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# New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women

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## Articles

# New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women<sup>†</sup>

JOAN C. WILLIAMS\* AND VETA RICHARDSON\*\*

*This Article reports on a survey of 694 law firm partners, virtually all women, who filled out an online survey about the impact of law firm compensation systems on women. The results were analyzed through the lens of thirty-five years of experimental social psychology studies of gender bias. Survey results showed considerable dissatisfaction among women partners with respect to their firms' partner compensation systems. Thirty to forty percent of respondents were dissatisfied or extremely dissatisfied with their firm's system, and minority partners were more dissatisfied than majority ones. Many respondents believed that their firms overvalued individual cash flow factors (origination, revenue and billable hours) and undervalued institutional investment factors (contributions to enhance the firm's human capital), and that the systems lacked transparency. Disputes over origination credit were very common, with minority attorneys more likely than majority ones to experience them. About a quarter of majority equity women partners, and a third of majority income and minority women partners reported feeling "bullied, threatened or intimidated" in a dispute over origination credit. Respondents' reported experiences track patterns of gender bias as described in the experimental literature. The Article ends with an extensive list of best practices to help firms address the problems identified in law firm compensation systems.*

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## INTRODUCTION

The system is completely unfair and rewards white males and those who are connected to those who are highly paid.

[Our compensation system is p]robably the fairest system out there.

These quotes summarize the good news and the bad news from the *Survey of Women Partners on Law Firm Compensation* (“*Survey of Women Partners*”) whose results are described in this Article.<sup>1</sup> Some respondents were satisfied with their compensation and felt that their firms’ compensation systems were eminently fair. Other respondents were dissatisfied and felt their compensation systems were very unfair.

Professional women have the largest gender wage gap in the entire economy: They earn proportionately less, as compared with professional men, than do women in non-professional jobs.<sup>2</sup> The legal profession provides a stark example: While the wage gap between male and female engineers has evaporated, the wage gap between men and women in the law remains robust.<sup>3</sup> A 2009 study of lawyers found clear evidence of a

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1. Unless otherwise cited, the responses quoted in this Article are from responses given during the course of the survey. The quotations have been verified by the Authors against the primary source, and the responses and corresponding data are on file with the Authors.

2. See Trond Petersen & Laurie A. Morgan, *Separate and Unequal: Occupation-Establishment Sex Segregation and the Gender Wage Gap*, 101 AM. J. SOC. 329, 355 (1995).

3. See Ronit Dinovitzer, Nancy Reichman & Joyce Sterling, *The Differential Valuation of Women’s Work: A New Look at the Gender Gap in Lawyers’ Incomes*, 88 SOC. FORCES 819, 843, 847–48 (2009).

continued gender gap among lawyers working full time in private practice who were otherwise similarly situated.<sup>4</sup>

Rigorous studies have suggested that law firm compensation systems probably play a role in the persistence of the gender gap in the law. For example, a 2004 study by Nancy Reichman and Joyce Sterling found that women lawyers were more likely to be dissatisfied with their compensation than were men: 14% of the women, but none of the men, rated their compensation systems as being on the bottom of a seven-rung scale.<sup>5</sup> Only about half of women (51%), but closer to three-fourths of the men (71%), reported high levels of satisfaction.<sup>6</sup>

Happily, the gender gap in law firm compensation has decreased in recent years. According to one study, women partners narrowed the gender gap in compensation from 69% in 1993 to 78% in 1999.<sup>7</sup> Yet two studies by the National Association of Women Lawyers (“NAWL”) found that dramatic pay differentials persist. NAWL’s 2009 report found women equity partners typically earning about \$66,000 less than their male counterparts<sup>8</sup>—an improvement over the \$87,000 differential they found in 2008,<sup>9</sup> probably due to overall declines in compensation caused by the Great Recession.<sup>10</sup> The wage gap among income partners also remains substantial: In 2009, male income partners averaged \$25,000 more than female income partners.<sup>11</sup> Another factor depressing the compensation of women partners is that women, as a group, take longer to attain the rank of equity partner than do men.<sup>12</sup>

The most common explanations for differentials between male and female partners are that women’s family responsibilities mean that they do not spend the hours necessary to develop business, or that they are more likely to go into less lucrative legal specialties.<sup>13</sup> While no studies of gender differentials in partner compensation are available, one study

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4. *Id.* at 843.

5. Nancy J. Reichman & Joyce S. Sterling, *Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers*, 14 *TEX. J. WOMEN & L.* 27, 46–47 (2004).

6. *Id.*

7. *Id.* at 37.

8. NAT’L ASS’N OF WOMEN LAWYERS & NAWL FOUND., REPORT OF THE FOURTH ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 11–12 (2009) [hereinafter NAWL, 2009 REPORT].

9. NAT’L ASS’N OF WOMEN LAWYERS & NAWL FOUND., REPORT OF THE THIRD ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 13–14 (2008).

10. Bernard Burk & David McGowan, Schumpeter, Coase and the Future of the (Law) Firm I (Mar. 2010) (unpublished manuscript) (on file with the Georgetown Law Center for the Study of the Legal Profession), available at <http://www.law.georgetown.edu/LegalProfession/documents/BurkMcGowan.pdf>.

11. NAWL, 2009 REPORT, *supra* note 8, at 11.

12. *Id.* at 8.

13. See, e.g., Mary C. Noonan, Mary E. Corcoran & Paul N. Courant, *Is the Partnership Gap Closing for Women? Cohort Differences in the Sex Gap in Partnership Chances*, 37 *SOC. SCI. RES.* 156, 157–58 (2007).

discounted these explanations for why men are more likely to become partners—at a rate that has not decreased since women entered the law in significant numbers in the late 1970s.<sup>14</sup> “Male graduates are more likely than female graduates to be partners even when men and women have comparable career plans, law school GPAs, marital status, parental status, work histories, and legal specializations. Sex also strongly predicts partnership among” lawyers, a correlation that remains robust even among more recent law school graduates, conclude Mary Noonan, Mary Corcoran, and Paul Courant.<sup>15</sup>

The 2009 study by Ronit Dinovitzer, Nancy Reichman, and Joyce Sterling found that the wage gap among young lawyers preparing for partnership does not result from the human capital women bring to their careers, or from their childrearing responsibilities.<sup>16</sup> “Lifestyle” considerations result in a modest narrowing of the gender gap.<sup>17</sup> A much larger factor is what sociologists call “opportunity paths”: networking opportunities and the ability to work on career-enhancing assignments.<sup>18</sup> “These findings confirm that in professional settings such as law firms, where work assignments travel from senior to more junior employees, socializing with more senior lawyers in both work and non-work settings can directly affect earnings.”<sup>19</sup> The study found that the field of law also contributes to the gender gap: “[T]he gender wage gap we find in our research signals that there may be something unique in the early professional work of lawyers that allows for the kind of subjective assessments and interactions that underlie differences in pay and account for significant within-occupation wage gaps.”<sup>20</sup>

Forty years ago, most large law firms had no more than a few hundred attorneys, along with lockstep compensation systems.<sup>21</sup> Lockstep systems both assumed and created a symbiosis between “finders, minders and grinders”: attorneys whose skill set rested on finding new clients, attorneys who were best at binding existing clients to the firm through attentive relationship skills, and attorneys who produced the high-quality legal work that fed the whole machine.<sup>22</sup> Most large firms had stable long-term relationships with institutional clients whom everyone—both attorneys and clients—assumed would not change firms absent dramatic

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14. *Id.* at 173–76.

15. *Id.* at 170–71.

16. Dinovitzer, Reichman & Sterling, *supra* note 3, at 846–47.

17. *Id.*

18. *Id.* at 847.

19. *Id.*

20. *Id.* at 848 (citation omitted).

21. See MARC GALANTER & THOMAS PALAY, *TOURNAMENTS OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 22, 42 (1991).

22. See *id.* at 52 n.109.

misbehavior.<sup>23</sup> Nor did partners leave their firms: this was frowned upon, and consequently rare.<sup>24</sup> Moreover, in all but a few firms, lawyers made very high middle-class salaries but did not expect to move into the ranks of the truly wealthy.<sup>25</sup>

Today, much has changed. As investment banking salaries exploded in the 1990s, large-firm New York lawyers' salary expectations rose sharply: Top partners looked at the millions their clients were making, and asked themselves why their salaries were not equivalent. This began a cycle in which the ratio between the highest- and lowest-paid partners climbed sharply. In mid-sized firms, top partners now average six times the compensation of their firms' lowest-paid partners.<sup>26</sup> In large firms, the ratio is now about 10:1.<sup>27</sup> Said one survey respondent, "[After a merger,] most of the partners were effectively de-equitized. . . . All this was done to increase profits per partner and to consolidate income in a select top tier of partners."

For complex reasons, probably related in part to lawyers' exploding salary expectations, corporate clients became far more willing to demand value and to change firms.<sup>28</sup> This made rainmakers much more important. As rainmakers' power increased, the taboo on changing firms evaporated.<sup>29</sup> The result is the current compensation system, which dramatically overvalues "finding," and dramatically undervalues "minding" and "grinding"—that oddly dismissive term for doing high-quality legal work.

A 2009 Altman Weil survey of law firm compensation found that individual performance factors account for 64% of law firm compensation.<sup>30</sup> Another 27%, which goes into the bonus distribution pool, probably often also goes disproportionately to rainmakers.<sup>31</sup> The study author concludes:

That leaves less than 10% weighting to teamwork in practices, departments and offices. If the "talk" is collaborative and encouraging of team behaviors, then clearly the "walk" of compensation is not aligned with those aspirations.<sup>32</sup>

23. *Id.* at 43, 48, 57 n.68.

24. *See id.* at 23–24, 28–29.

25. *See id.* at 52.

26. Joel A. Rose, *Firms Rethink Partners' Pay as Leverage Declines*, JOEL A. ROSE & ASSOCS., INC., [http://www.joelarose.com/articles/rethink\\_partners\\_pay.html](http://www.joelarose.com/articles/rethink_partners_pay.html) (last visited Feb. 2, 2011).

27. *Increasing Margins: Experts' Views of What Works Now with Partner Compensation Plans*, PARTNER'S REPORT FOR LAW FIRM OWNERS, June 2005, at 1, 13 (on file with the Author).

28. GALANTER & PALAY, *supra* note 21, at 48–50.

29. *See* Burk & McGowan, *supra* note 10, at 10–11.

30. James D. Cotterman, *Law Firm Compensation Practices Update*, REP. TO LEGAL MGMT., July/Aug. 2009, at 1, 9 (Altman Weil, Inc.).

31. *Id.*

32. *Id.*



Consultants wax purple on the perverse incentives built into the current system. Overvaluation of billable hours leads to the hoarding of work, with the consequent failure to match work to the attorney (a) with the relevant skill set, who (b) can deliver a high-quality product in the most cost-efficient fashion.<sup>33</sup> Overvaluation of rainmaking also leads to dissatisfaction among attorneys—men as well as women—who keep the clients happy, both through relationship-building and by providing high-quality legal work.<sup>34</sup> Lost in the shuffle, too, are the tasks that new larger law firms need to survive and thrive as institutions. As consultants have identified, law firms undervalue both teamwork and the kinds of institutional investments that are vital to the long-term viability of any business organization.

This Article combines a review of these studies and the existing literature on attorney compensation with extensive research into experimental studies of gender bias in order to discuss the results of the *Survey of Women Partners*. The survey was administered from July 13, 2009 to November 22, 2009 and was completed by 694 respondents. Fourteen percent of respondents were racial or ethnic minorities. Among our minority-partner respondents, 53% were equity partners, while 43% were income partners.<sup>35</sup> Generally, minority equity and minority income partners' responses will be reported separately. However, the responses for both groups are aggregated in instances where there is no significant difference between the two, or when the numbers for any one response category are so small (less than ten) as to compromise the anonymity of the respondents. Our sample is overwhelmingly female: 99% of equity- and income-partner respondents and 97% of minority respondents were women. This stemmed from a deliberate decision, due to budgetary constraints, to limit our outreach to women. The result is that we can draw conclusions, based on our data, about what women report, but we cannot compare women's impressions with those of men. An important point is that, to avoid awkwardness in the text, we have generally referred to "equity partners," rather than using more precise formulations, such as "women equity-partner respondents." Yet all of the survey data here represents findings about *women* lawyers, not the larger universe of lawyers.

Our survey respondents were more likely than lawyers in general are to be in large law firms: Roughly three-fourths of our respondents

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33. *Id.*; see James D. Cotterman, *Examining Your Compensation System*, REP. TO LEGAL MGMT., Apr. 2003, at 1, 5–6 (Altman Weil, Inc.).

34. Cotterman, *supra* note 30; see Cotterman, *supra* note 33.

35. Ninety-four respondents reported being a racial or ethnic minority. Of these respondents, thirty-six indicated being equity partners, and twenty-nine indicated being income partners. The survey instrument did not define the terms "income partner" and "equity partner." Respondents were left to make their own interpretations of the terms—which can differ between firms.

were in firms of over 250 attorneys, as compared with 26.4% of lawyers in the U.S. who are in private practice.<sup>36</sup> Fifteen percent of our respondents were in medium-sized firms (defined as 100 to 250 attorneys). Our sample was less likely than U.S. lawyers in general to work in small firms of one-to-five attorneys: Only 4% worked in firms of ten or fewer attorneys.

Our respondents also were less likely than were U.S. lawyers in general to be in very small firms of five lawyers or less. Overall, the majority of the sample was in multipractice and litigation firms (86%). Majority equity-partner respondents (91%) were more likely than majority income partners (81%) or minority equity partners (86%) to be in multipractice and litigation firms. Minority income partners were least likely to be in multipractice and litigation firms (69%). Although litigation-only firms were represented by only 4% of the sample, minority partners (7%) were more likely than majority equity (3%) or income partners (5%) to be in firms that do only litigation. Majority equity partners (6%) were less likely than majority income (13%) and minority (12%) partners to be in boutique firms with specialty practices.

Our income-partner respondents were about as likely as equity partners to be in law firms whose footprints are regional; they were more likely to be in national firms, and less likely to be in international ones. Minority partners were more likely than partners in general to be in firms with international footprints, slightly more likely to be at regional firms, and less likely to be in national firms.<sup>37</sup>

The Article first documents the major findings of the *Survey of Women Partners*, beginning with a discussion of who composes the committees that make compensation decisions at most firms—committees that respondents' found to lack diversity. Next it provides the survey results on respondents' overall satisfaction with existing compensation systems, noting that fewer than half of equity partners and only about one-third of income and minority partners report being satisfied with their compensation systems. The Article then identifies the factors that are perceived to be important—and not important—in setting law firm compensation, raising issues of lack of transparency, gaps between policy and practice, and problematic measures of personal “partner productivity” (in other words, billable hours, cash flow metrics, committee ratings, and institutional investment). The Article then addresses the issue of origination credit,<sup>38</sup> including how it is allocated

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36. See GITA Z. WILDER, NALP FOUND. FOR LAW CAREER RESEARCH & EDUC., *WOMEN IN THE PROFESSION: FINDINGS FROM THE FIRST WAVE OF THE AFTER THE JD STUDY 9* (2007).

37. See *infra* Appendix.

38. The term “origination” or “origination credit” generally refers to the credit toward compensation that a lawyer receives for bringing a client or new business into the firm. See, e.g., James D. Cotterman, *Recognizing Origination*, REP. TO LEGAL MGMT., Nov./Dec. 2009, at 1, 8 (Altman Weil,

and how disputes over origination can be painful. After identifying findings that discount the assumption that compensation is tied to women having less time for rainmaking, the Article presents additional issues in compensation systems that lead to gender inequity, including lack of succession planning, subjectivity, the impact of self-advocacy on women, and the concept of de-equitized partners.

The Article then moves on to address possible solutions in light of the study's findings. It first identifies the economic realities upon which any law firm compensation system must be grounded, and then concludes by providing nine concrete best practices that can foster greater gender equality in law firm compensation.

## I. FINDINGS

This study's findings address the overall satisfaction of women partners, minority and majority, and establish a significant correlative relationship between partner satisfaction, the understanding of how a firm determines compensation, the billable hours threshold, and the allocation of origination credit. The level of subjectivity inherent in the compensation system also factors into partner success and satisfaction and serves as an indicator of the potential for gender bias to be present in the system.

### A. WHO MAKES COMPENSATION DECISIONS?

The inner circle of white male lawyers, whether they bring in business or not, generally do much better in the firm compensation system than the female lawyers.

A key factor in assessing the gender gap in law firm compensation is that law firm partnership ranks remain overwhelming male. In 2009, only 16% of equity partners and 27% of income partners were women, despite the fact that over 30% of law school graduates have been women since 1980, and that as of 2000, one-half were women.<sup>39</sup> The underrepresentation of women among law firm equity partners has a profound influence on compensation decisionmaking. The most obvious influence concerns who makes the compensation decisions.

Respondents were asked to list all parties who play a role in setting compensation at their firms. Little difference emerged among the different groups of respondents.<sup>40</sup> The most common answer (39-40%) was that a management or executive committee made overall compensation decisions, as well as decisions regarding the salaries of

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Inc.).

39. NAWL, 2009 REPORT, *supra* note 9, at 7.

40. No difference was noted from the disaggregation of minority respondents into income and equity partners.

income partners (35-40%), the compensation of equity partners (40-42%), and whether bonuses are distributed and who gets them (37-39%).

Next most common (22-27%) were systems where a separate compensation committee determined overall compensation levels as well as the compensation of income and equity partners, with compensation committees being the most likely to set the compensation of income partners (27%) but less likely to set the compensation of equity and minority partners (22-23%).

Nearly as many respondents said that the managing partner, chair or president set overall compensation levels at their firms, although considerably fewer income (14%) than equity partners (19-20%) reported this system.

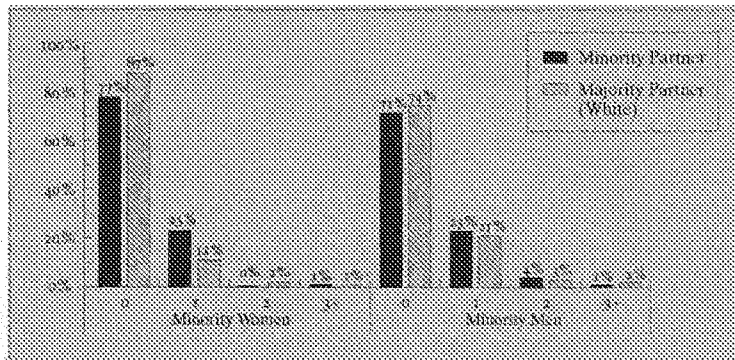
Practice group leaders played a role in setting income, draws, and bonuses at 12% or less of our respondents' firms. Partner vote played a role in 7% or less of respondents' firms.

The committees that decide compensation tended to have between five and ten members, although some had thirty-one or more members. Membership on the compensation or other key committee was most commonly determined by election by the partnership: 34% of equity partners and 23% of income partners reported this kind of system. The next most common system was appointment by the chair or equivalent, reported by 28% of equity partners and 23% of income partners. Next most common were systems that included a combination of elected and appointed members, reported by 14% of equity partners, and 17% of income partners. Comments on the surveys indicated that, in some firms, elections are pro forma, in that a preselected panel is typically or invariably elected.

The only major difference between women minority and majority partners was that minority partners were considerably more likely to be in firms in which compensation decisions were made by a combination of elected and appointed committee members: 26% of minority partners were, as compared to 14% of equity and 17% of income partners.

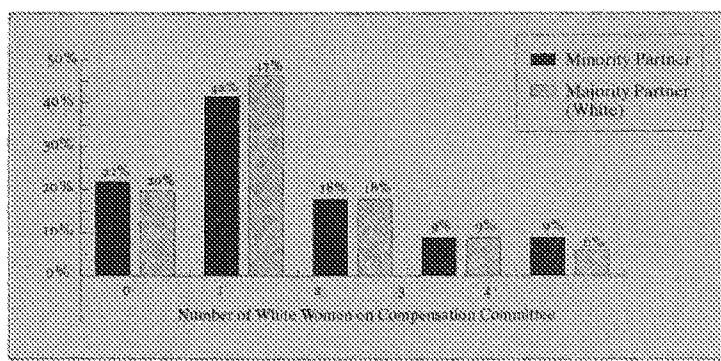
In addition, minority representation on the committee in charge of compensation often was low or nonexistent. As shown in Figure 1, the compensation committee had no minority women in nearly 90% of majority respondents' firms and in nearly 80% of minority respondents' firms. Compensation committees had no minority men in roughly 75% of minority respondents' firms, and 71% of majority respondents' firms.

FIGURE 1: COMPENSATION COMMITTEE COMPOSITION: NUMBERS OF MINORITY WOMEN AND MINORITY MEN BY MINORITY STATUS OF PARTNER



Representation of women on compensation committees also was low. About half of respondents had one woman on their compensation committees. One-fifth had none. Another fifth had two women on their compensation committees, as shown in Figure 2. Said one respondent, “We have only one woman on our management committee, and one woman group head—which is disturbing.” Three respondents disclosed that they serve on their firms’ compensation committees. 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.<sup>41</sup> Minority partners were slightly more likely to be at firms with no women on their compensation committees and were slightly less likely to be at firms with one woman on their committees.

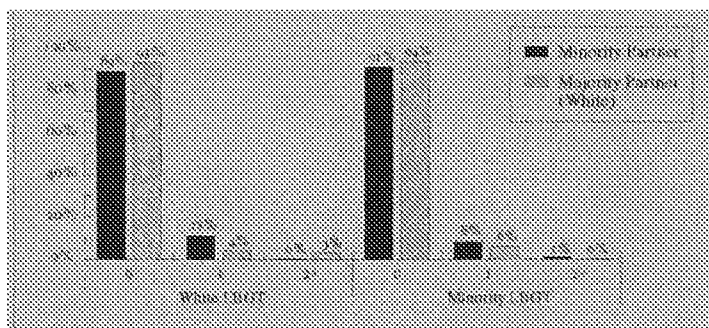
FIGURE 2: COMPENSATION COMMITTEE COMPOSITION: MAJORITY WOMEN BY MINORITY STATUS OF PARTNER



Out lesbian, gay, bisexual, or transgendered lawyers also are rare on compensation committees, as shown in Figure 3.

41. ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 238–39 (1993).

FIGURE 3: COMPENSATION COMMITTEE COMPOSITION: NUMBER LGBT BY MINORITY STATUS OF PARTNER



In short, our respondents' perception was that, at many firms, the committees that decide law firm compensation often are startlingly lacking in diversity. Data on law firm committee assignments suggests that powerful compensation and management committees are much more likely to be staffed by men. NAWL's *Fourth Annual Survey on Retention and Promotion of Women* reports that "about 14% of the nation's largest firms have no women at all on their governing committees."<sup>42</sup> The average percentage of female members on the largest firms' governing committees has not changed substantially in the last four years.<sup>43</sup>

Equity partners reported that compensation or executive committees were most likely to have responsibility for compensation decisions (38-42%), with special compensation committees (20-23%) and firm leaders (19-21%) roughly half as likely to play a role. Income partners were slightly more likely than equity partners to report participation by a special compensation committee (26-29%) and slightly less likely to report participation by firm leaders (14-16%). Among minority attorneys, firm leaders were more likely (17-21%) and the management or executive committee was less likely (35-40%) to play a role in compensation.<sup>44</sup>

Having practice group leaders involved in compensation decisions was a much less common practice: 8-12% of equity partners, 7-14% of

42. NAWL, 2009 REPORT, *supra* note 9, at 2.

43. *Id.* at 5; see also Laura R. Hammargren, Comment, *Servant Leadership and Women in the Law: A New Nexus of Women, Leadership and the Legal Profession*, 4 U. ST. THOMAS L.J. 624, 634 (2007) ("[D]espite women's equal parity in law school and entrance to the profession, gender composition at law firms has remained 70% male since 1997 and leadership percentages are even worse. The most compelling number reflecting the stagnancy of women advancement is the 18% of women equity partners that did not grow or expand from 2000 to 2005." (footnotes omitted)).

44. No difference was noted from the disaggregation of minority income and minority equity partners.

income partners, and 8-10% of minority partners reported involvement of practice group leaders in setting bonuses and the salaries of income partners. Practice group leaders were very rarely involved in setting the compensation of equity partners.

The demographics of law firm partnerships, and of the committees and individuals in charge of compensation, pave the way for a pattern called in-group favoritism.<sup>45</sup> 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*. In-group favoritism tends to be strongest when men greatly outnumber women, because then gender is salient—it jumps out as unavoidably apparent. In addition, subjective and highly discretionary decisionmaking, which describes most law firm compensation systems, can exacerbate in-group favoritism.<sup>46</sup>

People automatically prefer people like them.<sup>47</sup> They feel more comfortable with them, more obligated to them, more loyal to them. They impute positive attributes,<sup>48</sup> trust them, remember their positive traits while forgetting their negative ones, and favor them in distributing rewards.<sup>49</sup> When men are the in-group, men—but not women—tend to be given the benefit of the doubt. Objective rules tend to be applied rigidly to women but leniently to men.<sup>50</sup>

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45. Robin J. Ely, *The Power in Demography: Women's Social Constructions of Gender Identity at Work*, 38 ACAD. MGMT. J. 589, 625 (1995) ("In firms in which few women were in positions of power, sex roles were more stereotypical and more problematic. Women in these firms, when compared to women in firms with higher proportions of senior women, . . . evaluated feminine attributes . . . less favorably in relation to their firm's requirements for success . . ."); see also Paul R. Sackett et al., *Tokenism in Performance Evaluation: The Effects of Work Group Representation on Male-Female and White-Black Differences in Performance Ratings*, 76 J. APPLIED PSYCHOL. 263, 266 (1991) ("[W]omen are rated about half a standard deviation lower than men when women make up less than 20% of the group. When women make up more than 50% of the work group, they are in fact rated more highly than men.").

46. See William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 CONTEMP. SOC. 120, 123 (2000) ("[P]ersonnel systems whose criteria for making decisions are arbitrary and subjective are highly vulnerable to bias due to the influence of stereotypes . . . . A high degree of segregation in such a system is usually a strong indicator that ascriptive traits are strongly influencing personnel decisions . . . ." (internal citation omitted)); Daniel J. Brass, *Men's and Women's Networks: A Study of Interaction Patterns and Influence in an Organization*, 28 ACAD. MGMT. J. 327, 339-40 (1985) ("Men and women appeared to build networks equally well, although each gender tended to interact with itself. . . . The result of this segregation was that women were less central to men's networks, in particular the interaction network of the dominant coalition. Access to this group of high-level men was very strongly related to influence for the women employees and was significantly related to promotions for the entire sample.").

47. James N. Baron & Jeffrey Pfeffer, *The Social Psychology of Organizations and Inequality*, 57 SOC. PSYCHOL. Q. 190, 192 (1994).

48. Charles W. Perdue et al., *Us and Them: Social Categorization and the Process of Intergroup Bias*, 59 J. PERSONALITY & SOC. PSYCHOL. 475, 478 (1990) ("In-group words demonstrated the potential to imbue neutral stimuli with positive connotation by simply being concurrently presented.").

49. Baron & Pfeffer, *supra* note 47, at 192, 198.

50. See, e.g., *id.* at 198-99 ("The available evidence is quite clear that work performed by women

In-group favoritism does not mean that all men are in the in-group. In a typical law firm, the pattern instead means that, although some men are excluded from the in-group, most members of the in-group are white men. Said one respondent, who commented that it helps to know and be known. “White men seem to fare best on this, but not all white men do well—but of people who do well, almost all (maybe all) are white men.”

Some respondents expressed a high opinion of those committees’ work. Said one, “I think the compensation committee works very hard, makes tough decisions equitably and tried to do the right thing.” Yet floods of comments by other respondents demonstrated the effects of in-group favoritism when asked what factors played an important role in their compensation systems:

- “Anomalies are visible in the firm’s compensation patterns. Most partners attribute this to whether you are in the chairman’s inner circle or not.”
- “Partners who have the support of powerful partners are [more highly] compensated than other partners with the same metrics.”
- “Being part of the ‘in crowd.’”
- “Personal relationships with power partners.”
- “If a powerful partner cares about your compensation.”
- “Seniority plays no role but having a cheerleader, particularly if that cheerleader sits on the management committee, can play a huge role.”
- “Whether you are supported, well liked, etc. by partners with significant clout.”
- “Although the starting point of the discussions is an objective one, subjective judgment of the senior management plays a huge role . . . 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. Political relationships and history with the firm are significant, although unspoken, factors.”
- “It is primarily based on client base and billings but the firm also considers contribution to firm operations and management and other subjective factors, such as whether one of the partners on the compensation committee personally supports or favors you.”

Some respondents felt that members of the relevant committee took care of themselves: “Somehow members of the Executive Committee (who make the decisions) and the Practice Group Leaders seem to be the most

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is valued less highly than comparable work done by men.”); Marilynn B. Brewer, *The Social Psychology of Intergroup Relations: Can Research Inform Practice?*, 53 J. Soc. ISSUES 197, 205 (1997) (“[W]e-they distinctions . . . produce differential evaluation, liking, and treatment of other persons depending on whether they are identified as members of the ingroup category or not.”); Marilynn Brewer & Rupert J. Brown, *Intergroup Relations*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 554, 554 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 1998); Perdue et al., *supra* note 48, at 482 (“Our three experiments indicated that . . . “us” and “them,” together with other collective pronouns, may perpetuate and possibly transfer in-group-related biases to evaluations of other people.”).



highly compensated and seldom lose ground . . . during their tenure on the Committee.” Another respondent noted that being in the in-group not only translated directly into higher compensation, but also paved the way to management positions that could do so:

- “Being a friend of managing partners seems to translate into higher compensation. It also leads to management positions, which can be leveraged into higher compensation.”
- “The problem with the questions is that some of these criteria are . . . relied on by the management to reward themselves and those they want to reward, but not others.”

In an environment where women and people of color are underrepresented, both among partners and on the committees that make compensation decisions, in-group favoritism opens the door to gender and race bias. Again, comments abound:

- “Getting someone from the 97% male group that really runs the firm to advocate for you.”
- “It’s mostly a ‘good old boy’ system.”
- “When you see the distribution of compensation among partners, it has the appearance of a solid old boys’ network.”
- “Also includes total hours and subjective criteria and old boy relationships.”
- “As an unwritten principle, whether you are one of the ‘boys.’”
- “I was the highest paid woman in my office, and my compensation was about 50% less than any . . . male partner in my department in my office. There was significant backlash as a result of my sexual orientation internally.”

Extensive literature documents what everyone knows: People tend to associate with people like them. This is not news, but if job benefits are then distributed through males’ network ties, gender bias can appear.<sup>51</sup> In addition, in a context where decisionmaking involves secrecy and complex sets of often countervailing factors, in-group favoritism is more likely to have an influence.<sup>52</sup>

Sometimes gender creeps in not only because law firms are predominantly male, but also because more senior attorneys are. A few respondents expressed sentiments to the effect that “senior partners were compensat[ed] unfairly vis-à-vis junior partners.” One added, “Of course, this is a gender concern as well because there are far fewer senior women partners.”

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51. For a review of the literature on how gender shapes workplace networks, see Gail M. McGuire, *Gender, Race, and the Shadow Structure: A Study of Informal Networks and Inequality in a Work Organization*, 16 GENDER & SOC’Y 303 (2002).

52. See, e.g., Gerald R. Salancik & Jeffrey Pfeffer, *Uncertainty, Secrecy, and the Choice of Similar Others*, 41 Soc. PSYCHOL. 246, 246 (1978) (discussing how secrecy and conflicting criteria tend to fuel in-group favoritism).

Another respondent identified not only male networks, but also masculine assumptions and ideals as being disadvantageous to women:

“Origination is skewed by (1) historical firm client control (typically male), (2) individual partner generosity or lack of [the] same in attributing origination to others when multiple efforts have gone into attracting and keeping a client (more powerful 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.’”

Some respondents felt their firms crossed the line into outright gender discrimination:

- “Pure gender—women are paid less, period, although management would deny this.”
- “Law firm compensation at most firms in the AmLaw [American Lawyer] Top 50 is a per se violation of [federal law].”

Other comments do not identify reasons but express their sense that men clearly make more than women:

- “Across the board, men make more than women in the firm’s NYC office.”
- “It is hard to say that gender is not a factor, when the median compensation for male partners is almost double that of female partners in my department, which is the largest department in a large international law firm. Once bonuses (which are confidential) are factored in, it is my informed belief that women partners in my practice group make less than half as much as the male partners.”
- “I do not believe the firm could withstand a fairness audit that applied more objective criteria to compensation. We will never know, but most women partners believe their compensation is less than male counterparts’.”
- “Attorneys who put in many hours or bring in an important case are typically awarded bonuses. However, the firm has discriminated and used bonuses to pay certain women and gay men so that they do not have to increase the ‘base compensation’ of the partner. This is important because the partnership agreement provides that a partner’s comp cannot drop more than 25% per year. By awarding bonuses instead of additional comp, the firm does not have to commit to paying a high salary next year. The bonus was used in such a discriminatory way one year that a woman partner filed a claim against the firm, arbitrated it (won), and left the firm.”

At some firms, problems surrounding compensation appear to be part of a larger problem. Said one respondent:

“At this firm, women are almost never asked to go on a pitch unless it is to a female. We also get no referrals from male attorneys other than the men we worked with at our previous firm who moved with us to this firm. I have had to tell men not to call me ‘dear’ and ‘kiddo’ and they have been insulted by that. And our compensation and bonuses are clearly not the same.”

## B. OVERALL SATISFACTION

Somewhat under half (47%) of equity-partner respondents were satisfied or extremely satisfied with their annual compensation in relation to their partner peers, as compared with approximately 35% of income partners.<sup>53</sup> Among minority attorneys, approximately equal proportions indicated they were “satisfied” or “extremely satisfied” as those who indicated they were “dissatisfied” or “extremely dissatisfied” (36% and 37%, respectively). Majority equity partners were considerably more likely than were majority income partners and minority partners to be “satisfied” or “extremely satisfied.” Conversely, majority equity partners are less likely to indicate dissatisfaction or extreme dissatisfaction than were income partners and minority partners.

TABLE I: ARE YOU SATISFIED WITH YOUR ANNUAL COMPENSATION IN RELATION TO YOUR *PARTNER PEERS*?

	<b>Majority Equity Partners</b>	<b>Majority Income Partners</b>	<b>Minority Partners</b>
1. Satisfied or extremely satisfied	50%	39%	36%
2. Dissatisfied or extremely dissatisfied	31%	38%	37%

Equity-partner respondents were about as likely to be “satisfied” or “extremely satisfied” with their bonuses as they were with their compensation (48%).<sup>54</sup> They were less likely (27%) to be “dissatisfied” or “extremely dissatisfied” (as opposed to “mixed” or “neutral”). Minority partners were less likely to be “satisfied” or “extremely satisfied” (34%) with their bonuses than they were with their compensation. Minority partners were near equally balanced between those who were “satisfied” or “extremely satisfied” (34%) and those who were “dissatisfied” or “extremely dissatisfied” (33%), reflecting the fact that minority-partner respondents were about equally split between income and equity partners. These satisfaction rates with the frequency and/or amounts of their bonuses were about the same as their satisfaction rates with their overall compensation.<sup>55</sup> Among majority respondents, only 27% of income partners were “satisfied” or “extremely satisfied” with their bonus amounts, whereas 51% of equity partners were “satisfied” or “extremely satisfied.”

53. This data is not reflected in Table 1 *infra*.

54. This data is not reflected in Table 1 *supra*.

55. See *supra* note 55.

Respondents were less sanguine that their compensation systems were applied consistently from year to year. Equity partners had more confidence about this than did the other two groups: About one-third were “satisfied” or “extremely satisfied.” The two other groups were distinctly dubious: Only about one in four minority (25%) and income partners (26%) reported being “satisfied” or “extremely satisfied” about year-to-year consistency. Among majority respondents, a greater proportion of equity partners than income partners were “satisfied” or “extremely satisfied” that their compensation system is applied consistently (40% and 30%, respectively).

TABLE 2: ARE YOU “SATISFIED” OR “EXTREMELY SATISFIED” THAT YOUR COMPENSATION SYSTEM IS APPLIED CONSISTENTLY FROM *YEAR TO YEAR*?

	<b>Majority Equity Partners</b>	<b>Majority Income Partners</b>	<b>Minority Partners</b>
1. Satisfied or extremely satisfied	40%	30%	25%
2. Dissatisfied or extremely dissatisfied	38%	42%	51%

Satisfaction levels fell again when respondents were asked about satisfaction that their firms’ compensation systems were applied consistently from partner to partner. About one in three equity partners were satisfied or extremely satisfied, as compared to one in five income partners and one in four minority partners. Once again, minority partners looked more like income than equity partners.

TABLE 3: ARE YOU “SATISFIED” OR “EXTREMELY SATISFIED” THAT YOUR COMPENSATION SYSTEM IS APPLIED CONSISTENTLY FROM *PARTNER TO PARTNER*?

	<b>Majority Equity Partners</b>	<b>Majority Income Partners</b>	<b>Minority Partners</b>
1. Satisfied or extremely satisfied	36%	24%	22%
2. Dissatisfied or extremely dissatisfied	45%	54%	56%

In summary, about half of the equity-partner respondents were satisfied or extremely satisfied with their compensation and bonuses, while only one-in-three was satisfied or extremely satisfied that their compensation systems were applied consistently from year to year and

from one partner to the next. Not surprisingly, income partners were less likely to be satisfied or extremely satisfied than were equity partners. Unfortunately, in this exploratory study we are not able to compare these levels of satisfaction with the satisfaction rates of male partners. However, the finding that between 35% and 44% of respondents were satisfied or extremely satisfied with their compensation is lower than that of the Reichman and Sterling study, which found that 51% of women but 71% of male lawyers reported high levels of satisfaction with their compensation systems.<sup>56</sup> This is not surprising, given that the earlier study assessed the satisfaction of law firm associates as well as partners during an era when most law firms paid associates in lockstep. This meant that the women associates typically were getting the same compensation as the men, which would naturally create a situation in which women associates were more satisfied with their compensation systems than were women partners.

Our data also allow us to draw some conclusions about racial differences in satisfaction rates among women law firm partners. Although slightly over half of the minority-partner respondents (55%) were equity partners, the minority-partner respondents were far closer to income partners than to equity partners in terms of their overall satisfaction with their firms' compensation systems, and with their firms' compensation systems' consistency from partner to partner and from year to year than were partners in general. This racial difference in satisfaction rates is an important finding, although further study is needed to ascertain whether this pattern holds among men.

### C. WHAT FACTORS ARE IMPORTANT IN SETTING LAW FIRM COMPENSATION?

The firm gives lip service, when evaluating for compensation, to firm management activities, committee work, participation in non-billable events, but it seems they are unevenly applied in order to justify the subjective whims of the evaluators . . . Management activities are not compensated for; leadership is not, mentoring is not, and attorneys who are good billers, but do poorly in these areas, or are destructive factors, are nonetheless rewarded without any effort at correction.

Huge majorities of our respondents did not believe that their firms take into account the right combination of factors when determining compensation. Only about one in three equity partners (32%), one in six income partners (16%), and slightly less than one in six minority partners (15%) were satisfied or extremely satisfied that their firms' compensation systems recognized the right combination of individual partner contributions. Of course, some respondents showed confidence that their firms took into account a wide variety of factors and seemed content overall. Some examples:

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<sup>56</sup> Reichman & Sterling, *supra* note 5, at 46–47.

- “Subjective factors play a significant role, e.g. participation in management, civic and pro bono activities, etc. Being a team player, cross-selling to other groups, business development efforts and being a mentor are non-objective factors that are considered.”
- “Contribution to firm administrative, client development, trainings and other non-billable activities is taken into consideration during the compensation process.”

Very few respondents had true lockstep systems: Only two equity partners reported such a system. By far, the most common system reported by our respondents was one in which partner compensation is based “on the partner’s own client base and total billings or collection for that client base.” Nearly half (47%) of equity partners reported this type of system. This percentage is dramatically higher than what management consultants have found: They find such “eat what you kill” systems confined to small firms, with few such systems surviving beyond the founding generation of partners.<sup>57</sup> The likely explanation is that respondents felt that although firms’ systems were not formally “eat what you kill,” in practice, they place so much value on originations, partners’ billable hours, and revenue collected that they operated much like one. The next most common (37%) system reported by equity partners was an objective system with various factors taken into account. Very few equity-partner respondents (less than 1%) reported a true lockstep system: This system—once widespread—has nearly been eliminated,<sup>58</sup> although at least one respondent felt strongly that women fared far better under her firm’s lockstep system than under alternative types of systems. However, 20% of equity-partner respondents reported that seniority was one factor considered in setting compensation. Only 19% reported totally subjective systems, which comes as no surprise. Small firms are much more likely than large ones to have totally subjective systems, and the respondents tended to come from larger law firms.<sup>59</sup>

While some firms are explicit about the weighting of factors that play a role in partner compensation, many are not. Many provide only a long list of factors without much information about how the different factors are weighted. Feelings were mixed about how different factors are weighted in the setting of law firm compensation. Some of the comments received were upbeat with respect to the factors taken into account by their compensation systems:

- “Our focus is to take a qualitative look at a partner’s contribution and fairly compensate everyone.”

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57. Personal Communication with Blane Prescott, Hildebrandt Baker Robbins International Inc., (Dec. 3, 2008) (on file with Author).

58. See *supra* note 21 and accompanying text.

59. Personal Communication with Blane Prescott, *supra* note 57.

- “My firm does stress teamwork and the value of putting the interests of the firm ahead of individual interests.”
- “Excellence, collegiality.”
- “Willingness to undertake firm projects; ability to work effectively in a team-based environment.”
- “Quality of work, efficiency.”
- “Overall reputation for excellence of the partner.”
- “The firm considers a combination of business generation, fees received on time, and matter management as objective statistics and then look to the subjective factors such as team work, service to the firm, cross selling etc.”
- “External profile and visibility.”

Ironically, only a few comments explicitly mentioned excellent legal work as a factor that affects compensation. A rare example identified a “[m]ix of objective/subjective” factors, with the “[s]ubjective based on legal skills, teamwork, and client relationships.”

### *I. Transparency*

A surprising number of respondents did not know what factors drive compensation at their firms. Said one respondent, frankly, “I have no idea what the factors are.” Others knew what factors count, but not how those factors are weighted: “The method, we are told, considers objective factors like client billings and billable hours. However, there are other factors, such as mentoring, collaboration etc. that are considered. There is no way to know how these factors are weighed or even quantified.” Many respondents felt that their firm’s compensation systems lacked transparency. Only slightly more than one-third (37%) of equity partners, one-fifth (22%) of income partners, and one-fifth (23%) of minority partners reported that the criteria the firms use to determine partnership levels are clear or extremely clear. Slightly higher proportions of majority respondents found the criteria clear or extremely clear: 39% of equity partners and 25% of income partners. When information about organizational systems is not transparent, in-group favoritism can have a profound effect on who gets access to the necessary information through their informal networks.

- “I have no idea how partner compensation is determined. You should have a ‘no clue’ option in this survey.”
- “Completing this survey is difficult because the process is not completely transparent or understood, although efforts are being made to improve[] in this respect.”

Surprising numbers of respondents reported that they were not clear about how their firms’ compensation system works. Only 60% of equity partners, 30% of income partners, and 34% of minority partners reported that they were clear or extremely clear about this crucial information. Sixty-four percent of majority equity partners and 33% of

majority income partners were clear or extremely clear on this. The finding that law firm compensation systems lack transparency confirms the findings of the Reichman and Sterling study, which quotes an income partner:

There is this mysterious, quote, formula for setting your compensation, but no matter how hard you work in any given year you never share in the upside of that year. You may be rewarded in the next year, and you may not. You share in all the downsides. . . . So you're taking it in the shorts at both ends.<sup>60</sup>

Lack of information affects some equity partners as well. One survey respondent, in a firm with a closed compensation system, reported the sense that women partners were not informed about the necessary criteria for elevation in the partnership ranks. A “closed system” is a system in which individual partners do not know how much their partners make: This information is limited to members of the compensation committee, or other committee that decides compensation.

One positive comment highlighted the importance of transparency—even in a firm with a closed compensation system: “I think this is the best managed law firm anywhere, and that’s because compensation is done in a fair way—notwithstanding the closed system—transparent to the individual.”

## 2. *Gap Between Policy and Practice: What Really Counts?*

Many respondents felt a disconnect between the factors their firms *said* they considered and what factors *actually influenced* compensation. Few people had data: One would need to do a regression analysis to ascertain which factors actually play an important role in the setting of compensation in an individual firm.<sup>61</sup> “A regression analysis by a McKinsey-trained woman senior manager showed that the most dominant factor in setting compensation is origination credit,” noted one respondent. Many others noted a gap between policy and practice:

- “Theoretically, subjective factors are taken into account, but in truth, we are only compensated for the amount billed and the number of hours we work.”
- “There is a complete disconnect between what my firm says it values and how the compensation system is then set up. We pay all kinds of lip-service to diversity, associate training and mentoring, recruiting, etc., but when it comes to compensation the only thing that matters is whether you brought in the business and billed a lot of hours.”
- “I checked not important for pro bono/community service and bar association activities because while people are encouraged to participate, their compensation suffers if their revenue hours slip so that they can do these types of activities.”

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60. Reichman & Sterling, *supra* note 5, at 44.

61. Cotterman, *supra* note 30, at 3-4.



- “Where I indicated ‘not important,’ most of these items the Firm would say it considers as important, but the compensation does not appear to reflect that.”

Consultants also have noted a gap between policy and practice. Joel A. Rose warns that “[t]ensions can develop when the direction of firm’s compensation system is unclear or receives only lip service.”<sup>62</sup> He cites three examples: (1) when a firm encourages partners to delegate work but “overcompensates for revenue collected from partners” own billable hours rather than delegation, (2) when a firm encourages joint business development but tends not to split origination credit, and (3) when a firm encourages partners to do important nonbillable work, such as marketing, training, and so on, but “rewards those activities marginally in favor of billable hours/revenue” collected.<sup>63</sup> A key arena in which a gap yawns between policy and practice concerns the types of factors that actually influence compensation, as opposed to the factors that firms list as relevant, but which in fact rarely have a significant impact.<sup>64</sup>

### 3. “Personal Productivity”<sup>65</sup>

The number of hours a partner bills personally is often referred to as “partner productivity.” Yet, as will be discussed below, rewarding partners for working as many hours as humanly possible is not necessarily a good business model. A most-hours-wins system tends to disadvantage women, because it favors law firm partners who have a specific family form that most male law firm partners, but few women law firms partners, have: the “two-person career.” A lawyer with a two-person career has the advantage of a spouse who takes care of most, or all, of the lawyer’s nonwork responsibilities, from waiting for the cable repairman to picking up the dry cleaning to caring for children and elders.<sup>66</sup> Lawyers with two-person careers have an advantage over both mothers and single women, as noted by one African-American attorney quoted in *Visible Invisibility*:

The male associates all 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.<sup>67</sup>

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62. Joel A. Rose, *Hallmarks of a Well-Conceived Partner Compensation System*, IOMA’S REP. ON COMPENSATION & BENEFITS FOR L. OFF., Dec. 2010, at 1, 3.

63. *Id.* at 3–4.

64. *See infra* Part II.B.1.

65. James D. Cotterman, *Making Better Compensation Decisions*, REP. TO LEGAL MGMT., Apr. 2006, at 4, 5 (Altman Weil, Inc.) (“The performance factor that most highly correlates with lawyer compensation is personal productivity as measured by fees collected.”).

66. Hannah Papanek, *Men, Women, and Work: Reflections on the Two-Person Career*, 78 AM. J. SOC. 852, 860 (1973).

67. JANET E. GANS EPNER, ABA COMM’N ON WOMEN IN THE PROF., *VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS* 33 (2006).

Our sample reflects these nationwide trends: 69% of equity-partner respondents (virtually all women) had a spouse or partner who worked full time for pay. Only 10% had spouses or partners who worked only part time, and only 15% had partners who were home full time. Prior studies show that about half of male attorneys have wives at home full time.<sup>68</sup>

Taking a closer look at the women who had partners at home full time, we found that 17% were majority equity partners, 14% were majority non-equity partners, and 7% were minority partners. In keeping with national trends, roughly 70% of each group of partners we surveyed had a spouse or partner who worked full time for pay: 69% of equity partners, 70% of income partners. However, a comparison by minority-majority status of the partners reveals that a larger proportion of minority partners have a spouse or partner who works full time for pay relative to majority partners: 79% minority income partners and 83% minority equity partners, as compared to 68% majority income partners and 65% majority equity partners. This is consistent with prior research that finds women attorneys to be substantially more likely to be married to a professional spouse than male attorneys—a trend that has persisted since the 1960s.<sup>69</sup>

About two-thirds of majority equity- (69%) and minority-partner respondents (66%), and a slightly lower percentage of majority income partners (59%) had primary or shared care-giving responsibilities for children under 18 during their tenure at their current firms.<sup>70</sup> In professional families with children, mothers tend to find that “the buck stops here.” Said one mother in Pamela Stone’s influential study of professional women, when describing her husband, “He has always said to me, ‘You can do whatever you want to do.’ But he’s not there to pick up any load.”<sup>71</sup> Stone found that husbands played a role in the decisions of two-thirds of the women she interviewed to leave their careers.<sup>72</sup>

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68. Linda Bray Chanow, *The Business Case for Reduced Hours*, PROJECT FOR ATT’Y RETENTION, [http://www.pardc.org/Publications/business\\_case.shtml](http://www.pardc.org/Publications/business_case.shtml) (last visited Feb. 2, 2011) (“Nearly half of married [male] attorneys have stay-at-home wives.”); see also Betsy Morris, *It’s Her Job Too: Lorna Wendi’s \$20 Million Divorce Case Is the Shot Heard ‘Round the Water Cooler*, FORTUNE, Feb. 2, 1998, at 64, 65, available at [http://money.cnn.com/magazines/fortune/fortune\\_archive/1998/02/02/237198/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/1998/02/02/237198/index.htm) (“[I]n 84% of the marriages in this country both spouses now have jobs. Yet the topmost rungs of the corporate and professional American are still heavily populated by ‘traditional’ couples.”).

69. Kenneth Glenn Dau-Schmidt et al., *Gender and the Legal Profession: The Michigan Alumni Data Set 1967–2000*, at 74 (2008) (unpublished paper) (on file with Indiana University School of Law—Bloomington), available at [http://works.bepress.com/kenneth\\_dau\\_schmidt/](http://works.bepress.com/kenneth_dau_schmidt/).

70. Presumably, some respondents had child care responsibilities at an earlier or a later stage of their careers, while others had no children.

71. Pamela Stone & Meg Lovejoy, *Fast-Track Women and the “Choice” to Stay Home*, 596 AM. ACAD. POL. & SOC. SCI. 62, 76 (2004).

72. PAMELA STONE, *OPTING OUT?: WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME* 62 (2007).

Why? 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.<sup>73</sup> Being a good provider still is seen as an integral part of being a good father.<sup>74</sup> Fathers with childcare responsibilities risk failing to perform as an ideal worker<sup>75</sup> and, consequently, being seen both as a bad father and an inadequate man. Think of everyday language: When mothers dream about their daughters marrying a “successful” man, most are thinking of his paycheck, not his willingness to wear a baby carrier. Said one upper-middle class man, “Let’s face it, most men want to build their ego by saying, ‘I’ve made it, I’ve been successful.’ Hell, how do you grade that success? You grade it by the amount of money you made.”<sup>76</sup>

In short, gender pressures push men towards, and women away from, two-person careers. Our respondents likely were affected by these patterns, given that, in addition to child care, one in four (25%) equity-partner respondents and nearly one in six (17%) income-partner respondents had primary or shared responsibility for elderly parents or grandparents (including in-laws) or other elderly relatives. In keeping with other studies, we found that a higher percentage of minority-partner respondents—nearly one in three (32%)—had elder care responsibilities.

This is not big news: As a group, women have more responsibility than men for family caregiving. This is why compensation systems that confuse an attorney’s work schedule with the attorney’s productivity disadvantage women—particularly women with children, but also women without them.

*a. Origination and Billable Hours Are King*

“[T]he two most important partner compensation criteria in law firms remain the ability to bring in new clients to the firm and to be personally productive, as measured by fees collected as a working lawyer,” reports James D. Cotterman, a management consultant at Altman Weil.<sup>77</sup> Blane Prescott, of Hildebrandt Baker Robbins Inc., agrees, noting that 80% of partner compensation has historically been

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73. NICHOLAS W. TOWNSEND, *THE PACKAGE DEAL: MARRIAGE, WORK AND FATHERHOOD IN MEN’S LIVES* 125 (2002).

74. *See, e.g., id.* at 53 (discussing the central role that “providing” plays in men’s lives); William Marsiglio & Joseph H. Pleck, *Fatherhood and Masculinities*, in *HANDBOOK OF STUDIES ON MEN AND MASCULINITIES* 249, 260 (Michael S. Kimmel et al., eds., 2005) (“[W]hen men are unemployed or underemployed, they often find it difficult to feel good about themselves as fathers because the provider role continues to be an important feature of hegemonic images of masculinity and men’s fathering experience.” (citation omitted)).

75. JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 80 (2010).

76. MICHÈLE LAMONT, *MONEY, MORALS, AND MANNERS: THE CULTURE OF THE FRENCH AND THE AMERICAN UPPER-MIDDLE CLASS*, at xxix (1992).

77. Cotterman, *supra* note 30, at 1.

based on some combination of origination and productivity.<sup>78</sup> Other experts also agree.<sup>79</sup>

In fact, Cotterman's regression analyses suggest that origination typically is more important than billable hours: He reports that "one can explain 80% to 90% of the variability in [equity] partner compensation by knowing just one performance metric—origination."<sup>80</sup>

The percentage of compensation determined by origination varies from firm to firm: "95% of comp[ensation] is based upon client base and billings, and 5% discretionary," reported one respondent. Comments indicate that both origination and billable hours are important in some firms, while in other firms, one factor or the other clearly trumps:

- "Originations and worked collections are all that matters."
- "Billable hours, billable hours, billable hours."
- "It's all about originations."

Other respondents mentioned different factors, highlighting the variation between firms:

- "Firm really tries hard to do comprehensive evaluation of each candidate."
- "Ability to carry case management responsibilities start to finish, trial abilities."
- "What practice area do you belong to and is that an area of growth for the Firm."
- "Niche practice value."
- "We don't consider billable hours. It's money in the door. Is there any other calculus?"
- "Partner/associate leverage ratio (keeping at least two associates busy full time)."

Our findings confirm that originations, by client or matter, or by revenue collected, and hours worked are—by far—most often listed as being among the top factors in setting compensation in the law firms of our respondents. The following table lists the top ten factors listed as either "important" or "very important" in ranked order.

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78. Email from Blanc Prescott to Joan C. Williams (Feb. 14, 2010, 9:38 AM) (on file with Author).

79. See, e.g., *Compensation Decisions Surveyed: Economic Troubles Change Game*, IOMA'S REP. ON COMPENSATION & BENEFITS FOR L. OFF., Sept. 2009, at 1, 5 [hereinafter *Compensation Decisions Surveyed*] (concluding that origination and contributing "fee income to the firm's top line" are the two top factors in setting partner compensation).

80. Cotterman, *supra* note 30, at 11; see also Email from James D. Cotterman to Joan C. Williams (Feb. 14, 2010, 10:09 AM) (on file with Author).

TABLE 4: TOP TEN FACTORS LISTED AS “IMPORTANT” OR “VERY IMPORTANT” IN SETTING LAW FIRM COMPENSATION

Majority Equity Partners	%	Majority Income Partners	%	Minority Equity Partners	%	Minority Income Partners	%
1. Revenue collected	96%	1. Origination	93%	1. Origination	89%	1. Origination	93%
2. Origination	95%	2. Revenue collected	91%	2. Revenue collected	86%	2. Revenue collected	86%
3. Billable hours	86%	3. Billable hours	81%	3. Billable hours	83%	3. Committee rating	83%
4. Client matter expansion/cross-selling	87%	4. Committee rating	81%	4. Being billing partner	83%	4. Billable hours	79%
5. Firm management	81%	5. Client matter expansion/cross-selling	78%	5. Committee rating	77%	5. Being billing partner	69%
6. Committee rating	82%	6. Firm management	71%	6. Firm management	74%	6. Client matter expansion/cross-selling	67%
7. Practice group management	67%	7. Being billing partner	61%	7. Client matter expansion/cross-selling	66%	7. Firm management	59%
8. Whose work currently binds client	66%	8. Practice group management	61%	8. Whose work currently binds client	63%	8. Meeting threshold # of billable hours	55%
9. Being billing partner	56%	9. Whose work currently binds client	60%	9. Partnership rating	54%	9. Practice group management	55%
10. Partnership rating	45%	10. Meeting threshold # of billable hours	56%	10. Practice group management	53%	10. Ownership share	46%

*b. Individual Cash Flow Metrics*

Our findings confirm the opinions of law firm consultants concerning the dominant role of partners’ billable hours and originations. Our respondents showed a remarkable level of agreement about which factors are “important” or “very important” in the setting of partner compensation. The top three factors are origination, revenue collected, and the partners’ own billable hours; origination and revenue collected, as high-universal factors, were followed closely by billable hours. All assess the extent to which a partner functions as an individual cash flow generator within the firm; these will be referred to as the “individual cash flow” factors. Origination credit is the single most common of these factors, followed by the revenue collected by an individual partner. These would obviously be the crucial measures if an individual partner was in solo practice, for they measure whether the firm has clients, work, and cash flow.

The next most common factor is another measure of client relationship: being the billing partner. In some firms, the billing partner

is almost always, or often, the originator; at other firms, the two functions overlap less. Because equity partners are much more likely to be billing partners than are income partners, being the billing partner is more likely to be important for minority equity partners (83%) than for others (56-61%), since minority equity partners are much less likely to receive a high rating by the compensation committee or to be awarded origination credit.

Individual cash flow factors can be designed in different ways. For example, billable hours can be assessed through a system that rewards those who work the highest possible number of billable hours, which is the typical system. An alternative, reported by 12% of equity-partner and 20% of income-partner respondents, is a system that requires partners to meet a billable-hours threshold, but does not give partners ever-increasing credit for working billable hours in excess of the threshold.<sup>81</sup> Such a system reflects an assessment that partners' time may be better spent balancing short-term profitability with contributions to the long-term future of the firm, through business development or human capital development. Among our respondents, the most-hours-wins approach was close to twice as common as requiring partners to meet an hours threshold, with equity partners the least likely (44%) to report the threshold approach.

Origination, too, can be designed in different ways. The most common is the "first touch" 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. According to equity-partner respondents, his 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 matter.<sup>82</sup>

Some firms have abolished formal origination credit altogether, although our survey shows that origination credit remains important in many of those firms. Other firms have moved towards systems that reward teams rather than individuals.<sup>83</sup> Another trend is to reward not origination, but a lawyer who currently binds the client to the law firm: About half of majority and minority income partners, and two-thirds of majority and minority equity partners, report that this is "important" or "very important" in their compensation systems.

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81. These are the percentages of respondents who listed the billable-hours threshold as "very important" in the setting of compensation. These percentages climb to 44% and 56%, respectively, in response to the question of what factors are either "very important" or "important."

82. We do not report the statistic for income or minority partners, because nearly one-third of these groups were unsure or did not know how origination credit worked at their firms, as were nearly one-fourth of minority partners.

83. See discussion *infra* Part II.B.9.

*c. Institutional Investment Measures*

Measures of long-term investments in the law firm as an ongoing institution, from teamwork to effective development of human capital to strategic initiatives, are much less likely to play an important role than are individual cash flow measures. Less than 10% of law firm compensation rewards teamwork, according to the Institute of Management and Administration.<sup>84</sup> In our survey, teamwork does not show up in the top ten factors affecting compensation. Other institutional investments are weighted little, if at all, as discussed below. The only context in which respondents' firms weigh institutional investments to any significant extent concerns client matter expansion or cross-selling, which was the fourth most common factor on equity partners' lists, but less common for income partners (fifth), minority-equity partners (seventh), and minority-income partners (sixth). These data may indicate that income partners are less likely than equity partners, and minority partners are less likely than either group, to feel that they are able to gain fair credit for their contributions to client work when they lack origination credit.

*d. Committee Rating*

Rating by the committee in charge of compensation also was listed by many respondents as playing an important role in compensation. For majority-income and minority partners, rating by the compensation committee shows up in the top five factors; many equity partners listed it, too, although it appears to be a somewhat less common factor in determining equity partner compensation.<sup>85</sup> In some firms, committee rating merely reflects objective metrics; in others, it can be partially or totally subjective. The role, and impacts, of subjectivity in the setting of law firm compensation will be discussed later in this report.<sup>86</sup>

*4. Which Factors Are Listed as "Very Important"?*

A greater divergence emerges between the three groups of partners when asked which factors are "very important" in setting compensation at their law firms. The following table lists the top factors listed as "very important" in ranked order:

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84. *Compensation Decisions Surveyed*, *supra* note 79, at 5.

85. *See supra* Table 4.

86. *See infra* Part I.G.

TABLE 5: TOP TEN FACTORS LISTED AS “VERY IMPORTANT” IN SETTING LAW FIRM COMPENSATION

Majority Equity Partners	%	Majority Income Partners	%	Minority Partners	%
1. Origination	66%	1. Revenue collected	64%	1. Revenue collected	57%
2. Revenue collected	63%	2. Origination	60%	2. Origination	52%
3. Committee rating	62%	3. Committee rating	56%	3. Committee rating	47%
4. Client matter expansion/cross-selling	37%	4. Billable hours	41%	4. Billable hours	35%
5. Firm management	27%	5. Client matter expansion/cross-selling	36%	5. Firm management	27%
6. Billable hours	26%	6. Being billing partner	27%	6. Client matter expansion/cross-selling	26%
7. Whose work currently binds client	18%	7. Ownership share	21%	7. Being billing partner	25%
8. Being billing partner	18%	8. Firm management	19%	8. Ownership share	24%
9. Rating by other partners	12%	9. Meeting threshold # of billable hours	18%	9. Whose work currently binds client	18%
10. Partnership rating	11%	10. Whose work currently binds client	17%	10. Meeting threshold # of billable hours	17%

This chart highlights the tremendous power of compensation committees at many, although not all, firms. Their ratings emerge high on the list for all partners and appear to play a particularly large role in the compensation of our equity-partner respondents.

While equity, income, and minority partners agree that revenue collected and origination are the two most important factors, they reverse the order of importance, with equity partners more focused on origination, and with income and minority partners more focused on revenue collected.<sup>87</sup> This probably indicates no more than that partners with books of business are more likely to be equity partners. All three groups listed “committee rating” as the third most important factor. Notably, majority income and minority partners both again highly rated “billable hours” as a factor in setting compensation.<sup>88</sup> This presumably

87. Table 5 *supra*.

88. Compare Table 5, *supra*, with Table 4, *supra*.



signals that these two groups are less likely than equity partners generally to have origination credit. To majority income and minority partners, therefore, increasing billable hours appears to be one of the best ways to increase their compensation. Firm management seems more important to equity and minority partners than to income partners. Being the billing partner seems more important to majority than minority lawyers.

5. *What Factors Are Not Important in Setting Draw or Salary?*

The finding that individual cash flow categories are more important than factors that measure long-term investments in human capital emerges in sharp focus if we look at investment measures specifically. Effective development of the firm's human capital and associate development rarely plays a role in partner compensation. Nor do teamwork, contributions to diversity, or community service. Even effective leveraging of associates, which is important for short-term profitability, does not play a significant role in respondents' firms. The group most likely to be tapped to help with diversity efforts, minority partners, is the least likely to feel that the contributions to diversity efforts are rewarded.

TABLE 6: FACTORS RARELY LISTED AS "VERY IMPORTANT" IN LAW FIRM COMPENSATION<sup>89</sup>

<b>Majority Equity Partners</b>	<b>%</b>	<b>Majority Income Partners</b>	<b>%</b>	<b>Minority Partners</b>	<b>%</b>
14. Effective development of firm's human capital	7%	14. Contributions to diversity efforts	4% (tie)	13. Teamwork	7% (tie)
15. Effective leveraging of associates	5%	14. Teamwork	4% (tie)	13. Effective development of firm's human capital	7% (tie)
16. Contributions to diversity	3%	16. Effective development of firm's human capital	2% (tie)	16. Effective leveraging of associates	5%
18. Associate development work	2% (tie)	16. Effective leveraging of associates	2% (tie)	19. Pro bono and community service	2% (tie)
18. Pro bono and community service	2% (tie)	18. Associate development	1%	19. Contributions to diversity	2% (tie)

89. Note that the overall ranking out of twenty-two possible factors is included in the table.

These factors are more often listed as “important” but not “very important,” as shown in Table 7 below. Equity partners are much more likely than income partners to believe that effective leveraging of associates and firm committee work (other than on diversity committees) play an important role in compensation at their law firms; minority lawyers again were in the middle, reflecting that group’s composition of a combination of income and equity partners. Fewer than one-in-three of each group of partners believed that associate development, firm committee work, or diversity contributions were “important” or “very important.”

TABLE 7: FACTORS LESS OFTEN LISTED AS “IMPORTANT” OR “VERY IMPORTANT” IN LAW FIRM COMPENSATION<sup>90</sup>

<b>Majority Equity Partners</b>	<b>%</b>	<b>Majority Income Partners</b>	<b>%</b>	<b>Minority Partners</b>	<b>%</b>
12. Effective leveraging of associates	42%	15. Effective leveraging of associates	28%	15. Effective leverage of associates	32%
16. Other firm committee work	30%	17. Associate development	22%	17. Associate development	19%
17. Contributions to diversity efforts	29%	18. Other firm committee work	21%	18. Contributions to diversity efforts	18%
18. Associate development	27%	19. Contribution to diversity efforts	21%	19. Other firm committee work	17%

Thus some of the activities crucial to the long-term health of law firms as institutions typically play little role in partner compensation. Today’s top lawyers will not live forever, yet their firms typically do not reward associate development or effective development of the firm’s human capital. Typically, firms do not reward all measures of teamwork, including teamwork itself, ironically. More intriguing still, effective leveraging of associates is often undervalued, while a partners’ personal hours billed, which cuts against effective leveraging, is overvalued. And, of course, committee work other than on the compensation or management committee is undervalued, with work on diversity often valued even less than other non-compensation committee work.<sup>91</sup>

All this negatively impacts the compensation of women as a group. Women are more likely to serve on diversity or associates’ committees

90. Note that the overall ranking out of twenty-two possible factors is included in the table.

91. An interesting wrinkle is that studies show that serving on the firm’s recruitment committee does have a positive effective on compensation. See Dinovitzer, Reichman & Sterling, *supra* note 3, at 835.

than on compensation, business development, or partnership selection committees.<sup>92</sup> The Reichman and Sterling study of Colorado lawyers described a female department head in a medium-sized firm, Paula Kramer, thusly:

She was the “go to” person for cases in a new practice area that she developed. She also was the head of the recruitment committee and the associates’ committee. All were essential to the smooth operation of the firm, but she was rarely given credit for the work she did on them. She told us that at “every compensation meeting I have . . . been really miserable.”<sup>93</sup>

When she complained, her firm was shocked and raised her compensation, “but [it was] still not as high as the partner above her.”<sup>94</sup> Appointment of women to these less-powerful committees is driven, in part, “by the desire of firms, for good reasons, to have diversity in their committee rosters,” notes James J. Sandman, former Managing Partner of Arnold & Porter LLP and current General Counsel for the District of Columbia Public Schools.<sup>95</sup> “Usually the most important committees are elected, often by a weighted vote, with the votes of partners having more shares carrying more weight.”<sup>96</sup> The results speak for themselves: Women are underrepresented on elected compensation and executive committees. Sandman concluded, “Firms end up doing what they can—through appointments to other committees—where they can to create committee opportunities for women.”<sup>97</sup>

The issue is not malevolent intent, but results. Once women are asked to serve on the less powerful committees, it may be hard to say no. Said Kathryn Fritz, Managing Partner of Fenwick & West LLP:

I do think generally, with respect to all administrative duties, it is much easier for men to say no and take no penalty for it because the assumption is they must be spending their time doing something else for the firm. A woman, on the other hand, both may feel more internal pressure to say yes (the “good girl” problem) and every “no” may raise a question about her commitment to the institution. I think this is just a different flavor of the potential/achievement dichotomy applied to a different set of tasks (he has a better potential way to spend his time/she needs to do what we ask her to do or she isn’t achieving).<sup>98</sup>

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92. Judith S. Kaye & Anne C. Reddy, Essay, *The Progress of Women Lawyers at Big Firms: Steadied or Simply Studied?*, 76 *FORDHAM L. REV.* 1941, 1947 (2008) (citing a 2001 New York State Bar Association study).

93. Reichman & Sterling, *supra* note 5, at 67.

94. *Id.* at 68.

95. Telephone Interview with James J. Sandman, Gen. Counsel, D.C. Pub. Schs. (Apr. 12, 2010).

96. *Id.*

97. *Id.*

98. Telephone Interview with Kathryn Fritz, Managing Partner, Fenwick & West LLP (Feb. 26, 2010).

Sandman adds,

When a man turns down a committee assignment saying, "I would like to concentrate on building my practice," people tend to nod and say "that's a smart decision." That may happen less often if it's a woman. Women are more likely to say "I've got a lot on my plate," or to feel guilty and express their guilt.<sup>99</sup>

This may be because women feel less entitled than men, or may be because they expect pushback if they simply refuse to serve in a direct way.

In addition, 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."<sup>100</sup> Social psychologists identify other traditionally feminine roles that may arise in workplace settings: the "princess," who aligns with but does not threaten the dominance of a powerful man; the "cheerleader" who applauds male achievements; "Ms. Efficiency," who cheerfully accepts the ministerial tasks; the "daughter" who looks up to the men around her.<sup>101</sup> This pattern may also help explain why women end up playing traditionally feminine roles such as attending to the development of the young (associate development; running the summer program) and engaging in community building (pro bono committee).

In short, 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, but whose value is not rewarded when compensation levels are set.

#### 6. *What Factors Are Important in Setting Bonuses?*

In roughly three-fourths of respondents' firms, the same evaluation mechanisms and processes applied in the case of cash bonuses. Among respondents whose firms used a different system for bonuses, a mix of objective and subjective factors is used in roughly two-thirds of income-partner respondents' firms and half the firms of minority- and equity-partner respondents. About one in four equity and minority partners, but

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99. Telephone Interview with James J. Sandman, *supra* note 95.

100. HOLLY ENGLISH, GENDER ON TRIAL: SEXUAL STEREOTYPES AND WORK/LIFE BALANCE IN THE LEGAL WORKPLACE 119 (2003).

101. See, e.g., Kay Deaux et al., *Level of Categorization and Content of Gender Stereotypes*, 3 SOC. COGNITION 145, 166 (1985); Peter Glick & Susan T. Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications for Gender Inequality*, 56 AM. PSYCHOL. 109, 113 (2001); Shelley E. Taylor, *A Categorization Approach to Stereotyping*, in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 83, 84 (David L. Hamilton ed., 1981); see also Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*, 7 EMP. RTS. & EMP. POL'Y J. 401, 419-20 (2003).

only 6% of income partners, reported that bonuses are awarded solely on subjective assessments. This probably reflects the fact that income partners' bonuses tend to be very formula-driven and therefore, objective. About one-third of all respondents said that bonuses are rewarded solely on objective criteria.

Wide variation exists with respect to bonuses. Comments indicate that firms use bonuses in a wide variety of contexts. Some examples are bonuses given to partners who had a particularly good year, to "overwhelming work on a firm (nonbillable) project," to "friends of managing partners . . . and those on committee deciding compensation and bonuses," to "extraordinary efforts or results in a given year by young partners," to originators of new clients or new matters, to "the most highly compensated partners," and finally, "It is a mystery to me . . ." Another response indicated, "the threat of leaving [by] big originators appears to be very influential." And another: "Our bonusing is very subjective and is simply 'fairness' based." One respondent noted that bonuses depended on the overall profitability of the firm. Some firms give bonuses chiefly to income partners, while at other firms, they appear to go chiefly to equity partners.

When bonuses were given, the top factors influencing prospective law firm compensation were very similar to the top factors used to set retrospective bonuses. Factors below the top four are considerably less common in the calculation of bonuses than they are in influencing prospective compensation. With the exception of majority income partners' 44% agreement that committee ratings are "very important" in setting bonuses, the fifth-highest ranking item reached less than a 30% consensus among partners.

TABLE 8: TOP FACTORS LISTED AS "VERY IMPORTANT" IN SETTING BONUSES

<b>Majority Equity Partners</b>	<b>%</b>	<b>Majority Income Partners</b>	<b>%</b>	<b>Minority Equity Partners</b>	<b>%</b>	<b>Minority Income Partners</b>	<b>%</b>
1. Revenue collected	63%	1. Revenue collected	62%	1. Committee rating	50%	1. Revenue Collected	64%
2. Origination	58%	2. Origination	56%	2. Revenue collected	42%	2. Origination	61%
3. Committee rating	56%	3. Client matter expansion/cross-selling	30%	3. Billable hours	38%	3. Billable hours	59%
4. Billable hours	42%	4. Billable hours	46%	4. Origination	34%	4. Committee rating	56%
5. Client matter expansion/cross-selling	29%	5. Committee rating	44%	Numbers too small to report	—	Numbers too small to report	—

We also analyzed what were the factors listed as either "important" or "very important" in the setting of bonuses.

TABLE 9: FACTORS LISTED AS “IMPORTANT” OR  
“VERY IMPORTANT” IN SETTING BONUSES

Majority Equity Partners	%	Majority Income Partners	%	Minority Equity Partners	%	Minority Income Partners	%
1. Origination	81%	1. Revenue collected	87%	1. Revenue collected	77%	1. Revenue collected	79%
2. Revenue collected	81%	2. Origination	86%	2. Origination	75%	2. Origination	79%
3. Committee rating	75%	3. Billable hours	77%	3. Committee rating	72%	3. Committee rating	78%
4. Billable hours	71%	4. Committee rating	69%	4. Billable hours	69%	4. Billable hours	70%
5. Client matter expansion/cross-selling	69%	5. Client matter expansion/cross-selling	70%	5. Being billing partner	69%	5. Client matter expansion/cross-selling	57%
6. Firm management	58%	6. Being billing partner	56%	6. Client matter expansion/cross-selling	59%	6. Being billing partner	54%
7. Whose work currently binds client?	53%	7. Firm management	50%	7. Whose work currently binds client?	57%	7. Firm management	47%
8. Being billing partner	41%	8. Whose work currently binds client?	47%	8. Firm management	52%	8. Practice group rating	44%

Once again, with the exception of cross-selling and committee ratings (themselves often based on individual cash flow metrics), individual cash flow metrics appear to predominate in the setting of bonuses. Consultant commentary confirms that bonus pools, which are becoming more common, typically are used to reward an equity partner who “had an unusually good year.”<sup>102</sup>

7. *Do the Factors That Are Important in Setting Compensation Differ from the Factors Important in Determining Elevation to Equity Partnership?*

Our survey also asked what factors play important roles in the decision whether to elevate lawyers from income to equity partner. Once again, revenue collected, billable hours, origination, and committee rating were the top four factors listed by all groups of respondents. Yet some striking differences emerged between the factors considered for elevation to equity partnership and the factors that influence partner compensation. Equity-partners’ responses suggest that teamwork (61%), effective leveraging of associates (43%), committee work (37%), effective development of the firm’s human capital (43%), associate development (36%), and contributions to diversity effects (32%) are considerably more likely to be considered “important” or “very important” for criteria for elevation to equity partnership than they are as criteria for partner

102. Cotterman, *supra* note 30, at 1 (stating that bonuses are becoming more common).

compensation. These factors may well play an important role in elevation to partnership than in partner compensation, because lawyers who are just being elevated to partnership status often do not yet have significant originations—which means that other factors inevitably play a larger role.

#### D. THE ALLOCATION OF, AND DISPUTES OVER, ORIGINATION CREDIT

Just today, a capital partner indicated to me in an email, which he copied to the client, that I should not have opened a new matter (regardless that he was getting credit for the new matter). . . . [T]his is a client that the capital partner inherited from another attorney who left the firm . . . . [F]rom what I can tell, I've worked with the client longer than he has.

According to Rose, in many firms, origination credit ranges between 20% and 25% of billings, with credit in some firms ranging as high as 33%.<sup>103</sup> This is particularly dramatic because, in many firms that award formal origination credit, such credit never “sunset” but instead lasts forever: “Relationship credit survives until the partner has absolutely no involvement with the client any longer,” said one respondent. Of the equity-partner respondents who reported that their firms had origination credit, over half (56%) reported permanent credit for all work on a given client account. Another 11% of equity-partner respondents reported a different system: Partners received origination credit only for new work if the client placed the phone call to the original originating attorney when a new matter came in. Fully 11% did not know how origination credit worked at their firms, which, given the complexity of some firms’ systems and the ambiguities in the way origination credit is defined, probably is not surprising. In several comments, some respondents reported “sunset”: that origination credit at their firm was limited to three years. Other firms had a functional, although not a formal, sunset: “Almost always some credit for future, frequent splitting with others; if originator becomes detached from client/work, this credit is given little or no weight.”

Forty percent of equity-partner respondents worked in firms that formally award origination credit, yet this far underestimates the importance, and the prevalence, of origination credit. As noted above, origination is one of the top factors considered in setting compensation at most firms—even in firms that do not formally award origination credit.<sup>104</sup> Of the 40% of firms that award formal origination credit, 88% reported systems that allow partners to split origination credit. This may

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103. Rose, *supra* note 62, at 5.

104. See *supra* Tables 4 & 5. This is slightly lower than the percentage of firms in general: Cotterman reported in 2008 that 56% of law firms surveyed by Altman Weil, Inc. awarded formal origination credit. See Cotterman, *supra* note 30, at 1.

be more aspirational than commonplace: The 2009 Altman Weil survey reported that, in fact, “Strikingly few clients are ‘shared’ for origination purposes . . . .”<sup>105</sup> Four out of five (80%) equity-partner respondents felt they had been denied their fair share of origination credit at some point over the past three years. Thirteen percent said this happened often, 38% said it happened occasionally, and 30% said it had happened rarely.

Income-partner respondents were more likely than equity partners to work in firms that awarded origination credit (50%). They were as likely as equity partners (88%) to report systems that allow partners to split origination credit. Income partners were a bit more likely than equity partners (83% versus 80%) to report having been denied their fair share of origination credit over the past three years, were more likely to believe that this happened to them often (18% versus 13%), and were less likely to believe it happened rarely (16% versus 30%).

Minority partners were less likely than other respondents to work in firms that award origination credit (39%) and less likely to report systems that allow partners to split origination credit (76%). Minority partners were about as likely as other respondents to have been denied their fair share of origination credit: Approximately 20% of majority income and minority partners and 16% of majority equity partners report having “never” been denied credit.

TABLE 10: ORIGINATION CREDIT

	<b>Majority Equity Partners</b>	<b>Majority Income Partners</b>	<b>Minority Income Partners</b>	<b>Minority Equity Partners</b>	<b>Minority Partners</b>
Work in firms that award origination credit	40%	51%	46%	34%	39%
Split origination credit	91%	88%	85%	—	76%
Denied fair share of credit in last three years	84%	82%	—	—	86%
Often	14%	16%	—	—	19%
Occasionally	37%	22%	—	—	19%
Rarely	33%	22%	—	—	47%

Minority-partner respondents were more likely than majority attorneys to face disputes about origination credit. Forty-eight percent faced them often or occasionally, compared with only about one-third (30%) of equity partners and income partners (32%). Minority-partner respondents also were less likely to report that such disputes occurred rarely (44% equity; 46% income; 32% minority) or never (27% equity;

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105. *Id.* at 9.



22% income; 16% minority). This is an area with the strongest racial differences we identified.

TABLE 11: STRONG RACIAL DIFFERENCES IN DISPUTES OVER ORIGINATION CREDIT

	<b>Majority Equity Partners</b>	<b>Majority Income Partners</b>	<b>Minority Partners</b>
Disputes over origination credit	73%	78%	84%
Often	8%	3%	12%
Occasionally	22%	29%	40%
Rarely	43%	46%	32%
Never	27%	22%	16%

Approximately one-fourth (27%) of majority equity-partner respondents reported feeling that a partner had tried to intimidate, threaten, or bully them into backing down in a dispute over origination credit, compared to 32% among majority income partners and 36% of minority partners. A few respondents felt that they had been bullied, but no more than men were: “But no more than that person would have bullied a male.” Some answers are vague (“I don’t feel comfortable providing this detail”), while many are vivid:

- “I have 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 decision to use my services on me.”
- “My practice group leader demanded a large percentage of origination credit for a client where I had the relationship. Since he was my practice group leader, I felt intimidated to agree.”
- “Senior equity partner with no real relationship to client made it difficult for me to claim origination for client where origination is obvious. Had to split origination with him 50/50 although he has not had relationship with or billed anything to client in over 3 years.”
- “Senior white partner starts to have lunch with and meet with my clients—not telling me about it and excluding me from the client relationship. He then claims that he brought in the additional new work from my client, and that he is sharing one-half credit.”
- “Once I was told that I shouldn’t take a matter, that I should give it to someone else because it wasn’t my direct area of litigation, which others never had to do in similar situations; once I was lead counsel on trial team but had no supervisory origination credit because partner who brought the matter in needed the credit that year.”

Some respondents reported being told they would be cut out of future relationships unless they shared or ceded origination credit. Some examples:

- “Threats to pull all future work and opportunities.”

- “Suggestion that would not refer any work in the future . . . .”
- “Implicit threat that if they had to share credit on this matter, they wouldn’t come to you with another.”
- “I can make your life difficult.” “On the other hand, I can be helpful.”
- “I was actually told that I was ‘trying to steal clients’ and that it would make more sense to send all the work to associates. I struggled for a year trying to build up my own practice separate from managing partner who made the threat (and stood by it).”

In yet another context, the power of firm leaders and power players emerges in clear focus.

- “The other partner called the conflict screening people and told them to change the billing credit. I elected not to fight, as . . . he was on our firm’s management committee that made compensation decisions.”
- “My own department chair opened a matter for one of my clients, but told me that ‘this one was his,’ and refused to give me any credit.”
- “[Origination credit went] . . . to the practice group leader who was a good friend of the partner.”
- “Origination from ‘institutional clients’ is not divided fairly. Cold calls that come into the firm are directed to the head of department or members of the board. Given that firm management (e.g. head of litigation department) does not change very often (once every ten to twelve years), this type of origination tends to cluster with the senior men.”
- “[Originations are] not necessarily connected to your being the reason the client sent the work to the firm. Rather they arise from being the first contact and having the internal political clout to demand that you are to get all or most of the origination. If you are the one who expands a client relationship there is no reason to believe that you will get any origination credit for your effort.”
- “[O]r they just lie to your face and agree to do something and simply never follow up equitably as promised. These same people make the decision on my future and pay.”

Other researchers have made similar findings. Said a partner in a national firm, “Position and power determine whether [origination credit] is split or kept.”<sup>106</sup>

A few comments highlight the costs to clients of law firms’ decision to treat partners as individual profit centers:

- “Tax lawyer refused to work further on a multi-jurisdictional transaction if I did not let him be an originator and billing partner . . . at a point . . . when the deal needed him. I went to Managing Partner and won the ‘appeal’ but nothing happened to the tax lawyer.”

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106. Nancy J. Reichman & Joyce S. Sterling, *Recasting the Brass Ring: Deconstructing and Reconstructing Workplace Opportunities for Women Lawyers*, 29 *CAP. U. L. REV.* 923, 947 (2002).

- “I brought in work outside of my area and other partner refused to do work unless granted billing credit. I refused. Work was ultimately turned down resulting in my loss of client.”
- “I went to our group Managing Partner to discuss the matter and he summarily dismissed my concerns and stated that partners often get work from different contacts at a client (not generally true unless by agreement of the partners) and that my client contact (a woman known to him) was just trying to rile things up.”

Two recognizable patterns of gender bias emerge in the comments on disputes over origination credit. The first is that women have to “try twice as hard to get half as far” because of an unspoken sense that men are entitled to share credit (but women are not). As one respondent described,

“This issue has been the most challenging for me. Some of the young male partners are just handed shared origination because ‘their brains also brought in the client.’ I have not had the same level of shared financial opportunity, despite more years of helping to build the very clients whom I requested to share . . . .”

The second stems from a pattern known as the “double bind.” Studies show that women are often faulted for lacking in collegiality or for having personality problems for behavior that, in a man, is seen as showing “he is someone to be reckoned with,” or that “he knows his own worth.”<sup>107</sup> Women who behave confidently and assertively are not as well received as men who do so.<sup>108</sup> Women managers who adopt a direct, assertive style tend to trigger strongly negative evaluations.<sup>109</sup> Women who act assertively tend to be less popular than men who do so.<sup>110</sup> The risks for women are particularly pronounced when macho behavior is

107. *Double Bind*, GEND. BIAS LEARNING PROJECT, CTR. FOR WORKLIFE LAW, [http://genderbiasbingo.com/stereotype\\_doublebind.html](http://genderbiasbingo.com/stereotype_doublebind.html) (last visited Feb. 2, 2011).

108. See, e.g., Doré Butler & Florence L. Geis, *Nonverbal Affect Responses to Male and Female Leaders: Implications for Leadership Evaluations*, 58 J. PERSONALITY & SOC. PSYCHOL. 48, 54 (1990) (finding that “intellectual assertiveness by women in mixed-sex discussions elicits visible cues of negative affect” and that women leaders received fewer “pleased” responses and more “displeased” responses from group members, while male leaders experienced the opposite); Norma Costrich et al., *When Stereotypes Hurt: Three Studies of Penalties for Sex-Role Reversals*, 11 J. EXPERIMENTAL SOC. PSYCHOL. 520, 520 (1975) (finding that women who engaged in sex-role reversals by behaving in line with stereotypes counter to their sex—namely, as aggressive-assertive—suffered adverse effects in their popularity ratings and in their perceived psychological adjustments); Madeline E. Heilman et al., *Has Anything Changed? Current Characterizations of Men, Women, and Managers*, 74 J. APPLIED PSYCHOL. 935, 939 (1989) (“[O]ur analyses also indicated a set of items that . . . emerged to differentiate women managers from both men managers and successful managers. Included in this cluster of items are the following: bitter, hasty, quarrelsome, selfish, less understanding, independent, high need for power, and high need for achievement.”).

109. See, e.g., Alice H. Eagly et al., *Gender and the Evaluation of Leaders: A Meta-Analysis*, 111 PSYCHOL. BULL. 3, 3, 5–6, 12, 16 (1992) (“[W]omen in leadership positions [a]re devalued relative to their male counterparts when leadership [i]s carried out in stereotypically masculine styles, particularly when this style [i]s autocratic or directive.”).

110. See Costrich et al., *supra* note 108, at 520–30.

rewarded (“Rainmakers and aggressiveness are important factors,” noted one respondent), given that aggressiveness is often admired in men but faulted in women.<sup>111</sup> Disputes over origination credit can jeopardize the reputations of women partners unless they have an unusual degree of political skill and savvy—more than is required of their male partners.

This gender dynamic is exacerbated if women have to struggle to gain origination credit that would have been offered automatically to a man. When women have to fight more battles, not only are they likely to win fewer; they may well also pay a long-term price in terms of perceived likability. This exacerbates the situation because women who are not likeable often are judged more harshly than men who behave in similar ways. The double bind stems from a pattern called “ambivalent sexism,” in which 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.<sup>112</sup> Of course, to succeed in most organizations requires being both liked and respected. One respondent provided the most concise description of the double bind offered: “I know that I will be punished [for] raising my concerns, and yet know that I’ll be mistreated if I don’t.”

Another respondent voiced her fear of getting “a reputation as a difficult woman.” A third “got the impression the older male partner thought I was being ‘uppity.’” A fourth reported, “[T]hey make your position seem selfish . . . .” Allegations that women are behaving selfishly often stem from the unspoken insistence that women conform to feminine role expectations that women are selfless and communal, concerned more with the welfare of others than with their own interests.<sup>113</sup> Said one respondent, “It is an old boys’ network and if you complain you are accused of not being a team player.” The speaker clearly has the impression that a man would not have encountered the same problem.

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111. *Id.*; see also Eagly et al., *supra* note 109, at 16 (finding that women, but not men, “are negatively evaluated when they exhibit masculine leadership styles”).

112. See, e.g., Susan T. Fiske et al., *(Dis)respecting Versus (Dis)liking: Status and Interdependence Predict Ambivalent Stereotypes of Competence and Warmth*, 55 J. SOC. ISSUES 473, 476 (1999); Peter Glick & Susan T. Fiske, *Ambivalent Sexism*, in 33 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 115, 151 (2001).

113. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 14–36, 251 (2000); see also ALICE H. EAGLY & LINDA L. CARLI, THROUGH THE LABYRINTH: THE TRUTH ABOUT HOW WOMEN BECOME LEADERS 78–81, 86–87 (2007) (positing that women who are too supportive or “communal” may be seen as weak, while women who are too assertive may not be liked by others); Eagly et al., *supra* note 109, at 11–12 (finding that women leaders were viewed more negatively when they adopted an autocratic, masculine leadership style, as compared with a democratic, feminine style).

Other respondents report harsh consequences for women who do not gracefully back down from their claims for origination credit or increased compensation:

- “Meeting held with me and four male partners at which my contribution was totally trashed, until I agreed to waive any claim to credit and then my practice group leader took a cut himself apparently for facilitating. It was just me arguing against the two guys claiming the credit should be totally theirs although it had been my client for years. The other two guys said nothing.”
- “Last year when I did make a stink after a phenomenal year, management purported to reward me for my great performance . . . but simultaneously hosed my husband, who is also partner, by exactly the same amount to the penny and denied (they were affronted by my drawing) any relationship.”

These situations are particularly intriguing. Assuming the informants’ assessments were correct, one possible explanation may be found in studies that document that violating stereotypes can result in social and economic reprisals—a phenomenon known as the “backlash effect.”<sup>114</sup> In a series of experiments, men and women competed in a computer game about football.<sup>115</sup> When women beat men at this male-domain task, women tended to be sabotaged—male subjects were more likely to provide them with misleading clues in preparation for the next task to be undertaken.<sup>116</sup> Subjects who sabotaged the gender deviants showed greater subsequent self-esteem.<sup>117</sup>

When faced with the double bind, one strategy is to fight. The other strategy, less risky and probably more common, is to give way in order to conform to expectations.<sup>118</sup> As respondents described:

- “It is subtle. You just know not to make an issue of it.”
- “I would never be confrontational about this.”
- “I would never enter into such a dispute . . . for that would have extremely negative consequences with management far in excess of any benefit associated with the billing credit.”
- “I just back down. I depend on others to share the origination with me so it is not worth it to me to get a reputation as one who disputes origination allocation.”
- “I make it a practice not to dispute business generation credit with my partners. I am a firm believer that ‘what goes around comes around.’ I

114. See Laurie A. Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74 J. PERSONALITY & SOC. PSYCHOL. 629, 629 (1998) (“[W]omen may suffer from a *backlash effect* in which self-promotion may enhance perceptions of their qualifications, but at the cost of social rejection.”).

115. Laurie A. Rudman & Kimberly Fairchild, *Reactions to Counterstereotypic Behavior: The Role of Backlash in Cultural Stereotype Maintenance*, 87 J. PERSONALITY & SOC. PSYCHOL. 157, 162 (2004).

116. *Id.* at 162, 164.

117. *Id.* at 164.

118. See *id.* at 169–70, 172.

find, however, that my male partners are much more aggressive about 'grabbing' credit in circumstances that might be questioned by an objective observer."

Survey comments alone cannot answer the relevant question: Are these respondents giving way because life is too short to fight with one's partners, or because they recognize that they will pay a price if they are seen as "difficult" for doing what, in a man, would be seen as legitimately trying to protect one's own interests?

Research suggests that the double bind often plays a role in compensation decisions. One survey respondent referred researchers to a news article reporting on a study that women who attempt to negotiate often face negative consequences: "Anyone studying how women do, or do not, get ahead in the workplace should go read this article."<sup>119</sup> The relevant study, co-authored by Linda Babcock (who wrote *Women Don't Ask: Negotiation and the Gender Divide*, which sends quite a different message)<sup>120</sup> examined whether and how women negotiate for compensation.<sup>121</sup> The first experiment, which investigated whether subjects were willing to hire candidates who initiated a salary negotiation, found both male and female evaluators were more likely to penalize female candidates who initiated salary negotiations more than men who did so.<sup>122</sup> The second experiment, which explored people's willingness to work with women who negotiated salary, found that women, but not men, incurred a large penalty for attempting negotiations—the penalty for women was 5.5 times steeper than the penalty for men—and both women and men were less willing to work with other women who initiated salary negotiations.<sup>123</sup> The third experiment, which involved a video of the candidate's interview, found that male evaluators—but not females—penalized women for salary negotiations, and they insisted on a greater degree of likeability from women candidates than from men.<sup>124</sup> The final experiment found that when the evaluator was male, women were more reluctant than men to negotiate compensation.<sup>125</sup> This difference did not exist when the evaluator was a woman.<sup>126</sup>

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119. Hannah Riley Bowles et al., *Social Incentives for Gender Divergences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84 (2007).

120. See generally LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* (2003). The basic thrust of *Women Don't Ask* is that women do not get ahead, because they do not negotiate as well as men—that "women don't ask." Babcock's academic studies suggest that many women do not ask because they encounter pushback when they do. See *id.* at 1–17.

121. Bowles et al., *supra* note 119, at 84.

122. *Id.* at 89.

123. *Id.* at 91.

124. *Id.* at 99.

125. *Id.*

126. *Id.*

Babcock and her co-authors asked whether women's greater reluctance "to initiate negotiations over . . . compensation could be explained by the differential treatment of male and female negotiators"<sup>127</sup> and concluded "the answer is yes."<sup>128</sup> In the first three experiments, the authors pointed out, male evaluators punished women more than men for attempting to negotiate salary.<sup>129</sup> In the third, women's reluctance to negotiate salary disappeared when negotiating with a woman.<sup>130</sup> "We show with this research that women's disinclination relative to men to initiate negotiations over resources, such as compensation, may be traced to the higher social costs that they face when doing so."<sup>131</sup> The authors point out that their results indicate that society rewards women for living up to the feminine ideals of modesty, niceness, warmth, and sensitivity to others, and often penalizes women for engaging in the kind of competitive, self-promoting behaviors that are accepted as appropriate for men.<sup>132</sup> "As lower-status group members making claims to the privileges of higher-status group members, women are likely to appear inappropriately demanding if they attempt to negotiate for higher levels of compensation,"<sup>133</sup> especially (but not only) if the evaluator is a man. Other studies confirm that women's inability to negotiate disappears when negotiating for others; it is only when they negotiate for themselves that they falter, for fear they will transgress the separate-spheres mandate of selflessness.<sup>134</sup> This conclusion is further supported by the findings of a meta-analysis of sixty-two different studies.<sup>135</sup>

This may help explain why few respondents to our survey were "satisfied" or "extremely satisfied" with their ability to negotiate or address any concerns they had regarding compensation. Only about one in five minority (21%) and income (19%) partners, and one in three (32%) equity partners reported satisfaction, as noted in Table 12.

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127. *Id.* at 98–99.

128. *Id.* at 99.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 98–99.

133. *Id.* at 86.

134. LINDA BABCOCK & SARA LASCHEVER, *ASK FOR IT: HOW WOMEN CAN USE THE POWER OF NEGOTIATION TO GET WHAT THEY WANT* 156 (2009).

135. Amy E. Walters et al., *Gender and Negotiator Competitiveness: A Meta-Analysis*, 76 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 1, 1 (1998).

TABLE 12: HOW SATISFIED ARE YOU WITH YOUR ABILITY TO EFFECTIVELY NEGOTIATE OR ADDRESS ANY CONCERNS YOU MAY HAVE REGARDING YOUR COMPENSATION?

	Majority Equity Partners	Majority Income Partners	Minority Partners
Extremely satisfied	11%	2%	5%
Satisfied	23%	20%	13%
Neutral or mixed opinion	22%	32%	27%
Dissatisfied	25%	20%	40%
Extremely dissatisfied	19%	26%	16%

Both partnership status and race significantly affected whether our respondents felt comfortable raising questions or concerns about their compensation with law firm management or their firm's compensation committee. Over half of majority equity-partner respondents (53%) felt "comfortable" or "extremely comfortable," but only about one-third (34%) of majority income partners and minority partners did. Nearly one in three equity partners (32% majority; 36% minority) felt "uncomfortable" or "extremely uncomfortable" raising such issues, as compared to 45% of majority income partners. Minority income partners reported the highest level of discomfort (61%). Discomfort about raising questions and concerns may stem from personal hesitations, or it may reflect fears of pushback that are exacerbated not only by gender, but also by race.

On the bright side, some respondents reported that they had not run into trouble over matters of origination, or that their firms dealt effectively with partners who are unfair in the allocation of origination credit. Some examples:

- "The compensation committee knows which partners have a habit of not distributing credit fairly and makes behind-the-scenes adjustments."
- "Credit is negotiated between partners, and partners who have a reputation for 'fairness' in credit sharing and collaboration, arguably have a competitive advantage in the long haul."
- "In our firm, we have a policy that each partner will help others on their pitches for no compensation or share of the client if the client comes on board . . . ."
- "[In our lockstep system, where] the ideal is that we are a team and it takes everyone to make the firm profitable for us all, I don't want to let my partners down and I work harder. I don't think it is just women either. I believe research shows that there are many motivators to human behavior other than money."

Other respondents felt well equipped to deal with any problems that arose:

- "I generate almost all of my own work (\$2.5 million+ book), so I am rarely in a position where I have to ask for credit. When I do pitch



work with other partners, I ask for an agreement before the pitch that we will split any credit for the new work equally. If a partner won't agree to this arrangement then I don't do a pitch with them."

- "If there is resistance I don't push the issue. I would not want to poison my well over this sort of thing. It does however influence my actions going forward."

Disputes over origination credit are handled typically either through negotiations between the affected partners or through review by a compensation or other internal committee. Equity-partner respondents were more likely (67%) than income-partner respondents (56%) to report disputes handled by negotiation. Income partners were much less likely to report that disputes over origination credit were handled by the compensation or other internal management committee (28%, as compared with 48% of equity partners).

Income-partner respondents (21%) and both groups of minority-partner respondents (25%) were much less likely than equity partners (45%) to report being "satisfied" or "extremely satisfied" with the way such disputes are generally resolved. Majority and minority income partners were considerably more likely to be "dissatisfied": 31% of income and 42% of minority income partners were "dissatisfied," as opposed to 17% of minority and majority equity partners.

In short, disputes over origination credit are a significant factor in the lives of many women lawyers. Among the 50% of respondents whose firms awarded origination credit, four out of five equity partners, and even more income and minority partners, reported having been denied a fair share of origination credit in the past three years. Minority-partner respondents were even more likely than majority women to find themselves in disputes over origination credit. Most disturbing, a quarter of the equity-partner respondents, a third of the income-partner and the minority-equity respondents, and 40% of the minority-income respondents reported feeling that a partner had tried to intimidate, threaten, or bully them into backing down in a dispute over origination credit.

#### E. IS THE REAL PROBLEM THAT WOMEN HAVE LESS TIME FOR RAINMAKING?

A common assumption is that women's compensation is lower than men's, because they have less time for rainmaking.<sup>136</sup> But such comments were rare in our study—a finding reinforced by PAR's recent study of part-time partners, which found that part-time equity partners (virtually all of whom are women) tend to do as much, or more, rainmaking, as do

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136. CYNTHIA THOMAS CALVERT ET AL., PROJECT FOR ATTORNEY RETENTION, REDUCED HOURS, FULL SUCCESS: PART-TIME PARTNERS IN U.S. LAW FIRMS 8, 14 (2009).

full-time partners.<sup>137</sup> Indeed, some comments indicated the opposite situation:

- “Women . . . tend to be lone rangers at the firm (i.e. they are not part of the big teams on big cases). . . . On the other hand, many of the partners (all male) working for the leaders of the section serve as ‘support’ lawyers—they spend all their time billing hours on their senior partners’ clients’ files. Naturally, the senior partner ensures they are promoted in order to keep his kingdom growing . . . . The women tend to leave and try to find a firm that rewards the ability to generate business.”
- “I have . . . the distinct impression that [origination] . . . matters not at all to determining my compensation as I have been categorized as a ‘worker bee.’”

More common were comments to the effect that respondents’ firms did not provide women with equal opportunity to participate in client pitches:

- “Women are routinely left out of client pitches and have to scream to get the attention of marketing professionals at the firm. The firm simply does not take female lawyers seriously.”
- “I have not been invited or gone to a beauty contest in the past three years. My firm does not adequately compensate ‘service’ partners.”
- “While the compensation at my firm is on its face objective . . . I have found that women who are ‘service’ partners do not have as many opportunities to work on high-profile cases and clients. Those opportunities more often than not go to men and as a result their compensation is increased.”
- “Women are not groomed in the same way men are at the firm for business development . . . . You have to be in the boys’ club to get the origination, which is really the way power is measured at the firm . . . . [T]hey are perceived as not being able to develop clients and they are encouraged to keep their noses to the grindstone. Then when they don’t have their own business, they are forced out. And no one worries about this because the powers that be figure by this time the women will be getting ready to have a baby, etc.”
- “Although I feel like I am well compensated and the compensation system is fair currently, I do not think I have as many opportunities to participate in pitches and other important matters as my male counterparts.”
- “My concerns regarding partnership compensation are not about the ‘fairness’ of how the system compensates (I think the determinations made are very fair in that they accurately compensate partners for their contributions in past years), but rather about the ability of women partners to get the types of opportunities and responsibilities that generate the ‘objective’ (billable hours, client generation) and ‘subjective’ (management, client responsibility, trial experience) performance that the system ultimately rewards.”

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137. *Id.*

The Reichman and Sterling study, based on interviews, found quite a different dynamic at work:

I was certainly one of the higher billing partners that period of my time there. But it was still hard to attract associates to work with me because I was never one of the partners who was yelling at them that they had to do my work . . . . It was very hard for me and it got to be not worth the effort to try to put out what I needed to put out to get the associates to stay on my work. They would tend to put my work and down pick up somebody else's work . . . . My clients were getting pissed off . . . . I think the associates liked me. It certainly wasn't a popularity contest. It's just that that's the way their bread is buttered . . . . I had to be head of the hiring committee, which meant that I had to interview all these same [associates] who wouldn't work for me later and to persuade my partners to have interviews with them so that they could ultimately go and work for them.<sup>138</sup>

This partner quit her firm and opened a solo practice.<sup>139</sup> Another respondent said that the politics of her firm made it impossible for her to keep practicing:

It's actually one of the reasons I left private practice cause I had grown my book to a point where I couldn't service it myself any longer or I was going to go nuts. I finally got to a point where I hired a new associate dedicated to my work and she was very, very good and that got recognized very quickly and people started to take her away—little by little, bit by bit. What can you do? She needs to get out there and work with other partners if she wants to move up the ladder internally in the firm. I saw the handwriting on the wall . . . .<sup>140</sup>

Over half of our respondents reported situations in which they had participated in “beauty contests” but had not been included in the client work that resulted. Over 70% of minority income partners, 58% of minority equity partners, 55% of majority equity partners, and 48% of majority 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 majority and minority equity partners, 48% of minority income partners, and 31% of majority income partners reporting having this happen once or twice, while 14% of majority equity partners, 18% of minority partners and 8% of majority income partners had experienced this three or more times.

Respondents also reported that in the last three years, many had participated in successful client pitches but did not receive a proportionate share of the origination credit or otherwise have their contribution recognized financially. Forty percent of majority equity partners and 37% of majority income partners reported this experience. Among minority partners, 52% of income partners and 39% of equity

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138. Reichman & Sterling, *supra* note 5, at 57–58.

139. *Id.* at 57.

140. *Id.* at 64–65.

partners reported this experience. This happened once or twice among one-fourth of minority equity partners and majority income partners, while 28% of majority equity partners and 35% of minority income partners experienced this once or twice; a slightly smaller proportion of majority equity and income partners (12% each) had encountered this three or more times in the prior three years as compared to minority partners (15%).

#### F. LACK OF SUCCESSION PLANNING

Who inherits the credit when an attorney leaves the firm? Firms that have origination credit typically allow it to be passed on if an attorney leaves a firm: Only 4-7% of respondents said their firms disallowed this. Roughly one in three majority equity partners, and one in five majority income partners reported no consistent approach, with minority partners in between (29%). The most common system reported was that partners with origination credit are allowed to decide who will inherit their origination credit, with 26% of majority equity partners, 28% of minority equity partners, and 30% of majority income partners reporting this practice. Minority income partners were most likely (48%) to identify this practice as their firm's approach to succession planning for origination credit. Much less common was for firm management to play a role (6-14%). Clients rarely played a role in choosing their new lawyers (1-3%). A surprising proportion of each group of partners did not know how succession was handled at their firms: 24% of majority income partners, 11% of majority equity partners, and 9% of minority partners.

Most comments said that the partner who "owns" the client chooses the successor. A few felt this system had a negative effect on women:

- "Succession appears to consist of persons bequeathing the credit to their 'chosen person,' w[ho] is typically a white male."
- "Men are consistently provided with succession opportunities or the opportunity to get credit for landing a client — women are not."
- "When partners leave and their clients stay they have not been even partially assigned to me as requested even though I have built relationships with these clients and often do much of the work."

Responses indicated that more firm involvement appears to be a trend.

- "If the originating attorney leaves the firm but the client stays, the Compensation Committee may transfer the origination credit to another shareholder who demonstrates that he or she is the primary cause of the client's continued use of the firm's services."
- "Often the current partner in charge has a large say . . . . However, the firm is becoming more active in selecting successors. The firm does not allow partners to pass on credit for a client without approval of management."
- "Successor is chosen based on the best interest of the client."

A few respondents mentioned that origination credit ended at their firms if the originating attorney left the firm: “When a partner leaves, the client is assigned to the firm in general.” Only a few comments indicated that the client had a say in deciding what happens. For example: “Mostly, subjective determined by [the] partner in charge, but firm management occasionally ‘chooses’. . . . I bet clients sometimes pick too.”

A few comments described active firm involvement:

- “Our approach is to introduce a client to more than one originating partner so there is a team that is available to service the account.”
- “We encourage each senior partner to come up with and propose a plan to transition key clients. The plan is reviewed by the practice group head and the Advisory Board. The focus is not on who becomes the new ‘engagement partner’ but on making sure the client is connected to enough people that it will remain with the firm.”

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.

#### G. SUBJECTIVITY

By a wide margin, most respondents had compensation systems that combine objectivity and subjectivity: 85% of equity-partner respondents reported such systems, while 10% had completely subjective systems, and 4% had completely objective systems. Our respondents reported a sharply higher percentage of systems that combine objectivity and subjectivity, and a sharply lower percentage of firms that rely on completely subjective systems than do medium and large firms in general. One consultant’s study reported that only 32% of law firms with 100 or more lawyers had a combination of objectivity and subjectivity, while 42% rely on totally subjective systems.<sup>141</sup>

Altman Weil’s 2009 survey found that just over one-third of respondents reported that 76% or more of total partner compensation at their firms is subjective.<sup>142</sup> An additional 35% of respondents reported that some part of compensation was subjective, but said this component counted for less than 75% of total compensation.<sup>143</sup> Our respondents also had a sharply lower percentage of purely objective systems: The Altman Weil survey found that nearly one-third of law firms had compensation systems with no subjective component.<sup>144</sup> Both differences probably reflect that our respondents were more likely to be in large law firms than are lawyers in general, and that large law firms are more likely to

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141. See Alan R. Olson, *Subjective Law Firm Compensation Systems, Marketing and Origination*, REP. TO LEGAL MGMT., Apr. 2003, at 6–7 (Altman Weil, Inc.).

142. Cotterman, *supra* note 30, at 9.

143. *Id.*

144. *Id.*

have subjectivity as a significant part of their systems. Income and minority partners reported similar findings. In other firms, every partner votes on the compensation of every other partner, typically using subjective criteria in the process. “Each lawyer can use whatever criteria she wants to determine her vote . . . .”

A flood of comments stressed that law firm compensation is subjective even when objective factors are considered. Some examples:

- “Subjective application of a list of 12 objective criteria.”
- “Articulated 10 factors but application is subjective.”
- “Factors related to compensation are published but decisions seem totally random.”
- “There are ‘policies’ for determining compensation, including a number of objective criteria regarding billings, hours, client generation, and your history, but there is lots of room for subjective variations.”
- “‘Numbers’ (amounts billed, amounts collected, origination, hours worked) are considered; these are objective criteria. But how these objective factors are weighed and how other factors are taken into account is subjectively done by the executive committee . . . . [B]onuses are given every year (totally within the discretion of the executive committee.)”
- “Purportedly based on origination, managing, responsib[ility] and working collections for three-year period, but decisions subjectively made by Comp Committee.”

Subjectivity is inevitable and appropriate in setting law firm compensation. A completely objective system is infeasible in most firms, given the wide range of contributions made and roles played by various partners. Yet decisions made on the basis of subjective criteria are especially vulnerable to the influence of stereotypes and bias.<sup>145</sup> The stereotypes that emerge boost men but operate as a drag on women in male-dominated workplaces. Such workplaces define competence in ways that are considered a natural fit with the stereotypical man—ambitious, aggressive, rational, direct<sup>146</sup>—but an uneasy fit with the stereotypical woman—who is seen as modest, selfless, and emotional.<sup>147</sup>

Because stereotypes drive perception and memory, people tend to notice and remember stereotype-consistent information better than

145. See Bielby, *supra* note 46, at 123 (“[P]ersonnel systems whose criteria for making decisions are arbitrary and subjective are highly vulnerable to bias due to the influence of stereotypes . . . .”); see also SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 246–85 (1984) (discussing the default mechanisms of social inference that operate most particularly in the absence of complete and/or reliable information).

146. See JEANETTE N. CLEVELAND ET AL., *WOMEN AND MEN IN ORGANIZATIONS: SEX AND GENDER ISSUES AT WORK* 44 (2000).

147. Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women’s Ascent Up the Organizational Ladder*, 57 *J. Soc. ISSUES* 657, 658 (2001).

stereotype-inconsistent information.<sup>148</sup> Because stereotypes drive inference, observers tend to attribute behavior to stereotype-consistent explanations rather than to stereotype-inconsistent ones.<sup>149</sup> Consequently, men's successes tend to be attributed to abiding dispositions, while women's successes tend to be attributed to fleeting, outside conditions: This pattern is often called the "he's skilled, she's lucky" syndrome.<sup>150</sup> The reverse is also true: Men's failures tend to be attributed to outside conditions (no one could have won before that judge) while women's tend to be attributed to stable personality traits (she lacks the forcefulness to be a litigator).<sup>151</sup> These simple principles account for the sense, mentioned above, that women (and people of color) have to "try twice as hard to get half as far."<sup>152</sup> Unfortunately, once stereotypes are activated, they tend to reinforce themselves, as new information is interpreted through the lens of stereotypes—information that then is interpreted as further evidence of the proof of the stereotypes' accuracy.<sup>153</sup>

These processes appear to be at work in the lives of our respondents. For example, several comments report that objective factors sometimes are given different values for men and women.

- "Thus, some factors are 'important' if they justify paying a man, especially a man with a family, . . . and other factors are 'important' if they will justify paying a woman, especially a single woman, less."
- "While statistics are considered in the process, instances of double and triple counting for the same business [is] rampant among the boys' club, while women rarely get the same level of credit unless they are in a position to 'walk' the business."

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148. See generally David L. Hamilton & Jeffrey W. Sherman, *Stereotypes*, in 2 HANDBOOK OF SOCIAL COGNITION I (Robert S. Wyer, Jr. & Thomas K. Srull eds., 2d ed. 1994) (summarizing two decades of research on this phenomenon, called "illusory correlation"). For further discussion of this trend, see Galen V. Bodenhausen & Robert S. Wyer, Jr., *Effects of Stereotypes in Decision Making and Information-Processing Strategies*, 48 J. PERSONALITY & SOC. PSYCHOL. 267, 280–81 (1985).

149. See Bodenhausen & Wyer, *supra* note 148, at 279–81.

150. See Jeffrey H. Greenhaus & Saroj Parasuraman, *Job Performance Attributions and Career Advancement Prospects: An Examination of Gender and Race Effects*, 55 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 273, 274, 276, 290 (1993); see also Janet K. Swim & Lawrence J. Sanna, *He's Skilled, She's Lucky: A Meta-Analysis of Observers' Attributions for Women's and Men's Successes and Failures*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 507 (1996).

151. See Greenhaus & Parasuraman, *supra* note 150, at 274, 276, 290.

152. See *supra* Part I.D. and *infra* Part II.B.7.

153. See Bodenhausen & Wyer, *supra* note 148, at 279 ("The effects of activating a stereotype appear to override the effects of other information available about the target. . . . [S]tereotypes functioned as judgmental heuristics in interpreting the target's behavior and why it occurred. . . ."); Lucy Johnston, *Resisting Change: Information-Seeking and Stereotype Change*, 29 EUR. J. Soc. PSYCHOL. 799, 799 (1996) (finding that stereotype-preservation bias affected information gathering and prevented modification of existing stereotypic beliefs); see also Greenhaus & Parasuraman, *supra* note 150, at 275–78 (discussing gender differences in performance attributions and how those attributions inform and reinforce supervisors' subsequent behavior toward their subordinates).

- “Each of the items listed above assumes uniform application of the factors. [T]hese items matter more for some partners but not for others . . . . That should be a focus of whether women partners’ compensation is commensurate with that of their male colleagues.”
- “Again, depends on who is being compensated, especially with respect to whom management favors. A factor that means nothing as [to] one partner can be the reason to compensate another partner, if someone on management wants to protect/cover that person.”

These comments indicate a specific pattern fed by the general principles outlined above. Eric L. Uhlmann and Geoffrey L. Cohen found that when two job candidates were considered for a male-dominated job, respondents preferred the male candidate when he had more experience, citing the importance of experience, but they still preferred the male candidate when the male candidate had more education, citing the importance of education.<sup>154</sup> In both cases, a female candidate, who was objectively very similar, lost out.<sup>155</sup>

The same basic principles also drive another well-documented pattern, called leniency bias, in which objective rules are applied leniently to men but rigidly to women.<sup>156</sup> Some responses demonstrate this pattern:

- “My compensation was ‘adjusted’ those years I worked less than goal due to young children. Several of my male colleagues have worked equivalently under goal for years with no adjustments made. Instead, I’m told that they have illness/family/other issues that we all must support them through.”
- “One disparity I see is that male partners who experience a decline in business due to factors outside their control are protected from a reduction in their partnership share while the earnings of similarly situated women partners decline rapidly and dramatically.”

Most of the patterns above link back to a basic precept: Men enjoy an assumption of competence in male-dominated environments, while women seem not to “fit.”<sup>157</sup> As a result, women may find that they need to prove themselves over and over again. A 1988 report concluded that women lawyers felt they had to “work harder, do better and make fewer mistakes” than men, and that they are “treated with a presumption of incompetence,” whereas male lawyers enjoy a presumption of competence that is “overcome only after numerous significant mistakes.”<sup>158</sup>

154. See, e.g., Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 *PSYCHOL. SCI.* 474, 475–77 (2005) (discussing unfettered discretion in hiring criteria, and noting that criteria used to assess merit can be defined flexibly to favor certain groups).

155. *Id.* at 479.

156. See Marilyn B. Brewer, *In-Group Favoritism: The Subtle Side of Intergroup Discrimination*, in *CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS* 164–67 (David M. Messick & Ann E. Tenbrunsel eds., 1996).

157. See Madeline E. Heilman, *Sex Bias in Work Settings: The Lack of Fit Model*, 5 *RES. ORG. BEHAV.* 269, 280 (1983).

158. ABA COMM’N ON WOMEN IN THE PROF., REPORT TO THE HOUSE OF DELEGATES 12 (1988).



Our survey suggested that women still may have to prove themselves over and over again. Some examples:

- “I firmly believe that the achievements of women in the firm are routinely and systemically discounted and have confirmed that through an analysis of compensation statistics. We are called upon to contribute heavily in administrative time and commitment, to build big books of business and bill [lots of] hours to ‘earn’ our place.”
- “There are clearly discrepancies with male and female partners with equal or better numbers from an objective standpoint. If you want to appeal, you are appealing to the same seven people who made that decision.”
- “It is very difficult with our firm to figure out their logic. There are several male partners whose numbers are significantly less than female equity partners but their compensation is dramatically higher.”

A quite different type of bias emerges from the assumption that men are breadwinners while women are not. This leads to the unspoken sense that men with children “need” the money, whereas women with children do not, because they have men supporting them.

- “Perception with respect to whether the partner ‘needs’ the income, which leads to less pay for women (particularly married women) than that for men (particularly men with children to support).”
- “In setting a female partner’s compensation, it is my impression that the firm considers whether a woman will have children [and] take the allotted maternity leave, whether the woman will return to work, and whether the woman will return full- or part-time. All of these factors appear to negatively impact a woman’s compensation and equity partner track.”
- “[T]he firm seems to use whatever factors justify paying men more and women less, particularly men with families.”
- “For example, that a man, recently divorced, was now ‘effectively a single parent’ and therefore needed a raise, while [everyone else was] being cut . . . .”
- “I am expecting in January. In December, met billing obligations, got de minimis bonus. Told the firm would be flexible with me in future. Never asked for flexibility. Just wanted fair bonus for past year.”

Decisionmaking that is subjective and unchecked gives free rein to gender stereotyping. This stereotyping reflects the unspoken sense that men inherently possess the skills one needs to succeed in the law, a skill set which, both historically and traditionally, is associated with men and masculinity.<sup>159</sup>

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159. See Peter Glick, *Trait-Based and Sex-Based Discrimination in Occupational Prestige, Occupational Salary, and Hiring*, 25 *SEX ROLES* 351, 365 (1991); Peter Glick, Korin Wilk & Michele Perreault, *Images of Occupations: Components of Gender and Status in Occupational Stereotypes*, 32 *SEX ROLES* 565, 570 (1995); Peter Glick, Cari Zion & Cynthia Nelson, *What Mediates Sex Discrimination in Hiring Decisions?*, 55 *J. PERSONALITY & SOC. PSYCHOL.* 178, 185–86 (1988); Heilman, *supra* note 157, at 280; see also Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 *GENDER & SOC’Y* 139, 151–53 (1990).

## H. THE PERILS OF SELF-ADVOCACY FOR WOMEN

It can also be referred to as “law of the jungle”—those who fight for credit and are in the inner circle get origination credit.

The most common forms of input into partner compensation decisions reported by our respondents were objective reports of billables, such as collections and originations: 92-94% of respondents reported this type of input. The next most common input was partners’ written self-advocacy, reported by 69% of minority-partner respondents, and 77-79% of other respondents. Next most common were evaluations by heads of practice groups or departments—reported by 49% of minority equity partners and 66-68% of other respondents—followed by evaluations by other partners—reported by 21% minority income, 41% income, and 43% equity partners—and committee interviews—reported by 28-29% minority, 35% income, and 47% equity partners. In a small percentage of firms, as noted above, each partner votes on the compensation of every other partner.

A number of respondents commented that they needed to fill out self-assessments but that, in practice, these seemed to play a limited role in compensation decisions. Said one: “They say self-assessments and meeting with partners are considered but they are not.” Another responded, “[p]artners are asked to fill out self-assessment[s], but it is unclear how much they matter.” Sometimes self-evaluations are combined with direct lobbying of the decisionmaker(s): “Partners write a self-evaluation, but my assessment is that they have no impact. Numbers and individual ‘lobbying’ of the firm chair seem to affect compensation.”

Where self-assessments and personal lobbying are important, women may face another facet of the double bind. Women often encounter pushback for self-promotion. To quote one study, “[s]elf-promotion may be instrumental for [establishing competence]... yet women who self-promote may suffer social reprisals for violating gender prescriptions to be modest.”<sup>160</sup> Women may be reluctant to self-promote for fear they will be seen as unfeminine and pushy. In short, “women may be stuck in a Catch-22 in which they are damned if they do self-promote, and damned if they do not.”<sup>161</sup>

All this affects women partners. Most systems rely on partners to put their best case forward for increased compensation, either in writing, or in person, or both. In some firms, this self-advocacy is directed to the head of the firm. In others, it is directed to management or compensation committee members. In a few firms, it is directed to every one of one’s

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160. Rudman, *supra* note 114, at 629.

161. Laurie A. Rudman, *To Be or Not To Be (Self-Promoting): The Consequences of Counterstereotypical Impression Management, in POWER AND INFLUENCE IN ORGANIZATIONS* 287, 290 (Roderick M. Kramer & Margaret A. Neale eds., 1998).

partners. This places many women partners in the situation of having to have one or many hallway conversations where they detail their accomplishments—and may well face one or more crucial partners who find this distasteful: “You certainly think highly of yourself, don’t you?” may be the reaction.

#### I. DE-EQUITIZED PARTNERS

Some people want to make much more money at the cost of others’ compensation . . . . [Others] think we have to have a stronger upper tier of compensation to attract laterals. The result, in my mind, is fewer people making equity partner and more existing partners being de-equitized.

Fourteen percent of the majority income partners, 12% of minority partners, and 3% of the majority equity partners had reported that they had been de-equitized.<sup>162</sup> In each group, the total number who responded to this question was small, so these numbers should be treated with caution: based on their self-identifications, eight minority partners and twenty majority partners said they had been de-equitized.

The most common factor identified by the equity partners was a low level of originations (63%), trailed distantly by low billable hours (25%). Among the income partners, the most common factor was a firm’s decision to increase profits per partner (52%), trailed by low billable hours (30%) and low originations (26%).

For income partners who had been de-equitized, the most common factor was their firms’ decision to increase profits per partner (52%), followed by low billable hours (30%) and low origination of new clients (26%).

Minority partners, half of whom were equity partners, were about as likely as majority income partners to have been de-equitized (12%). For them, the most common factor was a firm’s decision to increase its profits per partner (63%), trailed distantly by low new client origination (38%) and low existing partner expansion (38%).

A small number of the comments reflected a decision by an individual partner to cut back her commitments due to childcare responsibilities:

- “I had twins (so three children) and decided that I wanted to reduce the commitment [while they were young] to client development and marketing, which was expected of equity partners . . . . I was told that I would be welcomed back as an equity partner in the future. I regained equity partner status when the girls were ten.”

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<sup>162</sup> Given that de-equitized partners, by definition, are no longer equity partners, respondents to this question who reported themselves equity partners most likely were de-equitized at a different firm.

- “I was a young equity partner and had just had twins (in addition to a 6 year old), so my time/attention to client development and marketing was limited. I chose to be ‘de-equitized’ as a way to balance the demands at the time. Ten years later, I returned to equity.”

Note that, in both cases, the firms matched an “off-ramp” with an “on-ramp” and gained a happy and productive partner as a result. Yet other respondents’ stories lacked a happy ending:

“[Why I was de-equitized] was never fully explained to me. The head office instructed our office to reduce the number of equity partners, and I was the one chosen (during my pregnancy, even though I had significant revenue generation and billable hours).”

Other personal reasons included medical issues, and one attorney who had undertaken a transgender transition. Still other respondents were de-equitized for work-related reasons: “This was my decision, as a way to continue working but reduce the hours and the responsibility for training associates and feeding work to a specific group of associates. I can now focus on developing business and helping in firm management with less concern about billable hours.”

A few respondents clearly felt burned by their firms’ decisions to de-equitize them. Several respondents tied decisions to de-equitize to their firms’ desire to increase profits per partner, or profits per equity partner:

- “I was asked to handle a significant pro-bono [matter] and my ‘profits per partner’ numbers weren’t acceptable.”
- “Our compensation system has been changing significantly in the last few years as profits per equity partner (versus profits per partner) is used by more firms to tout their finances to merger targets. It is becoming much harder to become an equity partner and I anticipate that a number of partners will be de-equitized this year. I had to fight like hell to avoid that last year.”

Other scholarship has questioned whether de-equitization is a significant trend in law firm compensation. One recent study followed the attrition of 100,000 lawyers at 285 law firms.<sup>163</sup> The report found that “[d]espite anecdotal evidence that partners were affected by layoffs through the ‘de-equitization’ process[,] . . . we find no evidence of large direct effect on partners. Even at firms with the largest layoffs, partner attrition rates have been at standard levels throughout the process.”<sup>164</sup>

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163. Paul Oyer & Scott Schaefer, *What Drives Turnover and Layoffs at Large Law Firms?* 15–16 (Mar. 2, 2010) (unpublished manuscript), available at <http://www.law.georgetown.edu/LegalProfession/documents/oyerlayoffs.pdf>.

164. *Id.* at 12.

## II. WHERE TO GO FROM HERE?

Compensation represents a tangible expression of a person's value. It defines lifestyle, position within a community, status among peers, friends and family, and measures the relative importance of the individual to the organization.<sup>165</sup>

No wonder people care a lot about compensation. This study shows some strong racial and gender effects in current law firm compensation systems—yet changing these systems is not something one does lightly. Someone's ox is always gored, which can lead to serious interfirm conflicts. According to Altman Weil consultant James D. Cotterman, "Generally it will take two or three years to move from an existing system to a new one."<sup>166</sup>

Nonetheless, a discussion of best practices is important for several reasons. First, this report provides some helpful guidance to women on how to choose their law firms: Some firms have compensation systems that work well for women, while others have systems that present significant career difficulties for at least some of their women partners. Before women choose their law firms, they should find out some crucial facts about its compensation system.

A discussion of best practices is also important for law firms. The discussion below will highlight a striking conclusion: the aspects of law firms' compensation systems that open the door to hidden bias—against lawyers of color as well as women—also have been widely criticized by law firm management consultants. Failing to address the problems with compensation systems will have a disproportionate impact both on women and on lawyers of color, but good management will help everyone—and the firm's bottom line.<sup>167</sup>

This Part will first address the common claim that the current design of law firm compensation systems simply reflects economic reality. It then will proceed to a discussion of best practices.

### A. ECONOMIC REALITY?

Our survey data confirm that, while many firms say they consider a wide range of factors in setting compensation, our study respondents perceive that the key factors in most law firm compensation systems are origination and hours worked, measured in various ways.

Is this not just economic reality? After all, if partners do not bring in work, no law firm can survive. Yet many consultants believe that existing

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165. Cotterman, *supra* note 33, at 4.

166. Cotterman, *supra* note 30, at 10.

167. See generally LOTTE BAILYN, *BREAKING THE MOLD: WOMEN, MEN, AND TIME IN THE NEW CORPORATE WORLD* (1993) (describing current expectations of career success, the cost to both employers and employees for following these expectations, and the potential gains if this traditional mold could be broken).

compensation systems do not incentivize behavior that is in the best long-term interest of firms. Management guru David Maister comes out swinging:

Many law firms have discovered you can make money if you work everybody very, very hard and really slash your costs and don't care about how people—partners, associates, or staff—feel about their work lives. 'Let's succeed by working more hours and ever-decreasing amount of support' is not the most sophisticated piece of business thinking I have ever heard.<sup>168</sup>

Not surprisingly, others take a softer line. Notes the Vice President and General Counsel of Hildebrandt Baker Robbins Inc.:

[W]hen Partner A needs help from another specialist, Partner B, Partner B will either expressly or implicitly refuse to give his best service to Partner A's client because Partner A will collect the origination fee forever. Partner B figures, "I'm better off finding my own client, rather than working on Howard's client."<sup>169</sup>

As previously discussed, Joel A. Rose, a law firm management consultant, highlights the perverse incentives that can plague law firm compensation systems: "Tensions can develop when the direction of the firm's compensation system is unclear or only receives lip service."<sup>170</sup> He cites several examples:

- When "the firm verbally encourages partners to 'delegate client work to others within the firm,' but, in practice, it overcompensates for revenue collected from partners' personal production . . . ."<sup>171</sup>
- When "the firm verbally encourages partners to work together to develop business from existing and potential clients but rewards individuals at the expense of joint origination credit . . . ."<sup>172</sup>
- When "the firm verbally encourages partners to perform consequential nonbillable work to progress the firm (e.g., marketing, enhancing the firm's image, training, management of the firm and its substantive practice areas, etc.) but rewards those activities marginally in favor of billable hours/revenue from personal production."<sup>173</sup>

Compensation systems that focus on origination also give partners incentives to bring in clients "regardless of client quality, not only in terms of putting the firm at greater risk of claims, but also at greater odds of writing off fees. Since D gets a share as originator without doing the

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168. David Maister, *Are Law Firms Manageable?*, Am. L., Apr. 2006, at 96, 100.

169. *Compensation: A Law Firm's Pandora's Box: Origination, Profitability and Hours Worked All Add Up*, MERRILL'S ILL. LEGAL TIMES, Sept. 1996, available at 1996 WLNR 6402767 (quoting Joel F. Henning, Senior Vice President and General Counsel of Hildebrandt Baker Robbins Inc.).

170. Rose, *supra* note 62, at 3.

171. *Id.*

172. *Id.*

173. *Id.* at 3-4.

work, the write-off falls disproportionately on those doing the work.”<sup>174</sup> Peter J. Winders, a partner with Carlton Fields in Florida, is particularly harsh in his criticism of origination credit:

Make a rule that Brown, the corporate lawyer, cannot dabble in litigation. Thus, Brown is theoretically forbidden from handling the litigation, but if he goes ahead and does it anyway, he is rewarded for doing so. Unworthy clients are to be avoided, but compensation is paid for originating one. Crime does in fact pay, but one person is appointed as cop to keep him from doing it. And of course since the cop work is underpaid (it is non-billable, and not provided for in the system) there is a temptation to do it only sporadically. It is like hoping to stop the importation of drugs from Columbia [sic] by decreasing penalties and manning law enforcement with unpaid volunteers.<sup>175</sup>

Winders also highlights the perverse incentives that stem from a focus on partners' billable hours. Each partner “is tempted to favor ‘his own’ clients, so long as he has plenty to do . . . [over] stepchilding” his partners' clients' work, even if that is of greater long-term value to the firm.<sup>176</sup>

Consultants warn that an excessive focus on long work hours incentivizes behavior harmful both to clients and to law firms.<sup>177</sup> When firms place too much emphasis on partners' billable hours, partners lack sufficient motivation to “develop and delegate client work to others within and outside their area of expertise,” notes Rose.<sup>178</sup> He continues:

Most firms that place a premium on revenue from partners' personal production find that partners tend to hold their client relationships too close to their vests, they frequently hoard client work rather than spread it around to other partners . . . partners perform work that could be performed by associates . . . partners do billable work when their better use for the law firm is to generate additional business from existing and potential clients, and lawyers may perform work outside their princip[al] areas of expertise that others in the firm could perform more effectively and efficiently.<sup>179</sup>

Another consultant, Michael J. Anderson, notes “liability risks when partners perform work in areas in which they are not proficient,”<sup>180</sup> while another author has argued that the structural conflicts of interests set up

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174. Peter J. Winders, *The Ideal Law Firm Compensation System*, 16 PROF. LAW, no. 2, 2005 at 1, 5.

175. *Id.* at 4–5. See generally Steven Kerr, *On the Folly of Rewarding A, While Hoping for B*, 18 ACAD. MGMT. J. 769 (1975) (discussing reward systems that reward discouraged behaviors, while failing to reward desired behaviors).

176. Winders, *supra* note 174, at 4.

177. See, e.g., Rose, *supra* note 63, at 5; Winders, *supra* note 174, at 7.

178. Cf. Rose, *supra* note 63, at 5 (explaining that rewarding partners billing and collecting for work for which they are the responsible partner, but not the originating partner, motivates them to develop and delegate work inside and outside their area).

179. *Id.*

180. MICHAEL J. ANDERSON, *EDGE INT'L, PARTNER COMPENSATION: SYSTEMS USED IN PROFESSIONAL SERVICE FIRMS* 8 (2001).

by current compensation systems place lawyers at risk of violating the ABA Model Rules of Professional Conduct.<sup>181</sup>

Our respondents reported a variety of perverse incentives at work in their firms. One noted that a high billable hours requirement can lead to padding of bills: “The high billable hour requirement encourages padding . . . . It’s a system with few realistic incentives other than to work yourself silly or lie about it.” More common were reports of client hoarding:

- “Several senior partners have retired in the past five years and the work simply went away—no one had planned for succession, in my view because the partners were busy hoarding credit to advance their careers, and not to look at either the client’s interests or the law firm’s. Dysfunctional compensation systems can really cripple a firm.”
- “After seeing the two systems at work, it seems to be that lock-step is much fairer to women. There is substantially less hoarding of clients, exclusion from contacts, elbowing women out once the client gets in the door (after we’re trotted out for appearance of diversity).”
- “I have expressed my dissatisfaction with the compensation system, which I believe encourages partners to hoard work, not to develop teams and not to institutionalize clients.”

Other respondents identified other behaviors not in the long-term interest of their firms:

- “As a minority female, I am clearly in an outer circle, and at the mercy of others. Efforts have been made to thwart my business development in my respective practice group. It is very frustrating.”
- “[The billing partner is said not to matter at all, except that there is a trend, since this is a multi-office firm, of writing off time of lawyers in other offices and otherwise gaming the system, and this is the power of the billing partner. So while the ‘status’ is not said to be important, the position is important nonetheless.”

Some consultants fault compensation systems that focus on origination and personal production for focusing on revenue, rather than on the bottom line. Such systems stress cash flow over cost controls and ignore the need to incentivize the investments necessary to ensure long-term viability of a business organization.<sup>182</sup> The failure to value the kinds of human capital and management activities that are vital to the long-

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181. Edward A. Bernstein, *Structural Conflicts of Interest: How A Law Firm’s Compensation System Affects Its Ability to Serve Clients*, 2003 U. ILL. L. REV. 1261, 1262 (arguing that the shift away from lockstep sets up incentives that can cause partners to give poor legal advice).

182. John W. Olmstead, *Cutting the Pie, Determining Partner Compensation*, OLMSTEAD & ASSOCS. (2005), <http://www.olmsteadassoc.com/resource-center/determining-partner-compensation.aspx> (“Compensation systems should do more than simply allocate the pie—they should reinforce the behaviors and efforts that the firm seeks from its attorneys. Many firms are discovering that desired behaviors and results must go beyond short term fee production and must include contributions in areas such as marketing, mentoring, firm management, etc. to ensure the long term viability of the firm.”).



term vitality of a business organization is apparent from the responses to the survey. Many firms now operate on a modified “eat what you kill” system, which in its pure form, notes Anderson, results in

a total lack of responsibility for managing the entity. Because no one gets recognition for non-billable time spent there is often a void when it comes to firm management, training of juniors, firm marketing or human resources . . . . The system creates no need for collegiality other than as a method for partners to market other partners for work for their clients.<sup>183</sup>

As noted above, even law firm and practice group management are rated far below the individual profit-center factors. Other forms of institutional investment play little, if any, role in law firm compensation.

“The most advanced method is to look at how groups are performing,” says Cotterman.<sup>184</sup> “You need some element of compensation that recognizes group success and performance. You want to make sure compensation rewards collaboration.”<sup>185</sup> Our data indicate that this trend is still in the birthing stage. Some comments signaled it, as when one respondent reported that “associate profit of the practice group/office” was part of the compensation formula. Yet only 4% of income partners and 11% of equity partners felt that teamwork was very important in determining compensation. More progress is evident if one widens the scope of inquiry: 32% of income partners and 46% of equity partners felt that teamwork was “important” or “very important.” Yet both figures trailed measures reflective of hours worked and origination by a very wide margin. Even more striking, from an economic standpoint, is how rarely “effective leveraging of associates” plays a role in law firm compensation. This is, of course, vital both from the viewpoint of the firm, to enhance profitability, and from the viewpoint of clients, to ensure cost-effectiveness. Yet rewarding leveraging remains rare: It is virtually never a major factor in setting compensation and was listed as “important” or “very important” by fewer than half of our respondents.

A bit more progress is evident in redesigning origination credits to incentivize teamwork. Roughly one-third of respondents noted that cross-selling and/or expanding work for an existing client is a very important factor. This trend is even stronger if we widen the inquiry: 84% of equity partners and roughly three-fourths (77%) of income partners listed these activities as either “important” or “very important” in the setting of compensation. It thus seems that law firms are well on their way to encouraging teamwork with respect to *gaining* clients, but

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183. ANDERSON, *supra* note 180, at 11.

184. Telephone Interview with James D. Cotterman, Consultant, Altman Weil, Inc. (Feb. 24, 2009).

185. *Id.*

they have a long way to go in incentivizing teamwork with respect to *servicing* clients.

Another problem with the design of law firm compensation systems is the undervaluing of long-term investments. Peter Winders highlights the perverse incentives that arise when “nobody is paid for minding the store.” Partners are incentivized to

avoid committee assignments, recruiting interviews and other time consuming duties that benefit the firm because they do not benefit him monetarily. He can then claim he brings in more money than anybody, ignoring, as the formula does, the fact that the other duties are essential if the firm is to thrive.<sup>186</sup>

One point that does not appear in the consultant literature, but is suggested by our survey, is that the attrition of women partners, which is higher than that of male partners, is sometimes linked with the perception of gender bias in compensation. Said one respondent:

“A key motivating factor in my decision to leave the firm was that I learned that my base salary and bonus were lower than those of a male peer (same law school graduating class, similar prior work experience, similar expertise, same practice group) despite the fact that my work product was consistently in demand and I was consistently busy, whereas he had trouble maintaining a solid workload and many partners expressed concerns about the quality of his work.”

Of course, when a partner leaves, she takes her book of business with her. This is a cost of current compensation practices at some firms that has, to our knowledge, never been noted in the literature.

If the long-term economic viability of law firms does not explain contemporary law firm compensation systems, what *does* explain them? We posed that question to James J. Sandman. He first addressed the overvaluation of hours worked: “Rainmakers make the argument all the time, ‘Measuring me in terms of the hours I work doesn’t make sense—that’s not the best use of my time.’”<sup>187</sup> The reason partners’ billable hours survive has to do with lawyers’ skill sets. Rainmaking skills are not equally distributed across the lawyer population. Other partners can generate revenue for the firm more easily by working a lot of hours. The many risk-averse partners who do not want to gamble their compensation on their business-generating success feel that maximizing their billable hours as service partners gives them more control over and certainty about their compensation.<sup>188</sup>

The result, Sandman continued, is that

certain things the firm needs in the long term are not valued. The trend in partner compensation is toward trying to measure the individual partner’s economic contribution to the firm. This tends to devalue less

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<sup>186</sup>. Winders, *supra* note 174, at 4.

<sup>187</sup>. Telephone Interview with James J. Sandman, *supra* note 95.

<sup>188</sup>. *Id.*

tangible but nevertheless important attributes that are not easily measured. Teamwork? A partner who cites that as his or her best argument for compensation would be considered a lame advocate.<sup>189</sup>

In summary, many commentators feel that current compensation systems overvalue individual cash flow measures and undervalue institutional investment measures. Our data indicate some movement away from compensation systems that create incentives mismatched with firms' long-term strategic goals. Yet the key features that have been widely criticized by consultants as creating perverse incentives remain robust in the law firms of our respondents.

## B. BEST PRACTICES

This study suggests that many law firms could benefit from changes to their compensation systems. Such changes are not easy: Abrupt and controversial changes to a firm's compensation system can easily lead the firm to break up. Yet gradual progress towards fairer and more effective compensation practices is, in the opinion of many of our respondents, clearly needed. These include:

1. Increasing transparency;
2. Benchmarking;
3. Improving diversity on compensation committees and introducing other checks on bias and in-group favoritism;
4. Examining the billable hours threshold;
5. Redesigning the origination credit;
6. Creating a diverse committee that handles disputes over reward allocation, particularly origination credit;
7. Taking proactive steps to check the hidden bias that will otherwise surely emerge in the context of compensation systems;
8. Ensuring a process that does not penalize women for self-advocacy; and
9. Conforming to standard business practices by linking compensation to individuals' contributions to the long-term viability of the firm.

### *I. Increasing Transparency*

The path to becoming a billing partner is varied, with inconsistencies, and there is no official guidance as to how one becomes a billing partner. Sometimes it is just who gets the file open first; sometimes it is the partner with the most political clout. . . . There is no consistency and no one to turn to for guidance; there are no rules. Yet this is [important] to the overall determination of partner compensation.

A system that is not clearly and formally explained to everyone means that, to gain the knowledge necessary to understand the system,

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<sup>189</sup> *Id.*

one needs to rely on informal networks and relationships with people in power. This situation will disadvantage out-groups, which in most law firms means that it will disadvantage disproportionate numbers of women and people of color. Informal, opaque systems also will disadvantage many white men who are too shy or introverted to know the right people and the ropes.

A best practice is to write a memo that explains clearly how a firm's compensation system works, and provides for each new partner an introductory session with an existing partner-mentor to explain the system and to answer questions. Of course, the partner-mentor needs to be someone who actually understands the compensation system: As our survey indicates, many partners do not.

When the compensation system is changed, this also needs to be clearly explained. This probably will be best handled in small meetings: In large meetings, people will be reluctant to ask questions, and one-on-one meetings are likely to yield inconsistency in the information given.<sup>190</sup>

A more basic point is that firms need to understand what factors *actually* play a major role in a firm's compensation—to talk about realities rather than aspirations. Gaining this information often will require a statistical analysis to identify what those factors are, as opposed to what factors are announced to have an influence. This kind of statistical analysis typically will require an outside consultant—but this is a type of analysis familiar to consultants who specialize in compensation systems.

A final point is that firms need to understand whether those factors that play an important role in elevation to partnership are different from those factors that play an important role in setting partner compensation. If different factors have more influence on setting partner compensation than on elevation to partnership, firms need to inform new partners of this fact. Again, formalizing this kind of information process can avoid in-group favoritism—where “those in the know” succeed, while those who are not in the know tend to fail. Allowing in-group favoritism to flourish will disadvantage not only women, but also people of color, LGBT lawyers, and perhaps others.

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190. E-mail from James J. Sandman to Joan C. Williams (Apr. 4, 2010, 6:43 PM) (on file with Author).

## 2. *Benchmarking*

The system is effectively feudal. Compensation is centralized with a very small group of partners. Because voting is weighted, the firm chair knows exactly how many votes he needs to control the firm and he pays the top tier enough to buy their loyalty. The dominant factor is origination credit, but there are virtually no rules or guidelines and so credit is a free for all, with the strongest usually winning.

A first step is to establish baseline information on the percentage of revenues and/or profits generated by, and credited to, women lawyers and lawyers of color.<sup>191</sup> The second, and perhaps most important step is to implement regular monitoring and analysis of the impact of a given compensation system on out-groups, including women and people of color.<sup>192</sup>

This type of benchmarking is important in order to control the kind of biases that occur even in organizations where good intentions abound. A recent study of a business with an elaborate performance evaluation process, and a strong commitment to merit-based compensation systems, found that women and people of color nonetheless got lower raises when supervisors took the evaluations and awarded raises, without a process to check for bias at that step of the process.<sup>193</sup>

To quote a well-known phrase, “what gets measured gets done.”<sup>194</sup> To put this differently, “[i]f you’re not keeping score, you’re only practicing.”<sup>195</sup> If systematic differentials in compensation by race and/or sex emerge, further steps can be initiated. Given the wide range in different types of compensation systems, probably the best advice is to call in a consultant to analyze where the problems arise and how best to address them.

## 3. *Improving Diversity on Compensation Committees and Introducing Other Checks on Bias and In-Group Favoritism*

In our respondents’ firms, the committees in charge of compensation were remarkably white, and remarkably male. This creates the perfect conditions for in-group favoritism, which systematically disadvantages women and people of color of both sexes. It is important to note that having a single woman or a single person of color on a committee often increases the risk of creating the unhealthy dynamics

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191. NAT’L ASS’N OF WOMEN LAWYERS, ACTIONS FOR ADVANCING WOMEN INTO LAW FIRM LEADERSHIP: REPORT OF THE NAWL NATIONAL LEADERSHIP SUMMIT 20 (July 2008) [hereinafter NAWL, SUMMIT REPORT].

192. Bielby, *supra* note 46, at 126 (detailing the need for such monitoring).

193. Emilio J. Castilla, *Gender, Race, and Meritocracy in Organization Careers*, 113 AM. J. SOC. 1479, 1482 (2008).

194. Maureen Giovannini, *What Gets Measured Gets Done: Achieving Results Through Diversity and Inclusion*, 27 J. FOR QUALITY & PARTICIPATION 21, 26 (2004).

195. Oral Communication with James Potter, Senior Vice President, Gen. Counsel, and Sec’y of Del Monte Foods, and Chair of the Advisory Board of Project for Attorney Retention (Spring 2009).

associated with tokenism. For example, when only one woman is on an important committee, her sex can become so salient that she may feel the need to judge women more harshly to prove that she is not favoring women. Or she may feel that every time she opens her mouth her comments are taken as representing all women. A variety of dynamics can emerge.<sup>196</sup> In short, heterogeneous committees can provide a break in bias.

The fact that many committees in charge of compensation are elected may contribute to those committees' lack of diversity. In this context, it is worth noting that many respondents said that although the committee in charge of compensation, in theory, is elected, in practice, the election typically rubber-stamped candidates that have already been chosen by the powers that be.<sup>197</sup> One useful approach, if that firm has a separate compensation committee, may be for the management committee to propose a diverse slate of candidates for the compensation committee.

A final practice that exists in some firms can help reduce in-group favoritism in the operation of compensation committees: the rule that no partner's compensation can rise more than 10% while he or she is serving on the comp committee.<sup>198</sup> Said Barbara Caufield, equity partner at Dewey & LeBoeuf, "We used to do this. I don't know why we ever stopped. It was very effective in ensuring that nobody stayed too long on the compensation committee!"<sup>199</sup>

#### 4. *Examining the Billable Hours Threshold*

NAWL's 2007 study found that a high billable hours requirement is correlated with a dramatic increase in the wage gap between men and women.<sup>200</sup> The gender gap was \$140,000 at firms with high hours requirements, \$73,000 at firms with no hours requirement, and \$51,000 at firms that required partners to log billable hours lower than the median for all firms.<sup>201</sup>

Billable hours inevitably play a significant role in the level of partner compensation. Yet two different models exist for taking billable hours into account. One requires all partners to meet a certain billable-hours threshold in order to receive all the credit available for the billable-hours component of attorney compensation, on the theory that billable hours are only one type of contribution partners need to make for firms to flourish. The other system rewards the attorneys who work

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196. Kanter, *supra* note 41, at 238–40.

197. Telephone Interview with Cathy Salvatore, Dir. of Career Dev. (Mar. 5, 2010).

198. Personal Communication with Barbara Caufield, Partner, Dewey & LeBeouf (Mar. 18, 2010).

199. *Id.*

200. NAT'L ASS'N OF WOMEN LAWYERS, NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 13 (2007).

201. *Id.*

the most hours, signaling that billing hours is a critical contribution to a firm's long-term financial viability.

The threshold approach to billable hours was used in only a small minority of our respondents' firms. The predominant system presumably was one in which attorneys who work the longest hours tend to receive increased compensation even if, for example, a partner could be increasing a firm's profitability more by leveraging associates better, decreasing unwanted attrition among valued attorneys, or moving from lower- to higher-margin practice areas. Because many more men than women have two-person careers in which they can rely on their partner to take care of all matters outside of work,<sup>202</sup> a most-hours-wins systems disproportionately disadvantages women partners. In addition, in the opinion of many law firm consultants, systems focused heavily on billable hours are more than just not economically justified, they also introduce perverse incentives, most notably the hoarding of work, and inefficiencies that are detrimental to clients' interests.

##### 5. *Redesigning the Origination Credit*

Sixty percent of firms in the survey do not formally award origination credit. Yet even in firms without formal origination credit, origination often plays a central role in the setting of law firm compensation. Old-fashioned origination credit could usefully be redesigned in a number of ways:

*Origination credit should not be inheritable.* If the purpose of origination credit is to incentivize lawyers to bring in new clients, it is hard to discern the rationale for allowing the partner who "owns" the client to pass on origination credit to whomever he or she wants. This practice has negative effects both on diversity and on the perceived fairness of a firm's compensation system.

*Reward teams, not individuals.* The point of a law firm is to build teams of lawyers that, together, can serve a client's interests better than a sole practitioner could.<sup>203</sup> As noted above, consultants often advocate systems that recognize a variety of contributions to a given client's work. One step in this direction is the common practice of dividing credit among three or more attorneys: the one who brought in the work, the billing partner, the partner who manages the client relationship, and the partners who actually do the work. Obviously, if the weight given to origination credit swamps the other factors considered, the resulting system will differ little from old-fashioned origination credit. Another alternative is to shift away from origination credit, towards an analysis of whose work currently binds a given client to the firm. Fewer than one-in-five majority equity partners and only roughly one-in-six income partners

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202. See *supra* notes 66–68 and accompanying text.

203. See Burk & McGowan, *supra* note 10, at 64–67.

and minority equity partners reported this kind of system when asked which factors were considered “very important” in setting compensation. Yet a majority of firms appear to already be engaged in this calculation: 66% of majority equity partners, 63% of minority equity partners, 60% of majority income partners and 45% of minority income partners said this factor was either “important” or “very important.”

*Origination credit by matter, not by client.* A complementary practice is to reward origination credit according to who brings in a given matter, rather than to who first introduced the client to the firm. Another recommended practice is that any expansion of the work goes not to first contact, but rather to the expander and spread among the other secondary actors. This type of distribution is important because women and minorities are more likely to be expanders than first contacts.

*Sunsets.* Some firms have a three-year sunset on origination credit. “At that point,” said Alan R. Olson of Altman Weil, “either new business credit ceases or is reduced. Other compensation credits, such as billing attorney credit and working attorney credit, would remain in most systems and palliate the abrupt reduction in new business credit.”<sup>204</sup> Sunsets recognize the importance of origination, while also ensuring that different lawyers have relationships with a given client, to ensure that the client stays with the firm even if a single attorney on the team serving the client leaves.

*Pitch credit.* A pervasive complaint by both women and people of color is that they are invited on pitches in order to appeal to in-house departments that seek diversity—but then are given no origination credit for doing so. This could be eliminated by a clearly stated and widely disseminated policy to the effect that, if a woman or person of color is invited on a client pitch, that attorney needs to be given part of any origination credit that results from the pitch—and part of the work.

#### 6. *Creating a Diverse Committee That Handles Disputes over Reward Allocation, Particularly Origination Credit*

Not only the system of reward allocation, but also the process for settling disputes, can make a tremendous difference for women and people of color. This study shows clearly that the current system, in which origination credit contests are left to be negotiated privately between the contesting partners is having a highly negative effect on many women and attorneys of color. This is precisely the kind of context—out of the public eye, with no oversight whatsoever—in which hidden bias flourishes. NAWL recommends that firms establish “a

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204. Alan R. Olson, *How Law Firms Use Formulaic Systems to Reward Business Development*, 22 COUNSEL, May 2003, at 14–15.



powerful and diverse oversight committee” charged with resolving disputes over origination credit.<sup>205</sup>

7. *Taking Proactive Steps to Check the Hidden Bias That Will Otherwise Surely Emerge in the Context of Compensation Systems*

The first step is to look very carefully at law firm compensation systems that are totally subjective. While these may work well in some small firms, they present very serious risks of gender and racial bias. These systems also has serious drawbacks from a business standpoint, which is why, as one consulting firms notes delicately, “Altman Weil’s consultants find it difficult to justify totally subjective systems.”<sup>206</sup> If a firm has a totally subjective system, benchmarking to assess whether it is creating racial and gender disparities is even more important.

Even where a firm’s system is not totally subjective, subjectivity is an inevitable part of most firms’ compensation systems. If biases are unmonitored and unchecked, both women and attorneys of color often will find themselves having to “try twice as hard” to make half as much. This occurs, as noted above, because the successes of women (and the literature is much the same with respect to people of color<sup>207</sup>) will tend to be overlooked or attributed to quirks of fate, while evidence of their failures and limitations will tend to be noticed, remembered, and interpreted as evidence of lack of merit. Again, this will happen even when the individuals in a given firm have no hostility or ill-will towards women or people of color, and believe, in good faith, that they are sincerely committed to advancing women and attorneys of color.<sup>208</sup>

Luckily, employers can institute practices that control for cognitive bias.<sup>209</sup> The goal is not to eliminate bias—which is impossible—but to teach people what assumptions they need to double-check. An efficient way to accomplish this in a law firm setting is to require a short training in the context of performance evaluation, given each year, to introduce the four basic patterns of gender stereotyping:

- I. *Prove It Again!* When women have to prove their competence over and over again in order to be judged as competent as men.

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205. NAWL, SUMMIT REPORT, *supra* note 191, at 20.

206. Alan R. Olson, *Subjective Law Firm Compensation Systems, Marketing and Origination*, REP. TO LEGAL MGMT., Apr. 2003, at 6, 10 (Altman Weil, Inc.).

207. See, e.g., Gordon Hodson et al., *Processes in Racial Discrimination: Differential Weighting of Conflicting Information*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 460, 460 (2002).

208. See FISKE & TAYLOR, *supra* note 145, at 274–79; see also Galen V. Bodenhausen & C. Neil MacRae, *The Self-Regulation of Intergroup Perception: Mechanisms and Consequences of Stereotype Suppression*, in STEREOTYPES AND STEREOTYPING 227, 227–53 (C. Neil MacRae et al. eds., 1996).

209. Barbara F. Reskin, *Employment Discrimination and Its Remedies*, in SOURCEBOOK OF LABOR MARKET RESEARCH: EVOLVING STRUCTURES AND PROCESSES 589–90 (Ivar Berg & Arne L. Kalleberg eds., 2001) (stating that employers can control cognitive bias); see also Baron & Pfeffer, *supra* note 47, at 193–94 (same); Bielby, *supra* note 46, at 126 (detailing the need for such monitoring).

2. *Catch-22*: When women face social pressure to play a limited number of traditionally feminine roles—and encounter pushback if they do not. Research shows that, too often, women who conform to traditional roles are liked but not respected, while women who do not conform are respected but not liked. This is important for all attorneys, because they all weigh in on others' advancement and compensation—be it of associates or partners.
3. *Maternal Wall*: When motherhood triggers strong assumptions that women are no longer committed or competent.
4. *Gender Wars*: When gender bias against women turns into conflicts among the women.

The committee that decides compensation needs additional training to ensure that they do not penalize women for self-promotion, do not discount women's successes, do not award men more compensation "because they have a family to support," or award women less compensation "because they have someone to support them." Many programs and consultants are available to provide this training. Another important resource is the ABA Commission's *Fair Measure: Toward Effective Attorney Evaluations*.<sup>210</sup>

In addition, studies show that procedures that require the formal articulation of reasons for a decision provide a check on bias, because people stop and self-check to examine their assumptions.<sup>211</sup> This recommendation poses a challenge for compensation systems that traditionally have operated in the closet. Unfortunately, that kind of decisionmaking opens the door wide to unexamined bias, particularly in an environment in which there are relatively few women, people of color, or other diverse attorneys. The literature also stresses that putting someone in charge of diversity who has access to leadership is the single most effective way to achieve diversity.<sup>212</sup>

A minimum first step is to introduce a formal metric, formally disseminated, that reports the breakdown of women and people of color in tiers of compensation. This will no doubt be a controversial proposal but, again, "if you're not keeping score, you're only practicing."<sup>213</sup>

#### 8. *Ensuring a Process That Does Not Penalize Women for Self-Advocacy*

In firms with effective performance evaluation training, partners will soon learn that penalizing women for self-promoting when men are not penalized for the same conduct is gender bias. Firms that fail to do so, at

210. See generally JOAN C. WILLIAMS & CONSUELA A. PINTO, ABA COMM'N ON WOMEN IN THE PROF., *FAIR MEASURE: TOWARD EFFECTIVE ATTORNEY EVALUATIONS* (2d ed. 2008).

211. Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 611–12 (2006).

212. *Id.*

213. See *supra* note 195 and accompanying text.

the very least, need to make partners aware that their instincts may be to find distasteful in women the kind of self-promotion they take for granted in men. Again, implicit bias will inevitably be a factor affecting law firm compensation of women and attorneys of color unless and until the firm makes its partners aware of the need to recognize the kinds of patterns that commonly arise and to self-correct when they do so.

As noted above, women are often sanctioned for self-advocacy, particularly by other women. One way to address this is to issue a memorandum that delineates what is expected and encouraged during self-advocacy interactions, outlining the type of information required, and describing what is inappropriate. It is important to have female as well as male partners discuss this, given that studies show that women actually are more likely than are men to sanction a woman for self-promotion.<sup>214</sup> The key is to have the partners who are deciding compensation ask: What is my reaction—and would my reaction be the same if partner *ABC* (a male partner at the woman partner's level, not just an anonymous man) had written the same thing?

9. *Conforming to Standard Business Practices by Linking Compensation to Individuals' Contributions to the Long-Term Viability of the Firm*

An important point, rarely mentioned, is the current system's odd focus on *current cash flow*. To state the obvious, cash flow differs from the bottom line, which is a measure of the difference between revenue flow and expenses. Consultants circle around this when they note that partners in practice areas with higher profit margins should be rewarded financially.<sup>215</sup> To quote Joel F. Henning Senior Vice President and General Counsel of Hildebrandt Baker Robbins, Inc: “[v]ery often the celebrity lawyers . . . will . . . say ‘[t]hey’re not paying me enough money. I brought in \$2 million worth of business.’ I’ll look into it and I’ll often find that it costs \$3 million to bring in that \$2 million worth of business.”<sup>216</sup> He also states: “If you measure hours, receipts and originations, that doesn’t take into account whether the work is profitable or not.”<sup>217</sup>

Of course, cash flow is easier to measure than bottom line. A particular challenge faced by law firms is that those who manage them typically have had no training in how to manage a large business organization, nor do most law firm partners have an appreciation for

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214. Rudman, *supra* note 114, at 629.

215. Joel A. Rose, *Dealing with Tensions Surrounding Partner Compensation*, JOEL A. ROSE & ASSOC., INC., [http://www.joelarose.com/articles/dealing\\_with\\_tensions.html](http://www.joelarose.com/articles/dealing_with_tensions.html) (last visited Feb. 2, 2011).

216. *Compensation: A Law Firm's Pandora's Box: Origination, Profitability and Hours All Add Up*, *supra* note 169, at 18.

217. *Id.* at 17.

what they did not learn when they chose not to go to business school.<sup>218</sup> The past lack of sophisticated management feeds skepticism about the potential for sophisticated management in the future.<sup>219</sup> The result, notes Maister, is an absence of trust that leads to “extremely short-term orientations of many law firms. If partners don’t believe the firm will remember or value their contributions to future success, why would they make any investment that they may ultimately not get credit for?”<sup>220</sup>

The basic principle is easy to articulate: “Compensation theory generally says that you ought to be rewarding people for the behaviors that you are trying to elicit . . .,” notes Henning.<sup>221</sup> The typical approach in most business settings is to link compensation to the individual’s annual goals, which in turn reflect the organization’s strategic plan.<sup>222</sup> One survey respondent noted that her firm had instituted such a system outside of the compensation context: “Individual must meet the specific written elevation criteria and reflect/support standards set forth in the firm’s strategic plan.” When asked about what factors into compensation, other comments offer intriguing hints of systems designed to reward teamwork: “Cross-office fertilization (ability to generate work for lawyers in other offices); ability to generate marketing and billable opportunities for lawyers in other practice groups.”

Law firms’ failure to link partners’ compensation to their contribution to the long-term viability of the firm has a disproportionate impact on women, for several reasons. Most important, women lawyers often are under significant informal pressures to make such contributions, for example, through service on committees related to recruitment, associate development, and diversity. In addition, due to a history of gender discrimination in the profession, women may feel a greater obligation than do men to mentor other women, and to help them develop their careers—contributions that help develop a firm’s human capital but rarely play a significant role when partner compensation is set.

A straightforward fix is for firms to reward all of the different kinds of contributions partners are asked to make to the firm, both through mentoring and other programs, and as well as through committee work. This theory of compensation would recognize that if the firm requires partners to make a contribution, it is important enough to the long-term future of the firm to be recognized when compensation is set. The

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218. Maister, *supra* note 168, at 99–100.

219. *Id.* at 96.

220. *Id.* at 98.

221. *Compensation: A Law Firm’s Pandora’s Box: Origination, Profitability and Hours All Add Up*, *supra* note 169, at 3 (quoting Joel F. Henning, Senior Vice President and General Counsel of Hildebrandt Baker Robbins Inc.).

222. Telephone Interview with Cathy Salvatore, *supra* note 197.

inverse would also be true—that if a given type of contribution is not important enough to recognize when compensation is set, perhaps it is not important enough to be required.

*How* these factors are taken into account also matters. For example, we suspect that most firms represented by lawyers in our survey *say* that they take into account, in setting compensation, partners' contributions to diversity, associate development, and so on. Yet many of our respondents were notably skeptical; evidently, many felt that their firms paid lip service to but did not actually account for such activities to a significant extent when compensation was set. This finding may indicate that firms need to communicate better how they actually *do* take these types of contributions into account. Alternatively, firms may need to set up more formal systems than they currently have; it may be that existing informal recognition ("it's in the mix; we just don't quantify it") translates good intentions into few results.

More sweeping than a mechanism for adding additional factors into the mix in setting law firm compensation is to shift to the type of compensation systems adopted long ago. For example, Ernst & Young's compensation system weighs partners in four different arenas: quality, people, markets, and operational excellence.<sup>223</sup>

"Quality" is, quite simply, the quality of the partners' work—something rarely considered explicitly in law firm compensation systems.<sup>224</sup> At Ernst & Young, detailed assessments of quality are performed for each major "engagement," as client matters are called.<sup>225</sup>

"People" concerns whether a partner is "actively involved in attracting growing and training our people," said Cathy Salvatore, Director of Career Development, "because our people are the only thing we have."<sup>226</sup> Partners can choose how they will contribute to human capital development of others in the firm: "I tell them, these are the people who are going to pay for your retirement," Salvatore said.<sup>227</sup> Some partners choose to focus on recruiting, whether recruiting recent law school graduates or more experienced attorneys.<sup>228</sup> Individuals are given responsibility for recruiting from their alma maters.<sup>229</sup> "They own it. It is their responsibility to see that we get what we need, and to make sure the relevant professors are happy."<sup>230</sup> Other partners focus on inclusiveness and diversity, or serve as Service Program leaders, teaching in-house

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223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

training programs, and recruiting others to do so.<sup>231</sup> Also included is how a partner interacts with his or her team: “How are they going to engage with people on the job? It is very easy for a partner to never be on the scene—to come in at the beginning, at the end, and other than that only if there’s a problem. Younger people love to see the partners,” Salvatore noted.<sup>232</sup> But a partner who spent all his or her time with an engagement team, who was totally invisible at office events and “was not driving anything cross functionally” would be penalized under the “People” category.<sup>233</sup> The focus is on strategic development: “[H]ow are you contributing to what E & Y needs to do to make sure we have the strongest workforce, period—across all accounts not just your account.”<sup>234</sup> A single respondent reported a law-firm system that reflects some of these concerns: Her firm’s partner compensation took account of associate evaluations of partners.

“Markets” includes revenue generated, but goes far beyond that: It measures the extent to which a partner engaged in strategic development of new markets—not only for him or herself, but also for the firm as a whole.<sup>235</sup> Markets also measures whether the partner has brought in work, and worked strategically to penetrate new markets or develop new products.<sup>236</sup> One consideration is “account planning—how you prepare to get your teams ready to deliver whatever service has been contracted for,” Salvatore noted.<sup>237</sup> It also includes strategic work to penetrate a new market: “Who are we going to go after and how are we going to go after them.”<sup>238</sup>

“Operational excellence” focuses on whether work is performed and revenues are collected efficiently and in a timely manner.<sup>239</sup> So, if a partner has “a lot of days of revenue sitting uncollected,” or has a significant number of write-offs, this would show up in the operational excellence metric.<sup>240</sup> Also considered is “fee-sharing”: efficient deployment of the person with the relevant skill set, who is closest to the geographical locale of the engagement. “This discourages partners from using people they know over and over again because it may be more cost-efficient to use someone closer to the client,” said Salvatore.<sup>241</sup>

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231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

A straightforward approach would be to adopt this kind of system: Law firms who inquire will find that many of their larger clients have a similar system. Firms that feel this is too large a leap could adapt their current systems by awarding points for a variety of institutional investments (from management to developing the firm's human capital). A third alternative is to set aside a specific percentage of firm profits to be distributed based on institutional investments.

### CONCLUSION

No compensation system is perfect. But some are awful.<sup>242</sup>

In 1960, only 38 U.S. law firms had over 50 lawyers.<sup>243</sup> The largest law firm in the United States had only 169 lawyers in 1968.<sup>244</sup> Between 1998 and 2004, the only size category of law firms that increased appreciably were the largest firms: The number of attorneys working for these firms doubled during that period.<sup>245</sup> By 2008, the average AmLaw 100 firm had 778 lawyers and 183 equity partners; the average AmLaw 200 firm had 289 and 92 equity partners.<sup>246</sup>

As law firms have transitioned into the twenty-first century, systems that served the profession well thirty or sixty years ago are no longer working well.<sup>247</sup> The Great Recession has exacerbated many of the tensions surrounding law firm compensation by making a broad swath of law firm partners feel at risk. Several studies have substantiated this fear and its impact on women, including a survey conducted by Paul Oyer and Scott Schaefer, which followed over 100,000 lawyers between 2008 and 2009.<sup>248</sup> Their findings indicated that "being female increased the turnover rate by about 7.5%."<sup>249</sup> However, the trend did not start with the beginning of the Great Recession. In their study, Reichman and Sterling recall an interview with a woman partner, who began to notice gender inequities in partner compensation in the 1980s and "brought them to the attention of the management committee, who were

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242. Winders, *supra* note 174, at 14.

243. Marc Galanter, "Old and in the Way": *The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081, 1090.

244. Marc Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747, 749 (1990).

245. George P. Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. REV. 1635, 1659 (2006).

246. Aric Press & John O'Connor, *Am Law Second Hundred: Steady Does It*, AM. LAW. (May 30, 2008), <http://www.law.com/jsp/article.jsp?id=1202421806313>.

247. See Michele Beardslee et al., *Hiring Teams from Rivals: Theory and Evidence on the Evolving Relationships in the Corporate Legal Market* (Feb. 21, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1442066> (considering the evolving relationships between clients and law firms); Burk & McGowan, *supra* note 10, at 24-33 (discussing the downsizing of Big Law). See generally Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749.

248. Oyer & Schaefer, *supra* note 163, at 1.

249. *Id.* at 15-16.

'appalled. They had never thought about it . . . .'<sup>250</sup> They introduced diversity training, but, for those not at the top,

[I]t didn't get better. . . . I think that the reason . . . . [is that those who took over were] people [who] tended to be about my age who in some ways were more threatened by the women being there than the older partners had been. And who in some ways were more competitive with everybody including the women and in some ways who saw success by a woman as somehow diminishing them.<sup>251</sup>

The bad news is that existing law firm compensation systems open the door to gender bias, because they contain tremendous amounts of subjectivity and lack transparency, and because so much of the negotiation surrounding origination credit takes place out of sight. In a profession in which 90% of women lawyers report having encountered sex discrimination—a percentage that has not decreased since the early years of women's entry into the legal profession in the late 1970s—these practices open the door wide to bias and discrimination.<sup>252</sup>

Yet, if that is the bad news, the 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.

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250. Reichman & Sterling, *supra* note 5, at 43.

251. *Id.*

252. Noonan, Corcoran & Courant, *supra* note 13, at 163, 173.



## APPENDIX

Minority partners were as likely as majority partners to be in one-tier partnership systems. Approximately 30% of majority and minority partners were in firms with one-tier partnership systems.

Roughly two-thirds of majority equity partners' (70%) and minority income and equity partners' (63% and 68%), but only 54% of majority income partners' firms used a compensation systems based on levels or points. In most such systems, the levels or points are reevaluated annually: 80% of majority equity partners, 71% of majority income partners, 75% of minority income partners, and 82% of minority equity partners reported this practice. The remaining firms, with one exception, reevaluated every two years: 14% of majority equity partners, 10% of minority, and 4% of majority income partners reported this practice.

Most majority equity partners (76%) reported open compensation systems, where partnership compensation is disclosed and circulated, 5% reported closed systems, and 14% reported semi-open systems, where compensation is available but is not distributed automatically. Among our majority income-partner respondents, only 48% reported open systems, while 26% reported closed and 20% semi-closed systems. Minority partners were in the middle, with 48% reporting open systems, 22% reporting closed systems, and 23% reporting semi-open systems. Comments indicate that open compensation systems typically are open only for equity partners.

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