

...and Justice for All?

THE GENDER PAY GAP IN THE LAW

By Gary Toohey and Cynthia K. Heerboth



"So many of the conscious and unconscious ways men and women treat each other are deeply ingrained.... The women's movement may manage to clean up the mess in society, but I don't know if it can clean up the mess in our minds."

Author Nora Ephron

From the corporate boardrooms at the world's largest brewery to the management suite at the nation's most prominent newspaper, the issue of pay disparity between men and women has been at the forefront of the news recently. But these examples are just the latest skirmishes in a long history of gender inequity when it comes to the issue of compensation.

Laws supporting equal pay date back to the 1930s. However, little has changed in the intervening years. Indeed, gender biases, lack of support, a shortage of networking opportunities and rigid workplace rules continue to negatively impact the advancement of women in the workforce – both in terms of promotion and compensation.

Shockingly, the situation appears to be even worse within the legal profession, as studies have shown that women lawyers earn significantly less than their male counterparts at all levels of the law firm hierarchy. "Equally educated women and men in the same occupation with similar work experience bring home very different paychecks," said Laurel G. Bellows, immediate past president of the American Bar Association. "Women are significantly underrepresented in the political and business leadership of this country – and this world."¹

St. Louis attorney Megan Phillips, who co-chairs the Joint Commission on Women in the Profession, a project of the Supreme Court of Missouri and The Missouri Bar, said this harsh reality often comes as a surprise to women making the transition from law school to the workplace.

"For the most part, women graduating from law school now have had a pretty level playing field," she said. "I think there's a perception among young women that everything is fixed now and the feminist movement is over because everything has been fixed. But I also think every young woman has that moment, very early in their career, where that bubble gets burst."²

"By far, the large majority of men and women law student believe there's no gender bias, and one reason is they haven't encountered it yet," Bellows affirmed. "Women are being admitted to law schools in large numbers, and there's not apparent bias in those schools because we have female tenured professors, women writing substantive course books, and case law study involves women plaintiffs and defendants. Law firms are also hiring men and women in almost equal numbers.

"So up to the very moment they get out of school, they have no idea there's a problem."³

Washington, D.C. attorney Cynthia Thomas Calvert, who works with other lawyers to counter the effects of hidden gender biases, agrees.

"I heard over and over again from young women that they didn't experience sex discrimination in law school or as summer associates and didn't understand the fuss we were making. Then they'd call me two or three years later saying, 'All these horrible things are happening to me at my firm, and I really need some help.'

"Women do no better or worse than men in terms of performance," Calvert added. "But men are presumed competent, while women still have to prove it."⁴

In Calvert's mind, the proverbial "glass ceiling" – the intangible barrier within a hierarchy that prevents some people (particularly women) from getting the most powerful jobs – has been replaced by a new "glass ceiling/gender bias 2.0."

"While the days of women lawyers being mistaken for secretaries may be gone, significant unconscious biases held by women and men hold women back," she explained. "The biases affect how women's performances are perceived and interpreted, which in turn affects the assignments and opportunities they get, their evaluations, their compensation, and their advancement."⁵

The irony of the existence of such a situation within a profession dedicated to equality and justice is not lost on women in the legal field.

"There is a business case to be made for retaining women because it affects your bottom line," Phillips said, "but shouldn't we also do this because it is right and because it is consistent with the goals of our profession?"

"The long-standing and continuing gender gap in compensation should be considered unacceptable in any business," concluded a 2013 American Bar Association compensation report. "That gender disparity is so entrenched in the legal profession is particularly troubling in light of our profession's principles. Justice not only includes what we seek for our clients, but it also includes equal access to opportunities to succeed in our own workplaces."⁶

I. THE NUMBERS DON'T LIE

More than 50 years ago, on June 10, 1963, Congress enacted the Equal Pay Act prohibiting wage discrimination on the basis of sex.

"In 2012, women who worked full time still earned only 80.9 percent of the salaries of their male counterparts."

The Equal Pay Act made it illegal to pay workers lower wages than other workers who were doing the same work, solely on the basis of their sex. Although this was a large step in the right direction, many women remained in the types of jobs that generally paid less than their male counterparts. For those women, their pay rate obviously remained the same, and, consequently, they continued to earn less than men.⁷

Today, equality and justice continue to elude women. In 2009, full-time, year-round workers include 56.1 percent of men and 43.2 percent of women. The median income for men was \$47,100 and \$36,300 for women – 77 percent less for women.⁸

In April, President Barack Obama held a press conference describing that 77 percent statistic as an “embarrassment” to America.⁹ Soon after, the President signed two new executive orders addressing gender pay discrimination. However, even the White House is not immune – a January 2014 study by the American Enterprise Institute indicated that women working as White House staff members make on average 88 cents for every dollar that a male staff member makes.¹⁰

In controlled laboratory experiments, social psychologists have documented that, though less overt, gender stereotyping and bias remain commonplace.

The cumulative effect of bias was best demonstrated years ago by a computer simulation of an eight-level institution with equal numbers of male and female employees. The model assumed a mere 1 percent bias favoring men. After eight rounds of promotions, the top level of management was composed of 65 percent men and just 35 percent women, demonstrating that biases accumulate over time and eventually impact formal employment decisions.¹¹

A. A National Law Firm Overview

In 2009, 50 percent of law school graduates were women. “No one questions your ability to practice law,” said Bellows. “But women in the top 200 law firms are earning 86 percent of what their male counterparts get. And that’s already equalized for women who are working the same number of hours with the same responsibilities, on the same cases, bringing in the same amount of business.”¹²

According to a recent Census Bureau report, the median

income of women lawyers is 74 percent of that of male lawyers, and does not improve even when women climb within the law firm hierarchy. “Unfortunately, what starts as a \$2,000 annual gap between male and female associates accelerates to a \$66,000 annual gap between male and female equity partners.”¹³ Female income partners average \$25,000 less annually.¹⁴

B. A Closer Look at Other States

Many states have conducted studies focused on the practice of law and the discrimination faced by female attorneys. The results of those studies, no matter the state, show that gender pay bias flourishes in law firms and law practices throughout the nation.

For example:

- Washington state law firms surveyed reported “startling gender disparities at all levels – 77% of all lawyers receiving the top 25% of monetary compensation are male lawyers compared to 62% of all lawyers receiving the bottom 25% are female lawyers.”¹⁵
- The results of a 2010 Florida Bar survey showed that women lawyers earn 59 cents for every dollar earned by a male lawyer.¹⁶
- The University of Michigan Law School did a study of its graduates. The study revealed that men and women started their careers at basically equivalent salaries. However, 15 years after graduation, the female lawyers earned only 61-63 percent as much as the male lawyers. “Of importance, the study also reported that women are less likely to be married, have fewer children, and are nearly twice as likely to be childless as their male classmates.”¹⁷
- Colorado lawyer surveys likewise report “continued and pervasive income disparities between male and female attorneys.”¹⁸

C. The Missouri Perspective

Missouri’s women lawyers face the same biases, as illustrated in The Missouri Bar’s 2013 Economic Survey. The results show that:

- A female full-time sole practitioner earned 73 percent of the salary made by males in 2012. Those reporting incomes of less than \$64,000 included 51 percent of women and 38 percent of men.

- Full-time private practice respondents reflected the same pattern, with 64 percent of women lawyers, compared to 39 percent of men, reporting income of less than \$90,000.

II. THE IMPACT OF SOCIAL NORMS

“[T]o combat sex discrimination, it will be necessary to change stereotypes about occupations, not just stereotypes about people.”¹⁹ But that is a task easier contemplated than done.

“[Stereotypes] cannot be changed overnight, or even over generations, as has been proved,” Phillips admitted. “We are fighting an uphill battle.”

Indeed, “[s]tereotypes drive the way we perceive, interpret, and recall events; they affect the way we think. The result is ‘cognitive bias’ – bias built into common patterns of thought and behavior, as opposed to bias that stems from dislike of a given group.” This type of bias has a wide-ranging impact, affecting everything from recruitment and hiring to compensation, training, performance evaluations, promotions, discipline and terminations.²⁰

Nowhere is the need for the breakdown of these sorts of stereotypes more compelling than within the legal profession, where longstanding gender stereotypes – “structured sets of beliefs about the personal attributes of men and women”²¹ – are firmly entrenched. “Attitudes hard-wired into the minds of men (and women) are very difficult to change,” notes social scientist Ben Waber.²²

At the root of such a faulty belief system is what social scientists call “descriptive stereotyping” – that is, focusing on how people are *presumed* to behave or will behave.²³ For more than 40 years, social psychologists have documented that this type of stereotyping can “drive ... perceptions, interpretations, inferences, retention, and recall.”²⁴

One of the key dynamics within the concept of descriptive stereotyping is

in-group favoritism – a tendency to favor people similar to oneself. This “is particularly pernicious when it alters one’s perception about the rules of fairness that should be applied when decisions about merit are being made.”²⁵ Thus, in-group favoritism “may lead to situations where objective rules are applied leniently to men but rigidly to women.”²⁶

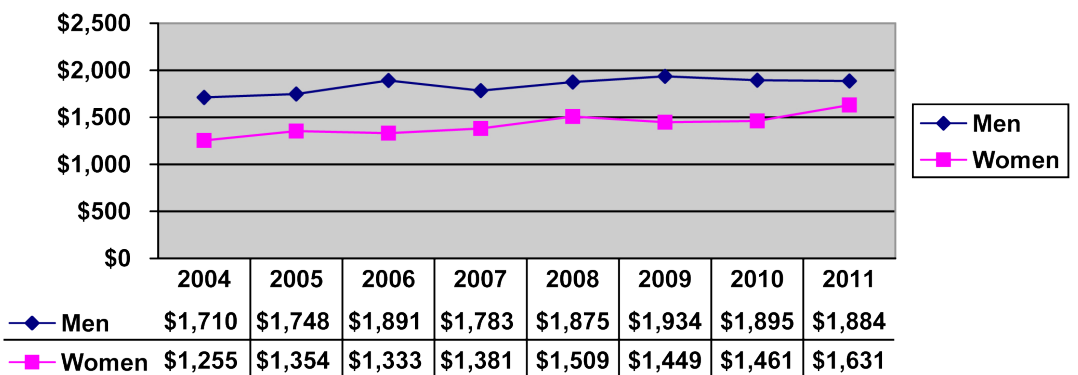
“In-group favoritism flips the common image that gender bias discriminates *against women*. In-group favoritism is a potentially powerful form of bias that discriminates *in favor of men*.”²⁷

A. Pressure on Women – and Men

While “social science documents that, in male-dominated environments, women often face pressures to play traditionally feminine roles,”²⁸ males face their own social pressures:

Professional men feel under intense pressure to fulfill workplace ideals – even if (according to management consultants) those ideals place an artificially high value on working as many hours as possible. Being a good provider still is seen as an integral part of being a good father. Fathers with child care responsibilities risk being seen as wimps, so a man who fails to perform as an ideal worker risks being seen both as a bad father and a failure as a man.²⁹

Weekly Salary Men vs. Women Lawyers



Women lawyers’ weekly salary as a percentage of male lawyers’ salary:

| 73.4% | 77.5% | 70.5% | 77.5% | 80.5% | 74.9% | 77.1% | 86.6% |

2011 Bureau of Labor Statistics, *Median weekly earnings of full-time wage and salary workers by detailed occupation and sex*. www.bls.gov/cps/cpsaat39.pdf

Ironically, “[f]athers may run up against a comparable set of assumptions when they take an active role in caring for their families.”³⁰ Though one study suggests that “fathers were viewed as more committed to their jobs ... presumably on the assumptions that fathers are stable breadwinners,”³¹ others claim that the “fatherhood bonus” vanishes when a man actually begins assuming some child care responsibilities.

Men who took parental leave received fewer recommendations and were viewed as less committed than women who did so, and men who experienced a work/family conflict received lower performance ratings than women with similar conflicts. Thus the benefit a man received from being a father becomes a liability when he tries to meet caregiving responsibilities, a role stereotypically reserved for mothers.³²

This sort of view only serves to bolster the societal assumption that women – unlike men – must balance both family and career.

“Gender pressures push men towards, and women away, from two-person careers.”³³ “Not big news: as a group, women have more responsibility than men for family caregiving.”³⁴

B. For Women, It’s Lonely at the Top

Since the early 1980s, the term “glass ceiling” has been used to describe the barrier that so often blocks women from management positions. Management expert Ann Morrison describes this barrier as something “so subtle that it is transparent, yet so strong that it prevents women from moving up the corporate hierarchy.” Morrison adds that the glass ceiling “is not simply a barrier for an individual, based on the person’s inability to handle a higher-level job. Rather, the glass ceiling *applies to women as a group* who are kept from advancing higher *because they are women*.”³⁵

The validity of this belief is in the numbers. The number of women serving at the top rungs of the law firm ladder is shockingly small. According to the American Bar Association, women comprise 64 percent of staff attorneys, 47 percent of associates, 38 percent of “of counsel” positions, 29 percent of non-equity partners, 17 percent of equity partners, and only four percent of managing partners.

“Even today, half of the nation’s 200 largest firms have only one woman or no women at all serving on their highest governing committee.”³⁶

Although women have increased access to supervisory and middle management positions, they remain quite rare as elite leaders and top executives. To explain this phenomenon, public and scientific discussion has centered on the idea of a “glass ceiling” – a barrier of prejudice and discrimination that excludes women from higher level leadership positions....

The popularity of the glass ceiling concept may stem from the rarity of women in major leadership posts, despite the presence of equality or near equality of the sexes on many other indicators.³⁷

Social psychologists Alice H. Eagly and Steven J. Karau, in a landmark 2001 research article, argue that

perceived incongruity between the female gender role and leadership roles leads to [two] forms of prejudice: (a) perceiving women less favorably than men as potential occupants of leadership roles and (b) evaluating behavior that fulfills the prescriptions of a leader role less favorably when it is enacted by a woman. One consequence is that attitudes are less positive toward female than male leaders and potential leaders. Other consequences are that it is more difficult for women to become leaders and to achieve success in leadership roles.³⁸

“The ‘think manager – think male’ phenomenon reflects gender stereotypes that associate greater status worthiness and competence with men than women.”³⁹

Stereotypes ... impact leadership succession. The fundamental aspects of many talent management systems are linked in ways that disadvantage women, creating a vicious cycle in which men continually dominate executive positions. The reasons include lack of senior leadership commitment, dearth of appropriate checks and balances to minimize gender biases, level-playing field for men and women, and gaps between design and execution in talent management programs.⁴⁰

The legal profession is certainly not immune to such issues. Bellows noted the disparity she sees within law firms in a column she wrote last year:

[W]hen it comes to climbing the ladder in their careers, women fall further and further behind.

According to the latest survey by the National Association of Women Lawyers (NAWL), the percentage of women equity partners (those who have ownership stakes in a firm and share in its profits and losses) at the nation's 200 largest law firms has remained largely unchanged at 15 percent since NAWL began its survey in 2006. And when it comes to the top leadership posts in law firms (managing partners), the numbers dwindle even more: If I were to meet with 100 managing partners from the nation's largest firms, chances are only four of them will be women.⁴¹

“With little or no voice in leadership, the status of women in the legal profession is unlikely to change. The ‘stickiness’ of the 15% equity partner statistic for the past 20 years in U.S. firms demonstrates the intransigence of the problem.”⁴²



“When it comes to climbing the ladder in their careers, women fall further and further behind.”

— Laurel Bellows

Some theorize that the absence of women in positions of leadership with the legal field can be attributed to “organizational cultures where long hours are the norm as well as the unequal division of domestic responsibilities.”⁴³

III. TYPES OF IMPLICIT BIAS

While there are many forms of biases, “[g]ender bias, in particular, is about common perceptions that people have about men and women.”⁴⁴ The once blatant gender bias – “We don’t hire women” – has been replaced by less overt expressions of the same commonplace sentiment.

A. Hiring Issues

In 2007, Stanford University professor Shelley Correll and colleagues Stephen Benard and In Paik sent out more than 1,200 fictitious resumes to employers. Though the résumés had the same qualifications and workplace performances, the study found that female applicants were significantly less likely to get hired, and, if hired, would be paid a lower salary than male applicants with children.⁴⁵

Another study conducted by two Ivy League economic experts illustrated “that when evaluators of applicants could see the applicant’s gender, they were more likely to select men. When the applicants’ gender could not be observed, the number of women hired significantly increased.”⁴⁶

B. The Marriage Penalty

Once a woman has been hired, the next challenge to her

compensation occurs when she chooses to get married. In ways large and small, organizations (law firms included) tend to penalize married women – and reward married men.

1. He Has a Family to Support

“The male in the workplace can explicitly state that he is supportive of women, even as his implicit/unconscious beliefs result in behaviors that contradict his conscious expressions.”⁴⁷

The study by Professor Correll and her colleagues “found that actual employers are discriminating against mothers when making evaluations that affect hiring, promotion, and

salary decisions, but not against fathers.” There is even data demonstrating that marriage is associated with a decrease in income for women

attorneys and an increase for men.”⁴⁸

“Too often, women’s wages are regarded by bosses as supplementary and not that important, and this impacts the wages women get,” journalist Liza Mundy said in an e-mail.⁴⁹ This could be reflective of the fact that while 85 percent of marriages consist of two-income families, the upper echelon of professional and corporate America is composed almost exclusively of “traditional” couples consisting of the male breadwinner and the stay-at-home wife.

Women respondents in a 2010 ABA compensation survey confirmed this concept when they reported experiencing the bias that women don’t need their paychecks because their husbands can support them, whereas men really need their paycheck because they are supporting their families.⁵⁰ This may have been accurate in 1960, when only 11 percent of households had the wife as the primary source of income. The 2012 U.S. Census data shows that 40 percent of “American households with children under 18 have mothers who are the sole or primary breadwinners.”⁵¹

Nationwide, 69 percent (virtually all women) of equity-partners have a full-time employed spouse or partner. Prior studies show that about half of male attorneys have wives at home full time. Lawyers who have stay-at-home wives have an advantage over both mothers and single women, as noted by one attorney quoted in another ABA report, *Visible Invisibility*: “All the male associates had stay-at-home wives who took care of all the everyday things. Even if they didn’t have children, their dry cleaning was picked

up, their dinner was cooked, their house was cleaned. And women have to do all that stuff on top of their work.”⁵²

One recent study suggests an important connection between the barriers women face at work and the marriage structure of their male colleagues. A collaboration of researchers from multiple universities studied the attitudes and beliefs of employed men from homes where their wives did not engage in paid work, worked part-time, or were employed full-time. The data revealed that the employed husbands whose wives did not work outside the home or who worked part-time were more likely to:

- Have an unfavorable view about the presence of women in the workplace;
- Perceive their workplace was running less smoothly if there were higher percentages of women, compared to perceptions of their workplace if there were fewer women;
- Find workplaces that have female leaders as less desirable places to work; and
- Evaluate female candidates for promotion as less qualified than comparable male colleagues.”⁵³

C. The Maternal Wall

The strongest and most explicit bias in the workplace is the so-called “maternal wall” bias generated by pregnancy and motherhood. Professor Correll’s 2007 study found that “mothers were 79% less likely to be hired, 100% less likely to be promoted, offered an average of \$11,000 less in salary, and held to higher punctuality and performance standards.”

“The career interruption of motherhood – either perceived or actual – is where implicit bias comes into play,” said Lucy Unger, a partner at Williams, Venker & Sanders, L.L.C. in St. Louis. “The divide tends to happen when that first child is born.”

1. Mothers Belong at Home

In the case of *Bailey v. Scott-Gallagher, Inc.*, a Virginia woman gave birth. After the doctor’s release, she called the president of the company about returning to work and was

told that “since she had delivered a child; that [her] place was at home with her child; that babies get sick sometimes and [she] would have to miss work to care for her child.”⁵⁴

That case was in 1997. Today, gender bias is more implicit. As quoted in *Visible Invisibility*, “They may prize you as a lawyer, they think you’re a heck of a litigator, but deep down they’re wondering, ‘What’s she doing here? Why isn’t she home with the kids like my wife is?’”

In *Trezza v. The Hartford, Inc.*, the company’s senior vice-president said that he expected the plaintiff, a lawyer, would be “home eating bon bons” if her husband, also an attorney, won another big verdict.⁵⁵

2. Mothers Are Undependable, Fathers Are Not

When a man needs time off to tend to family issues, “people think it reflects well on them.” However, when a woman needs time off to tend to family issues, “it is seen as a lack of commitment or a weakness.”⁵⁶

The unspoken bias that comes to light with the advent of having a child has led to numerous cases brought against employers.

In *Bailey v. Scott-Gallagher*, Lisa Bailey was fired while on maternity leave. The employer told her that “she had been terminated ‘because was no longer dependable since she had delivered a child’; ... and that [the employer] needed someone more dependable.”⁵⁷

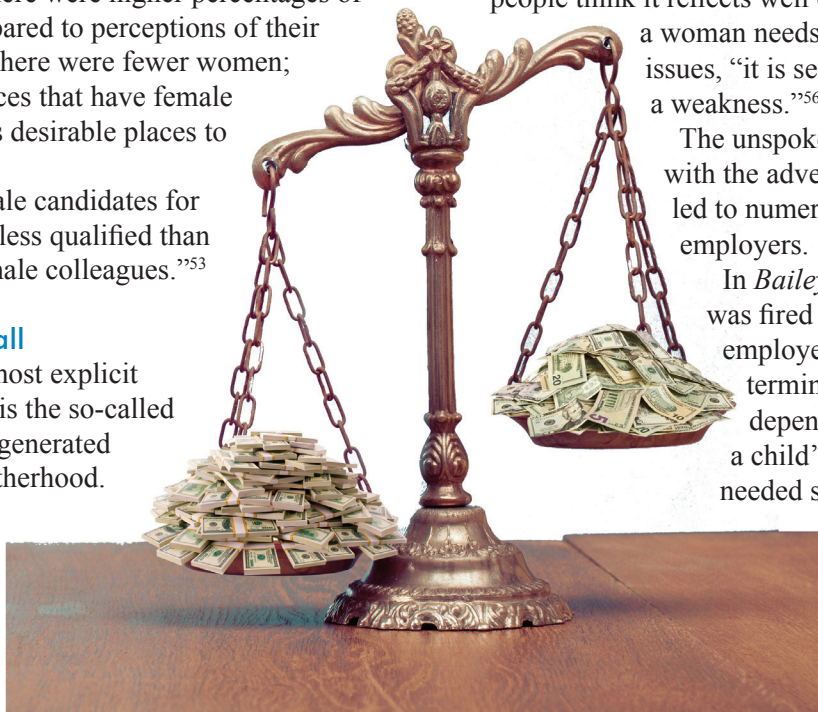
In *Trezza*, Joann Trezza, an attorney and mother of two children, testified that the general counsel of the legal department in which Ms. Trezza worked stated that working mothers cannot

be both good mothers and good workers, saying, ‘I don’t see how you can do either job well.’”⁵⁸

In *Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, a male partner told Ms. Gallina that “she was not perceived as being ‘as committed’ as the other (male) lawyers ... and he stated that she needed to decide whether she wanted to be ‘a successful mommy or a successful lawyer.’”⁵⁹

3. Mothers Are Incompetent

“This pattern typically occurs when a lawyer announces



that she is pregnant, returns from maternity leave, or adopts a reduced-hours or flexible work schedule. Maternal wall bias stems from the assumption that mothers are not as competent as others, not as committed to their jobs, and belong at home.”

The stigma associated with part-time work, which has been extensively documented, can be seen as a kind of maternal wall bias. In the law firm context, where working part-time or flexible hours also can trigger maternal wall bias, a woman’s motherhood must be considered. However, other part-time work taken for reason unrelated to motherhood does not generate the same stigma.⁶⁰

“In a study by the Massachusetts Bar, a woman lawyer who had been doing sophisticated work prior to her maternity leave returned to find herself receiving only paralegal-level assignments. Her now famous quote, ‘I had a baby, not a lobotomy!’ reflects the effects of this kind of bias.”⁶¹

In *Trezza*, the plaintiff quoted the senior vice-president of her company as subjecting her to disparaging comments “about the incompetence and laziness of women who are also working mothers.” During a business dinner, the senior vice-president, in the presence of four other male executives, allegedly said that “women are not good planners, especially women with kids.”⁶²

4. Mothers Need Protecting

“Women with children also face some of the strongest effects of implicit bias when male partners try to ‘protect’ mothers by passing them over for travel or time-consuming projects,” said Bobbi Liebenberg, chair of the ABA Commission on Women in the Profession.

For example, in *Trezza*, the plaintiff claimed that her employer failed to consider her for promotions because she was a mother. Ms. Trezza said she was not considered for promotion because the new management position required extensive traveling, and her supervisors assumed she would not be interested because of her family responsibilities. “When asked why she had not been considered for the [promotion], the Managing Attorneys . . . told plaintiff that because she had a family they assumed she would not be interested in the position.”⁶³

D. Double Standards

Twenty-five years of studies have supported the veracity of the common saying, “Women must work twice as hard to achieve half as much.” “Double standards” is the term that “refers to the fact that women have to work harder to prove that they are as competent as their male colleagues

because they do not enjoy the same default assumption of competence as do men.”⁶⁴

“Women need to provide more evidence of competence before evaluators feel confident about their competence. Not only do women have to work harder to establish competence; they also can make fewer mistakes than men before they are judged incompetent.”⁶⁵

1. Men Are Skilled, Women Are Lucky

Unconscious perceptions are exhibited in bias about how genders *should* act. “For instance, men are supposed to be more assertive, competent and committed to their careers compared to women. Likewise, women are supposed to be more sensitive and caring.”⁶⁶

“Men’s failures tend to be attributed to situational factors (he was very busy) while women’s tend to be attributed to personality traits (she has trouble dealing with deadlines). When men’s successes are [credited] to personality traits, they will be seen as deserving of larger rewards than women for the same accomplishment.”⁶⁷

Men’s successful performance on tasks tends to be attributed to stable personality traits (he’s a natural litigator) while women’s successes tend to be attributed to transitory situational factors (she got lucky).⁶⁸

2. Men Are Tough, Women Are Pushy

“[S]tudies show that if a woman is strong and direct, they think she’s overbearing and won’t be liked, whereas a man in that same context, people say, ‘Gee, he’s good; he’s tough,’” said Carolyn Lamm, a partner at White & Case, L.L.P. in Washington, D.C.⁶⁹

Calvert explained a common bias with the following scenario:

A female lawyer taking a deposition does a good job, but doesn’t hammer the witness into making a damaging statement. Her supervising partner assumes she isn’t tough enough and in the future doesn’t give her difficult depositions, says in her evaluation she isn’t sufficiently aggressive, recommends a meager bonus, decides she isn’t worth mentoring as another lawyer, and doesn’t support her bid for partnership. A male lawyer who performs the same in a deposition? Calvert says it may go unnoticed. If it is noted, the supervising partner may assume the lawyer had a strategic reason for not being aggressive or decide the lack of aggressiveness doesn’t matter, probably forgetting

about it at evaluation, compensation and partnership-consideration time.⁷⁰

3. ... And Women Talk Too Much

Researchers have found that “high-powered women feared a potential backlash from speaking too much. But the most critical finding of the study was that they were, in fact, correct in their concerns. ‘Results showed that a female CEO who talked disproportionately longer than others in an organizational setting was rated as significantly less competent and less suitable for leadership than a male CEO who talked for an equivalent amount of time.’”⁷¹

4. Education Trumps Experience, Unless ...

“A recent *Harvard Business Review* study found that respondents strongly preferred an educated candidate over an experienced one as long as the educated candidate was male; when the educated candidate was female, the ‘education advantage’ disappeared, and many respondents favored the experienced candidate over the educated one.”⁷²



“Stereotypes cannot be changed overnight, or even over generations. . . . We are fighting an uphill battle.”

E. Double Binds

Double binds have been described as the proverbial “stuck between a rock and a hard place” scenario. A respondent to the ABA Commission on Women in the Profession survey described “double bind” succinctly when she wrote: “I know that I will be punished [for] raising my concerns, and yet I know that I’ll be mistreated if I don’t.”⁷³

1. Catch-22

“Behavior that is acceptable in men often is considered unacceptable in women.”⁷⁴ In certain work environments, very few women succeed because they are penalized both for behaving and for *not* behaving a certain way. For example, in an appeal to the U.S. Supreme Court, the prevailing law firm’s team included a senior female associate, who had contributed significantly. The firm’s managing partner, a male, sent out a congratulatory e-mail praising the team – listing every name but hers. When she sent a private e-mail bringing her contributions to the case to his attention, the managing partner called her a “prima donna.”⁷⁵

“Such backlash against women for self-promotion has been repeatedly documented by research. Women who self-promote themselves are judged as unlikeable by both men and women. Men experience no such loss in positive

evaluations when they self-promote.”⁷⁶

As the U.S. Supreme Court in *Price Waterhouse v. Hopkins* noted: “An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.”⁷⁷

2. Everyday Denigration

“Microaggressions are brief, everyday exchanges that send denigrating messages to individuals because of their group membership.”⁷⁸ They have also been described as subtle, implicit verbal and nonverbal (visual) insults often performed by the offender without realizing the effects.

“In the world of business, the term “microinequities” is used to describe the pattern of being overlooked, underrespected, and devalued because of one’s gender.

They are often unconsciously delivered as subtle snubs or dismissive looks, gestures, and tones.⁷⁹ “These exchanges are

— *Megan Phillips*

so pervasive and automatic in daily conversations and interactions that they are often dismissed and glossed over as being innocent or innocuous.”⁸⁰

“The day to day experiences of women lawyers often include invisibility: the absence of a greeting or eye contact, minimal interaction, an unfriendly tone of voice, a facial expression communicating impatience or cool and rejecting body language.”⁸¹

Because this type of bias is invisible, “perpetrators are unaware that they have insulted or demeaned the [victim] and are allowed to continue in the belief of their innocence.”⁸² The victims of these microaggressions are placed in a catch-22 position, where they face the backlash no matter how they react – confronting the perpetrator or choosing to do nothing.

“The accumulated effect of these microaggressions is debilitating.” “[T]hey impair performance in a multitude of settings by sapping the psychic and spiritual energy of recipients and by creating inequities.”⁸³ “Women who have left firms repeatedly say there was no single incident that drove them away. Instead, the constant subtle aggression, exclusions, insults, and invalidations drove them out of their firms.”⁸⁴

However, in *Faragher v. City of Boca Raton*, the U.S. Supreme Court directed courts, when determining whether a business had a sexually objectionable environment, to determine the severity of the perceived actions – “whether it is physically threatening or humiliating, or a mere offensive utterance.” The Court wrote that “‘simple teasing,’ offhand comments, and isolated incidents will not amount to discriminatory changes in the ‘terms and conditions of employment.’”⁸⁵ The Court explained that Title VII does not prohibit these actions.

F. Ambivalent Sexism

“Ambivalent sexism” is when women who show traditionally feminine behaviors are met with benevolent approval but not necessarily taken seriously, while women who do not are respected, but met with hostile disapproval.⁸⁶ The theory of ambivalent sexism “accounts for the contrasting perceptions of the warm but incompetent woman, who fits traditional subgroups (housewife, sexy chick), and the competent but not warm woman, who fits nontraditional subgroups (career woman, feminist).”⁸⁷

Social science documents that, in male-dominated environments, women often face pressures to play traditionally feminine roles. “I’m like the frigging firm mom,” said one woman, who clearly felt trapped by the role, “People come to me if they’re having problems.”⁸⁸ Women may well find themselves facing pressure, at times gentle and well-meaning, to contribute to law firms in ways that are important to the long-term health of the firm (e.g., associate development, pro bono committee, running the summer program), but whose value is not rewarded when compensation levels are set.

A male West Coast partner discussed the two “types” of older women in the firm who have succeeded: One type is

real intensely aggressive, kind of a nasty personality, that is feared in law firms Or there’s the perennially moderate, wishy-washy, milquetoast kind of woman, who may do well because she doesn’t offend anyone. She may be very bright, but she’s not going to rock any boat in any way ever. Those women either had to fly under the radar and be the nice daughter, or be this kind of feared intense type that nobody wants to offend.”⁸⁹

IV. PERPETUATING THE PROBLEM

These insidious and ingrained biases, in all their many forms, simply perpetuate the economic penalty women

tend to suffer by virtue of being female. They do this by bolstering subjective criteria that automatically favor men in the workplace – even when other seemingly important employment factors would clearly seem to give the edge to women.

As a result, women more often than not have one figurative arm tied behind their backs when it comes to attaining billable hours goals, gaining credit for new business, receiving compensation adjustments, and establishing the networking opportunities so vital for client recruitment and retention – all vital factors in compensation review and adjustment.

A. The Compensation Committee

There may be a kernel of truth in the old adage that “hard work is its own reward,” but most people expect that work to be recognized and rewarded with occasional adjustments in compensation. For female lawyers, that process can be both confusing and frustrating

“Knowledge of a particular law firm’s compensation system provides the key to understanding the behaviors and interpersonal relationships that are likely to exist among that firm’s attorneys.”⁹⁰ However, the reality is that there are a variety of law firm compensation systems being used today, “each with its own nuances designed for the firm’s particular culture... [Still], client origination, revenue collection, and billable hours remain the three key criteria.”⁹¹

The ABA compensation study affirmed that “[m]any respondents felt that their firm’s compensation systems lacked transparency.” Thirty-seven percent of equity partners and 22 percent of income partners within that study “reported that the criteria the firms use to determine partnerships levels were clear or extremely clear.”⁹² In those types of situations, “[w]omen who suspect that they are being shortchanged in their compensation ... cannot prove their concern because they are denied access to verifying information.”⁹³

1. Composition of Committee

As noted earlier in this article, the number of women serving in top management positions within law firms is shockingly small. Not surprisingly, the same situation exists within many firms’ compensation committees.

“A key factor in assessing the gender gap in law firm compensation is that law firm partnership ranks remain overwhelmingly male.”⁹⁴ Likewise, data suggests that the memberships of compensation committees are overwhelmingly more likely to be male. In this situation, “where

decisionmaking involves secrecy and complex sets of often countervailing factors, in-group favoritism is more likely to have an influence.”⁹⁵

The ABA survey tells the story:

Respondents commented frequently on the lack of diversity on the committees that decide compensation. One-fifth of the women surveyed indicated that there were no women on the committees deciding their compensation. About half had one woman on the relevant committee. Research shows that one woman serving on a committee of men can give rise to tokenism dynamics that negatively affect both the woman herself and her ability to influence decisionmaking.⁹⁶

“[S]ubjective judgment of the senior management plays a huge role ...,” said one survey respondent. “It is staggering how two partners who are similarly situated on paper can end up in very different organizational tiers, and how people in the same tier can be incomparable on paper.”

“When you see the distribution of compensation among partners, it has the appearance of a solid old boys’ network,” said another.⁹⁷

2. Billable Hours

While coming under fire in recent years from those who favor alternative fee arrangements, the billable hour remains the ultimate arbiter of legal fees – and of lawyer evaluation and compensation. Indeed, if anything, the number of billable hours a lawyer must accumulate each year has steadily risen. Not surprisingly, this trend has tended to penalize female lawyers who – as mentioned earlier – must often balance both career and family to a far greater extent than their male colleagues.

“[W]hereas 1,300 billable hours was considered full time in the 1960s, full time at large law firms today typically requires at least 1,950, and, anecdotally, ‘go-getter’ associates are reported to be pushing 3,000 billable hours a year.”

This sort of schedule “virtually requires full-time lawyers to have ... a ‘two-person career’: a lawyer who earns virtually all of the family income and a spouse who supports his or her career. The vast majority of female lawyers do not have a stay-at-home spouse. In sharp contrast, the bulk of male law firm partners – 78% - earn most or all of the family income.”⁹⁸

A 2012 paper analyzing performance differentials among

“I’ve yet to be on a campus where most women weren’t worrying about some aspect of combining marriage, children, and a career. I’ve yet to find one where many men were worrying about the same thing.”

—Gloria Steinem

young lawyers noted “clear evidence of a gender gap in annual performance” with respect to billable hours.” The same paper, in analyzing the situation, reported:

[T]here is a differential effect of the presence of young children on billable hours. Having young children results in female lawyers billing fewer hours but does not affect male lawyers. In particular, we find that female lawyers with young children bill around 160 fewer hours per year, while male lawyers with young children do not experience a significant decline in the number of hours billed. This suggests that female lawyers shoulder a greater part of the household responsibilities than male lawyers with regard to raising [children].⁹⁹

In support of this assertion, the paper notes that male lawyers bill 10 percent more hours than their female counterparts, and bring in more than double the new client revenue. Given another conclusion of that report – that billing 100 additional hours per year leads to a 3.1 percent increase in salary – it is easy to see how the gender pay gap is sustained.

3. Origination

The other primary factor in law firm compensation decisions is origination credit – that is, quantifiable evidence of the initiation or retention of client work. Indeed, the ability to build and maintain a “book of business” has become increasingly crucial to decisions regarding both advancement and compensation within contemporary law firms.

A 2013 study conducted by Keshet Consulting revealed that, although “both men and women participate in client pitches, such pitch group participation was far more significantly correlated with origination credit for men than for women. Moreover, ... male lawyers received significantly more internal firm referrals for new work and had a higher percentage of the origination from internal referrals.”¹⁰⁰

Origination models can be designed in many ways. However, as the ABA's compensation study reveals,

[t]he most common is the "first touch system" system, in which the partner who brings in the client is paid forever on all future work billed by that client – whether or not the "originator" did any work on the matter at hand. This system is five times as common as one in which the originator only receives future credit if he or she is the attorney whom the client actually calls to work on a new matter¹⁰¹

Respondents reported that their firms did not provide women with equal opportunity to participate in client pitches. When they were invited to participate, respondents reported that they often participated in successful client pitches but did not receive a proportionate share of the origination credit or otherwise have their contribution recognized financially. Over half of the survey respondents reported situations in which they had participated in "beauty contests" but had not been included in the client work that resulted.

In addition, more than half of female equity and income partners "reported that in the last three years they had participated in successful client pitches in which they did not end up billing a significant number of hours. Forty-two percent of ... equity partners" reported this happening once or twice, but 14% of equity partners had "experienced this three or more times."¹⁰²

One respondent to the ABA survey clearly had her own experience in mind when she opined that origination credit

is skewed by (1) historical firm client control (typically male), (2) individual partner generosity or lack of same in attributing origination to others when multiple efforts have gone into attracting and keeping a client (more power partners (usually male) may claim origination without challenge from others). The final piece of compensation is entirely subjective – board's discretion to consider special circumstances deserving additional comp – male dominated ideas of measuring value and what is "special."¹⁰³

Another respondent said she has "had experiences where

men tried to undermine my involvement, take credit for my work, claim credit for relationships when the client literally did not know who they were, and in the past, I have literally been told I was stupid to think the client was basing its decisions to use my services on me."

In her book *Ending the Gauntlet: Removing Barriers to Women's Success in the Law*, author Lauren Stiller Rikleen wrote that "women frequently described circumstances where, for example, male rainmaking partners shared billing origination or responsible attorney credits with other male partners considered critical to their practice, but did not do so with women who made similar important contributions."¹⁰⁴

"Nearly one-third (32%) of ... income partners, and one-fourth (27%) of ... equity partners, reported that a partner had tried to intimidate, threaten or bully her into backing down in a dispute over origination credit."¹⁰⁵

"The startling fact that 30% of the [ABA] survey respondents reported that they had been subjected to intimidation, threats or bullying to back down after they had disputed the allocation of origination credit for a client speaks volumes as to the need for improved compensation appeal procedures," the ABA compensation study noted.¹⁰⁶

4. Succession

In the ABA study, the majority of respondents "reported that their firms allowed the attorney with origination credit to bequeath it to another attorney if the originating attorney left the firm. The most common system reported was to allow originating attorneys to decide who would inherit their origination credit, with little or no oversight by the firm."¹⁰⁷

"Clearly, in institutions in which women tend to be more junior partners, systems that continue to reward lawyers for



service rendered years ago will disadvantage women far into the future.”¹⁰⁸

5. Networking

The impact of implicit biases “can also be seen in the study of informal networking that can become critical to an individual’s advancement and compensation... Here, the research is clear: ‘The benefits of having informal networks are not the same for women and men... Women are less likely than men to have high-status network members and to have diverse networks.’”¹⁰⁹

Such informal opportunities “can play a key role in advancement and compensation decisions. When women have less access to the informal network structures upon which people rely to advance themselves and their friends, however, the result is continued inequity.”¹¹⁰

“[N]etworking does not affect hours billed but has important consequences for raising new-client revenue. An extra hour spent networking is associated with raising an additional \$2,800.”¹¹¹

Victoria Pynchon was a commercial litigation lawyer in Los Angeles and worked with one of the firm’s biggest clients, Mitsubishi Motors.

As an associate, she was second in charge of the account, although she was never included in business trips to Japan that the senior partner took. The only opportunity she had to meet her clients was when they came to L.A., “and the evening’s activity was going to be a strip club,” says Pynchon, who was told to make her own decision about “whether it was appropriate for her.” Knowing how uncomfortable she’d feel, she said, “No, I’m not going to come. Have fun.”¹¹²

6. Reluctance to Self-Advocate

In addition to billable hours, origination credit and other intangible factors, the ability to advocate on behalf of one’s compensation is a crucial part of the review process. Yet, once again, ingrained beliefs as to the proper role of women in the workplace often result in women being reluctant to speak up for themselves.

“Social science studies suggest that women are often reluctant to negotiate compensation due to fear of backlash,

fueled by gender stereotypes.”¹¹³ In fact, research “documents social reprisals for women who self-promote.”¹¹⁴

This was verified in another study, which found that “women are penalized when they try to negotiate starting salaries. Male evaluators tended to rule against women who negotiated but were less likely to penalize men” Likewise, “women who applied for jobs were not as likely to be hired by male managers if they tried to ask for more money, while men who asked for a higher salary were not negatively affected.”¹¹⁵

“Nearly one in three [female] equity partners (32%) felt uncomfortable or extremely uncomfortable raising such issues, as compared to 45% of income partners.”¹¹⁶

7. Other Factors

Other factors within the compensation review process that can adversely affect women include inconsistent application of criteria to be considered and subjectivity in dealing with those criteria. And, as has been demonstrated, the in-group favoritism within a compensation committee

completely (or predominately) composed of men tends to negatively impact women.

Indeed, in order to prove competence to male supervisors who unconsciously assume otherwise, “women must breach three successive partner filters: what he notices, how he interprets his

—Clare Boothe Luce

observations, and his memory of that interpretation.”¹¹⁷

The situation is further complicated by entrenched attitudes among longtime partners who feel that there is only one way to practice law effectively – and that way is exactly the way they have always done it.

“It is critical that partners, particularly senior partners, recognize the gap between their experiences and those of many of today’s associates Partners who base their evaluations on their own life experiences may be allowing gender bias to creep into their thought process.”¹¹⁸

B. Gender Fatigue

The topic of gender bias isn’t something new to law firms; indeed, many law firms happily take on gender discrimination cases for clients while internally sustaining an environment that – usually unknowingly – allows gender bias within its own ranks. However, in an effort to appear progressive, some law firms have simply swept the problem under the rug by initiating steps that prohibit more

overt forms of bias while ignoring the more difficult, innate issues that continue to exist. This happens so often that a term has been coined to describe it: “gender fatigue.”

“Gender fatigue refers to a moment in time in which gender discrimination may still be a feature of modern workplaces but is repudiated in such a way that workplaces appear to be gender neutral.”¹¹⁹ Typically, this is the result of “a desire to demonstrate a progressive attitude by insisting that gender equity has been achieved, knowing that being perceived otherwise is no longer socially acceptable.”¹²⁰

However, as with so many other instances of implicit bias, talk is cheap. “Studies demonstrate that even where gender inequities exist, they are ‘masked by a strong rhetoric of gender equality, which makes articulating experiences of gender discrimination difficult.’”¹²¹

CONCLUSION

There has been little progress toward closing the gender pay gap in the 51 years since the Equal Pay Act of 1963, as evidenced by the need for President Obama’s two executive orders in April. “We may see more progress over the next couple of generations,” Phillips said.

Implicit bias has been exposed through years of studies, books and blogs, but advancement toward equality in the workplace will take years. “Unless and until the firm makes its partners aware of the *need* to recognize” and correct these biases, “implicit bias will inevitably be a factor affecting law firm compensation of women.”¹²²

Workplace pay equality is not only right for women, but affects law firms as well. “Law firms lose money when women leave,” Phillips said. “The firm loses the investment they placed in that attorney, clients are unhappy when their lawyer leaves, and firms know this.”

“[T]he good news is that many of the aspects of law-firm compensation that present the greatest difficulties for women are the same elements that knowledgeable management consultants have identified as outdated and/or not in the best long-term interests of today’s new, larger law firms. Changing law firms’ compensation systems will not only help diversity. It will enhance the economic robustness of law firms.”¹²³

In the summer issue of *Precedent*, coming in August, we will offer solutions to close the gender discrimination pay gap, address implicit bias, and enhance law firms’ financial bottom line.

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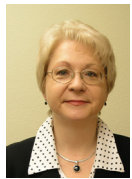
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