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*Symposium on The Attorney-Client Relationship: Rights and Duties*

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## LAW AS A BUSINESS: THE IMPACT OF TITLE VII ON THE LEGAL "INDUSTRY"

NANCY K. OLMSTED\*

The business of lawyering, as opposed to the practice of law, often seems less than respectable to many lawyers. Law is a business as well as a profession, however, and Title VII' treats legal employers precisely as it treats all others. Under its provisions, it is illegal to discriminate in employment on the basis of race, color, sex, national origin or religion.<sup>2</sup> This law carries no exemptions for any profession or class of professionals.<sup>3</sup>

There are, of course, very real tensions between such a statement of legal and economic reality and the legal profession's older conception of itself as a group of independent advocates. This article proposes that the refusal of many legal employers honestly to see themselves as business executives is directly responsible for much of the discrimination in legal employment.<sup>4</sup> Many lawyers illegally discriminate, not because of actual bigotry or ignorance—although there is undoubtedly some of both—but because they believe Title VII is unsuitable for and inapplicable to the practice of law.

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1. Title VII, Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq. (Supp. II 1972).

2. Title VII, § 703(a), at 42 U.S.C. § 2000e-2 (Supp. II 1972), defines unlawful employment practices:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

3. See text, p. 485, *infra*.

4. This statement and most of the remarks which follow apply primarily to the problem of discrimination at the professional level. It is worth noting, however, that the issue of corporate loyalty has surfaced strongly in *Equal Employment Opportunity Commission v. Rinella & Rinella*, 10 *Empl. Prac. Dec.* ¶ 10,330 (N.D. Ill. 1975), a case involving a legal secretary.

### POLICY CONSIDERATIONS

There are a number of reasons why lawyers hesitate to apply the principles of Title VII to their legal businesses. First, lawyers tend to believe strongly in the freedom to associate professionally with others of similar disposition, talents and prejudices. Second, some law firms, as well as some corporate legal departments, require a commitment of personal loyalty by each employee to the institutional structure. The embarrassment which develops when a firm member complains of employment discrimination makes it difficult for the employer privately to accept a person who has publicly complained. Third, the *Code of Professional Responsibility*<sup>5</sup> emphasizes, and many lawyers feel, that their primary responsibility is to pursue their clients' interests. Would the advocate of Title VII forbid a black lawyer from accepting a black client who especially wanted him as a black to represent him in an employment discrimination suit? If not, how is that situation distinguishable in theory from the more widespread practice of allowing white businessmen to find white male lawyers to represent them in their business transactions? Finally, it might be economically disastrous for a small or even medium-sized legal employer to hire someone totally unacceptable to an important client.

There are legal and practical answers to the economic dilemmas and client or firm loyalty problems which arise when Title VII is applied to law offices. In general, any fair employment practice involves a loss of the right of association by those who would keep out female or minority attorneys.<sup>6</sup> Here, Title VII affects lawyers no differently than white male structural ironworkers who feel they work best when they work with their white male relatives and close friends. As a practical matter, if the person alleging discrimination has thereby rendered himself totally unacceptable to the legal employer, nothing in Title VII forbids the employer from trying to settle the case through the payment of additional money in lieu of reinstatement.

Legally, a client's discriminatory preferences are not a sufficient defense to an allegation of discrimination. In *Diaz v. United Airlines*,<sup>7</sup> for example, a male applicant for the position of

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5. See, e.g., ABA CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 701 *et seq.*

6. See Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 257-263 (1969).

7. 442 F.2d 385 (5th Cir. 1971), *cert. denied* 404 U.S. 950 (1971). See also *Sprogis v. United Air Lines*, 444 F.2d 1194 (5th Cir. 1971), *cert. denied* 404 U.S. 991 (1971).

cabin attendant challenged the airline's policy of hiring only women for that position. The Fifth Circuit Court of Appeals adopted the Commission's position:<sup>9</sup> "The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers . . ." is almost never a reason to prefer one sex in filling a normal employment position. The court went on to add:

Indeed, while we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid.<sup>9</sup>

Thus, in the case of sex discrimination, only such positions as actors or actresses are normally considered to require a particular sex. In the case of race, Title VII, by excluding such language, recognizes no situation in which race would be a "bona fide occupational qualification" for a position. Again, nothing forbids a private financial settlement with the employee if all clients threaten to leave.

Finally, Title VII applies only to those "employers" who employ fifteen or more "employees" and who are "engaged in an industry affecting commerce."<sup>10</sup> Thus, the black victim of dis-

8. Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a) (iii).

9. *Diaz v. United Airlines*, 442 F.2d 385, 387 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

10. The definitions provided by Title VII are broad and the regulations provided by the Equal Employment Opportunity Commission have not narrowed their application:

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person . . .

42 U.S.C. § 2000e(b) (Supp. II 1972), *amending* 42 U.S.C. § 2000e(b) (1970).

The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

42 U.S.C. § 2000e(a) (Supp. II 1972), *amending* 42 U.S.C. § 2000e(a)

The term "employee" means an individual employed by an employer

. . . .

42 U.S.C. § 2000e(f) (Supp. II 1972), *amending* 42 U.S.C. § 2000e(f) (1970).

The Commission's Regulations merely adopt the definitions provided in the Act:

crimination and the white businessman can always go to a very small firm, if they wish to secure an advocate of their own race and persuasion. Title VII only restricts client preference when the lawyer has, by virtue of firm size, become a businessman.

However, very few cases involving legal employers have been reported.<sup>11</sup> In part this may be due to the fact that attorney victims of illegal discrimination may have more career options open to them than a professional or executive employee of a large corporation. Attorneys may also be more reluctant to attempt to force themselves upon the fairly small group of attorneys who make up the average law firm. Such relationships may be more personal than those which are involved in suing a large corporation or university. In addition, litigation is a slow, difficult method of resolving problems. Finally, not every law firm, governmental law branch or corporation can be sued successfully. Moreover, even when a suit is successful, its precedential impact may be blunted because of the importance of individual facts and the lack of legal reminders to these employers that they must update their compliance with fair employment practices.

Certain issues will, of course, arise in most Title VII suits. Any plaintiff suing a legal employer under Title VII must prove that the employer is included within the statute, which prohibits only discrimination by those employers with fifteen or more employees who are engaged in interstate commerce. While it may

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The terms "person," "employer," "employment agency," "labor organization," "employee," "commerce," "state," and "religion," as used herein shall have the meanings set forth in section 701 of the Civil Rights Act of 1964.

Equal Employment Opportunity Commission Procedural Regulations, 29 C.F.R. § 1601.2 (1975).

11. See *Hull v. Celanese Corp.*, 513 F.2d 568 (1975) (attorneys disqualified from representing female attorney who later intervened as a plaintiff in an action against her employer); *Equal Employment Opportunity Commission v. Rinella & Rinella*, 10 Empl. Prac. Dec. ¶10,330 (N.D. Ill. 1975); *Wall v. Coleman*, 10 FED. EMPL. PRAC. CAS. 741 (S.D. Ga. 1975); *Coopersmith v. Veterans Administration*, 10 FED. EMPL. PRAC. CAS. 627 (D.D.C. 1974); *Kapolowitz v. The University of Chicago*, 387 F. Supp. 42 (N.D. Ill. 1974) (law school placement facilities not used as discriminatory placement agency); *Kohn v. Royall, Koegel & Wells*, 59 F.R.D. 515 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974) (failure to hire attorney was not discriminatory).

In 1972, ten complaints were filed with the New York City Commission on Human Rights against ten major New York law firms. To date, only *Kohn* has resulted in a reported court settlement, although several others have been either administratively settled or dismissed.

be easy to prove that a firm is involved in interstate commerce, the determination of who constitutes an "employee" of the firm is occasionally more difficult. In addition, proof of employment discrimination by law offices is often difficult: the criteria for choosing competent attorneys are often subjective and the validity of statistical evidence is sometimes less than perfect.

Also, relief may be complicated by the nature of the law firm or office, which is often closeknit and committed to serving its clients' wishes to the utmost. The traditional "goal" hiring requirement must be carefully drafted and monitored to insure responsible hiring of new attorneys. Finally, conflicts of interest may develop when a company attorney finds himself or herself the victim of discrimination, and wishes to use information obtained as an attorney to end such practices.

It is possible to deal with those common problems of jurisdiction, proof and remedy, as well as the more unique problem of attorney-client privilege which are involved when an attorney sues a legal employer. Since many of the solutions to these problems have been worked out in a non-legal context, they are rather general guidelines. By now, however, it is clear that Title VII applies to law firms. Client preference will not justify discrimination; statistical evidence may be used in such cases; relief may include back pay, hiring or promotion, and such a suit may be brought as a class action.

#### JURISDICTIONAL PROBLEMS

Law firms as well as corporations and governmental agencies are covered by Title VII, regardless of whether they are organized as partnerships, corporations or sole proprietorships.<sup>12</sup>

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12. It might be suggested, despite the broad definitions contained in Title VII, that law as a service profession could never be "engaged in an industry." The Court of Appeals, in *Goldfarb v. Virginia State Bar Ass'n*, 497 F.2d 1 (4th Cir. 1974), took this position regarding law and the Sherman Act. The Supreme Court acknowledged that some legal services might not affect commerce but refused to totally exempt the "learned professions" from regulation under the Sherman Act. In doing so, the Court expressly noted and did not follow prior cases whose dicta had supported the argument for exclusion. See *Goldfarb v. Virginia State Bar Ass'n*, 421 U.S. 773, 786 at n. 15 (1975), in which the Court cited, *inter alia*, *Federal Baseball Club v. National League*, 259 U.S. 200, 209 (1922) ("a firm of lawyers sending out a member to argue a case . . . does not engage in . . . commerce because the lawyer . . . goes to another State"). Those courts which have considered cases involving law firms have assumed their general inclusion under Title VII. See *Kohn v. Royal, Koggel & Wells*, 59 F.R.D. 515 (S.D.N.Y. 1973),

However, Title VII only applies to law offices which have fifteen or more employees, and whose transactions affect interstate commerce. It is somewhat easier to determine whether a firm is affecting interstate commerce than to define "employer" or "employee."

The definition of an employer in Title VII is essentially a deliberately broad, descriptive catalog of various types of possible employers. The number of "employees" are determined in relation to that definition: if a person is employed by an "employer," he is an "employee" within the meaning of the statute. Since there are no statutory exceptions for private employers,<sup>13</sup> in theory anyone who works for a law firm is an employee of that firm. There will normally be little dispute that clerical employees and associates are employees of the firm.<sup>14</sup> However, a firm might dispute jurisdiction if it were necessary to show that one or more partners<sup>15</sup> were also employees within the meaning of the statute. Plaintiffs would then need to show, using a variety of factors, that the partners actually had little influence in the firm's policy decisions.

In one reported case, it was necessary to enumerate those factors which would make an attorney an employee of the firm. In *Equal Employment Opportunity Commission v. Rinella & Rinella*,<sup>16</sup> the Commission and a private party sued on behalf of a legal secretary and an association of women to which she be-

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*appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974). See also *Equal Employment Opportunity Commission v. Rinella & Rinella*, 10 Empl. Prac. Dec. ¶ 10,330 (N.D. Ill. 1975), and legislative history cited therein, note 19.

13. In contrast, see the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1970), which specifically excludes supervisors or independent contractors from its coverage.

14. The term "associate" is used here to mean a lawyer practicing with a firm, who receives a fixed salary and who may or may not receive a "bonus" or additional compensation for work brought into the firm.

There may well be technical problems involving the period of time which should be counted or the status of certain clerical employees. See, e.g., *Slack v. Havens*, 11 FED. EMPL. PRAC. CAS. 27 (9th Cir. 1975), (calendar year problem); *Pascutoi v. Washburn-McReavy Mortuary*, 11 FED. EMPL. PRAC. CAS. 1325 (D.C. Minn. 1975) (part-time employees).

15. The term "partner" is used here to mean a lawyer practicing with a firm whose total annual income is some direct ascertainable percentage of the firm's net profits, whether or not the person has a regular, fixed "drawing account" which estimates that eventual share.

16. 10 Empl. Prac. Dec. ¶ 10,330 (N.D. Ill. 1975) (petitions for preliminary relief by the Commission and for a permanent injunction and back pay by private plaintiffs; consolidated cases).

longed. Before Title VII would apply, the court had to determine the status of approximately seven attorneys, at least three of whom had to be termed "employees" if the firm was to have the necessary fifteen employees.<sup>17</sup> None of the attorneys were called or believed themselves to be "associates" of the firm. On the other hand, Samuel A. Rinella, the senior person in the firm, termed himself the "sole owner" and no one claimed that the other attorneys were "partners." Defendants argued that the other attorneys were "independent contractors" and hence not within the definition of "employees."<sup>18</sup>

After noting that professionals, *qua* professionals, were not excluded from Title VII coverage,<sup>19</sup> the court stated:

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17. See definition of employer under Title VII, note 9 *supra*.

18. There is no statutory exemption for "independent contractors." However, courts are obviously faced with the problem of deciding how much of an employment relationship warrants use of the broad remedial powers of Title VII. While it might well make sense to vary the inclusiveness of the "employee" definition with the relief sought (i.e., broader scope for injunctions, narrower for back pay), it is more likely that many courts will fall back on the common law meaning of "employee." For example, *Mathis v. Standard Brands Chemical* 10 FED. EMPL. PRAC. CAS. 295 (N.D. Ga. 1975), involved an allegation of racial discrimination by an individual who "contracted" with the "employer" to remove waste materials. The court was willing to accept the more traditional definitions of employee and independent contractor, although in this particular situation the "contractor" arguably performed enough other duties to be called an employee.

19. The decision quotes extensively from that part of the legislative history in which an amendment to exclude the employment of physicians from hospitals was defeated. During that debate, Senator Williams made the following remarks:

As I stand here leading the debate on this measure, I try to think as a young person who has gone through the long, hard and expensive trail to be the graduate of a medical school, be he man or woman, black or white, or whatever national ancestry. I say that in this Nation, which so badly needs doctors, it would be a terrible crime if because of ethnic background, sex, race or religion, the American people were denied the services of the new doctor.

This is exactly what this amendment would do. It would take from a doctor the protection the Constitution gives him and would protect through this law. I think it would be against all that this country holds itself up to be, in an area of one of our greatest needs.

*Equal Employment Opportunity Commission v. Rinella & Rinella*, 10 Empl. Prac. Dec. ¶10,330 at 5342 (N.D. Ill. 1975).

Senator Javits noted:

One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water, that only the blue collar jobs and white collar jobs are preserved for them; and that though they build



Accordingly, we do not find that the greater independence and authority generally afforded attorneys associated with smaller law firms precludes their being employees of the firm. Rather, the court must examine the totality of the firm's arrangements to determine whether an employer-employee relationship in fact exists.<sup>20</sup>

The "totality of the firm's arrangements" included the authority to hire or fire, control over cases, percentage of attorney time spent on firm work, final authority over amount and type of compensation, ownership of fixed assets, arrangements for rent, insurance, and control of clerical employees. Considering these things, the court found it reasonable to conclude that the attorneys were employees, since there was no partnership and they were not listed as "of counsel."<sup>21</sup> This test of what constitutes an "employee," determined by looking at actual firm arrangements is, of course, commonly used in labor and fair employment cases.<sup>22</sup>

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America, and certainly helped build it enormously in the days of its basic construction, they cannot ascend the higher rungs in professional and other life.

Yet this amendment would go back beyond decades of struggle and of injustice and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion—just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain—and thus lock in and fortify the idea that being a doctor or surgeon is just too good for members of a minority, and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them.

*Id.* There is, of course, a difference between a graduate of medical school; who must serve one year as an intern in a hospital before becoming licensed to practice medicine, and the law school graduate who has only to pass the bar in order to practice. In the case of physicians, discrimination can lead to denial of the right to practice. Moreover, staff physicians during internship and residency are paid regular salaries and work hours which are scheduled to meet the demands of the hospital. Still, the amendment did not limit itself to new doctors, and the words of Senator Javits obviously go beyond doctors to all professionals.

20. *Id.*

21. *Id.* at 5344.

22. See, e.g., *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (band members held to be employees); *Williams v. United States*, 126 F.2d 129, 132 (7th Cir. 1974) (orchestra members held to be employees); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972) (Salvation Army minister held to be employee); *Westover v. Stockholder Publishing Co.*, 237 F.2d 948, 951 (9th Cir. 1956) (newspaper route men held to be employees).

However, *Rinella & Rinella* did not involve a situation in which the attorney-employees considered themselves to be "partners." Indeed, it is possible to conclude from the language, "[s]ince the firm is not a partnership," that the court would have refused to consider partners to be employees. On the other hand, in many situations an analysis of the total employment relationship would indicate that many young partners of older, established firms are really still employees of the firm, regardless of their official status. Thus, while the court in this case did not explicitly resolve the status of "junior partners," it seemingly did not automatically exclude them from possible employee status.

Unlike the employee determination, rarely will a law firm contest its dealings in interstate commerce. The court in *Rinella & Rinella* found that the firm worked in interstate commerce where the attorneys, who specialized in divorce cases, made only a few business trips across state lines and spent a reasonably small amount for law books, out-of-state telephone calls, etc.<sup>23</sup> In reaching this decision, the court followed the broad path laid down after *Katzenbach v. McClung*,<sup>24</sup> which held that a small, family-owned restaurant serving local people was nevertheless in-

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Commission decisions have also consistently taken this position. See, e.g., EEOC Decision No. 75-273, 11 FED. EMPL. PRAC. CAS. 1485 (June 9, 1975) (employees did not include board of directors); EEOC Decision No. 74-85, 8 FED. EMPL. PRAC. CAS. 425 (Feb. 7, 1974) (farm workers were employees despite presence of middleman contractors); EEOC Decision No. 72-0651, 4 FED. EMPL. PRAC. CAS. 837 (Jan. 1, 1972) (service station dealer was employee while in training with oil company); EEOC Decision No. 72-0679, 4 FED. EMPL. PRAC. CAS. 441 (Dec. 27, 1971) ("indicia of control shared by two employers").

Interestingly, in *Puntotillo v. New Hampshire Racing Comm.*, 375 F. Supp. 1089 (D.N.H. 1974), the court found that even absent the more traditional indicia of the employer-employee relationship, e.g., power to hire or fire, certain associations could still exert such control over a person's ability to earn a living that they should be deemed employers within the meaning of Title VII. See also *Sibley v. Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973) (male private duty nurse, directly employed by his patient, may sue hospital). But cf. *United States v. Steamfitters, Local 638*, 360 F. Supp. 979 (S.D.N.Y. 1973) (employer association); *Williams v. New Orleans Steamship Ass'n*, 341 F. Supp. 613 (E.D. La. 1972) (employer association).

23. Equal Employment Opportunity Commission v. *Rinella & Rinella*, 10 Empl. Prac. Dec. ¶ 10,330 at 3345 (N.D. Ill. 1975).

24. 379 U.S. 294 (1964). See also *Goldfarb v. Virginia State Bar Ass'n*, 421 U.S. 773, 784-785 (1975) (interstate commerce, where legal services rendered in a house closing were part of a closely linked chain involving large amount of out-of-state money through use of mortgage guarantors such as FHA).

volved in "interstate commerce" as defined in Title II of the Civil Rights Act of 1964. In particular, the National Labor Relations Board, in *Evans and Kunz, Ltd.*, found that a small law firm had involved itself in interstate commerce, but the Board exercised its discretion and declined to assert jurisdiction over the firm.<sup>25</sup> Thus, while it still may be necessary to ascertain specific jurisdictional facts regarding any particular law firm, rarely will the firm be able to use the interstate commerce argument to exclude itself from coverage.

### DIFFICULTIES OF PROVING DISCRIMINATION

Beyond these preliminary issues, it is normally very difficult to prove employment discrimination in upper level or professional positions.<sup>26</sup> Discrimination in legal hiring, promotion, discharge or

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25. 194 N.L.R.B. 1216 (1972).

26. See generally Note, *Title VII and Employment Discrimination in "Upper Level" Jobs*, 73 COLUM. L. REV. 1614 (1973). See also Chanin, *Recent Developments in Title VII (Sex Discrimination) Litigation*, 10 GA. S.B.J. 373 (1974); Field, *Equal Pay Benefits for Women Professors, Academic Administrators and Professionals*, 29 MO. B.J. 455 (1973); Noue, *Tenure and Title VII*, 1 J. COLL. & UNIV. L. 206 (1974); Sandler, *Sex Discrimination, Educational Institutions and the Law: A New Issue on Campus*, 2 J.L. & EDUC. 613 (1973); Wells, *Sex Discrimination and Title VII*, 43 U.M.K.C.L. REV. 273 (1975); Note, *Diplomas, Degrees and Discrimination*, 26 HASTINGS L.J. 1377 (1975); Note, *Black Lawyers and Corporate and Commercial Practice: The Unfinished Business of the Civil Rights Movement*, 18 HOW. L.J. 685 (1974).

Most of the litigation regarding professionals has involved women or minorities in the academic profession, a field only open to Title VII litigation since passage of the 1972 amendments. The Civil Rights Acts, 42 U.S.C. §§ 1981, 1983 and 1985 have, of course, also been used and still may be used to advantage to avoid certain of the jurisdictional and back pay limitations of Title VII; but § 1983 requires a finding of "state action," § 1981 usually applies only to race, and § 1985 requires a conspiracy.

For cases involving academic professionals which have reached the merits, see *Faro v. New York University*, 502 F.2d 1229 (2d Cir. 1974) (acknowledging need to rely on subjective judgments in the area of academic appointments, in this case a medical professor); *Sime v. Trustees of the California State University and Colleges*, 11 FED. EMPL. PRAC. CAS. 1104 (9th Cir. 1974) (denial of employment to chemistry professor not discriminatory); *Green v. Board of Regents*, 474 F.2d 594 (5th Cir. 1973) (denial of tenure not discriminatory); *Chung v. Morehouse College*, 11 FED. EMPL. PRAC. CAS. 1084 (N.D. Ga. 1975) (failure to renew contract of physics professor not discriminatory); *McRae v. Goddard College*, 10 FED. EMPL. PRAC. CAS. 143 (D.C. Vt. 1975) (failure to renew contract of college professor not discriminatory); *Huang v. Holly College*, 10 FED. EMPL. PRAC. CAS. 969 (D.C. Mass. 1974) (denial of tenure not discriminatory); *Labat v. Board of Higher*

conditions of employment is no exception to this rule. Absent outright proof of discriminatory intent—e.g., a letter to a female attorney applicant saying, “you are very well qualified, but we never hire women,”—many allegations of employment discrimination will not be pursued successfully, thus meeting the same fate reserved for cases involving female and minority professors.<sup>27</sup> Among the problems of proof is the necessary element of discretion in evaluating attorney qualifications. Another difficulty is in finding a meaningful statistical pool which will aid in proving a case of discrimination.

There is understandable judicial reluctance to venture into a field in which discretion in evaluating a professional is obviously necessary. While the Commission and courts generally have taken a dim view of completely subjective criteria for employment decisions,<sup>28</sup> those cases were based upon the existence of a large industry involving low-skilled labor, and they make sense largely in that context. In considering cases at the professional level, the attitude of the court in *Faro v. New York University*<sup>29</sup> is typical. In *Faro*, a female medical school professor sought a preliminary injunction to secure a place on the tenure-track of her faculty, following a cutback in those research funds paying most of her previous salary. The court was unsympathetic:

Of all fields which the federal courts should hesitate to invade and take over, education and faculty appointments at a university level are probably the least suited for federal court supervision. Dr. Faro would remove any subjective judgments by her faculty colleagues in the decision making process . . . .<sup>30</sup>

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Education, 401 F. Supp. 753 (S.D.N.Y. 1974) (denial of tenure to modern language professor not discriminatory).

A few other cases involving professionals other than legal employers, see note 10 *supra*, are analogous. See, e.g., *Orr v. Frank P. MacNeill & Son, Inc.*, 511 F.2d 166 (5th Cir. 1975) (lower salary to female department head not discriminatory); *Cypress v. Newport News Hospital Ass'n*, 375 F.2d 648 (4th Cir. 1967) (denial of staff membership to black physician discriminatory); *Levens v. GSA*, 391 F. Supp. 35 (W.D. Mo. 1975) (denial of supervisory job to female applicant not discriminatory).

27. It will be noted that there were no plaintiffs who won in the academic cases cited, note 26 *supra*. This does not mean, of course, that none are settled favorably for the plaintiff. In legal employment, see *Kohn* settlement, in appendix *infra*.

28. See, e.g., *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382 (4th Cir.), cert. denied, 409 U.S. 982 (1972); *Rowe v. General Motors Corp.*, 457 F.2d 348, 358-59 (5th Cir. 1972).

29. 502 F.2d 1229 (2d Cir. 1974).

30. *Id.* at 1231-32.

In denying a petition for relief, the court went on to indicate the implications of the plaintiff's position:

This situation is not confined to medical schools. Of a hypothetical twenty equally brilliant law school graduates in a law office, one is selected to become a partner. Extensive discovery would reveal that the others were almost equally well qualified. Fifty junior bank officers all aspire to become a vice-president—one is selected. And, of course, even judges are plagued by the difficulty of decision in selecting law clerks out of the many well qualified.<sup>31</sup>

While upper level promotions or hiring on a more subjective basis may be allowed, there is no inherent reason why employment decisions at the very standard and prosaic level of a law school graduate's first job should be accorded the same deference by courts in Title VII suits. Law school grades, writing, prior summer and full-time jobs, and admission to the bar are much less variable than the qualifications of most new Ph.D.'s. More lawyers graduate each year; large firms hire more than one new graduate every year, each with approximately the same "objective" qualifications as those who have been hired in the recent past. Thus, if a female law graduate is rejected by a firm which had previously taken male graduates from her school and she possesses at least as strong "objective" qualifications as those with whom she is competing, then she should be in a somewhat better position to prove sex discrimination than her counterpart with a Ph.D. in medieval history who is competing for the one opening a department has had in the last ten years. Obviously, the farther from immediate post-graduate hiring the attorney is, the harder it is to distinguish between the law and non-law candidate. The decision to promote an associate to partner would therefore evoke judicial reluctance to second-guess discretionary judgments.

The legal statistical universe with which a plaintiff must work is usually small enough to be almost meaningless. There are generally two ways to utilize employment statistics: to establish a statistical prima facie case in a class action<sup>32</sup> and to buttress

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31. *Id.* at 1232.

32. *See, e.g.*, *Griggs v. Duke Power Company*, 401 U.S. 424 (1971); *Davis v. Washington*, 512 F.2d 956 (D.C. Cir. 1975); *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239 (3d Cir. 1975); *United States v. Lathers*, 471 F.2d 408 (2d Cir. 1973); *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972); *United States v. Chesapeake & O. Ry.*, 471 F.2d 582 (4th Cir. 1972); *cert. denied*, 411 U.S. 939 (1973); *Jones v. Lee Way Motor Freight*,

an individual claim of discrimination.<sup>33</sup> Courts have used statistical evidence in both types of cases, but have been reluctant to place great weight on such evidence in cases involving a small number of people.<sup>34</sup>

In a law firm setting, it is usually difficult to find a large enough number of applicants which would serve as a sample. Often, a firm has had no minority or female attorneys for the past twenty years or more. If the firm is at least medium-sized, these "statistics" may look incriminating at first glance. However, a small or medium-sized firm may only hire two or three new associates every two or three years, and some of those associates will have had several years of experience. In this hypothetical situation, if only five new law graduates were hired as associates within the past ten years, it is difficult to argue that even one of them "should" have been a woman or a minority person, or that the lack of women and minorities indicates employment discrimination. It is quite unlikely that the firm will have kept the various resumes received from job applicants;<sup>35</sup> hence, it will be almost impossible to prove that the firm has even had other female or minority applicants.<sup>36</sup> At best, absent other, more direct proof of discrimination, the individual plaintiff will have to show that he or she was "at least as qualified" as the accepted applicant. Of course, the plaintiff then encounters judicial unwillingness to judge those qualifications which the plaintiff had attempted to avoid by proving the case statistically. The task of proving a Title VII case is obviously more difficult once the specialized skills acquired in practice become criteria for a specific job. Although the legal pro-

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Inc., 431 F.2d 245 (10th Cir. 1970); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970).

33. See, e.g., *McDonnell Douglass Corp. v. Green*, 411 U.S. 792 (1973); *King v. Yellow Freight System, Inc.*, 523 F.2d 879 (8th Cir. 1975); *Terrell v. Feldstein Co.*, 468 F.2d 910 (5th Cir. 1972).

34. See, e.g., *Harper v. Trans World Airlines*, 11 FED. EMPL. PRAC. CAS. 1974 (8th Cir. 1975) (only five couples previously subjected to same anti-nepotism rule as plaintiff); *Robinson v. City of Dallas*, 514 F.2d 1271 (5th Cir. 1975) (only seven employees disciplined in past eight years' period for failure to pay debt). *But see Chicano Police Officer's Ass'n. v. Stover*, 11 FED. EMPL. PRAC. CAS. 1056 (10th Cir. 1975) (class of 26 police officers used as sample to determine impact of test on Spanish-speaking officers).

35. Commission regulations require only that respondent keep application forms for six months and "all personnel files relevant to the charge" if a person files a charge of discrimination. 29 C.F.R. § 1602.14 (1975).

36. Law school placement offices might keep some records, but usually only for a limited period of time.

fession may be at fault, it is not the fault of any individual firm that female or minority attorneys lack the necessary experience.<sup>37</sup>

Large legal employers such as the government and large firms are better targets for the use of such statistical evidence, since their applicant pool is greater, at least for summer clerks and new law graduates. In *Kohn v. Royall, Koegel & Wells*,<sup>38</sup> for example, a female law student sought a summer clerking position with a large New York law firm. When it became apparent that the position would not be offered to her, she sought relief for a class composed of female students applying for summer jobs as well as new female law graduates and female associates seeking partnerships. Following decisions on the propriety of the class action, the case was settled by consent.<sup>39</sup> In this case, the firm reported that during 1970 alone—the year during which Kohn applied for the clerkship—it had received 78 applications from women.

In *Coopersmith v. Veterans Administration*,<sup>40</sup> the V.A. rejected a middle-aged applicant because she lacked recent legal experience and performed poorly on a writing test which required her to write a complex administrative decision. The plaintiff was unable to convince the court that the requirement for such recent experience resulted in a disparate impact upon female attorneys. In part, this was because the agency employed twice the percentage of female attorneys available for work from the general applicant pool. There was no showing that female attorneys were more likely than males to take off large numbers of years from the practice of law.

Both *Kohn* and *Coopersmith* indicate that statistics may fail to carry the burden of proof, even when the statistical universe is large enough to lend strength to a claim of discrimination. The plaintiff in *Kohn* might clearly have had a good argument for discrimination if, presented with large numbers of qualified women, the firm consistently chose large numbers of male law students. Even if *some* of the accepted male applicants were dem-

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37. For example, recent statistics indicate that large numbers of women are currently in law school or have recently graduated, but it is necessary to remember that this is a recent phenomenon. In 1964, only 490 of those in ABA-approved law schools were women. In 1969, the figure was still only 7%. By 1972, it was 12% and by 1975, it was 23%. See White, *Legal Education: A Time of Change*, 62 A.B.A.J. 355 (1976). Experienced women attorneys are still rare in many fields.

38. 59 F.R.D. 515 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974).

39. See Appendix, *infra*, for text of the settlement.

40. 10 FED. EMPL. PRAC. CAS. 627 (D.D.C. 1974).

onstrably "more qualified" than *most* of the female applicants, the total or almost total exclusion of women would be enough to raise a presumption of discrimination against the class, if not against the individual plaintiff. Even though the statistics may well have established a *prima facie* case, it is perhaps unlikely that they would have been conclusive as a matter of law. The defendant law firm might still have been able to establish that despite the statistics, each male applicant was superior to those women who were rejected.

In *Coopersmith*, it was necessary to discover the *proper* universe from which to draw statistical conclusions. Thus, despite the fact that the agency employed more female attorneys than the national average, the actual local labor pool as indicated by applications might have shown that the agency still hired more male attorneys than their percentage in the applicant pool warranted. However, the plaintiff in *Coopersmith* experienced a common difficulty in using statistics: there are often general tables indicating general statistics for women, but there are none which compare the actual work records of male and female attorneys. Such lack of specificity, which can be partially cured only by discovery, will always be a problem, especially if the employer does not hire enough attorneys to make a fair judgment possible.

To date, no reported case involving a large legal employer has directly involved a female or minority associate who was not granted a partnership. The consent settlement in *Kohn* has notification provisions for partner hiring,<sup>41</sup> but it is clear that the major thrust of the settlement involved hiring goals for summer clerks and newer law graduates. The practical difficulty in pursuing partnership discrimination claims may well be that many potential plaintiffs desire merely to leave the firm quietly with a good recommendation. A female or minority attorney probably has invested six or seven years in trying to work within the context and tradition of a large law firm. He or she may be disillusioned with the type of practice, or anxious to find another position requiring a good performance record from the older firm. Also, the attack on a refusal to promote a woman or minority person to partner involves an even smaller statistical universe and the decision is made on an even more subjective set of criteria.

Finally, it is unlikely that statistics will be conclusive against even a large legal employer, despite the proper selection of a statistical universe, once the employer has actually hired a few

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<sup>41</sup> See Appendix, *infra*, Sec. X(6).



women or minority members. Three more qualified women might have applied for every one male the firm accepts, but once the employer's percentage of female and minority attorneys is greater than zero, the lack of purity in statistics may prompt a court to hold, at best, that plaintiff has established a prima facie case through the use of statistical evidence.<sup>42</sup> If the firm is able to present a reasonable defense, the plaintiff must show that those more qualified female and minority applicants really were so qualified, using criteria acceptable to the courts.

Thus, plaintiffs in Title VII cases may find serious difficulties in proving a case of discrimination. As a practical matter, even a potential prima facie case of discrimination established solely through the use of statistics can usually be forestalled by defendant's employment of a few women or minorities, and in a partnership promotion case, by persuading the court of the necessity for using subjective criteria for selection. Once discrimination is proven, Title VII remedies may be adjusted slightly to serve the interests of firm loyalty and client preferences which cannot otherwise justify discrimination.

#### APPROPRIATE RELIEF

Once the plaintiff has prevailed on the issue of liability, however, a court should order basically the same relief to which any other successful Title VII plaintiff is entitled.<sup>43</sup> If the action was brought on behalf of an individual, appropriate relief might include hiring or promotion,<sup>44</sup> back pay,<sup>45</sup> and clearing the employ-

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42. See *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970), for the overwhelming nature of the statistical evidence which established liability as a matter of law.

43. 42 U.S.C. § 200e-5(g) (Supp. II 1972) provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

Courts in Title VII cases have liberally construed these remedial provisions. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

44. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), sets forth the standard for proving discrimination in an individual hiring case and tangentially deals with the problem of post-discharge conduct which might legitimately excuse an employer from rehiring an individual. Presum-

ment record of any mention of the suit. A firm which would have serious difficulty in accepting the successful plaintiff can, if it wishes, try to avoid such a court-ordered result and offer the aggrieved person additional money in lieu of reinstatement. If the action was brought on behalf of a class, additional relief might include goals for hiring or promotion, changes in recruitment policies, elaborate reporting provisions and the possibility of class back pay. In such a case, relief might appropriately extend over three to five years and involve close monitoring by the court and plaintiff's attorneys.

Obviously, the scope of this relief is directly related to the initial extent of plaintiff's action. A legal employer would normally wish to restrict potential liability to as few aggrieved persons as possible, restricting any class both in type of employee and geographical range. Thus in *Kohn*, the plaintiff sought to represent a class of all women who were qualified for legal positions at the firm and denied positions because of sex, a class estimated at approximately 500 women who were currently students or graduates of the nation's leading law schools. The plaintiff also sought to represent the few women attorneys already employed by the firm. Both types of representation were allowed. As a result, the relief agreed to by Royall, Koegel & Wells commits the firm to elaborate hiring goals over a five-year period.<sup>46</sup> Fortunately for the plaintiff in *Kohn*, the firm's recruiting patterns at major law schools had been clearly established and those schools enrolled a reasonable number of female students. If race discrimination had been alleged, it might have been necessary to require the firm to recruit at schools which it normally did not visit, or to use other criteria in making a final decision.

In any case, effective injunctive relief almost requires that the plaintiff either negotiate or convince the court to require a compliance framework that comes close to a quota system. The language of the order or decree may well be couched in terms of "goals," but failure to reach those goals should explicitly result in shifting the burden of proving compliance back to the defendant.<sup>47</sup> Conversely, defendants may well win the final battle

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ably, subsequent illegal activity against an employer would be a successful defense against court-ordered hiring, even if the original failure to hire was discriminatory.

45. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

46. See Appendix, *infra*, Sec. V.

47. Some courts have accepted "quotas" as appropriate relief when a court has made a finding of actual employment discrimination. Absent such

if they keep the burden of proof on the plaintiff. Thus, in a firm hiring five new associates each year, the firm may have agreed to hire three female attorneys within two years. If the firm has succeeded in hiring one female attorney but failed to comply with its agreement to hire three, a court may still find that the firm is trying to comply with the decree and allow them to proceed without further restrictions. In such cases, it is important that the firm be required to assume the burden of justifying its failure to hire according to its agreement.

### CONFLICTS OF INTEREST

In addition to these normal difficulties of jurisdiction, proof and relief, certain legal employees face conflict of interest problems in bringing a Title VII suit against their employers. In *Hull v. Celanese Corp.*,<sup>48</sup> Delulio, a female attorney working for defendant corporation, was assigned to work on Hull's sex discrimination case. In the course of her work, she investigated the personnel practices of the division in which Hull was employed and attended a conference with outside consultants whom the corporation had hired to do a statistical study of that division. Later, after terminating her work on the Hull case, Delulio became a plaintiff-intervenor in the case, using the same attorneys as Hull. The corporation then brought a motion to disqualify the attorneys, claiming that the lawyer-client status between Delulio and the corporation in the Hull case made it highly likely that privileged material would pass from Delulio to Hull's attorneys. The court agreed and instructed Delulio to seek other counsel, although without explicitly suggesting that the cases would have to be severed, or that Delulio should not be able to use information obtained through her job in her own suit.

The court, in affirming an order to disqualify, had no reason to speculate on how Delulio could practically advance her case by using such information without an inevitable conflict of interest. It would seem almost impossible for an attorney-employee of a corporation to separate many facts learned about the corporation into those learned as the corporation's attorney and therefore privileged, and those learned through other means. Such an employee never stops being an attorney, except perhaps in stating

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a determination in, for example, the typical settlement agreement or consent decree, the appropriate formal language is "goals." See, e.g., *Crockett v. Green*, 12 FED. EMPL. PRAC. CAS. 1078 (7th Cir. 1976)

48 513 F.2d 568 (1975).

the facts of her individual case of discrimination. Even if she were not working on a particular case, she learns about the employment situation in her company in her capacity as an attorney. One solution would be to restrict such attorneys to individual actions. Even in such cases, however, the individual is normally allowed to discover and use general statistical evidence which may rebut the reasons given by the corporation as pretexts for discriminatory acts.<sup>49</sup> It seems unreasonable to require the attorney-plaintiff to forego either that type of proof or the right to file a class action.

As a practical matter, the broad techniques of federal discovery may make much of the problem meaningless. Very little of Delulio's "privileged" information would not be available to Hull through normal discovery. In Delulio's case, it would be reasonable to allow her to introduce anything which could normally be obtained through these or other normal investigative methods. Of course, Delulio would be in the best position to know whom to depose and where to direct her attack on the corporation's documents; but, in that knowledge, she would be no different than any other high-level employee.

However, the court in *Hull* focused on the real problem: the court considered Delulio to be an independent attorney, whose status as an executive level employee was subordinate to her duty to her client, who happened to be her employer. While the court expressed sympathy for the attorney, it ultimately concluded that the lawyer-client privilege could not be broken. Underlying this conclusion is the same attitude which may make courts hesitate to apply Title VII case law liberally to legal employers: they view the lawyer as an independent professional, not an employee, whose relationships both to his clients and his colleagues are sometimes more important than the employment policies reflected in Title VII. However, even in the conflict of interest situation, the attorney has rights under Title VII which should normally supersede those relationships formed in his or her position as an attorney, once the appropriate limitations for necessary confidentiality have been placed on evidence used in Title VII cases.

#### CONCLUSION

Title VII was written to encompass employment in industry as well as the small law firm. It is therefore understand-

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<sup>49</sup> See note 43 *supra*.

able that the costs of complying with a law written and enforced in many less "professional" employment situations appears to many lawyers to outweigh the small benefits they see in having women and minority attorneys join white male legal employers instead of starting their own firms. It is, however, an economic reality that government, corporations and larger law firms are major, increasing powers in the legal world. Thus, many attorneys *are* more employees than independent professionals. Every executive has some degree of independent judgment. While one can sympathize with the plight of the vanishing sole practitioner of great independence and moral integrity, employment discrimination cases would not seem proper vehicles to foster such nostalgia. It is not necessary to abandon professional standards of integrity and judgment in order to admit that questions of race, sex, national origin and religion have no place in the hiring or promotion of competent attorneys.

Appendix

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

MARGARET KOHN, individually and	)	
on behalf of all other persons similarly	)	
situated,	)	72 Civ. 2705
	)	(MEL)
Plaintiff,	)	
—against—	)	
ROYALL, KOEGEL & WELLS,	)	
Defendant.	)	

AGREEMENT OF SETTLEMENT

I. *Statement of General Principles*

This agreement is entered into by plaintiff, Margaret Kohn, individually and on behalf of all other persons similarly situated (hereinafter "plaintiff"), and by defendant Rogers & Wells, formerly Royall, Koegel & Wells (hereinafter the "Firm"), in order to reaffirm its existing policy of seeking out and employing the best qualified persons available without regard to sex.

II. *Administration*

1. The Firm, within thirty days after approval of this agreement by the Court, shall appoint a partner as Administrator. (Said Administrator shall not be the same partner as is responsible for hiring or assignments.) The Administrator will direct the Firm's compliance with this agreement including responsibility for compliance with all of the reporting procedures provided for herein. Upon appointment, the Administrator shall notify in writing the plaintiff's counsel of his/her appointment and the date thereof.

2. The Administrator will distribute written material to the Firm's interviewing personnel reaffirming the Firm's commitment to equal employment opportunity and setting forth guidelines for fair and non-discriminatory interviewing. A copy of these guidelines will be sent to counsel for plaintiff and any changes made in those guidelines will be sent to counsel for plaintiff within thirty days of such change. The Administrator will indoctrinate the Firm's regular interviewing personnel as to the Firm's commitment to equal employment opportunity. Interviewers will be informed that they are not to indulge in assumptions that solely by reason of sex a person is suited for only certain kinds of work

or that a person is less qualified for professional work which requires travel, dealings with clients, long hours of appearances before certain tribunals. In this connection, women applicants are not to be asked questions with regard to family plans and child care arrangements nor any questions which are not asked of male applicants.

3. Upon inquiry, interviewers will inform applicants that the Firm has a policy of full equal employment opportunity and affords them opportunities for client contact, travel, and appearances in all courts on an equal basis, without regard to sex.

### III. *Selection Criteria*

1. All selection criteria used by the Firm shall be job-related. Plaintiff does not challenge as either inherently discriminatory or non-job related any of the following selection criteria:

- a) academic success;
- b) ability to understand and communicate conceptual ideas;
- c) judgmental ability of an applicant;
- d) motivation of an applicant;
- e) poise and appearance of an applicant;
- f) working background of an applicant;
- g) overall impression upon the interviewer or interviews made by an applicant;
- h) desire of an applicant to remain in the New York City area;
- i) an applicant's interest in the kind of legal practice in which the Firm engages; or
- j) the likelihood of an applicant accepting an offer of employment from the Firm.

2. No woman will be required to possess other or higher qualifications for the position of summer law clerk, associate or partner than is required of males.

### IV. *Recruitment*

1. Brochures and other materials distributed to law schools by and about Rogers & Wells shall refer to "men and women" or "he/she" or some similar description, where appropriate. Such materials shall also state the number of women employed by the

**Firm.** The Administrator shall forward to the plaintiff's counsel copies of such materials together with a list of the schools to which they were distributed within two weeks of such distribution.

2. The Firm has interviewed at the following law schools: Harvard, Chicago, Fordham, Columbia, N.Y.U., Yale, Cornell, University of Pennsylvania, Duke, University of Virginia, Stanford and University of Michigan. If the Firm interviews at fewer than eight of these schools, or interviews at schools other than among these twelve, it will do so in such a manner as not to lower by 2% or more the percentage representation of women in the second year or graduating classes from all of the schools at which it interviews.

3. If the Firm's representatives do not interview all applicants requesting such an interview, the Firm shall seek to limit the number of interviews either on the basis of academic performance (and to use the same cutoff point in grade point averages for women as for men), or on the basis of the applicant's stated preference for the Firm.

4. The Firm will offer women applicants travel and other expense money on an equal basis with men applicants.

## V. *Hiring*

1. (a) During each of the four hiring years 1975-1978<sup>1</sup> the percentage of the Firm's total offers for permanent employment for associate attorneys which the Firm shall make to women shall not be less than the minimum offering goal, as herein defined, for that hiring year.

The minimum offering goals for 1976, 1977 and 1978 shall be separately calculated, year by year, and shall be 120% of the aggregate percentage of women in the graduating classes of those law schools where the Firm interviews during the hiring year for which the goal is being established. For example, if women constitute 25% of the total enrollment in the graduating classes at the schools where the Firm interviews for permanent employees in 1976, then 30% of the Firm's offers for permanent employees for that hiring year shall be extended to women.

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1. "Hiring year" shall be defined as the period from February 1 of one year until January 31 of the following year. For example, 1975 hiring year is the period from February 1, 1975 to January 31, 1976. Those individuals who are covered by the 1975 minimum offering goal will be those who would begin work in 1976.



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(b) During each of the four hiring years 1975-1978 the percentage of the Firm's total offers for summer employment which the Firm shall make to women shall not be less than the minimum offering goal for that hiring year.

The minimum offering goal for 1976, 1977 and 1978 shall be separately calculated, year by year, and shall be 120% of the aggregate percentage of women in the second year classes of those law schools where the Firm interviews during the hiring year for which the goal is being established.

(c) The minimum offering goal for each hiring year 1976-1978 shall be determined as follows: by September 10 of each hiring year, the Firm will obtain from each of the law schools listed in Section IV(2) the number and percentage of women in the classes entering their second and third year of school. By September 13 of each hiring year, the Firm shall inform counsel for plaintiff of any failure on the part of any law schools to cooperate in providing the requested information. For any law school class about which the Firm does not have the appropriate information by October 13 of the hiring year in which that class is in contention for summer or permanent jobs, the Firm shall use appropriate data on that particular class at the time it entered law school for the purpose of calculating the minimum offering goal. In the event that no information on the number and percentage of women in the relevant class(es) at a particular school is available, the Firm may exclude that class or those classes from its calculation of the minimum offering goal for that year. By October 30, the Firm shall inform counsel for plaintiff of the minimum offering goals for permanent and summer employment under Sections V(1) (a) and V(1) (b) of this agreement for that hiring year.

2. Offers to female applicants will be made at the same time, in the same manner, and will offer the same terms and conditions of employment, as offers to similarly qualified men, including salary, opportunities for transfer, travel and client contact.

3. Whether or not the Firm achieves the minimum offering goals set forth above, the Firm shall submit to plaintiff's counsel reports disclosing the proportion of women to men among those who accept offers to begin work with the Firm. In the event that the number of women accepting the Firm's offers constitutes 70% or less than the number of offers which constituted the minimum offering goal for that year, the Firm shall provide the plaintiff's counsel with the number of persons who sought in-

interviews during the year in question and those interviewed, broken down as between male and female, and the name, address, and telephone number of those persons invited for a second interview, those given offers of employment with the date of the offer, those who accepted, with the date of acceptance and those who declined, with the date of declination.

4. If in any hiring year the Firm fails to meet a minimum offering goal, in the succeeding year there shall be an adjusted minimum offering goal which shall be calculated as follows: the adjusted minimum offering goal shall be the minimum offering goal plus the number of persons by which the Firm missed its previous year's goal.

5. For purposes of computation of goals and other objectives of this agreement, where calculations result in fractional persons (e.g., the minimum offering goal or adjusted minimum offering goal for female summer employees in a given hiring year requires the Firm to make offers to 2.5 females), any fraction one-half or above should be rounded off to the next higher whole number and any fraction less than one-half to the next lower whole number.

6. Failure to meet the minimum offering goal in one year and failure to meet the adjusted minimum offering goal as described in Section V(4) in the succeeding year shall be a *prima facie* violation of this agreement.

7. In computing the number of offers made to men and women for purposes of determining whether the minimum offering goal has been met, there shall be excluded any offers made to (a) persons who graduated from law school more than six years prior to the date when the offer is made and (b) persons previously employed by the Firm on a permanent basis.

8. For the hiring year 1975 the minimum offering goal for women for permanent employment is 25.5% and for summer employment 27.6%.

#### V. *Assignments and Advancements*

1. All work assignments and assignments to departments will be made by the Firm without regard to sex.

2. Sex is not a permissible criterion in determining remuneration and advancement.

## VI. *Promotion*

Women at the Firm shall advance in status on a basis equally applicable to males at the Firm.

## VII. *Fringe Benefits*

1. Medical, hospital, accident, life insurance and retirement benefits shall be available equally to male and female attorneys, and will not be conditioned upon status as "head of household" or "principal wage earner".

2. Any benefits which are made available to wives and/or families of male attorneys will be made available equally to husbands and/or families of female attorneys, and any benefits made available to the wives of male attorneys shall be made available equally to female attorneys whether or not the cost of such benefits is greater with respect to women.

3. The Firm shall accord each women attorney, in addition to her regular paid vacation, a paid maternity leave of six weeks at the time of the birth of her child or at the time of any miscarriage.

4. Disabilities caused or contributed to by miscarriage, abortion, or complications of pregnancy or childbirth will be treated as other temporary disabilities for sick leave purposes.

## VIII. *Clubs, Business and Firm Social Events*

1. By March 15, 1976, the Firm will request in writing any clubs, the membership dues of which are paid for partners by the Firm which do not admit women members, to revise such policy.

2. The Firm shall invite and encourage female attorneys to participate in firm-sponsored events and meetings with clients on the same basis as men and will not organize or sponsor any such events or meetings in clubs where women are excluded from membership.

## IX. *Miscellaneous*

1. This agreement does not apply to the Firm's non-legal staff. This agreement shall apply only to the Firm's New York office.

2. This agreement does not constitute any admission whatsoever by the Firm of any violation of law.

**X. Reporting and Compliance**

1. All reports, unless otherwise specified, shall be signed by the Administrator and submitted to plaintiff's counsel by the 15th day of March of each year of this agreement.

2. The Firm will file with the plaintiff's counsel for each year of this agreement a report indicating, by law school and sex, (a) the number of law students interviewed on-campus, (b) the number of law students invited for an office interview, and (c) the number interviewed in the office. The report shall also include the total number and date of offers made, the number and date of offers made to women, the total number and date of acceptances, the number and date of acceptances by women, the total number and date of rejections, the number of refusals by women, and if known, the reason for refusal. The above reports shall be done separately for summer law clerks and permanent associates.

3. The Firm will maintain copies of all resumes and correspondence with applicants for the hiring years 1975-1978 until at least two years after the expiration of this agreement.

4. The Firm will submit to plaintiff's counsel for each year of the agreement a report indicating the name of all associates with the Firm, indicating sex, the year of graduation from law school and department. If the person is not assigned to a particular department the report should so state. This report shall indicate any transfers and terminations occurring within the year.

5. The Firm shall submit to plaintiff's counsel a report indicating the number of partnership offers made during each year during the term of this agreement, specifying the sex of the persons to whom the offers were made.

6. The Firm will file with the plaintiff's counsel a statement for each year of this agreement each time a woman associate is not offered a partnership when a male associate, who graduated from law school in the same year as she, receives such an offer from the Firm. In each such instance, the woman associate shall be advised of the provisions of this paragraph. The statement shall explain why that particular woman was not offered a partnership. If, however, the particular woman requests in writing that such a statement not be made, the explanation requirement, but not the general report of the occurrence, will be waived in that instance.

7. The reports provided for by this agreement in respect of the final year during which this agreement is in effect, will be submitted to plaintiff's counsel by no later than the 15th day of March in the year after the other terms of this agreement expire.

8. By March 15, 1976, the Firm will supply plaintiff's counsel with the following information reflecting the associate attorneys employed by the Firm as of that date, the name, sex, department (where appropriate), year of law school graduation, and date of hire.

9. The Court will retain jurisdiction of this action for entry of such orders as are necessary to effectuate the provisions of this agreement.

#### XI. *Confidentiality*

All information furnished to counsel for plaintiff is furnished for the purpose of compliance review and is confidential; provided that such reports may be used as evidence in a proceeding to enforce the terms of this agreement. All such information and reports shall be returned to the Firm by January 1, 1980, unless there is then pending a proceeding to enforce the terms of this agreement.

The parties also agree that neither Margaret Kohn, the Firm, nor their attorneys, will make any statements to the media concerning the settlement, going beyond the fact of settlement and referring inquiries concerning the terms thereof to the text of the agreement thereof, except that the parties may, at the time the settlement is submitted to the Court for approval, make available a joint written press release which may contain a brief description of the terms of the settlement and a statement of the Firm's denial of any discrimination.

XII. *Duration*

This agreement shall terminate at the close of the 1978 hiring season, with the final compliance report due in 1979.

Dated: \_\_\_\_\_, 1975  
Margaret Kohn

George Cooper, Harriet Rabb and  
Howard J. Rubin

By Harriet Rabb  
Attorneys for Plaintiff

Rogers & Wells

By \_\_\_\_\_  
A member of the Firm  
Attorneys *pro se*

December 12, 1975

Harriet Rabb, Esq.  
Columbia University School of Law  
435 West 116th Street  
Room 8 East 18  
New York, N.Y. 10027

Re: *Kohn v. Royall, Koegel & Wells*

Dear Mrs. Rabb:

This will confirm our understanding that upon approval of the settlement agreement, we will make a contribution to Columbia University School of Law of \$40,000.00 in a manner which has been agreed upon between us.

It is understood that this letter will be annexed to the settlement agreement and will be filed with the court simultaneously therewith.

Very truly your,  
ROGERS & WELLS  
A Member of the Firm  
By \_\_\_\_\_

# Valparaiso University Law Review

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