

Recommendations for Legal Workplaces
Post-Pandemic:

A Statement by the Massachusetts
Supreme Judicial Court Standing
Committee on Lawyer Well-Being

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Introduction

With COVID-19 vaccination now widely available, leaders of law firms and other legal organizations across Massachusetts are in the process of deciding how their workplaces will be structured in the coming months and years. This provides an opportunity to shed certain assumptions that drove rules about legal organization structures pre-pandemic, and to take into account the experiences of members of the community who are underrepresented in law firm partnership positions and legal organization leadership across the city.

The 2019 Report of the Mass. Supreme Judicial Court Steering Committee on Lawyer Well-Being¹ emphasized the need for culture changes in legal workplaces, and our emergence from the COVID-19 pandemic represents a unique opportunity to shift these cultures toward inclusivity in ways that will meaningfully improve the well-being of lawyers individually and the bar as a whole. Below, we have set forth a set of recommendations and guiding principles for firms, public agencies, legal services organizations, in-house legal departments, and other legal institutions that call for flexibility as the model for all rather than the exception. We urge leaders in the legal profession to consider these recommendations as decisions are made about post-pandemic workplace structures.

In making these recommendations, we acknowledge the longstanding history of the legal profession centered on physical workspaces and that there are certain benefits to in-person contact in any legal organization. At the same time, following this extraordinary year of remote work, it is clear that flexibility in legal workplaces is possible and in fact permits lawyers across many demographics to succeed and thrive. Incorporating changes to the status quo is not easy and will not occur overnight; it will require ongoing efforts, assessments, and intentionality. Nevertheless, in light of all the successful ways in which the legal community adapted to changes demanded by the past year, we believe that now is the perfect time to begin reexamining certain assumptions about the structure of legal workplaces in order to improve the well-being of all lawyers, and particularly those who were disproportionately impacted by the pandemic. We plan to conduct a survey in approximately one year to shed light on whether the Massachusetts legal community used this moment as a catalyst for legal practice structure reexamination and positive change.

Moving Forward to Inclusion, Not Back to Marginalization

In most legal organizations, the option to work flexibly or remotely was the exception rather than the rule prior to the pandemic. Flexible/remote options were primarily reserved for relatively rare situations and only where a unique need was demonstrated. For the most part, legal organizations have long either assumed or explicitly said that lawyers would function best if they were physically present in the office on a full-time basis. This full-time in-person expectation

¹ <https://www.mass.gov/doc/supreme-judicial-court-steering-committee-on-lawyer-well-being-report-to-the-justices/download>

remained even as technology rapidly advanced, enabling employers and clients to communicate and interact with attorneys anywhere and anytime.

In addition, this assumption that full time, in-person work is preferable in all circumstances generally ignores or excludes the lived experiences of those who are balancing work with individual challenges, disabilities, or significant external obligations (such as caring for themselves, young children, aging parents, or others). Unfortunately, before the pandemic, initiatives aimed at popularizing and ensuring adequate support for remote/flexible work in the legal profession largely failed to gain traction.²

Moreover, when lawyers *were* provided the option to work flexibly or remotely pre-pandemic, it was often a source of stigma, sometimes to the point of limiting professional development and career trajectories of the attorneys who availed themselves of such options. For example, attorneys working flexible or reduced hours in order to accommodate family responsibilities have had to contend with a misperception that they are less committed to their workplace or clients; and attorneys with various forms of disabilities that may make certain tasks more difficult, including but not limited to physical transportation to and from an office, are often perceived as less talented or capable, regardless of the quality or impact of their work or their business development achievements. As a result, many women attorneys, Black, Indigenous and People of Color (BIPOC) attorneys and Lesbian, Gay, Bisexual, Transgender, Queer and/or Questioning, Intersex, and/or Asexual (LGBTQIA+) attorneys, attorneys with disabilities, and attorneys caring for dependents survived and moved forward in their legal professions by silently juggling responsibilities and burdens not shared by their peers either without asking for the support they needed, or asking for and not receiving it.

When the COVID-19 pandemic began, nearly all legal organizations in Massachusetts shifted to fully remote work. The change in how work was getting done was so dramatic that many legal workplaces worried about whether they could weather the storm. For the most part, fortunately, it seems that legal businesses and organizations in Massachusetts have survived the pandemic better than they initially expected; continuing to serve clients well, cut costs, increase certain efficiencies, and pull together to maintain morale as well as possible. Technology helped us all adapt, and on the whole, attorneys adjusted their lives to help their clients and organizations succeed.

The question now facing this great Massachusetts legal community is whether we will take the opportunity presented to us by the challenging year of COVID to begin to innovate and expand the possibilities for balance and inclusion in the workplace, or whether we will revert to pre-pandemic norms that were problematic and ultimately not sustainable for many attorneys then, and will remain problematic and not sustainable for many going forward.

² Initiatives have traditionally focused on hours reductions for women with young children, which, without other efforts to ensure fairness and equity in promotion, compensation, and other leadership opportunities, do not in practice tend to promote full inclusion in the workplace. Flexibility in the workplace is good for all. To ensure a level playing field, efforts must also be made to encourage non-female attorneys to take advantage of these opportunities, and to ensure that no stigma or retaliation is applied to those who do.

Guiding Principles and Recommendations

- As legal organizations transition from their pandemic-based workplace structures to the next phase, guiding principles should include:
 - Ongoing commitment to the highest level of client service.
 - Accepting flexibility in individual workplace arrangements as the standard rather than simply tolerating attorneys' flexible schedules as an exception.
 - Ensuring that attorneys with such arrangements are provided support, in terms of both material resources and fair evaluation of the attorneys' value, on par with those physically in the office more often.
 - Eliminating any form of stigma associated with attorneys choosing to avail themselves of flexible or remote work arrangements.
- To act on those principles in setting policy, workplace leaders should:
 - Ensure that the decision-making teams and organizational bodies determining policies and practices consist of people representing diverse identities, backgrounds, experiences, and interests, and take into account the needs of people at all levels of the workplace.
 - Conduct anonymous surveys and/or find other ways of facilitating honest reporting of the experience of their workplace's attorneys over this past year, and what they need moving forward.
 - Implement policies that embrace flexibility as a model, rather than treating it as an exception, and ensure that these policies are available to all attorneys, regardless of gender, race, ethnicity, parenthood, and/or disability status.
 - Whenever possible, be forthcoming and transparent about organizational efficiency and functioning during the period of flexible/remote work in order to increase trust in the reasons behind the implementation of policies.
 - Invest in technology, means of communication, and/or training for attorneys on efficient and effective flexible/remote work strategies (including effective management and staffing techniques that do not rely on in-person interaction) in order to support successful client service and work outside of the office.
 - Acknowledge the mental, physical, and financial strain that many people experienced during the pandemic – even if members of their organization have not communicated that to leadership. This is particularly important in the context

of recent racially-motivated violence and its consequences for BIPOC individuals in this country. Redouble concrete efforts to acknowledge those and other communal traumas as part of the lives of attorneys working in their organization, and to address the many barriers to success for attorneys from underrepresented and historically excluded populations in the Massachusetts legal community.

- Educate themselves and the other leaders of their organizations about the disproportionate burden of the pandemic on certain demographics, and take affirmative steps to provide support, such as through employee assistance programs and Lawyers Concerned for Lawyers, mental health resources, health insurance plans, and/or identity-specific and/or employee-specific accommodations.
- Implement performance evaluation programs, compensation guidelines, and work allocation systems that guard against devaluing the contribution of those who opt for flexible/remote work, or those who experience disproportionate hardship due to their identities.
- When reviewing timekeeper performance during 2020-2021, take into account that attorneys from underrepresented and overburdened populations may have billed fewer hours during this particular year due to circumstances beyond their control. Instead of viewing this as a failure, use this opportunity to provide these attorneys with the support they need to ramp up their workflow and efficiency again if their circumstances allow, and to invest in their long-term success despite this challenging period.
- Commit to regular morale and well-being checks as a means of identifying issues as they arise and to address problems that may cause attrition if not resolved.

Accountability

In order to gauge the progress of Massachusetts legal organizations to more equitable and inclusive workplaces, in approximately one year, the Committee will conduct a follow-up review. We believe that collecting and publishing (in aggregate form) the following information, among other data, will help all of us in the Massachusetts legal community evaluate whether we have effectively used this moment of transition as an opportunity to evolve, or instead whether our legal organizations have reverted to workplace structures that are not inclusive. To that end, the plan is to conduct surveys of legal organization management to find out, among other data points:

1. Did legal organizations develop a post-pandemic policy that embraced flexibility as a model, rather than as an exception?

2. How did legal organizations ensure that their decision-making bodies about policy were diverse?
3. What were legal organizations' rates of attrition compared to prior years? Did they disproportionately lose women or other attorneys in underrepresented groups?
4. Do legal organizations' systems of performance evaluation, compensation, and/or work allocation deliberately guard against penalizing or disadvantaging lawyers who utilize flexible/remote work options?

An Opportunity to Advance Diversity, Equity, and Inclusion

Many firms, public agencies, legal services organizations, in-house legal departments and other legal institutions have publicly stated support for diversity, equity and inclusion. While a rethinking of traditional workplace norms will benefit everyone in the workplace, the choices that leaders now make about workplace structure post-pandemic will demonstrate the true extent of the support to increasing diversity, equity and inclusion in the legal profession.

This Committee's *Report Summarizing Affinity Bar Town Hall Meetings* recently described in detail the many barriers facing BIPOC individuals and LGBTQIA+ individuals in the Massachusetts legal community.³ We also know that, in addition to the types of unacceptable realities of professional life for BIPOC lawyers described by the Report, the negative workplace behaviors that impact women of all races as described in the Women's Bar Association of Massachusetts *Survey of Workplace Conduct and Behaviors in Law Firms*,⁴ and the many challenges that people with disabilities faced in the workplace, many individuals within those same communities suffered disproportionately during the COVID-19 pandemic. Women of all races disproportionately shouldered particular burdens since the inception of this pandemic.⁵ They and other primary caregivers took on the greater share of homeschooling and overseeing remote schooling and disproportionately attended to the physical and mental health needs of their children, their own parents and other family members.⁶ And for these lawyers who are women and/or BIPOC individuals, the pandemic responsibilities have all been borne while they simultaneously remained focused on their clients, work obligations, and the well-being of their workplace communities, and dealt with the despairingly frequent incidents of racially-motivated

³ Massachusetts Supreme Judicial Court Standing Committee on Lawyer Well-Being, *Report Summarizing Affinity Bar Town Hall Meetings* (Feb. 4, 2021), available at <https://lawyerwellbeingma.org/report-of-affinity-bar-town-hall-meetings>.

⁴ Lauren Stiller Rikleen for Women's Bar Association of Massachusetts, *Survey of Workplace Conduct and Behaviors in Law Firms* (2018), available at https://wbawbf.org/sites/WBAR-PR1/files/WBA_Survey_of_Workplace_Conduct_and_Behaviors_in_Law_Firms_FINAL.pdf.

⁵ Sarah Coury et al., *Women in the Workplace 2020*, McKinsey & Company (Sept. 30, 2020), available at <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace>.

⁶ McKinsey & Company (edited by Justine Jablonska), *Seven charts that show COVID-19's impact on women's employment* (Mar. 8, 2021), available at <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/seven-charts-that-show-covid-19s-impact-on-womens-employment>.

violence around the country. We recognize that many attorneys have accomplished this extraordinary effort over the past fifteen or more months without communicating to colleagues or organizational leadership the extent of their many struggles.

The American Bar Association recently found that large numbers of women are considering an exodus from the profession due to their experience during the pandemic and the anticipation that their post-pandemic needs will not be met.⁷ Further, a recent peer-reviewed study found that women in the legal profession are experiencing meaningfully worse mental health and drinking more hazardously than men, and that 1 in 4 women is contemplating leaving the legal profession due specifically to mental health problems, burnout, or stress.⁸ The needs of these women will not be met if legal organizations return to pre-pandemic workplace norms. Such an exodus would be a devastating step backwards, especially in light of the already dismal representation of women, particularly BIPOC women, in law firm partnership and other leadership positions across the profession.⁹ In addition, it is crucial to take into account that BIPOC individuals in the United States experienced a traumatic year of loss, violence, and fear, attendant to which are significant mental health and other impacts, which, in turn, can affect workplace productivity and focus. The racial reckoning taking place in this country encompasses *all* of our workplaces. It is not a separate and apart phenomenon.

As we emerge from a devastating but also transformational year where change was necessitated in order to survive, we are presented with this unique and opportune moment to make positive changes in legal workplaces that will truly support the well-being of our *entire* profession, including those from underrepresented and historically excluded backgrounds and identities. Firms, public agencies, legal services organizations, in-house legal departments, and other legal institutions that choose not to learn from this past year and fail to move forward in innovative and inclusive ways risk losing talented women and other attorneys from already-underrepresented groups. In turn, such organizations may over time, suffer decreased performance and marketability compared to what would have been achieved with a diverse workforce, equitable policies and practices, and an inclusive culture.

It is not enough for our community to voice its commitment to the diversity, equity and inclusion principles that will support our individual and collective well-being without taking real action. Legal employers (large, small, public, and private) can take specific actions through these recommendations. We know this may not be an easy task, and we know that transitioning to a workplace model that embraces flexible/remote work arrangements will not take place overnight,

⁷ Stephanie A. Scharf & Roberta D. Liebenberg with N. Gallagher & D. Peery, *Practicing Law in the Pandemic and Moving Forward: Results and best Practices from a Nationwide Survey of the Legal Profession*, American Bar Association (2021), available at <https://www.americanbar.org/content/dam/aba/administrative/digital-engagement/practice-forward/practice-forward-survey.pdf>.

⁸ Justin Anker & Patrick Krill, *Stress, drink, leave: An examination of gender-specific risk factors for mental health problems and attrition among licensed attorneys*, PLOS ONE 16(5) (2021), available at <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0250563>.

⁹ See Destiny Peery, Paulette Brown, and Eileen Letts, *Left Out and Left Behind: The Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color*, American Bar Association (2020), available at <https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf>.

but we believe that these changes can be accomplished with commitment and intentionality, and that doing so will be critical in supporting the well-being and inclusion of the many exceptional lawyers from diverse and underrepresented communities.