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MCLE Self-Study

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Elimination of Bias

Gender Bias in the Law

"Not a suitable job for a woman" is a phrase you rarely hear today. Most young women are brought up to think they can be anything they want to be. Yet women constitute only one-fifth of full professors, according to the American Association of University Women; 1.6 percent of CEOs and 9.4 percent of executive positions in Fortune 500 companies, according to a recent Catalyst study; and only 3.3 percent of electricians and 2.6 percent of professional firefighters nationwide, as found by the U.S. Department of Labor, Women's Bureau.

Though you might hope that gender bias would be less apt to develop and flourish in the legal profession, only 17.9 percent of law firm partners nationwide are women, according to the NALP Foundation for Law Career Research and Education. And this is true despite the fact that since the mid-1980s more than 40 percent of entering law students have been women, and about half since 2001. The number of female partners in California has hovered around 19 percent for the past decade, even though nearly half of California law firm associates are women.

Indeed, the argument that "women just need to work their way through the pipeline" has long since been disproven, as statistics about women in the law exemplify. To eliminate gender bias in the legal profession, it is essential to understand and eliminate gender stereotyping.

Social psychologists, in controlled laboratory experiments, have documented that gender stereotyping and bias remain commonplace, though less overt, today. Some bias stems from a desire to keep people in traditional gender roles. For example, in one case a woman was fired while on maternity leave. The employer reasoned that "she was no longer dependable 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; and that [the employer] needed someone more dependable." (*Bailey v. Scott-Gallaher, Inc.*, 480 S.E. 2d 502 (Va. 1997).) Such stereotyping, which *prescribes* how women should behave, is called prescriptive stereotyping.

Other stereotyping involves not prescriptions about how women should behave but assumptions about how someone will or does behave. One example is the experience of an in-house lawyer who shifted to a part-time schedule. She told the Project for Attorney Retention: "[B]efore I went part-time, when people called and found I was not at my desk, they assumed that I was elsewhere at a business meeting. But after I went part-time, the tendency was to assume that I was not there because of my part-time schedule—even if I was out at a meeting." Note that the bias exhibited was not *prescriptive*—that mothers *should* be home with their children; it was *descriptive*—that, as a part-timer, this lawyer was in *fact* at home with her children.

Stereotypes 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. Women as well as men exhibit patterns of cognitive bias fueled by gender stereotyping.

Cognitive bias means that stereotypes may affect our interactions even with people we know well, by influencing what we notice about someone, our interpretations of their behavior, how we interpret ambiguous events, and what we remember about them. The common notion that stereotypes operate only when one person knows little about another person is false.

The Dangers of Hidden Bias

While some bias is open, much more of it is hidden. Much bias is built into our everyday sense of "the way things are" and into our everyday interactions. This type of bias is triggered automatically and will control behavior unless the particular patterns of bias are brought to consciousness and self-consciously controlled. Such bias affects how ambiguous information is interpreted, how causation is inferred, and which information will be remembered and for how long. A popular way to measure hidden bias, developed within the past decade, is the implicit association test, or IAT. (You can learn more about the IAT and take a short test focusing on age bias at implicit.harvard.edu/implicit/.) Many who take the test are surprised when they see the strong effect of stereotypes on their automatic associations.

Hidden bias affects workplace interactions in many ways, from hiring to firing. In interviews it influences friendliness, eye contact, body lean, speaking time, and number of smiles. Interviewers trained to mimic uncomfortable behavior elicit poorer performance from interviewees, a finding that helps explain why hidden bias can create self-fulfilling prophecies, as candidates from stereotyped groups appear to interview less well than the general run of candidates.

Cognitive bias affects not only recruitment and hiring; it can also influence compensation, training, performance evaluations, promotions, discipline, and terminations, according to Ford and Harrison LLP, a management-side

employment law firm. As a response Ford and Harrison recommends that employers engage in a comprehensive audit and redesign of their employment practices to lessen the potential for bias.

It is a common misconception that cognitive bias is uncontrollable because it is unconscious. In fact, though stereotype *activation* is automatic, stereotype *application* can be controlled. That is, our snap judgments may arise automatically, but we can keep from acting on those judgments if we are aware of them. Today, a substantial literature explores behaviors—institutional and personal—that social actors can adopt to avoid being "clueless," to use the vernacular. This is all the more important because while open, explicit bias has fallen sharply in recent decades, cognitive bias has changed very little.

The first step in controlling cognitive bias is to spot it when it occurs. The following descriptions, based on a review of about 250 social psychology studies, is designed to help you spot gender stereotyping. Given the statistics cited earlier regarding women in the law, this is a pressing issue in the legal profession.

The Glass Ceiling

The "glass ceiling"—a term that refers to the bias women often encounter simply because they are women when they aspire to jobs of significant power and responsibility—is built from both descriptive and prescriptive stereotyping.

Imagine a law firm partner. Most of us envision a white man. It's not that we think that law firm partners *should* be white men—not prescriptive bias. It's that we think—in fact, we know—that most law firm partners *are* white men. Descriptive bias reflects the fact that we are measuring any individual candidate against this image, which makes it more difficult for a woman or a man of color to seem like partner material. The patterns of descriptive stereotyping, which make it harder for nontraditional candidates to establish competence, can be triggered by race as well as sex; hence the "concrete ceiling" faced by women of color, who compose a mere 1.48 percent of law firm partners.

Descriptive bias: Trying twice as hard to achieve half as much. Several types of bias help explain why women often have a harder time than men establishing that they are go-getters. These patterns are not based on prescriptions of how women should act but instead involve descriptions of how they are assumed to act.

Attribution bias: Skill in a man is viewed as luck in a woman. When a man wins a big case, he is usually seen as skillful and having the right stuff; a win by a woman is often held to prove that "she just got lucky" or drew a good judge. As an example of this bias, in a lawsuit involving academia, a department characterized a man with few publications as "a nascent scholar, soon to blossom"; a woman was denied tenure because she had not published enough. (*Lam v. University of Hawaii*, 1991 U.S. Dist. LEXIS 20572 (2001), rev'd, 40 F.3d 1551 (9th Cir. 2004).) Because of attribution bias, men may also be given larger rewards or greater recognition than women for the same performance or accomplishments.

Leniency bias: Objective standards are no guarantee of objectivity. When a man is late in finishing an assignment, for example, he is deemed to be busy; a woman in a similar situation has "trouble with deadlines." An objective criterion—in this case a time deadline—does not guarantee that people will be judged objectively against the criterion.

Recall bias: Men's mistakes are soon forgotten, but women's are remembered forever. Because of unstated assumptions about competence, a man may make mistakes that are often soon forgotten as anomalous, while a woman's mistakes may long be remembered as confirming that she "doesn't have what it takes."

Casistry: When standards shift. 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.

Polarized evaluations: When she's good, she's very, very good, but ... Superstar women in traditionally masculine jobs tend to get higher evaluations than men with similar performance. But women who are merely excellent tend to get sharply lower evaluations than comparable men.

Role incongruity: "She just doesn't fit in." Highly paid jobs, almost universally, are in traditionally masculine fields—blue collar as well as white collar. Our schemas of such jobs are gendered masculine—a plumber, for example. Women may "just not fit in" at an oil refinery, where masculine horseplay is the norm and pornography adorns the walls; or at an investment banking firm, where men brag about long hours worked and envelop their jobs with an aura of cowboy masculinity.

Prescriptive bias: The competence penalty. Even when women establish that they are go-getters, sometimes they are penalized for being too competent. In such situations, women have to choose between being liked but not respected, or respected but not liked. The following four common patterns all stem from unspoken prescriptions that women should conform to feminine stereotypes. Not surprisingly, such bias can have a detrimental effect on women attorneys who aspire to make partner.

He's assertive; she's abrasive. When a female CEO is called a "bitch" or "too ambitious"—as was former Hewlett-Packard CEO Carly Fiorina in situations where a male CEO would be seen as "hard-driving" or "knowing his own mind"—glass-ceiling bias is at work. Note the unacknowledged prescriptive norm that women should be demure and reassuring rather than assertive and goal-driven.

She's a shameless self-promoter; he knows his own worth. Studies show that respondents tend to find it distasteful when women, but not men, point out their own accomplishments.

Women can succeed only in womanly roles. In certain environments, women may get ahead by adhering to traditionally feminine roles: the "princess" who aligns herself with a powerful man; the "pet" who provides uncritical admiration for those whose opinions matter; the "vamp" who uses her attractiveness to appeal to powerful men. But women who do not follow such conventional feminine scripts fare poorly. Note that bias may still keep back most women in an environment in which a few women manage to succeed; the key question is whether advancement is offered to women on the same terms as it is to men.

The Catch-22. In certain work environments, very few women succeed because they are penalized both for behaving and for not behaving a certain way. As the U.S. Supreme Court in *Price Waterhouse v. Hopkins* (490 U.S. 228 (1989)) 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."

The Maternal—and Paternal—Wall

In some workplaces, including law firms, women face few obstacles so long as they have no children, but once they become mothers they encounter the "maternal wall." Studies show that pregnancy and motherhood are key triggers for gender stereotyping.

To judge from existing case law, women often are told that "it is impossible to do this job well and be a good mother." Likewise, pregnancy is assumed to "soften" a woman. One study found that the evaluations of pregnant women managers "plummeted" due to stereotyping that is both descriptive and prescriptive. Thus, pregnant managers get the prescriptive message that they should display qualities associated with motherhood but not with management, such as being nurturing and reassuring, and the descriptive message that pregnant women "are too emotional" to be good managers.

Another study found that mothers were judged less competent and less suitable for management positions than those who were not mothers. Though 84 percent of women who were not mothers were recommended for hire, only 47 percent of mothers with similar résumés were recommended. When study respondents were willing to offer jobs to mothers, they offered an average of \$11,000 less in salary to them than to women without children for the same position.

In another recent study, respondents tended to rate mothers as less committed to their jobs than those who were not mothers, and to apply more rigorous punctuality standards to them too. Perusing similar résumés for job candidates, respondents were willing to allow fathers and women without children to be late more often than mothers without letting it negatively affect their suitability for hire.

The strong stigma associated with part-time work in professional positions corresponds to maternal-wall bias, notably the negative competence and commitment assumptions triggered by motherhood.

Though men may gain advantage from the status of being a father, this "fatherhood bonus" does not apply to men who seek an active role in family care. In one study, fathers were held to more lenient performance and time-commitment standards than both men who were not fathers and mothers.

In another study, fathers were viewed as more committed to their jobs and offered an average of \$4,000 more in salary, presumably on the assumption that fathers are stable breadwinners.

Yet in other studies, 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 receives from being a father becomes a liability when he tries to meet caregiving responsibilities, a role stereotypically reserved for mothers.

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