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Featured Article

Young Women in the Law: The Best Advice. Ever.

by Jenn Eppensteiner, Carolyn Riggs, Nicollette Dailey, and Stephanie Holcombe



As a young lawyer, it is important to remember that DRI's wealth of resources goes beyond its cutting-edge seminars and publications. One of DRI's most valuable

resources is its people and their cumulative body of experience. Not surprisingly, when you ask the women of DRI for the best advice they ever received, you get a lot of good advice. The Young Women in the Law subcommittee collected some of this wisdom to share with you here, but *our* best advice is to capitalize on the resource yourself, by seeking out the women you admire and listening to what they have to say.

Take a Breath

Many women emphasized the importance of being self-aware in presentation style and adjusting accordingly.

One of the best pieces of advice I received in early practice was to be aware of the sound of my voice. When women are pressing a point, our voices tend to rise. If the arguments get passionate, our voices go higher and louder. At some point, if you look at the judge, he or even she will have a glazed look that says "you sound just like my wife when she is arguing with me." I wish this weren't so, but trust me, I've witnessed it countless times. So at some point in your presentation, take a moment to breathe deeply and then make your voice lower and slower. You will be more effective in your presentation.

Julia Molander
 Cozen O'Connor
 San Francisco, California

I believe one of the best pieces of advice I received as a young woman lawyer was to SLOW DOWN when talking. I believe my enthusiasm about what I was saying often worked against me because I would talk too fast. The mere change in my speaking pattern—to a slower cadence—improved the effectiveness of my message.

Margaret T. Brenner
 Schirrmeyer Diaz-Arrastia Brem LLP
 Houston, Texas

Don't let yourself be intimidated by older, seemingly more experienced men attorneys. While sometimes intimidating, your preparation for whatever the event is (presentation, deposition, court appearance) will carry the day in the end.

Melissa A. Geist
 Reed Smith LLP
 Princeton, New Jersey

Take a Chance

Many women echoed the sentiment that sometimes you just need to put yourself out there. Alison R. Christian of Christian Dichter & Sluga, P.C. in Phoenix, Arizona shared that "if no one knows who you are, your phone will never ring," and "90% of success is showing up." When you take a risk, do so confidently.

When I came to Philadelphia in the early eighties I knew no one except my husband. I left my family of six brothers and sisters and my mother in Minnesota and felt like a foreign exchange student at the DA's office. I did not understand the culture or the language of this city. Early in my career a woman gave me advice and then mentored me throughout my time at the DA's office. She told me to ignore gender in every meeting or court appearance (most people were men in those days) and to be confident (and if I did not really feel that way – to act that way), that anything I had to say was just as smart, just as insightful, and



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important as any man in the room.

Perhaps more importantly, she told me to calm down, to breathe deep, and have faith in myself because she had faith in me. She was about ten years older than me and I idealized her, so when she said those things to me, I remembered. I think she changed the course of my career. The confidence that she instilled in me as a young woman stayed with me when I joined Reed Smith as a commercial litigator. . . . I was confident that I could try any case, negotiate any deal, and work (if I wanted to) on even the most complex and demanding cases. If I had not had that mentor, I do not believe that I could have succeeded with those demands.

My best piece of advice is to listen to yourself, find something that you love, and do it. You cannot do everything well at all times, but you can do everything you want to do and know when and how to prioritize work life issues. Don't expect perfection, but do expect that you can do more than you think you can, and you can do it regardless of the lifestyle you choose.

Carolyn P. Short
Reed Smith LLP
Philadelphia, Pennsylvania

The advice was actually given to my son by his female teacher: "Just do it. You can apologize later." I thought it was so appropriate for female lawyers. There have been many articles written about how we tend to hold ourselves back by saying we don't have experience in a particular area, or we haven't done something before. I have seen this regularly in my practice, with female attorneys holding back and contemplating all the different scenarios, whereas less experienced males usually jump right in. So, this is wisdom I have employed and encourage other female attorneys to do the same. Maybe you won't have to apologize later, after all.

Annette C. Clark
Duckor Spradling Metzger & Wynne
San Diego, California

At a conference I recently attended, one female partner from another firm told me that it never hurts to ask for a particular case/client, because the worst you can be told is no.

Nicole A. Harrison
Manion Gaynor & Manning LLP
Los Angeles, California

Take Ownership

Women also highlighted the importance of being accountable, especially to yourself. Acknowledge your failures, but celebrate your successes. Ultimately, you control your path.

The best advice I ever received was if you want to be a working mom and have flexibility, develop a specialty.

Rachel Cutler Shim
Reed Smith LLP
Philadelphia, Pennsylvania

Keep track of what you are doing; maintain a file of cases and articles published; keep your resume up to date. Trying to remember all of this, years later, is very

difficult.

Keep track of where you are in your career; does it match with your goals? It is very easy to let the months and then the years go by without much thought about where you want to be in 5 or 10, even 20 years. Don't be afraid to make a move, even if you aren't unhappy. Keep your end goal in mind.

Realize that NOBODY will care about your career and your happiness and satisfaction as much as you. Own your path.

Kate A. Wilkinson
Director of Litigation Services
Oregon School Boards Association
Salem, Oregon

Own your problems. If you make a mistake, step up and say so. Similarly: own your successes. Women are way too afraid to say, "Hey, yes, I done good here!"

Terri L. Weber
Nash, Spindler, Grimstad & McCracken LLP
Manitowoc, Wisconsin

Take Care of Yourself

Many women stressed the importance of self-care and life outside of the office and courtroom.

Before entering private practice (after clerking for a judge for six years), a very reputable older female lawyer colleague of mine met with me to give me some advice. She said private practice is very stressful at times. She told me that in order to keep that stress at bay and to be a successful lawyer, you must take care of yourself. She suggested weekly massages or manicures/pedicures. I took that advice that first year, and it has helped me maintain a great work/life balance as my career gets more challenging.

Kimberly Kanoff Berman
McIntosh Sawran & Cartaya, P.A.
Fort Lauderdale, Florida

I'm not an attorney, but as a jury consultant I talk to a lot of women about communication styles and perceptions of female litigators. My piece of advice for young female attorneys is not to tell everyone where you are, all of the time. I frequently cite a study published in Harvard Business Review, conducted at a large management consulting firm. The study found that men who actually worked 80 hours a week and those who appeared to work 80 hours a week received equally favorable reviews and compensation. Those who worked 60 hours a week - and everyone knew it - received less favorable reviews and compensation. Perception is everything. The takeaway definitely applies to law firms. Make sure your assistant knows where you are in case of an emergency, and take advantage of technology - be responsive via email or phone when you need to be. Go to the soccer game, networking event, school play, etc., but don't announce it to everyone - just go.

Leslie Ellis, Ph.D.
DecisionQuest
Washington, DC

And, Don't Take Yourself Too Seriously

We have a (female) associate here who came into work one day looking really tired. When I asked her if she was ok, she told me that she had been up half the night making pony party gift presents out of pool noodles for the kids who were coming to her four-year-old daughter's pony-themed birthday party, and she really wasn't crafty, she burned herself with the glue gun, etc. This is when the sage advice came to me. I told her the next time she was home after work and she felt the urge to make something, she should make herself a vodka tonic and drink it. If she still felt like making something after that, she should make another vodka tonic. After that, she wouldn't feel like making things anymore. #nailedit

Sarah K. Rathke
Squire Patton Boggs (US) LLP

Jenn Eppensteiner and **Carolyn Riggs** serve as co-chairs of the Young Women in the Law subcommittee, together with co-vice chairs **Nicollette Dailey** and **Stephanie Holcombe**. Jenn is a senior associate with Reed Smith LLP's Life Sciences Health Industry group resident in the Princeton, New Jersey office. Carolyn practices in Boston, Massachusetts with Manion Gaynor & Manning LLP's Products Liability & Complex Tort group where she focuses on insurance defense and toxic tort litigation. Nicollette, also resident in Boston, is a partner at Morrison Mahoney LLP with a practice focused on insurance law. Stephanie, of Houston, Texas, is an associate in the litigation practice group of Porter Hedges LLP, specializing in employment, business, and construction cases.

Article of Note

Defending a “Fictitious Pricing” Class Action

by Peter Stiteler



Have you ever purchased an item on sale? If so, you could be the next named plaintiff in a class action worth tens of millions of dollars.

For example, in *Spann v. J.C. Penney Corp.*, Cynthia Spann visited a JC Penney store in Brea, California and purchased, among other things, three blouses that were part of JC Penney's private collection and were marked down from \$30 to \$17.99. 307 F.R.D. 508, 513 (C.D. Cal. 2015). But those blouses were not generally sold at \$30; rather, they had been offered at \$17.99 for at least the three months preceding Spann's purchase of them. Based on this, Spann filed a class action suit against JC Penney, alleging that it had mislead her by advertising the skirts as being worth \$30 when in fact they were worth far less, and accordingly had violated several of California's consumer protection statutes. Moreover, Spann alleged that JC Penney had perpetrated its fictitious pricing scheme against *all* purchasers of its private branded apparel and accessories. Based on these allegations, Spann successfully sought to represent all California individuals who purchased any private or exclusive branded apparel or accessories advertised as at least 30% off the “original” or “regular” price. The case only resolved in 2016 when JC Penney settled for \$50 million.

Class actions like these—often called “fictitious pricing” class actions—are a relatively recent phenomenon. Much of the recent rise in these cases can likely be attributed to *Hinojos v. Kohl's Corp.*, in which the Ninth Circuit held that a plaintiff could bring a claim under the above California law when he alleges that he purchased merchandise “on the basis of false price information” and “would not have made the purchase but for the representation.” 718 F.3d 1098, 1107 (9th Cir. 2013), *as amended on denial of reh'g and reh'g en banc* (July 8, 2013). The *Hinojos* Court explicitly rejected the argument that the plaintiff was not damaged because there was no difference between what he paid for (in that case, luggage and shirts), and what he got (the same). The Court reasoned that, under California law, the plaintiff was injured because he bought something that he thought was worth more than it actually was because of the deceptive pricing. *Id.* at 1105–07.

Hinojos opened the floodgates, and since that ruling fictitious pricing suits have proliferated. In the last two years, plaintiffs have filed suits against JC Penney, Kohl's, Neiman Marcus, Ross Stores, Art.com, Nordstrom, Best Buy, and Jos. A. Banks. The suits have not been limited to California: plaintiffs have sued in New York, Massachusetts, Illinois, and Minnesota, among other places (often bringing claims under the laws of those states and California law).

Perhaps because of the ubiquity of the cases, there is a great deal of authority in which courts have dismissed or narrowed similar class actions. Of course, authority on the below issues is often split: for every case indicating claims should be dismissed, there is another stating the contrary. Ultimately, each argument will therefore be complaint specific, court specific, and judge specific. Nonetheless, below are some of the arguments that could result in the court dismissing or narrowing a fictitious pricing class action.