois suggests, but there is little other publicly available information with which we might further explore this hypothesis.

Third, our study was not designed to determine the proportions of male and female attorneys in certain practice areas, such as domestic

230. 1998-99 SURVEY, *supra* note 16, at 37.

231. The ABA's own figures do show an 8% drop of 542 disciplinary sanctions from 1998 to 1999. 1998-99 SURVEY, *supra* note 16, at 8, 37 (indicating a decrease from 7091 public and private sanctions in 1998 to 6549 public and private sanctions in 1999).

232. Levin, *supra* note 15, at 6 (citations omitted).

relations, or certain types of firms, such as a solo practice. Nor was our study designed to determine whether attorneys in certain practice areas incur disciplinary sanctions at a higher-than-average rate relative to their proportion in the attorney population. Our much more limited findings on the most common types of legal matters to generate disciplinary sanctions suggest that whatever gender differences there might be in individual areas roughly cancel each other out. In particular, although a higher percentage of the legal matters handled by disciplined men involved criminal law and personal injury, a higher percentage of the legal matters handled by disciplined women involved domestic relations.

Fourth, although we do not know why, the median age of disciplined attorneys (both male and female) is much higher than the median age of lawyers generally. The fact that female attorneys are younger, on average, than male attorneys probably contributes to the overall difference in disciplinary rates between men and women. But age does not appear to significantly influence the length of a term suspension, suggesting that women's relative youthfulness might not explain why men suffer severe sanctions at a higher rate than women.

Fifth, gender differences in substance abuse and emotional problems could theoretically contribute to differences in disciplinary rates. But our data, published reports of disciplinary actions, did not contain enough information to evaluate this hypothesis.

Sixth, although female attorneys may be somewhat less motivated by money than male attorneys, the connection between financial motivation and disciplinary violations is murky. On the one hand, financial gain is likely to motivate the misappropriation of funds as well as the charging of excessive fees. Male attorneys misappropriate client funds and violate fees rules at a higher rate than female attorneys. On the other hand, some of the most common disciplinary violations, including incompetence, lack of diligence, and improper communications with clients, do not appear to be motivated by financial gain.

Seventh, women may still believe they are subject to discrimination. However, our study was not designed to test how this attitude might contribute to a lower discipline rate, and the data is not informative.

Finally, research in other disciplines suggests biological and social gender differences, such as women's better communication skills, that might lead clients to be more satisfied, or at least less aggravated, with female attorneys. Again, our study could not measure these traits. In addition, a large body of scholarship on a postulated gender difference in morality between a "rights" and a "care" orienta-

tion yields inconclusive results. In any event, the “rights”/“care” dichotomy does not appear particularly relevant in the context of attorney discipline, because violation of most disciplinary rules clearly offends both a “rights” and a “care” orientation.

To our knowledge, this is the first published national study of gender differences in attorney discipline.²³³ At a minimum, we hope that it makes a useful contribution to the slim volume of empirical work on attorney discipline and suggests areas for further research.²³⁴

TABLE 18
State-by-State Comparison of Genders of All Attorneys⁺
and Genders of Disciplined Attorneys⁺⁺

State	No. of Licensed Attor- neys	% (no.) Male Attor- neys	% (no.) Female Attor- neys	No. of Attor- neys Disci- plined in 2000	% (no.) of Male Disci- plined Attor- neys†	% (no.) of Female Disci- plined At- torneys†
Ala- bama**	8,838	82.6% (7,300)	17.4% (1,538)	47	93.6% (44)	6.4% (3)
Alaska**	2,219	74.2% (1,647)	25.8% (572)	14	92.9% (13)	0% (0)
Arizona**	10,685	77.2% (8,249)	22.8% (2,436)	71	90.1% (64)	9.9% (7)
Arkansas	4,414	82.9% (3,660)	17.1% (754)	84	89.3% (75)	10.7% (9)
Califor- nia**	113,173	73.6% (83,286)	26.4% (29,887)	449	84.2% (378)	15.1% (68)
Colorado	14,603	75.1% (10,971)	24.9% (3,632)	43	83.7% (36)	14% (6)
Connecti- cut**	15,093	75.5% (11,394)	24.5% (3,699)	75	90.7% (68)	6.7% (5)
Delaware	2,358	75.8% (1,787)	24.2% (571)	14	85.7% (12)	14.3% (2)

233. Cf. Menkel-Meadow, *supra* note 180, at 88 (“At present, virtually no studies report on how the different genders actually practice law . . .”).

234. See *supra* note 15.

State	No. of Licensed Attor- neys	% (no.) Male Attor- neys	% (no.) Female Attor- neys	No. of Attor- neys Disci- plined in 2000	% (no.) of Male Disci- plined Attor- neys†	% (no.) of Female Disci- plined At- torneys†
District of Colum- bia**	40,357	69% (27,849)	31% (12,508)	116	87.1% (101)	11.2% (13)
Florida**	41,131	78.4% (32,251)	21.6% (8,880)	310	87.7% (272)	11.6% (36)
Georgia**	19,593	77.2% (15,121)	22.8% (4,472)	90	89% (80)	10% (9)
Hawaii	3,679	75.2% (2,766)	24.8% (913)	14	92.9% (13)	7.1% (1)
Idaho	2,707	84.1% (2,276)	15.9% (431)	6	100% (6)	0% (0)
Illinois**	45,810	77.1% (35,321)	22.9% (10,489)	123	92.7% (114)	7.3% (9)
Indiana**	11,677	80.7% (9,424)	19.3% (2,253)	75	92% (69)	8% (6)
Iowa*	6,422	82.8% (5,316)	17.2% (1,106)	44	93.2% (41)	6.8% (3)
Kansas	6,412	81.6% (5,233)	18.4% (1,179)	30	90% (27)	10% (3)
Kentucky	8,533	79.6% (6,791)	20.4% (1,742)	48	77.1% (37)	22.9% (11)
Louisiana**	13,269	79.7% (10,569)	20.3% (2,700)	80	88.8% (71)	11.2% (9)
Maine	3,312	76.3% (2,528)	23.7% (784)	10	90% (9)	10% (1)
Maryland	17,074	74.3% (12,686)	25.7% (4,388)	84	79.8% (67)	17.9% (15)
Massachusetts**	28,967	72.9% (21,121)	27.1% (7,846)	126	84.9% (107)	11.9% (15)
Michigan	23,965	80.1% (19,186)	19.9% (4,779)	127	83.5% (106)	16.5% (21)

State	No. of Licensed Attor- neys	% (no.) Male Attor- neys	% (no.) Female Attor- neys	No. of Attor- neys Disci- plined in 2000	% (no.) of Male Disci- plined Attor- neys†	% (no.) of Female Disci- plined At- torneys†
Minne- sota**	15,084	76.3% (11,511)	23.7% (3,573)	44	97.7% (43)	2.3% (1)
Missis- sippi	5,028	85% (4,271)	15% (757)	28	92.9% (26)	7.1% (2)
Mis- souri**	16,065	78.5% (12,605)	21.5% (3,460)	41	92.7% (38)	7.3% (3)
Montana	2,369	81.8% (1,939)	18.2% (430)	13	92.3% (12)	7.7% (1)
Nebraska	4,651	81.2% (3,778)	18.8% (873)	12	75% (9)	25% (3)
Nevada**	3,651	79.8% (2,914)	20.2% (737)	41	68.3% (28)	2.4% (1)
New Hamp- shire	3,218	75.2% (2,420)	24.8% (798)	2	100% (2)	0% (0)
New Jer- sey**	32,516	75.9% (24,691)	24.1% (7,825)	189	84.7% (160)	13.8% (26)
New Mex- ico	4,231	72.6% (3,072)	27.4% (1,159)	4	100% (4)	0% (0)
New York**	97,025	74.4% (72,184)	25.6% (24,841)	237	92.0% (218)	8.0% (19)
North Caro- lina**	12,894	78.4% (10,115)	21.6% (2,779)	63	88.9% (56)	11.1% (7)
North Dakota	1,388	83.2% (1,155)	16.8% (233)	7	85.7% (6)	14.3% (1)
Ohio**	31,623	80.2% (25,359)	19.8% (6,264)	89	91% (81)	9% (8)
Okla- homa**	9,719	80.1% (7,785)	19.9% (1,934)	21	100% (21)	0% (0)

State	No. of Licensed Attor- neys	% (no.) Male Attor- neys	% (no.) Female Attor- neys	No. of Attor- neys Disci- plined in 2000	% (no.) of Male Disci- plined Attor- neys†	% (no.) of Female Disci- plined At- torneys†
Oregon	9,181	77.7% (7,133)	22.3% (2,048)	56	83.9% (47)	16.1% (9)
Pennsyl- vania**	38,648	75.1% (29,042)	24.9% (9,606)	80	91.2% (73)	8.8% (7)
Rhode Is- land	3,194	79.2% (2,530)	20.8% (664)	5	100% (5)	0% (0)
South Carolina	6,685	81% (5,416)	19% (1,269)	57	89.5% (51)	10.5% (6)
South Dakota	1,549	83.3% (1,290)	16.7% (259)	4	100% (4)	0% (0)
Tennes- see**	11,371	80.2% (9,125)	19.8% (2,246)	73	90.4% (66)	9.6% (7)
Texas**	52,686	77.6% (40,875)	22.4% (11,811)	230	83.0% (191)	16.5% (38)
Utah	4,456	83.7% (3,730)	16.3% (726)	27	81.5% (22)	18.5% (5)
Vermont	1,935	75.8% (1,466)	24.2% (469)	7	100% (7)	0% (0)
Virginia**	17,781	79% (14,045)	21% (3,736)	64	89.1% (57)	10.9% (7)
Washing- ton**	15,928	75.1% (11,956)	24.9% (3,972)	73	86.3% (63)	13.7% (10)
West Vir- ginia	3,694	80.1% (2,959)	19.9% (735)	14	85.7% (12)	14.3% (2)
Wisconsin	12,217	80.2% (9,793)	19.8% (2,424)	26	88.5% (23)	11.5% (3)
Wyoming	1,313	82.1% (1,078)	17.9% (235)	2	50% (1)	50% (1)

* The difference between expected and actual proportions of disciplined attorneys is statistically significant at a confidence level exceeding 90%.

** The difference between expected and actual proportions of disciplined attorneys is statistically significant at a confidence level exceeding 95% (chi square test).

+ Source for the percentages of male and female attorneys by state: CARSON, *supra* note 28.

++ Sources for disciplined attorneys on file with authors.