

# ADMISSION TO THE PRACTICE OF LAW AND LAWYER DISCIPLINE

*"In short, although the impact of gender and cultural inequity is hard to measure, eliminating such inequity is, simply, the right thing to do."<sup>1</sup>*

## A. INTRODUCTION AND OVERVIEW

We examined the processes for admission to the practice of law and for disciplining lawyers. Generally speaking, we found both the admission and discipline processes to be gender-neutral. The preparation and administration of the Oregon State Bar examination are objective, and the Board of Bar Examiners (colloquially known as the "BBX"), which is responsible for the bar examination, has policies and practices in place that ensure gender neutrality of the admission process. The disciplinary process generally is perceived to be unaffected by the gender of the participants, by both those who administer it and those whose conduct is under review.

## B. ISSUES STUDIED

We sought answers to the following questions:

1. Does gender affect the admission of lawyers to practice? If so, how?
2. Does gender affect the lawyer disciplinary process? If so, how?

## C. METHODS OF STUDY

The work group on Admission and Bar Discipline divided its work into two parts. The sub-group on admission included three members, two white women and one white man, all of whom are lawyers who had served on the BBX. The sub-group on discipline included a white, female law professor and a white, female assistant disciplinary counsel for the Bar. That sub-group also had available to it the assistance of the Willamette University Social Research Design class for the fall of 1996.

With respect to the question whether gender affects the admission of lawyers to the practice of law, the sub-group on the admission process approached its task by examining

- the composition of the BBX,

- the process by which the BBX creates the bar examination,
- the grading process, and
- the bar results.<sup>2</sup>

We looked at national and statewide statistics regarding pass rates of men and women and at the use of gender in both multiple choice and essay questions on the Oregon bar examination during the last 10 years.

With respect to the question whether gender affects the discipline of lawyers, the sub-group worked with students from the Willamette University Social Research Design class. The students developed a survey that they sent to all people who were involved in the disciplinary process between January 1, 1994, and January 1, 1996. The surveyed group included

- accused lawyers,
- accused lawyers' defense counsel,
- defense counsel,
- Bar counsel,
- members of local professional responsibility committees,
- members of the State Professional Responsibility Board, and
- members of trial panels.<sup>3</sup>

The students sent surveys to 306 lawyers, of whom 96 (31.4%) responded.

## D. FINDINGS

### 1. Admission to the Practice of Law

#### a. Admission Process

The Oregon Supreme Court (the "Court") is responsible for admitting new lawyers to practice in this state. In order to fulfill that responsibility, it has created the Board of Bar Examiners ("BBX"). Currently, there

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<sup>1</sup> Lynda Leidiger & Mary M. Sandifer, *Names, Gender, and Ethnicity in the MBE*, BAR EXAMINER, Aug 1996, at 21, 22.

<sup>2</sup> We did not survey bar applicants.

<sup>3</sup> We did not survey complainants.

are 14 BBX members, 12 of whom are lawyers and 2 of whom are “public members” appointed by the Court. Each member serves a three-year term.

The Court has charged the BBX with determining semi-annually which applicants should be recommended for admission to practice in Oregon. To this end, the BBX performs character and fitness investigations of each applicant and administers a bar examination. If the applicant passes the investigation and the examination, the BBX recommends to the Court that the applicant be admitted.

We focused on the examination process rather than on the character and fitness investigation, for two reasons. First, very few applicants are denied admission on the grounds of character and fitness; thus, any results of such a study would be statistically insignificant. Second, there is no way to measure unfairness based on the information available to us. The investigations are confidential, including the identity of the persons being investigated. The only public information is the Court’s opinion, which would be rendered only after the BBX has recommended denial and the applicant has sought review.

**b. Composition of the BBX**

The composition of the BBX was, from its inception in 1954 until 1981, exclusively male. One woman was appointed as a public member in 1980 for a two-year term. The first female lawyer was appointed in 1981, and a second in 1983. The BBX voted in its first female vice-chair in 1985, and its first female chair in 1989.

Since 1993, approximately equal numbers of men and women have served on the BBX. Women are actually over-represented on the BBX when compared to the composition of the bar as a whole. Between 1994-95 and today, the average annual female representation on the BBX was 44%, whereas the average female representation in the Oregon State Bar was 25.8% during that period.

**c. Bar Examination**

The examination itself is divided into three parts: professional responsibility (“MPRE”), multiple choice (“MBE”), and essay questions.<sup>4</sup> The MPRE and MBE are drafted by the National Conference of Bar Examiners (“NCBE”), which reviews all tests for potential bias. The NCBE appoints a group of law professors and

practitioners, both men and women, to serve on each drafting committee. Persons with varied racial and ethnic backgrounds assist in the preparation and review of items at multiple levels. In response to concerns about bias in the development of MBE questions, the NCBE has adopted guidelines for preparation of test forms that ensure balance in the use of roles, names, and gender in the MBE.<sup>5</sup>

The third area of testing is the essay examination. The BBX adopted policies in 1989 and 1990 that govern the drafting of essay questions for the Oregon bar examination. Those policies do not expressly address issues of gender identity in examination questions but, as a matter of practice, the BBX attempts to ensure that its questions do not reflect or incorporate gender bias. In appointing members of the BBX, the Court is sensitive to matters such as gender, ethnicity, region, and type of practice. In the past decade, the BBX’s composition has reflected its commitment to gender diversity.<sup>6</sup>

The BBX’s diversity produces a spectrum of perspectives and sensitivities that is brought to bear on the development and final character of each question. Each question is drafted by a member of the BBX and then is subjected to an extensive series of reviews and revisions, first by a small group of BBX members and then by the entire BBX. The months of drafting and the repeated review to which each question is subjected ensure that attention is paid not only to issues of substantive law, but also to drafting concerns such as gender neutrality.

Particular concerns that the BBX addresses in the drafting process include the following, and questions are drafted and revised to take account of these concerns:

- The roles that characters play in the questions. Both women and men run businesses and stop signs, as the case may be. There is a deliberate attempt to ensure that lawyers and judges, bad actors and innocents, are given both male and female identities or identities that do not specify gender.
- The fact patterns themselves. The questions attempt to describe events that are not, by their nature, necessarily more familiar to or more offensive to examinees of one gender or the other. Particular care is taken, for example, in the

<sup>4</sup> In 1998, a fourth component, performance testing (“MPT”), will be added.

<sup>5</sup> For a description of the guidelines, see Leidiger & Sandifer, *supra* note 1.

	Women on BBX	Men on BBX	%Women on BBX	% Female Lawyers In Oregon
1994-95	6	7	46.1	25.0
1995-96	5	8	38.5	26.0
1996-97	5	9	35.7	26.0
1997-98	8	6	57.1	26.2

drafting of questions that deal with issues of discrimination.

- Avoidance of words or phrases or contexts that are likely to be more readily understood by one gender than another. Thus, one would not likely see a bar exam question that uses a sports term, such as one party's making an "end run" around the letter of a contractual provision.

In addition to the foregoing specifics, the BBX also tries to ensure that the mix of examination questions as a whole reflects the range of legal practice for which applicants seek licensure, without undue emphasis being given to any particular area of practice. Thus, in selecting and approving essay topics, the BBX looks for a balance among general practice (*e.g.*, real property, family law, legal ethics, wills and trusts); commercial law (*e.g.*, UCC, contracts, corporations, partnerships); litigation (*e.g.*, evidence, civil procedure); and basic substantive law (*e.g.*, constitutional law, criminal law, tax law).

Finally, the examination is graded anonymously; that is, the grader does not know the identity of any applicant. There is no way of knowing, other than by guessing, whether a man or a woman answered a question. Applicants are given the choice whether to type or handwrite their examination. Although some handwriting styles may be associated with a man or a woman, the grading process is conducted in a way that does not allow the individual bias of a particular grader to have an effect on the outcome.

Before grading occurs, a member of the BBX develops a model answer to each essay question. From that model answer, a standard written grading outline is developed. The outline breaks the answer down into issues that an applicant is expected to identify in the answer. Each issue is broken down into sub-issues that, if identified by the test-taker, will result in points. For example, a real property question may involve the issue of adverse possession. On the grading outline, identifying adverse possession is worth five points. Identifying the element of hostility as part of the answer is worth two points. If the applicant goes on to identify that the concept of tacking of interests also was an issue, an additional three points would be awarded under the outline. In this way, each grader is awarding points in an essentially objective manner, with little room for awarding points on anything as subjective as a guess as to the gender of the applicant. Separate individuals

grade separate questions on the examination, and more than one individual may grade a specific question.<sup>7</sup>

Additionally, a regrading process is available to applicants who do not pass the bar exam on the initial grading but whose scores are close to the cutoff point. Usually some additional applicants pass after the regrading.

During the period under review (1987-1996), there was no statistical pattern in the pass rates on the bar exam that would indicate gender bias in the examination itself: overall, 74% of the female applicants and 73% of the male applicants passed the exam. Neither men nor women consistently passed at a higher percentage rate than the other group. For example, in 1989, the passage rate for men was 75% and for women 67%, whereas in 1993 the rate for men remained at 75% while women's passage rate rose to 89%. In the last 10 years, men passed in higher percentages half the time, while women passed in higher percentages the other half.<sup>8</sup>

The work group also reviewed bar examination pass rates for people of color. Race and ethnicity are the only intersectional characteristics, other than gender, for which data were available. Bar pass rates for applicants of color consistently have been lower than overall pass rates. However, there does not appear to be any gender-based disparity within the pool of test-takers of color. Between 1987 and 1996, women of color constituted 3.7% of all bar applicants. Their 52.1% pass rate was 22% lower than the pass rate for all women. Men of color constituted 4.9% of bar applicants for the same period. Their 47.5% pass rate was 25% lower than that for all men. For six of the ten years, a greater percentage of women of color than men of color passed the bar examination.<sup>9</sup>

## 2. Disciplinary Processes

In our survey of people involved in the disciplinary process, 72% of the respondents were male, and 90% were white. Included in this group were accused lawyers, their defense counsel, Bar counsel, members of local professional responsibility committees, members of the State Professional Responsibility Committee, and members of trial panels. We did not survey complainants. Almost all returned surveys came from lawyers who are currently in practice. Sixty-five percent worked in small firms or as solo practitioners. One-third of the respondents had been accused of a disciplinary

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<sup>7</sup> Even assuming that a gender-biased grader could or would skew an essay score, the relative weight of that one essay exam is unlikely to affect the overall passing score for the applicant. Each essay question constitutes one twenty-fourth of the applicant's overall bar exam score, with fully half being determined by the multiple choice ("MBE") portion, which is not subject to an individual grader's prejudices, if any.

<sup>8</sup> For complete figures, 1987-1996, see Attachment A to this chapter.

<sup>9</sup> See Attachment A to this chapter.

violation. Eighty percent of those were men.<sup>10</sup> Two-thirds of the respondents had served at one time or another as Bar counsel or as a disciplinary trial panel member. Accused lawyers who responded had experiences at all levels of the disciplinary process. Complaints against survey respondents typically involved neglect, dishonesty, and conflicts of interest in areas of practice such as litigation, domestic relations, civil practice, and probate law. Two-thirds of the complaints against the responding lawyers had been filed by men.

The disciplinary process begins with a complaint letter. Bar Disciplinary Counsel reviews the letter to determine whether the conduct of the accused lawyer appears to violate a disciplinary rule. If it does, the complaint is referred to the State Professional Responsibility Board (SPRB), which decides whether to prosecute. The SPRB may refer the matter to a local professional responsibility committee for further investigation. If the accused lawyer does not agree that a violation of the disciplinary rules has occurred, the matter goes to a trial panel for a hearing and decision. Appeals from decisions of the trial panel go directly to the Oregon Supreme Court, which decides each matter *de novo* on the record.

We asked respondents to indicate their level of agreement or disagreement with a number of statements about aspects of the disciplinary process, such as

- conduct of disciplinary proceedings,
- trial panel decisions,
- sanctions, and
- behavior of participants during disciplinary proceedings.

We asked for respondents' perceptions about the influence of gender on those aspects of the disciplinary process. The survey responses showed that, regardless of their roles in the process, respondents did not perceive gender bias in any aspect of the disciplinary process.

## E. CONCLUSIONS

### 1. Admission to the Practice of Law

Gender appears to play almost no role in the decision whether to admit an applicant to the Oregon State Bar. At the national level, the NCBE has taken effective steps to eliminate gender bias in its tests. In Oregon, the BBX has worked hard, especially during the

past decade, to be conscious of any kind of bias that might find its way into the admission process. It has been vigilant in recruiting as board members lawyers who reflect diversity in gender, firm size, areas of practice, and location. The process by which the examination is administered is designed to make test-taking and grading anonymous. No single grader or question can distort the outcome of the examination. Additionally, in the essay examination, the mix of questions does not appear to favor any individual or group of individuals based on their background, experience, or likely area of legal practice.

Although applicants of color do not pass the bar in the same proportion as applicants do overall, there does not appear to be a gender-based difference in their performance over time. No data are currently available concerning other intersectional characteristics such as age, class, sexual orientation, or disability, and we are not aware of any concerns about discrimination in the admission of persons in those groups.

## 2. Lawyer Discipline

Because of the small number of respondents, the findings from our survey cannot establish conclusively the absence of gender bias in the disciplinary process. However, those who responded to the survey perceived no gender bias. We recognize that accused lawyers who come into contact with the disciplinary system only once or twice have little basis for making an observation about the fairness of the system overall. Nevertheless, the absence of reported perceptions of gender bias by accused lawyers reveals, at the least, that they did not perceive gender bias to be present in their own proceedings. The views of Bar counsel and members of disciplinary trial panels, who have more experience participating in the disciplinary system, tend to support those observations.

## F. COMMENDATIONS

### 1. Admission to the Practice of Law

We commend the Oregon Supreme Court and the Oregon State Bar for ensuring gender balance on the Board of Bar Examiners.

We commend the Board of Bar Examiners for its continuing commitment to producing bar examination questions that are free of gender bias.

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<sup>10</sup> As reported in the Interactions Between Lawyers, Clients, Staff, and Other Professionals chapter of this report, 85% of all bar complaints are filed against male lawyers, and male lawyers are subject to discipline in a proportion even greater than the proportion of complaints against them. Even so, we did *not* discover a perception that those disparities resulted from gender unfairness. We did not study what other factors might explain the disparities, such as a disproportionate number of complaints against lawyers in particular age groups or practice areas.

## **2. Lawyer Discipline**

We commend Bar Disciplinary Counsel and others who perform disciplinary functions for conducting processes in which participants generally do not perceive gender bias.

## **G. RECOMMENDATIONS**

### **I. ADMISSION TO THE PRACTICE OF LAW**

#### **1. The Board of Bar Examiners should:**

- by the summer 1998 bar examination, formalize its policy addressing gender and racial and ethnic identity in examination questions, because the membership of the Board of Bar Examiners changes over time.

#### **2. The Oregon State Bar should:**

- continue to track bar pass rates by gender and by race and ethnicity. This process will enable the Bar and the Oregon Supreme Court to respond to any patterns of disparity that may become evident in the future.

### **II. LAWYER DISCIPLINE**

#### **1. The Oregon State Bar should:**

a. recruit equal numbers of men and women (and recruit diverse people) to serve on the committees, boards, and trial panels that conduct disciplinary proceedings; and

b. include participants in the disciplinary process in educational programs concerning gender and intersectionality issues.

#### **2. Bar Disciplinary Counsel should:**

a. by January 1, 1999, develop a system to track complaints about lawyer conduct by the gender of the complainant and of the accused; and

b. beginning in 1999, periodically survey complainants and accused lawyers to determine whether there is any perception of gender bias in the disciplinary process.

#### **3. The Oregon State Bar and the Oregon Supreme Court should:**

- review disciplinary rules to determine whether there is any gender-based unfairness to lawyers, to clients, or to the interests that those rules are designed to protect. If changes are warranted, the Disciplinary Rules and Procedures Committee should make appropriate recommendations to the Oregon Supreme Court.

## **III. GENERAL**

### **1. The Access to Justice for All Committee and all those to whom the Task Force addresses recommendations should:**

- consider the factors that have led to gender fairness, and the perception of gender fairness, in admission to the practice of law and in lawyer discipline. The Committee should determine whether areas of gender-based unfairness discussed in this report can benefit from those lessons. Such factors may include: extensive, gender-neutral, behavior-based written rules; diversity of persons in the enforcement process; conscious regard for the perceptions of people living at different intersectional points; and multiple layers of review.

## ATTACHMENT A BAR APPLICANTS

YEAR		TOTAL APPLICANTS <sup>11</sup>	% APPLICANTS	% PASSED
1987	All Women	219	40.4	69.0
	(Women of Color)	(19)	(3.5)	(57.9)
	All Men	323	59.6	75.0
	(Men of Color)	(23)	( 4.2)	(65.2)
1988	All Women	247	40.5	61.5
	(Women of Color)	(13)	(2.1)	(69.2)
	All Men	363	59.5	60.0
	(Men of Color)	(15)	(2.5)	(33.3)
1989 (Feb)	All Women	103	37.7	59.0
	(Women of Color)	(7)	(2.6)	(57.1)
	All Men	170	62.3	75.0
	(Men of Color)	(11)	(4.0)	(45.5)
1990	All Women	276	40.3	75.0
	(Women of Color)	(15)	(2.2)	(46.6)
	All Men	409	59.7	64.0
	(Men of Color)	(36)	(5.3)	(44.4)
1991	All Women	275	42.2	76.0
	(Women of Color)	(22)	(2.9)	(54.5)
	All Men	477	57.8	72.0
	(Men of Color)	(27)	(3.6)	(40.7)
1992	All Women	287	35.5	83.0
	(Women of Color)	(25)	(3.1)	(48.0)
	All Men	521	64.5	78.0
	(Men of Color)	(34)	(4.2)	(38.2)
1993	All Women	226	31.0	89.0
	(Women of Color)	(33)	(4.5)	(54.5)
	All Men	502	69.0	75.0
	(Men of Color)	(50)	(6.9)	(48.0)
1994 (July)	All Women	193	41.2	74.0
	(Women of Color)	(21)	(4.5)	(52.4)
	All Men	275	58.8	77.0
	(Men of Color)	(34)	(7.3)	(61.8)
1995	All Women	274	39.2	75.0
	(Women of Color)	(38)	(5.4)	(44.7)
	All Men	425	60.8	76.0
	(Men of Color)	(42)	(6.0)	(69.0)
1996	All Women	312	40.0	69.0
	(Women of Color)	(45)	(5.8)	(51.1)
	All Men	467	60.0	77.0
	(Men of Color)	(39)	(5.0)	(53.8)
TOTAL	All Women	2412	38.1	74.0
	(Women of Color)	(238)	(3.7)	(52.1)
	All Men	3911	61.9	73.0
	(Men of Color)	(311)	(4.9)	(47.5)

<sup>11</sup> Women and men of color are included within the total numbers and percentages of all women and all men applicants.