

Building Momentum For The Pay Equity Movement In BigLaw

Law360, New York (December 21, 2016, 11:04 AM EST) -- What does it mean for a woman lawyer when she pursues a career in private practice in 2016? She is equally likely to graduate at the top of her law school class, equally likely to be hired by a law firm and equally likely to approach her work with enthusiasm — but very unequally likely to be paid the same as her male colleagues. Outside of the practice of law, the explanations for why there is a pay gap run the gamut, including the notions that women need to catch up as they are new to the workforce or the fact that motherhood and the part time wage penalty are to blame.[1] While studies have shown multiple and complex reasons for the pay gap, the facts in BigLaw and in the legal profession as a whole are, of course, otherwise. Women have been graduating from law schools in very large numbers for over 30 years and the majority of women in firms work full time and long hours. Yet in spite of their talent, ambition and plenty of hard work — women lawyers get paid less at every level of practice.

The pay gap shows up within the first few years, and then widens up the ranks of law firm positions.[2] Not only do women fail to achieve each higher equity and nonequity partnership as often as men, when they do get promoted, their income does not keep pace with their male colleagues. Recent data show that women equity partners — those at the highest level of law firms — earn 80 percent of their male peers.[3] In more concrete terms, experienced women lawyers have to work 73 more days than men, until April 14 of the following year, simply to earn what their male colleagues enjoyed on Dec. 31 of the year before.[4]

For 30 years, the [American Bar Association Commission on Women in the Profession](#) has been surveying, monitoring and supporting equitable advancement and compensation of women lawyers. The commission has sponsored compensation initiatives such as "Closing the Gap: A Road Map for Achieving Gender Pay Equity in Law Firm Partner Compensation"[5] and has engaged with experts, including social scientists, to recommend meaningful progress in law firm compensation systems. The commission's work shows that in far too many law firms, there continues to be a gender pay gap and parallel gaps in law firm leadership and members of compensation committees.

Why Does the Pay Gap Continue to Exist?

When BigLaw hires associates from law schools or after clerkships, men and women generally start at the same salary.[6] This is lockstep — a system many BigLaw firms continue to embrace. However, as women associates progress into more senior roles, their opportunities to litigate large cases, receive credit for originating clients and become a partner lag behind their male counterparts.[7] A greater proportion of women are placed in



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“counsel” positions than in partner positions, a placeholder for lawyers that firms deem not “suitable” to become partners.[8] Even after becoming a first-level or nonequity partner, women are frequently without a sponsor or left out of the grooming process. In some firms, whether by design or through implicit bias, women lawyers have fewer opportunities for client networking and client marketing. These reduced opportunities mean not only less client visibility but also less ability to originate clients, distribute work or be involved in leadership. The partners who make compensation decisions are typically limited to a small group of senior lawyers and are less likely to be diverse.

The result is no surprise and what the bottom-line data show: fewer women in the top ranks of firms and a well-known compensation gap between men and women equity partners. The typical decision-making dynamics perpetuate the status quo so that year after year, the vast majority of private firms have many fewer women than men at the top.[9] Moving firms is not necessarily a solution as women face the “prove it again” problem.[10] If women move in a team, they are often perceived as service partners to the male team leadership and if moving alone, need to prove their worth while their male counterparts are assumed to be of value.[11]

The crux of compensation in most law firms is origination credit. In a survey developed by the Center for Worklife Law and the commission, 41 percent of white male lawyers but 60 percent of women lawyers reported that they are pressured to service other partners’ clients rather than originate their own.[12] Further, women partners have reported that men can be reluctant to split credit with women and will more easily do so with men. Some firms penalize women when they take maternity leave by counting their metrics as zero for the months they are on leave, and sometimes transferring women’s clients to male partners.[13] Of course, not all firms have these impediments although there are enough reports to conclude that “the fact that women report lower origination credit is often the result of gender bias.”[14]

A decade’s worth of multiple bar association initiatives, conferences, corporate law summits, detailed research reports and opinion pieces has seemingly fallen on the deaf ears of BigLaw. But recent events — including this past election cycle — presage substantial movement towards pay equity in law firms. While we are not in the business of predicting the future, there are tangible signs that very quickly in the next few years law firms will simply not be able to rest on inaction when it comes to gender pay equity and the broader arena of advancement of women into senior law firm roles. Of course, that assumes that enough women will remain at these firms and stay engaged.

What Signs Show Meaningful Change is on the Horizon for Pay Equity?

The context for gender pay equity in the legal profession has become broad and deep. No longer are women a curiosity in legal practice, rather they are occupying high-profile roles at the top ranks of the judiciary, corporations and law schools. As shown in “A Current Glance at Women in the Law May 2016,” published by the American Bar Association Commission on Women in the Profession,[15] 24 percent of Fortune 500 chief legal officers are women; more than 33 percent of all active federal judges are women; and 31 percent of law school deans are women. When private firms cannot provide the same type of diverse profile at their senior levels, they are viewed as out-of-date, elitist and the wrong match-up for

corporate clients.

Clients, especially corporate clients, are finally demanding — not simply asking — that their outside law firms provide diverse lawyers. Companies view gender diversity as a matter of talent management: unless there is full access at all levels to a diverse range of lawyers, then clients will not have the benefit of the best talent. The American Bar Association has provided tools that clients can use with respect to their law firm providers. One is "Power of the Purse: How General Counsel Can Impact Pay Equity for Women Lawyers." [16] Written for implementation by in-house counsel, these guidelines cover the business case for eliminating the gender gap at law firms, best practices and a "Checklist of Action Items to Advance Gender Diversity among Outside Counsel." The ABA recently developed a model diversity survey template for companies and law firms to use in assessing progress on diversity of outside counsel, including gender diversity. [17]

In summer 2016, the chief legal officers of 24 Fortune 1000 companies sent a letter to their colleagues at other Fortune 1000 companies asking them to support ABA Resolution 113, to direct a greater percentage of their legal services spend to law firms that show meaningful progress on diversity. [18] This initiative followed a creative program implemented by Microsoft, in which participating firms may earn an annual bonus based on their performance in increasing diversity in three aspects of a firm's leadership: (1) leading the management of the law firm; (2) leading the law firm's relationship with Microsoft; and (3) leading Microsoft's legal matters. [19]

More and more men are advocating for gender diversity. As one male general counsel of a global company put it: "If it is only women talking about diversity, it becomes a women's issue. If it is only ethnic people talking about diversity, it is an ethnic person's issue," he said. "Men need to be talking too because this is about how we ensure we get the very best talent in our companies." [20] Bill Proudman, CEO and co-founder of White Men as Full Diversity Partners, notes the power of men who "notice their privilege and learn to use it honorably." [21]

A number of states that include large numbers of lawyers have passed gender pay equity laws that encourage or mandate disclosure. States such as California, Massachusetts and New York have passed statutes requiring equal pay for substantially similar work based on skill, effort and responsibility and performed under similar working conditions. And most statutes also bar employers from forbidding employee discussions of compensation. In the same vein, new U.S. Equal Employment Opportunity Commission regulations require employers to begin reporting compensation data by gender, race and ethnicity within pay "bands." While these laws are not directed at BigLaw and may exclude equity partner compensation, there is a trend nonetheless to demystify compensation and equalize the playing field for professional women.

Lawsuits by senior women lawyers have bubbled up. Even as recently as a few years ago, a lawsuit against a major firm on the basis of gender discrimination was a rarity. This year alone we have seen several new cases against legal employers. A woman partner sued Chadbourne & Parke LLP specifically about pay equity, alleging that women partners were compensated less than male partners. A woman partner sued Sedgwick LLP alleging that she was not promoted to equity partner and punished for speaking out. An employee sued Jones Day claiming she was laid off because of her pregnancy, age and gender.

Farmers Group reached a \$4 million settlement plus \$1.8 million in attorney fees to resolve class action claims that it paid female staff attorneys less than male attorneys. While some firms may take the “hunker down” approach to these challenges, we suspect that many other firms will take a much harder look at whether they need a pay equity program and how their programs for allocating salary and other compensation measure up against an “equity” standard.

At a Practical Level, What are Reasonable Solutions to Implement Pay Equity Programs?

Fortunately, there are good guidelines for law firms and more research is being conducted. Perhaps most prominent is the American Bar Association’s “Closing the Gap: A Road Map for Achieving Gender Pay Equity in Law Firm Partner Compensation.”[22] No title could be more to the point. And we urge our readers to become familiar with the best practices described in this publication. In 2017 a study of “bias interrupters” will be released, co-sponsored by the ABA Commission on Women in the Profession and the Minority Corporate Counsel Association and performed under the direction of Joan Williams from the Center for Work Life Law. The research is designed to enable organizations to apply the same innovative problem-solving approaches they routinely use for their business challenges to the challenge of implicit bias.

In addition to concrete best practices and bias interrupters, we believe there are two overriding factors that will determine whether a law firm will manage a meaningful pay equity program. One is *candor*. Does a firm have the will or courage to look hard at whether it is currently achieving pay equity and talk about the problems and solutions? We are well aware that the term “firm” implies one fully integrated set of values and goals whereas in reality, today’s firms are far from unified internally on the issue of diversity.

And that fact leads to a second critical factor: *leadership and accountability from the top*. And so we end where we began. For all of the diversity initiatives and diversity officers that law firms have supported, women remain a small minority of equity partners.

It will take a meaningful change in the structure of BigLaw and the systems that manage, govern and reward lawyers before pay equity will be the norm. The firms that are in the lead on gender pay equity will reap the benefits: increased retention of experienced women lawyers, increased client recognition, and a richer array of diverse and talented lawyers to compete in today’s legal marketplace.

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[1] Robert J. Samuelson, What's the Real Gender Pay Gap, *The Washington Post*, April 24, 2016.

[2] The NAWL Annual National Survey of Retention and Promotion of Women in Law Firms (NAWL Annual Survey), sponsored by the National Association of Women Lawyers, was created and conducted for eight years by co-author Stephanie Scharf. See reports from 2006-2014 at <http://www.nawl.org/p/cm/ld/fid=82>. These are among the very few surveys that generate statistics about law firms as a whole in order to compare how men and women lawyers fare on key aspects of compensation and advancement including equity partnership.

[3] Report of NAWL Ninth Annual Survey, published October 2015.
<http://www.nawl.org/p/cm/ld/fid=506>

[4] The calculation assumes a five-day workweek and one federal holiday in January and in February.

[5]
http://www.americanbar.org/content/dam/aba/events/women/closing_gap_program.authcheckdam.pdf

[6] *Id.*, n. 2 above.

[7] *Id.*, n. 2 above. See also Stephanie Scharf and Roberta Liebenberg, First Chairs at Trial: More Women Need Seats at the Table, published by the American Bar Association and American Bar Foundation. 2016.
http://www.americanbar.org/content/dam/aba/marketing/women/first_chairs2015.authcheckdam.pdf

[8] Report of NAWL Sixth Annual Survey, October 2011.
<http://www.nawl.org/p/cm/ld/fid=82#surveys>

[9] Report of NAWL Eighth Annual Survey, February 2014, which shows that the gender composition of governing committee and compensation committees affects the size of the gender pay equity gap. <http://www.nawl.org/p/cm/ld/fid=82#surveys>

[10] Joan Williams, and Rachel Dempsey, in *What Works for Women at Work*, call this phenomenon the “prove it again” problem.

[11] The result is that women are “in the position of having to go above and beyond the standards to which men are held in order to demonstrate their competence.” *The Economist*, *What’s Holding Women Back?* Jan. 23, 2015.
<http://www.economist.com/blogs/democracyinamerica/2015/01/women-and-work>

[12] Joan C. Williams and Marina Multhaup, *What the Partner Pay Gap Tells Us About Bias*, *National Law Journal*, Oct. 24, 2016.
<http://www.nationallawjournal.com/id=1202770527617/What-the-Partner-Pay-Gap-Tells-Us-About-Bias?slreturn=20161109175941>. See also Jennifer Smith, *Female Lawyers Still Battle Gender Bias*, *Wall Street Journal* May 4, 2014.
<http://www.wsj.com/articles/SB10001424052702303948104579537814028747376>

[13] *Id.*

[14] *Id.*

[15] *A Current Glance at Women in the Law* May 2016, American Bar Association Commission on Women in the Profession,
http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_may2016.authcheckdam.pdf.

[16] Lauren Rikleem, Roberta Liebenberg and Stephanie Scharf, published July 2013 by the American Bar Association,
http://www.americanbar.org/content/dam/aba/administrative/women/power_of_purse.authcheckdam.pdf.

[17] See description of the Survey along with many other recent ABA initiatives on diversity at <http://www.americanbar.org/content/dam/aba/administrative/diversity-portal/diversity-inclusion-exec-summ-360-comm.authcheckdam.pdf>.

[18] See letter at <http://www.americanbar.org/content/dam/aba/administrative/diversity-portal/general-counsel-implementation-aba-resolution-113.authcheckdam.pdf>

[19] Microsoft On the Issues Announcing the next generation of Microsoft's Law Firm

Diversity Program: Working towards a more diverse and inclusive legal profession by Brad Smith, President and Chief Legal Officer posted on Aug. 4, 2015

<http://blogs.microsoft.com/on-the-issues/2015/08/04/announcing-the-next-generation-of-microsofts-law-firm-diversity-program-working-towards-a-more-diverse-and-inclusive-legal-profession/#sm.000sm947kg1ndqv107a1uczb5aohj>

[20] Craig Silliman, General Counsel of Verizon Communications Inc., as quoted in Bloomberg Law, Sept. 8, 2016. <https://bol.bna.com/can-two-dozen-gcs-bring-diversity-to-law-firms/>

[21] Wall Street Journal Sept. 27, 2016, by John Simons Diversity Workshops Try to Get Friendlier to White Men

<http://www.wsj.com/articles/diversity-workshops-try-to-get-friendlier-to-white-men-1474963381>

[22] Lauren Rikleen, author, and published by the American Bar Association Commission on Women, Summer 2013.

https://www.americanbar.org/content/dam/aba/administrative/women/closing_the_gap.authcheckdam.pdf.