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Law Professors' Comments in Response to the DOL Request for Information on the Family and Medical Leave Act of 1993

Marci Seville
Golden Gate University School of Law, mseville@ggu.edu

GOLDEN GATE UNIVERSITY | School of Law

Women's Employment Rights Clinic

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Richard M. Brennan
Senior Regulatory Officer
Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
Room S-3502, 200 Constitution Avenue, N.W.
Washington, D.C. 20210

Submitted via electronic mail and facsimile to: whdcomments@dol.gov Richard M. Brennan (202) 693–1432

Re: Law Professors' Comments in Response to the DOL Request for Information on the Family and Medical Leave Act of 1993

Dear Mr. Brennan:

This letter is in response to the Department of Labor's ("DOL") Request for Information on the Family and Medical Leave Act ("FMLA"), 71 Fed. Reg. 69,504 (Dec.1, 2006). We are professors from law schools throughout the United States, who are scholars and practitioners in areas including women's rights, constitutional law, labor and employment, and family law.

The FMLA was, in many respects, a groundbreaking statute, drafted with the fundamental purpose of making the workplace more equitable for women workers who have historically been adversely affected by the disproportionate burdens placed on them by family obligations. The United States had long lagged behind other nations in providing family leave benefits,[1] and passage of the FMLA was an

[1] Jody Heymann, Alison Earle & Jeffrey Hayes, *The Work, Family and Equity Index, How Does the United States Measure Up?*, Inst. for Health and Soc. Pol'y, McGill University, (2007); Jody Heymann,, Kate Penrose & Alison Earle, *Meeting Children's Needs: How Does the United States Measure Up?*, 52 Merrill-Palmer Quarterly (No. 2) 189 (2006). According to these studies, the latest research shows many U.S. public policies still lag dramatically behind all high-income countries, as well as many middle- and low-income countries. The findings include:

- Out of 173 countries studied, 168 countries offer guaranteed leave with income to women in connection with childbirth; 98 of these countries offer 14 or more weeks paid leave...[T]he U.S. guarantees no paid leave for mothers in any segment of the work force, leaving it in the company of only 4 other nations: Lesotho, Liberia, Papua New Guinea, and Swaziland.
- 137 countries mandate paid annual leave. 121 countries guarantee 2 weeks or more each year. The U.S. does not require employers to provide paid annual leave.
- At least 145 countries provide paid sick days for short- or long-term illnesses, with 127 providing a week or more annually. More than 79 countries provide sickness benefits for at least 26 weeks or until recovery. The U.S. provides only unpaid leave for serious illnesses through the FMLA, which does not cover all workers.

Mailing Address:
536 Mission Street
San Francisco, CA
94105-2968

Offices:
62 First Street
Suite 240
San Francisco, CA
tel: (415) 442-6647
fax: (415) 896-2450
www.ggu.edu/law/werc

important first step in tackling the notable failure of U.S. laws and policies to address the need for balancing issues of work and family.

However, experience since the 1993 enactment of the FMLA has demonstrated that the law has many limitations, resulting in denial of leave opportunities for large segments of the workforce.[2] The DOL's Request for Information raises deep concerns for us that the agency is considering changes that would *restrict* the ability of workers to take advantage of family and medical leave, when there is a clear need for *expansion* of those rights, to enable both men and women to balance the ever-growing demands of work and family. At a time when individual states and federal legislators are beginning to address the need for laws requiring *paid family leave* and/or *paid sick days,*[3] any agency rollback in FMLA protections would turn back the clock on efforts to bring the United States more in line with how other nations address the needs of working families. Any rollback would similarly undercut efforts to level the playing field for women in the workplace, and to increase workplace flexibility to meet the needs of all workers and their families.

These comments will address the history and purpose of the FMLA, as well as several issues of particular concern on which DOL has requested information.

History and Purpose of the FMLA

As scholars have frequently discussed[4], and as Justice Rehnquist addressed at length in *Nevada*

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[2]Employees at workplaces with fewer than fifty employees, and those who work part time and thus may not meet the threshold requirement of 1250 hours work, fall outside the protection of the FMLA. Low wage workers, at jobs that offer no paid sick leave or vacation benefits, are often unable to take advantage of the 12 week FMLA leave protection because they cannot afford to remain off work without pay. Still other workers find themselves without any leave protection because the particular medical condition involved may not constitute an FMLA covered "serious health condition" or the person needing care, such as a seriously ill child over the age of 18, falls outside the specified family members covered by the FMLA. *See,* Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 Mich. J. Gender & L. 113, 140-144 (1998).

[3] *See, e.g.,* Steven Greenhouse, *With the Democratic Congress, Groups Gear Up for Fight Over Paid Sick Days* , N.Y. Times, December 5, 2006 at A18; , National Partnership for Women and Families, *State Family Leave Laws That Are More Expansive Than the Federal Family and Medical Leave Act (*Updated 8/9/2002), http://www.nationalpartnership.org/site/DocServer/StatesandunpaidFMLLaws.pdf. On Feb 1, 2007, Senator Chris Dodd announced his intention to introduce legislation providing at least six weeks of paid leave for employees, http://dodd.senate.gov/index.php?q=node/3723.

[4] *See,* e.g., Joanna L. Grossman , *The Family And Medical Leave Act Of 1993: Ten Years Of Experience: Job Security Without Equality: The Family and Medical Leave Act of 1993,* 15 Wash. U. J.L. & Pol'y 17 (2004); Martin H. Malin, *Symposium: Litigating The Glass Ceiling And The Maternal Wall: Using Stereotyping And Cognitive Bias Evidence To Prove Gender Discrimination: Interference With The Right To Leave Under The Family And Medical*

Department of Human Resources v. Hibbs, 538 U.S. 721, 728 (2003), "the FMLA aims to protect the right to be free from gender-based discrimination in the workplace." The Congressional findings in the FMLA, on which the former Chief Justice relied, specify that the purpose of the FMLA is both to "promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection] clause" and "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity." 29 U.S.C. § 2601(b) (1), (5). The *Hibbs* decision noted that the FMLA "is based not only on the *Commerce Clause*, but also on the guarantees of equal protection and due process embodied in the *14th Amendment*." *Id.* at 727, citing H. R. Rep. No. 103-8, pt. 1, p. 29 (1993) (emphasis in original).

Congress made an explicit finding, when enacting the FMLA, that, "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." 29 U.S.C. §2601(a) (5). Congress therefore sought to accomplish the FMLA's purposes " . . . in a manner that [consistent with the Equal Protection Clause] . . . minimizes the potential for employment discrimination *on the basis of sex* by ensuring generally that leave is available . . . *on a gender-neutral basis*." 29 USC § 2601(b) (4); *Hibbs* at 729 (emphasis in original).

Justice Rehnquist recognized that "stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread." *Id.* at 730. Thus, the high court found that:

> Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. *Id.* at 736.

By creating "an across-the-board, routine employment benefit for all eligible employees," Congress sought to "ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men." *Id.* at 737. By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, "the FMLA attacks

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Leave Act, 7 Empl. Rts. & Employ. Pol'y J. 329 (2003); Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 Mich. J. Gender & L. 113, 116 (1998).

the...stereotype that only women are responsible for family care giving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes." *Id.*

More than a decade after passage of the FMLA, women continue to bear much of the burden of family care and many stereotyped beliefs about allocation of family duties remain.[5] Vigorous enforcement of the FMLA, without any rollback of protections, along with expansion of state and local initiatives to provide additional benefits, is essential to the ability of workers to balance work and family.

Issues of Particular Concern in the Request for Information

Eligible Employees and Use of Nonconsecutive Work Periods to Meet the Twelve Month Requirement

We strongly urge DOL to retain its regulation providing that the "12 months an employee must have been employed by the employer need not be consecutive months." 29 CFR 825.110(b). This regulation is fully supported by the Senate committee report on the FMLA, which specified that the 12 months "need not have been consecutive," S. Rep. No. 103-3, at 23 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 25[6]. The ability to aggregate non-consecutive periods to meet the 12-month requirement is critical for working women.

Women are far more likely than men to leave the workforce for a period of time and later return, most frequently because of pregnancy, childbirth, and childcare responsibilities. A recent study discussed in the *Harvard Business Review*, found that nearly four in ten highly qualified women (37%) report that they have left work voluntarily at some point in their careers. Among women who have children, that statistic rises to 43 percent. Sylvia Ann Hewlett & Carolyn Buck Luce, *Off-Ramps and On-Ramps: Keeping Talented Women on the Road to Success,* Harvard Bus. Rev., 2-3 (March 2005).

Employers need to address the work-family balance by accommodating employees who may leave the workplace for various periods, including extended breaks for childrearing or other personal reasons. If talented and valued employees cannot later aggregate their work periods to

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[5] According to women in dual-earner couples with children in 2002, 77 percent take greater responsibility for cooking, 78 percent take greater responsibility for cleaning, and 70 percent take greater responsibility for routine child care. In dual-earner couples, particularly those with children, there is a substantial third job that has to be done at home—family work... and wives are still much more likely to assume primary responsibility for family work than their husbands. *See,* James T. Bond, Cindy Thompson, Ellen Galinsky & David Prottas, *Highlights of the 2002 National Study of the Changing Workforce*, Families and Work Inst., 13, 17 (2002).

[6] Prior to enactment of the FMLA, Congress also considered but chose not to enact bills that would have specifically required 12 consecutive months of employment. *See,* Family Leave Act of 1990, H.R. 5374, 101st Cong.§ 101(1)(B) (1990); Maternity Leave Act of 1989, H.R. 3445, 101st Cong. § 101(1)(B) (1989).

satisfy the 12 month requirement, when faced with an unanticipated serious illness requiring FMLA leave, women will continue to be penalized for the primary role they play in family caretaking.

Definition of a "Serious Health Condition"

We urge DOL to retain the regulatory language in 29 CFR § 825.114(a) and not to alter those provisions so that conditions like earaches, flus, and similar illnesses can *never* constitute a serious health condition. The FMLA legislative history indicates that Congress expected that these illnesses, for which treatment and recovery are usually brief, would "fall within even the most modest sick leave policies. . . ." S. Rep. No. 103-3, at 28 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 30. However, as discussed in Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century,* 25 Berkeley J. Emp. & Lab. L. 351, 385 (2004), "this expectation falls flat given that many employers do not have a sick leave policy and those that do commonly limit the availability of the policy to cover a worker's own illness." Thus, flexibility is essential in assessing whether such health conditions warrant FMLA coverage in a given situation.

The statute itself recognizes the need for such flexibility. Congress expressly chose to forego excluding any conditions from the definition of a serious health condition and instead defined a serious health condition according to objective criteria. 29 U.S.C. § 2611(11) (defining a serious health condition as "an illness, injury, impairment, or physical or mental condition that involves - (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider"). In further refining the statutory definition of a serious health condition, DOL followed Congress' lead by implementing a regulation that relies on objective standards and allows for flexibility in the determination of a serious health condition. 29 C.F.R. § 825.114(a); The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2195 (Jan. 6, 1995).

The need for flexibility in assessing whether an illness is a "serious health condition" arises not only with childcare, but also with the increasingly important area of elder care. With the elderly, a seemingly minor medical condition can have dire health consequences, and there is often no one but a family member available to attend to the elder's needs. Data on the aging population indicates that elder care issues will grow substantially in the coming decades:

> Presently, individuals 65 and older represent 12 percent of the total United States population. By 2030, the figure is expected to increase to 20 percent. The aging of the population has prompted predictions that care giving for the elderly will equal, if not surpass, child care as the work-family concern of the twenty-first century. Estimates indicate that 22.5 million people in the United States currently care for an elderly person and 64 percent of them work for wages outside the home. By 2020, 40 percent of the workforce expects to care for an elderly relative.
> Smith, *Elder Care, Gender, and Work, supra, at.352-353.*

Congress recognized the impact of elder care responsibility on women when enacting the FMLA, noting that "two-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women." H. R. Rep. No. 103-8, pt. 1, p. 24 (1993); S. Rep. No. 103-3, at 7. Recent studies indicate that elder care is increasingly an issue affecting both men and women. Thirty-five percent of wage and salaried workers (of all ages and both genders) had in the past year, provided special attention or care for a relative or in-law 65 years old or older. About thirteen percent of all wage and salaried workers currently take some time off work to meet elder care responsibilities in a given year. James T. Bond, et al., *Highlights of The 2002 National Study of the Changing Workforce*, Families and Work Inst., 30 (2002).

As growing numbers of workers find themselves to be the "sandwich generation," caring for both children and elders, FMLA definitions of "serious health condition" must remain flexible enough to allow coverage in appropriate circumstances, for conditions that might otherwise be deemed "minor."

Different Types of FMLA Leave: The Need For Intermittent And Reduced-Schedule Leave

Intermittent and reduced schedule leaves are central to employees' ability to balance work and family. Because FMLA leave is unpaid (unless the employer otherwise provides paid leave), the opportunity to take leave in limited increments is extremely important to workers. In the case of one's own medical needs, intermittent and reduced schedule leave allow employees to continue working while undergoing medical treatments that require only partial absence from work. This not only gives the employee the opportunity to continue earning wages, but also to continue as an active participant in the workforce, with the corresponding benefits for the employee's psychological well being. For those who need only partial leave for care of a family member, such flexible leave arrangements give the worker the opportunity to maintain much needed earning capacity during periods of increased medical and caretaking expenses. The ability of employees to take intermittent and reduced schedule leave is thus a vital component of work-family balance and essential to maintaining workplace equality, since in many situations women are more likely than men to be the primary caregiver.

Significantly, the FMLA and the existing regulations already place substantial restrictions on the ability to take intermittent and reduced schedule, which should minimize concerns sometimes raised by employers. Intermittent or reduced leave for parental, adoption, or foster care leave generally is not permitted unless both the employer and the employee agree otherwise. 29 U.S.C § 2612 (b)(1). If such leave is taken for an employee's own serious health condition or that of a family member, intermittent or reduced leave is not allowed unless medically necessary, and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. 29 U.S.C § 2612 (b)(1); 289 CFR 825.117. Medical necessity does not include voluntary treatments procedures, and employees must attempt to schedule such leaves so as not to disrupt the employer's operations. Finally, an employer may assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced leave schedule. 29 CFR 825.117.

Any further restrictions on the use of intermittent or reduced scheduleleave will impose an undue burden on employees dealing with their own or family members' serious illnesses, as they strive to maintain their status as active participants in the workplace.

Substitution of Paid Leave

Because FMLA leave itself is unpaid, the ability of employees to substitute their accrued paid leave makes it possible for many workers to take advantage of FMLA leave protections. Women's more economically vulnerable position makes it crucial that they have the ability to use paid leave during FMLA leave periods.

Recent reports indicate that women's annual earnings are still significantly less than men's earnings ($36,716 versus $52,908). Studies support the view that women continue to earn less than men on average, because, among other things, many women assume or are steered into traditional female roles, and enter traditionally female occupations and industries. James T. Bond, et al.., *The 2002 National Study of the Changing Workforce, (Executive Summary 1, Highlights of the National Study 13),* Families and Work Inst., (2002).

The ability to substitute paid leave is particularly important for single mothers, who often provide the sole economic support for their families. Single mothers comprise a significant and growing portion of the labor market. In 2000, just over one fifth (21.9%) of families were headed by women, which was double the percentage in 1970, and upwards of 80 percent of those single mothers were working. This represents a sharp increase in the percentage of single mothers who are in the labor market. Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda*, 13 Duke J. Gender L. & Pol'y 7 (2006).

We urge DOL not to restrict the ability of employees to use accrued paid leave during periods of FMLA leave that would otherwise be unpaid.

Employee Turnover and Retention

Finally, DOL has requested information as to whether availability of leave affects employee morale, productivity and retention. Studies clearly suggest that workplace flexibility, such as leaves for family obligations, increases employee retention. *Highlights of the 2002 National Study of the Changing Workforce*, Families and Work Inst., 34-35, found that:

- Employees with more access to flexible work arrangements are also more committed to their current employers—more loyal and willing to work harder than required to help their employers succeed;
- Greater job retention -- Employees with more access to flexible work arrangements are more likely to plan to stay with their current employers for at least the next year;

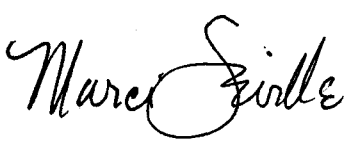
- Greater job satisfaction -- Wage and salaried employees who have immediate supervisors/managers who are more open to and supportive of the needs they have in their personal and family lives are significantly more satisfied with their jobs;
- Employees who have immediate supervisors/managers who are more open to and supportive of the needs they have in their personal and family lives are more committed to their employers and are more likely to plan to stay with their current employer.

These and other findings "strongly suggest that employers who provide greater opportunities for flexible work arrangements, have supervisors who are more responsive to the personal and family needs of employees, and create a workplace culture that is more supportive of the work-life needs of employees have employees who are more satisfied with their jobs, more committed to their employers, and more likely to plan to stay with their current employers. Interestingly, none of these work-life supports necessarily impose direct costs upon employers, in contrast with conventional benefits." *Id.* at 37.

Conclusion

We urge DOL to continue to enforce the FMLA vigorously and to reject any recommendations to roll back the protections in the areas addressed in the agency's Request for Information. We support the existing regulations and oppose any changes that would restrict access to FMLA protections.

Sincerely,



Marci Seville
Professor of Law
Director, Women's Employment Rights Clinic*
Golden Gate University School of Law

Linda Hamilton Krieger
Professor of Law
University of California, Berkeley
School of Law (Boalt Hall)

Joan W. Howarth
William S. Boyd Professor of Law
Boyd School of Law
University of Nevada, Las Vegas

Carlin Meyer
Professor of Law
New York Law School

[Additional signatories are listed on pages 9 through 14]

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Mark Aaronson	Clinical Professor of Law	Hastings College of the Law Hastings Civil Justice Clinic
Catherine R. Albiston	Assistant Professor of Law	UC Berkeley Boalt Hall School of Law
Annette Ruth Appell	Professor of Law	University of Nevada William S. Boyd School of Law
Susan Frelich Appleton	Professor of Law	Washington University School of Law
Elvia R. Arriola	Associate Professor of Law	Northern Illinois University
Michael Avery	Professor	Suffolk Law School
Felice Batlan	Assistant Professor of Law	Chicago-Kent College of Law
Stephen Befort	Gray, Plant, Mooty, Mooty, & Bennett Professor of Law	University of Minnesota Law School
Adele Bernhard	Associate Professor	Pace University School of Law
Beryl Blaustone	Law Professor	City University of New York School of Law
Cynthia Grant Bowman	Professor of Law	Northwestern University School of Law
Pamela D. Bridgewater	Professor of Law	American University Washington College of Law
Jennifer Brobst	Full-time Adjunct Faculty	North Carolina Central University School of Law
Allan Brotsky	Professor of Law	Golden Gate University School of Law
Mark R. Brown	Professor of Law	Capital University
Susan Bryant	Professor of Law and Clinical Director	City University of New York School of Law

Naomi Cahn	Professor of Law	George Washington University Law School
Robert Calhoun	Professor of Law	Golden Gate University School of Law
Timothy A. Canova	Professor of Law	Chapman University School of Law
Elaine Chiu	Associate Professor of Law	St. John's University School of Law
Carol Chomsky	Professor of Law	University of Minnesota Law School
Liz Ryan Cole	Professor	Vermont Law School
Sacha M. Coupet	Assistant Professor of Law	Loyola University Chicago School of Law
Bridget J. Crawford	Associate Professor	Pace University School of Law
Constance De La Vega	Professor of Law	University of San Francisco School of Law
Frank Deale	Associate Professor of Law	City University of New York School of Law
Maxine Eichner	Associate Professor of Law	University of North Carolina School of Law
Kathleen C. Engel	Associate Professor of Law	Cleveland State University Marshall College of Law
Zanita E. Fenton	Professor of Law	University of Miami School of Law
Kris Franklin	Professor of Law	New York Law School
Ann E. Freedman	Associate Professor of Law	Rutgers Law School
Mary Ellen Gale	Professor of Law	Whittier Law School
Ruben J. Garcia	Associate Professor	California Western School of Law
Howard A Glickstein	Professor of Law	Touro Law Center

Miye Goishi	Adjunct Clinical Professor of Law	Hastings College of the Law Hastings Civil Justice Clinic
Anne B. Goldstein	Professor of Law	Western New England College School of Law
Leigh Goodmark	Professor	University of Baltimore School of Law
Phoebe A. Haddon	Professor of Law	Temple University Beasely School of Law
Emily M.S. Houh	Professor of Law	University of Cincinnati College of Law
Margaret E. Johnson	Assistant Professor	University of Baltimore School of Law
Ann Juergens	Professor	William Mitchell College of Law
Helen H. Kang	Associate Professor of Law	Golden Gate University School of Law
Eileen Kaufman	Professor of Law	Touro Law School
Lisa Kelly	Professor of Law	University of Washington School of Law
Laura T. Kessler	Associate Professor of Law	University of Utah - S.J. Quinney College of Law
Laurie E. Leader	Clinical Professor	Chicago-Kent College of Law
Eumi Lee	Adjunct Assistant Clinical Professor of Law	Hastings College of the Law Hastings Civil Justice Clinic
Arthur S. Leonard	Professor of Law	New York Law School
Gillian Lester	Professor of Law	U.C. Berkeley School of Law
Raven Lidman	Clinical Professor of Law	Seattle University School of Law

Christine A. Littleton	Professor of Law	University of California Los Angeles School of Law
Deborah Maranville	Professor of Law	University of Washington School of Law
Martha McCluskey	Professor of Law	State University of New York at Buffalo
Reginald McGahee	Assistant Dean/Dean of Admissions	Howard University School of Law
James McGrath	Associate Professor of Law	Texas Wesleyan University School of Law
M. Isabel Medina	Professor of Law	Loyola University New Orleans College of Law
Doris Y. Ng	Associate Professor of Law	Golden Gate University School of Law
Helen Norton	Visiting Assistant Professor	University of Maryland School of Law
David B. Oppenheimer	Professor of Law	Golden Gate University School of Law
Ascanio Piomelli	Clinical Professor of Law	Hastings College of the Law Civil Justice Clinic
James G. Pope	Professor of Law	Rutgers University School of Law
Brian L. Porto	Lecturer in Legal Writing	Vermont Law School
Tom I. Romero	Assistant Professor	Hamline University School of Law
Leslie Rose	Associate Professor of Law	Golden Gate University School of Law
Jim Rowan	Professor of Law	Northeastern University School of Law

Susan Rutberg	Professor of Law	Golden Gate University School of Law
Donna Ryu	Adjunct Associate Clinical Professor of Law	Hastings College of the Law Hastings Civil Justice Clinic
Elizabeth J. Samuels	Associate Professor	University of Baltimore School of Law
Sean Scott	Professor of Law	Loyola Law School
Michael Selmi	Professor of Law	George Washington University Law School
Marjorie A. Silver	Professor of Law	Touro Law Center
Gail Silverstein	Adjunct Assistant Clinical Professor of Law	Hastings College of the Law Civil Justice Clinic
Jana Singer	Professor	University of Maryland School of Law
Joan Steinman	Distinguished Professor of Law	Chicago-Kent College of Law (Ill. Inst. of Technology)
Juliet P. Stumpf	Associate Professor of Law	Lewis and Clark School of Law
Joan Vogel	Professor of Law	Vermont Law School
Emily Gold Waldman	Professor	Pace University School of Law
Marley S. Weiss	Professor of Law	University of Maryland School of Law
Gary Williams	Professor	Loyola Law School
Verna L. Williams	Professor	University of Cincinnati College of Law
Theresa L. Wright	Clinical Law Professor	Lewis and Clark School of Law
Ellen Yaroshefsky	Clinical Professor of Law	Cardozo Law School

Noah Zatz	Acting Professor of Law	University of California Los Angeles School of Law
Maryann Zavez	Staff Attorney/Professor of Law	Vermont Law School