

THE BURFORD

# Quarterly

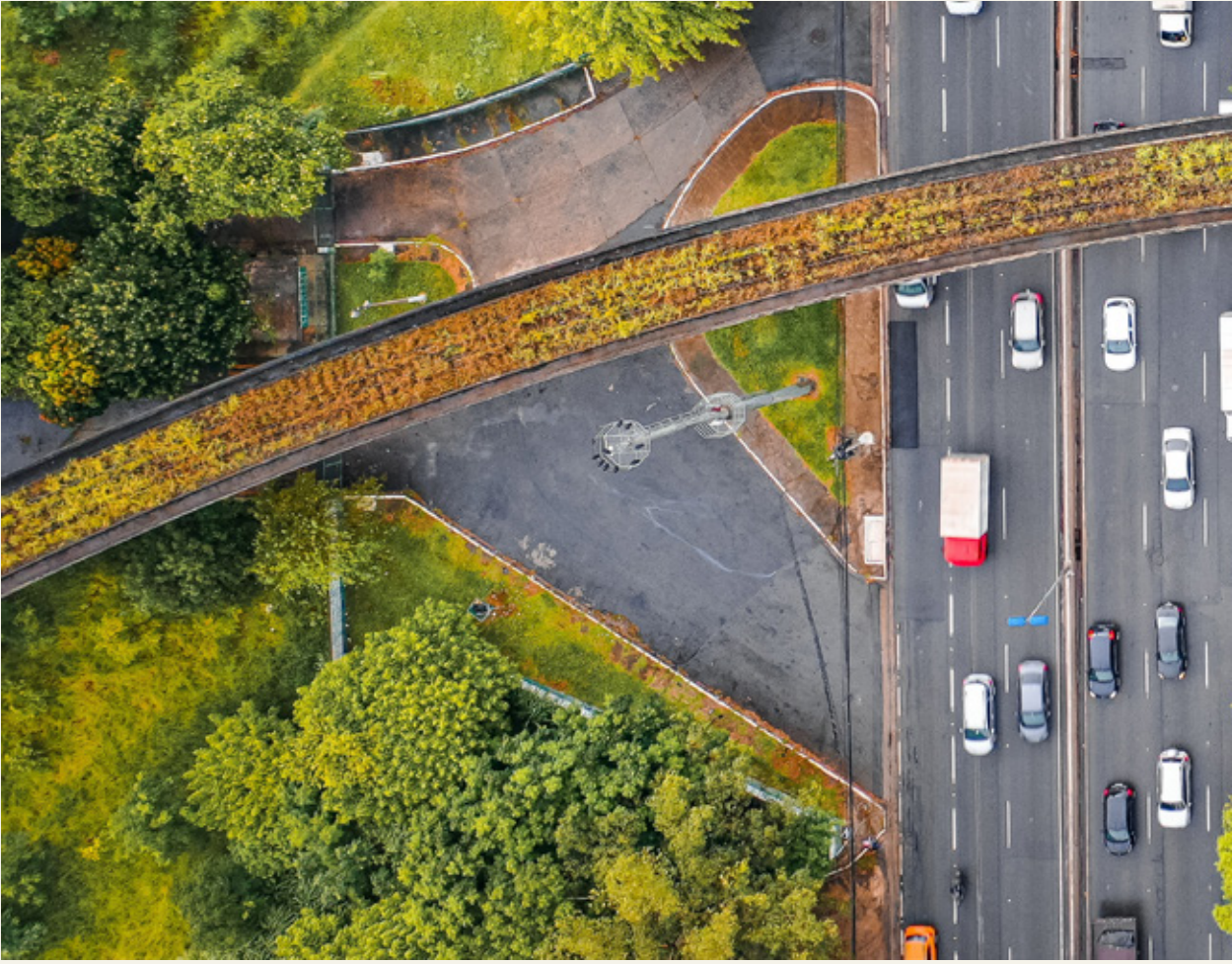
A REVIEW OF LEGAL FINANCE

LEGAL FINANCE & AFFIRMATIVE  
RECOVERY INSURANCE

EXPERT ROUNDTABLE:  
GENDER DIVERSITY IN IP

KEY LEGAL FINANCE  
DEVELOPMENTS ACROSS APAC





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ROUNDTABLE

# Expert insights: Diversity in intellectual property



*In September 2021, Burford Managing Director Katharine Wolanyk directed questions concerning diversity in intellectual property to a respected group of IP and patent professionals. Their perspectives are excerpted and gathered below.*

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## Q.

**There's a significant gender gap in the business of law—but gender disparity is particularly stark in patent law. Why?****Lisa Ferri:**

While the legal field is more conscious today of the institutional obstacles experienced generally by women lawyers, patent law has additional barriers to entry that exacerbate the gender gap that already exists in the practice of law. To practice before the US Patent & Trademark Office (USPTO), individuals must pass the patent bar exam, but to sit for the exam you must have a technical background, such as a degree in engineering, chemistry, biology and the like. These requirements drastically narrow the pool of candidates, as there are fewer women graduating from the science, technology, engineering, and math (STEM) fields. The numbers bear this out and can be discouraging—the USPTO has reported that women constitute roughly 18% of the patent bar and 10% of the attorneys arguing before the Patent Trials and Appeals Board (PTAB).

This gender disparity is not limited to patent practice before the USPTO but

is especially evident in law firm patent litigation practices. Firms, for the most part, hire only patent bar admitted lawyers into their patent practices. This barrier makes it more difficult to reach gender parity in law firm patent departments—which already suffer from the same retention issues experienced across the profession.

**Megan Carpenter:**

Gender disparity in patent law is particularly stark because the problem is squared—it's a problem both of gender disparity in the legal services profession, and of gender disparity in STEM. Women represent 50% of law school students, but only about 20% of law firm equity partners. Women are much more likely than their male counterparts to report never serving as first chair in a litigation. One out of five women in intellectual property law report having no real book of business, which is an important metric in the race for partnership. This gender gap is compounded by the fact that women earn only 36% of all STEM

**“Gender disparity in patent law is particularly stark because the problem is squared—it's a problem both of gender disparity in the legal services profession, and of gender disparity in STEM.”**

degrees. Given the gender gap in legal services and in STEM, it is no surprise that only 18% of all patent lawyers are women.

**Jill Bindler:**

There is no doubt that the gender gap in patent law is significant. I think the gender gap has been more prominent in patent law because patent lawyers have historically had an engineering or science background. Many of the patent lawyers I have worked with over the years were working in STEM fields before law school. There is certainly a direct correlation between the dearth of women in the STEM pipeline and the number of female patent attorneys. The leadership within the companies who hire patent lawyers tend towards hiring lawyers with technical backgrounds, under the assumption they can more easily understand the technology in the suit and convey nuances to a judge or jury.

**Eileen McDermott:**

Throughout my career as an IP trade journalist and having worked in-house at both patent and trademark industry organizations, I have always noticed and commented on the stark difference in numbers of women trademark and copyright attorneys compared with patent. Several years ago, I interviewed Elizabeth English<sup>1</sup> of the Archer School for Girls in Brentwood, California, about this persistent and multi-layered problem. She commented that, while more and more colleges and universities are focused on ensuring equal numbers of students in STEM programs, the percentages of women

who actually graduate are much smaller. One problem is that there are very few women professors, and representation does matter. But she also argued that “we deliberately teach courses that are designed to ‘weed people out,’ and girls are much harder on themselves than boys. I think we’re teaching it backwards.” That’s why the Archer School model is “inquiry-based” and research-focused. When girls become immersed in science in the hands-on way that girls are less likely than boys to have been encouraged to partake in at home, they become more engaged. Perhaps getting more girls involved in STEM—and, by extension, patent law—requires doing away altogether with the patriarchal approach to education, which obviously was crafted by and tailored to a traditionally masculine ideal of achievement, to get more girls—and probably more boys, as well—involved from the start. This is unlikely to happen in the near term, but there has been a movement on the consumer side to target STEM toys and books to girls, and to encourage girls in science early, and more and more primary and middle schools have been incorporating innovative STEM programs into their curriculums. This has already resulted in increased numbers of girls and women in STEM across the board, however small the percentages remain. But institutions of higher education, companies and law firms now need to do more to encourage women to stay on and thrive through mentorship and ensure there is appropriate representation to make new hires feel welcome and inspired in their work environments.

Q.

## Why is it important to encourage more diversity among inventors and patent lawyers?

### **Megan Carpenter:**

As leaders in IP and tech, we can have an impact and we have a responsibility to do so. There is a strong business case for diversity and inclusion. It is well understood that diverse teams are better problem-solvers than homogeneous ones. McKinsey studies have noted a strong relationship between financial outperformance and diversity on executive teams. Also, representation matters, not just among inventors and patent lawyers, but investors as well. Spanx founder Sara Blakely shopped her idea around to male patent attorneys and potential investors who didn't understand her invention. Women and minorities have historically faced social and legal

impediments to patenting. Some of the most important factors when it comes to women's engagement in this space include having role models, being part of an innovation ecosystem, and creating and maintaining networks throughout the life cycle of an invention.

### **Jill Bindler:**

Diversity is critical to excellence. The world we live and work in is diverse. The decision makers within law firms, companies and the government are becoming more diverse each year. When we consider that most scientific research and invention is team-driven, it is critical that different viewpoints and perspectives are acknowledged and valued.



**Eileen McDermott:**

We need more people working on—and helping the people who are working on—solving the world’s biggest problems. Right now, only a tiny percentage of half of the world’s population is involved in inventing and protecting the inventions that will eradicate climate change, hunger, disease, etc. We need to encourage diversity because problem-solving requires a diversity of perspective and thought. We need all-hands-on-deck.

**Lisa Ferri:**

At Mayer Brown we often say that creating a diverse and inclusive profession is both the right thing to do and vitally important to successful client and business relationships. We all recognize that our legal profession should reflect the society around us. In other words, we should have

many different voices, backgrounds and perspectives “in the room” as ultimately, diversity provides a better product for the clients we serve. As a practical matter, many businesses today require that their outside legal teams, including their patent lawyers, reflect the diversity of their customers, clients and shareholders.

We have all read the many studies that have shown that diverse teams deliver better results, as they are often more collaborative and innovative than teams with members that share similar backgrounds. This holds true in the patent world as well. A diversity of inventors—in the vein of Gertrude Elion, Ann Tsukamoto, Shirley Ann Jackson, Rosalind Franklin and Stephanie Kwolek—will bring more innovative ideas to our world.

**Q.****How can we facilitate access to women and diverse lawyers in the patent space?****Lisa Ferri:**

One approach for bringing more women and diverse attorneys into the patent law practice would be to open the doors more widely to patent bar admission, as the present USPTO requirements create barriers to entry. The prerequisite of a specific technical degree is often cited as necessary to maintain the high quality of practice before the USPTO. Yet, under the present rules, there is no requirement that a lawyer only practice within their technical expertise—for example, an electrical engineer that is

admitted to the patent bar is able to prosecute (or litigate before the PTAB) pharmaceutical patents and vice versa. In essence, the patent bar simply provides access to practicing before the Patent Office, in any technical field. We have seen no negative impact to the quality of patent practice under these present rules of practice.

If we would like to expand the patent bar while maintaining the technical expertise of the bar, the USPTO could create a category of patent bar admission for those individuals that

pass the patent bar (which requires mastery of the Manual of Patent Examining Procedure), but do not have a technical degree. These individuals, for instance, would be eligible to appear as lead counsel in post-grant proceedings before the PTAB. At the same time, a category of patent bar admission would remain for patent prosecutors that must demonstrate a proficiency in certain technical fields. These changes would not sacrifice the quality of the patent practice yet would remove unnecessary barriers for entry and would expand the patent bar in the near-term.

**Eileen McDermott:**

It seems to me that this is a simple matter of firms and organizations prioritizing and “lifting up”. One example from personal experience that seems small but could help with profile-raising for women attorneys is for senior attorneys and partners to let junior women and minority associates who co-write articles for publication to have more of the spotlight. I often receive very well-written articles for which much of the legwork is clearly done by the junior attorneys, but too often the most senior (and very often male) attorney is listed as the lead author, merely because he is their boss. Similarly, firms can prioritize women attorneys to argue in court or take the lead with clients. IP associations are also key in facilitating access by holding events and creating groups and committees, such as the Women in IP Law committees of the Intellectual Property Organization (IPO) and the American Intellectual Property Law Association (AIPLA), which encourage networking between in-house and private practice women attorneys.

I’ve noticed that some law firms also create special “women’s groups” to highlight on their websites, i.e., “Our Women Patent Law Team”, in order to spotlight the firm’s women leaders for clients, who increasingly are demanding diversity of firms.

**Jill Bindler:**

Support STEM programs targeted to elementary and middle school girls. We need to encourage STEM programs, invest in programs that not only teach, but also inspire young and diverse inventors and entrepreneurs. Internships, speaker programs and after-school programs within the schools can be used to show the joy of patent law, the actual red-ribbon documents and share some of the fun things that were patented.

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**When we consider that most scientific research and invention is team-driven, it is critical that different viewpoints and perspectives are acknowledged and valued.**

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**Megan Carpenter:**

It is important for those who can, to give back. Support the USPTO's clinical program that is run at law schools across the country. Support pro bono programs in each state. As dean of a law school, I see the enormous

impact a law school clinic can have in a community—funding one professor has an exponential impact by empowering students to represent underserved communities and making legal services accessible and affordable on a broad scale.

**Q.**

**Women accounted for 65% of the patent office attorneys arguing at the Federal Circuit over the last 20 months—an impressive contrast to the 13% of female attorneys arguing from private practice.<sup>2</sup> What other success stories do you see?**

**Jill Bindler:**

I am seeing more and more women in leadership roles, particularly on the federal bench. In fact, in the Northern District of Texas, Dallas Division, there are six inspiring female judges: Chief Judge Barbara M. G. Lynn, District Judges Jane J. Boyle, Karen Gren Scholer, Ada Brown and Magistrate Judges Irma Carrillo Ramirez and Renee H. Tolliver. These trailblazers excel at mentoring, not only those within their chambers, but within the community.

Our local IP Inn of Court, named for our Chief Judge—the Barbara M.G. Lynn Inn of Court—has 121 members this year. Of the 12 Pupilage Group leaders, seven are women. Three of our four officers are women, including our current President and Vice President. Hope Shimabuku is the Director of the Texas Regional United States Patent and Trademark Office. Two other USPTO Leaders are also women—Elizabeth Dougherty, the Atlantic Outreach Liason and Molly

Kocialski, of the Rocky Mountain Regional Office.

The recent Eastern District Bench Bar Conference I attended included the largest number of women and minorities that I can recall. The panels included a number of diverse speakers as well.

**Lisa Ferri:**

Many of the recent success stories we see in private practice in this field stem from the joint commitment of firms and clients to create a more diverse and inclusive profession. As clients have demanded diverse teams, firms have responded by increasing their efforts to recruit and retain diverse lawyers. For instance, many companies have embraced the Mansfield Rule, and have pushed their outside counsel to become Mansfield Certified which requires firms to consider a minimum of 30% diverse candidates for equity partnership, pitches, leadership and governance roles. Presently, there are over 100

leading firms now certified—and these firms are reporting impressive successes in diversity. Similarly, clients look to recognition such as WILEF gold standard certification as an indicator that a firm is committed to supporting diversity, as it requires that firms demonstrate that women represent a meaningful percentage of equity partners, leadership and governance positions and highly compensated partners, among other rigorous requirements.

In addition, in the daily practice, clients are putting together rules of engagement that require that teams be diverse—but with specific goals to be met and consequences for failure to meet those goals. For instance, there are requirements that at least half the leaders and team members be diverse to be hired for a project. As another example, one company has a unique requirement in which they ask that firms make specific diverse staffing commitments and if a firm does not meet its commitment for a particular matter, 15% of the total amount billed over the life of that specific matter will be withheld.

**“We need to encourage diversity because problem-solving requires a diversity of perspective and thought.”**

These specific initiatives that come with both incentives and ramifications are increasing diversity within firms, which will be reflected in the teams appearing in patent cases. From personal experience, I can say that I presently am involved in a patent case in which the four different legal teams, of both in-house and outside counsel, are almost exclusively women—I’ve never seen that before.

**Eileen McDermott:**

I think there are a lot of success stories. Despite the persistently low numbers of women in patent law, there is certainly more attention being paid to the problem in recent years, and the current presidential administration has made diversity a priority at every level. As a result, the USPTO is studying the issue, and whether there is anything they can do that will substantively impact the problem or not, there is a renewed awareness of the gap. In 2019, 170 in-house general counsel sent a letter to big law firms<sup>3</sup> demanding that they improve their diversity efforts, and such policies have already resulted in the kinds of changes I mentioned above, where firms are spotlighting their women attorneys in every practice area. While this is a problem that has seemingly resisted progress, it is only within the last 10 years that there has been a concerted effort to solve the problem. It will take time and a reconsideration of priorities on the part of primary schools, institutions of higher education and firms and companies, but the more everyone demands diverse teams, the more those establishments will have no choice but to change.

**Megan Carpenter:**

We will be most effective when we address this problem earlier in the pipeline, including in law school. Programs must focus on making a legal education affordable and accessible to nontraditional students, including women, underrepresented minorities and working professionals. I have worked to create a program at UNH Franklin Pierce to do just that. Franklin Pierce has had a top 10 program in intellectual property law for the last 30 years. Our school created a hybrid online program that makes a top legal education in IP accessible to working professionals across the country who may not be able to quit their job to attend law school. The program is designed for working professionals in all time zones, and seeks to meet students where they are, both literally and figuratively. Law school is expensive, and it is twice as expensive if students must quit their jobs to enroll; this program turns that notion on its head and looks at students' professional

experience as something positive for the classroom. The program is based on the notion that professional graduate education will be more diverse if it acknowledges the realities of people's lives, and we will have better outcomes if we can be intentional and thoughtful about our methods of instruction. The program is proving the concept: 40.7% of women in the Hybrid JD in IP, Technology and Information Law program this year have STEM degrees; this is in comparison to 16.7% of residential students. Those statistics have been comparable since the program's start in 2019. The program also has significantly higher numbers of underrepresented minorities, students with families and students with full-time jobs. This program is succeeding because it is designed to make a legal education accessible to people who would otherwise not be able to enroll, and it is enhancing the diversity of the legal profession in intellectual property.

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<sup>1</sup> IPO Education Foundation, "Marin Yamada, Student Inventor, and Elizabeth English of The Archer School for Girls", <https://www.ipoef.org/marin-yamada-student-inventor-and-elizabeth-english-of-the-archer-school-for-girls/>.

<sup>2</sup> Perry Cooper, "Patent Agency Lets Women Shine in Court While Big Law Sends Men", *Bloomberg Law*, <https://news.bloomberglaw.com/ip-law/patent-agency-lets-women-shine-in-court-while-big-law-sends-men-1>.

<sup>3</sup> Christine Simmons, "170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business", *American Lawyer*, <https://www.law.com/americanlawyer/2019/01/27/170-gcs-pen-open-letter-to-law-firms-improve-on-diversity-or-lose-our-business/>.

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**Eileen McDermott**

Eileen McDermott is the Editor-in-Chief of IPWatchdog.com. Eileen is a veteran IP and legal journalist, having held editorial and managerial positions at several publications and industry organizations. She has acted as editorial consultant for the International Trademark Association (INTA) and as a freelance editor for the World Intellectual Property Organization (WIPO).

**Jill Bindler**

Jill Bindler is a partner at Gray Reed and the firm's go-to advisor on all aspects of e-discovery in litigation and investigations involving complex, high-volume document production obligations. An accomplished trial lawyer, she achieved favorable results in numerous complex commercial litigation and patent infringement matters.

**Lisa Ferri**

Lisa M. Ferri is global co-chair of the Mayer Brown's Intellectual Property practice and Life Sciences group. She serves as lead trial and appellate counsel on behalf of high-profile companies in the pharmaceutical, biotechnology and medical device industries. She also serves as Chair of the firm's global Women's Leadership Committee and the New York Office Women's Forum and as a member of the firm's Diversity Steering Board.

**Megan Carpenter**

Megan Carpenter is the Dean of the University of New Hampshire Franklin Pierce School of Law and an internationally known expert in intellectual property, with particular interests in entrepreneurship, branding and the arts.

12

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