The American Bar Association
Commission on Women in the Profession,
Section on Individual Rights & Responsibilities,
Commission on Mental and Physical Disability Law,
Commission on Sexual Orientation and Gender Identity,
Center for Racial and Ethnic Diversity,
Presidential Diversity Commission and the
ABA Center for Continuing Legal Education
Present

Removing Bias from Attorney Evaluations
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Removing Bias from Attorney Evaluations

October 16, 2009

What Is Bias?
Key Points

- Everyone has biases
- Biases affect everyday interactions

Consider Sue

Sue takes the deposition of a difficult witness and, in her supervisor’s opinion, doesn’t press hard enough for straight answers to her questions. Sue’s supervisor decides that Sue “is not cut out to be a litigator.”
40 Years of Research by Social Psychologists Show...

Hidden bias

+ Experience seemingly consistent with belief

= Conclusion

Impact of Workplace Biases

- Discount abilities OR
- Provide opportunities
- Based (often unknowingly) on some characteristics or traits linked to gender, race, sexual orientation or gender identity, and disability
31.6% of lawyers are women  
18.7% of equity and non-equity partners in law firms are women; 1.8% are minority women  
45.3% of associates in law firms are women; 10.7% are minority women  
Women received 47.1% of JDs awarded in academic year 2007-08  
Women lawyers overall earn 80.5% of the weekly median salaries earned by men

In a recent survey, only 0.22% of partners at law firms have a disability (NALP)

2007 law school graduates with disabilities have lower starting salaries than non-disabled graduates: the mean salary was $75,096 for those with disabilities, $83,425 for women, and $89,060 for men (NALP).
Why Do We Care About the Attorney Evaluation Process?

Statistical Context

Degrees of Equality: A National Study
Examining Workplace Climate for LGBT

- 51% Not open to anyone or open to just a few
- Of those not open:
  - 54% - Lied about their personal life
  - 44% - Reported depression
  - 29% - Reported intentionally avoiding others
  - 29% - Reported avoiding social events
Test Your Biases

- Implicit Association Test
  - Demonstrates how we make connections more quickly between pairs of ideas that are already related in our minds
  - E.g., gender and career, black and white, gay and straight, disabled and abled

- Available at https://implicit.harvard.edu

Why Is Bias So Difficult to Fight in Law Firms?

- Few counter opinions
- Extreme environment
- Horizontal structure
Requires Three-Pronged Approach

- Reform
- Intervene
- Correct
Reform

Train evaluating lawyers to accurately evaluate performance

- All supervising attorneys should be required to attend a brief (no more than 60-90 minutes) meeting to discuss the evaluation procedures
- Stress that all evaluations will be specifically reviewed for bias, among other things – to ensure consistency
- Evaluators who fail to complete the evaluations as directed will suffer certain consequences, such as reduced compensation

Intervene

Develop specific job-related performance objectives or competencies, and communicate them to associates

- Effective job descriptions include the knowledge, skills, and abilities necessary to successfully perform as an attorney at any level of seniority
- The knowledge, skills, and abilities are the foundation for the performance competencies against which the non-partner attorneys will be evaluated
- The competencies should be specific and directly tied to associates’ actual job duties
- Performance objectives
**Intervene**
Define the rating scale

- The rating scale identifies the relative quality of the attorney’s performance vis-à-vis the performance criteria.
- Rate the attorney’s performance on each competency on a multipoint scale ranging from “poor” to “excellent” or “1” to “5” (or some similar arrangement).
- Minimize subjectivity by identifying specific examples of what constitutes a “poor” or “excellent” rating.
- The evaluation form should include space for narrative comments.

**Intervene**
Attorney Self-Evaluation

- The self-evaluation gives attorneys the opportunity to identify their strengths, key contributions, and developmental goals.
- It allows the firm to compare associates’ views of their performance against those of their supervising attorneys.
- Inconsistencies between the two evaluations.
Intervene

Diversity

- Ensure that evaluation committees are diverse so that implicit bias can be addressed

Correct

Assign an individual or committee to review all completed evaluations before they are finalized

- Ideally, one person should be assigned to review all completed evaluations because patterns of bias may be difficult to identify without reading every evaluation
- If that is not feasible, then establish a committee of reviewers
- The reviewer(s) should look for consistency in the application of competencies and indications that the evaluators were influenced by bias – the evaluator gives the attorney the same score for all criteria
Correct
Ensure that feedback from the evaluation process is provided and that attorneys have an opportunity to formally disagree with the results of their evaluations.

- The typical and most effective feedback process is the evaluation interview.
- A copy of the review should be given to the evaluatee prior to the meeting.
- The evaluatee should be told to come prepared to discuss the weaknesses noted in the review, any disagreements with the evaluation's findings, long-range goals and objectives for the coming year, and a plan to achieve those goals and objectives.

Correct
Upward Reviews

- An upward review is a process by which non-partner attorneys evaluate their supervising attorneys’ management skills.
- Significant differences between upward reviews and evaluations of subordinates.
- Confidentiality is a critical element.
- Performance criteria should focus on the supervisor’s approach to managing work and the performance of others as opposed to focusing on the quality of his legal skills.
- The firm must follow up on the results.
Hidden Biases

“Bring me the head of John the Baptist. Just kidding. Get me the Paulson file.”

“I’m off now to reproduce—but I’ll be back!”
Exercise

Identifying Bias in Evaluations
Review Evaluations

- Overtly inappropriate comments
  - “The litigation practice is no place for a mother”
  - “It is hard for a disabled attorney to travel”
  - “Not comfortable with how he flaunts his lifestyle”
  - “She needs to dress more femininely”

- Same score for all criteria

- Absence of a professional development plan or future-based comments

- Outlier (i.e., evaluations are better or worse than performance merits compared to other evaluations or the self-evaluation)

Look for Trends

- Trends easier to spot
  - By supervisor
  - By groups
  - People given low ratings

- Common trends
  - Leniency error (i.e., making excuses for poor or mediocre performance in evaluations of men but not women)
  - “Someone like me”
  - Same level of performance rated differently
What Can We Do to Address and Resolve the Problem of Biased Evaluations?

- Train evaluating lawyers to accurately evaluate performance
- Develop specific job-related performance objectives or competencies, and communicate them to associates
- Define the rating scale
- Ensure that evaluation committees are diverse
- Assign an individual or a committee to review all completed evaluations before they are finalized
- Ensure that feedback from the evaluation process is provided and that attorneys have an opportunity to formally disagree with the results of their evaluation

What Questions Do You Have?
The Lesson

- Everyone is biased
- Actions that result from the bias may be harmful, particularly now
- Need multi-pronged approach:
  - Reform
  - Intervene
  - Correct

Fair Measure:
Toward Effective Attorney Evaluations, 2nd Edition

How to:
- recognize hidden bias and eliminate stereotyping
- implement and conduct performance evaluations that are free from bias

Includes:
- sample evaluation forms
- performance evaluation training materials for supervising attorneys
- instructions for completing performance evaluations

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  www.abanet.org/irr
EXERCISE #1

ANNUAL ASSOCIATE PERFORMANCE EVALUATION

Associate: Jennifer Mills
Evaluator: Elizabeth Smith

Writing Ability: Written communications are accurate, well-organized and clear. Work product addresses all key issues and, where appropriate, cites to supporting legal authority. Associate’s written work requires an appropriate amount of editing.

Comments: Jennifer’s written work product is excellent. The tone is always appropriate and she never misses an argument. She is able to explain the most complex issues in terms any audience can understand. I honestly believe her strong drafting skills made all the difference in Haynes arbitration.

Rating:  ______  5 - Outstanding
____   4 - Exceeds Expectations
____   3 - Meets Expectations
____   2 - Below Expectations
____   1 - Poor

Oral Communication Skills: Communicates effectively in all settings (internal meetings, client interactions, presentations to outside organizations, courtroom, etc.), tone is appropriate, engages the audience, and comments are clear, well organized, and concise.

Comments: Jennifer’s communication skills are top notch. She is comfortable speaking to any size crowd in any setting. She is great on her feet and handles questions from clients, co-workers, and audience members well. She is entertaining, persuasive and confident in her presentations.

Rating:  ______  5 - Outstanding
____   4 - Exceeds Expectations
____   3 - Meets Expectations
____   2 - Below Expectations
____   1 - Poor

Technical Knowledge: Level of expertise/knowledge of the law in assigned practice area is appropriate given the associate’s level of seniority.

Comments: Jennifer’s level of expertise in securities law is well beyond her years. She ranks up there with many of the partners in our group. She is the go to person for many clients and junior lawyers.

Rating:  ______  5 - Outstanding
____   4 - Exceeds Expectations
____   3 - Meets Expectations
____   2 - Below Expectations
____   1 - Poor
**Client Relations:** Inspires client confidence, understands clients’ needs and its business plans and goals; clients contact him/her directly to discuss pending or new matters.

**Comments:** As I said above, Jennifer is the go to person for many clients. I think that says it all.

**Rating:**  
- **X** 5 - Outstanding  
- ___ 4 - Exceeds Expectations  
- ___ 3 - Meets Expectations  
- ___ 2 - Below Expectations  
- ___ 1 - Poor

**Summary Comments:** My only concern with respect to Jennifer’s performance relates to her level of availability this year. She was not immediately available when we needed her because she was dealing with the death of a family member and the birth of her second child.
ANNUAL ASSOCIATE PERFORMANCE EVALUATION

Associate: Stephanie Small
Evaluator: Kate Jones

Writing Ability: Written communications are accurate, well-organized and clear. Work product addresses all key issues and, where appropriate, cites to supporting legal authority. Associate’s written work requires an appropriate amount of editing.

Comments: Stephanie’s work is more than satisfactory. She handled a number of research and writing projects for me this year and they were exemplary. She is a strong writer – clear and concise. She hits all the key points. I look forward to working with her again.

Rating: ___ 5 - Outstanding
        ___ 4 - Exceeds Expectations
        _ X 3 - Meets Expectations
        ___ 2 - Below Expectations
        ___ 1 - Poor

Oral Communication Skills: Communicates effectively in all settings (internal meetings, client interactions, presentations to outside organizations, courtroom, etc.), tone is appropriate, engages the audience, and comments are clear, well organized, and concise.

Comments: Stephanie is a strong public speaker. She and I did a few presentations together this year - internally to our practice group, a training session for a client, and a presentation at an association’s annual conference. She was confident, knowledgeable and handled questions well. The evaluations we received from the conference were positive. I look forward to seeing her get on her feet in a more formal setting like a deposition or courtroom appearance.

Rating: ___ 5 - Outstanding
        ___ 4 - Exceeds Expectations
        _ X 3 - Meets Expectations
        ___ 2 - Below Expectations
        ___ 1 - Poor
**Time Management & Dependability:** Meets deadlines, spends appropriate amount of time on tasks, and informs supervising attorneys of the status of assignments.

**Comments:** Stephanie is generally reliable and she typically keeps me up to speed on the status of her assignments. She missed a couple of deadlines earlier this year and I didn’t know that she was going to be late until the drafts failed to land on my desk when expected. She and I talked about timeliness and the need to keep me better informed of the status of her assignments. Since then her performance in this regard has improved.

**Rating:**

- ___ 5 - Outstanding
- ___ 4 - Exceeds Expectations
- X 3 - Meets Expectations
- ___ 2 - Below Expectations
- ___ 1 - Poor

**Interpersonal Skills:** Gains the respect and confidence of clients, opposing counsel, and colleagues within the firm; exhibits ability to work in a group setting.

**Comments:** I enjoy working with Stephanie and I get the sense that her peers like her as well. No complaints from staff or other lawyers. She hasn’t had much direct exposure to opposing counsel. Some of our regular clients are starting to contact her directly. Good sign.

**Rating:**

- ___ 5 - Outstanding
- ___ 4 - Exceeds Expectations
- X 3 - Meets Expectations
- ___ 2 - Below Expectations
- ___ 1 - Poor

**Summary Comments:** The issue of hours isn’t covered in the performance evaluation form. But, I feel have to point out that despite all of Stephanie’s accomplishments this year, she did not make her hours. I was worried about that possibility when we hired her. She needs to take the initiative and seek out more work if she needs it. This is an area for her to focus on next year.
EXERCISE #2B

ANNUAL ASSOCIATE PERFORMANCE EVALUATION

Associate: John Smith
Evaluator: Kate Jones

Writing Ability: Written communications are accurate, well-organized and clear. Work product addresses all key issues and, where appropriate, cites to supporting legal authority. Associate’s written work requires an appropriate amount of editing.

Comments: John is a strong writer. His work product is well organized and clear. He includes all the key arguments and makes his points effectively.

Rating:

5 - Outstanding
4 - Exceeds Expectations
3 - Meets Expectations
2 - Below Expectations
1 - Poor

Oral Communication Skills: Communicates effectively in all settings (internal meetings, client interactions, presentations to outside organizations, courtroom, etc.), tone is appropriate, engages the audience, and comments are clear, well organized, and concise.

Comments: John didn’t have much opportunity to get on his feet this year. He and I are scheduled to hold a series of training classes for a client next month. I will have a good sense of where he stands after these sessions are over. Based on how he handles himself in practice group and one-on-one client meetings I am confident that he will excel in this area.

Rating:

5 - Outstanding
4 - Exceeds Expectations
3 - Meets Expectations
2 - Below Expectations
1 - Poor

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**Time Management & Dependability:** Meets deadlines, spends appropriate amount of time on tasks, and informs supervising attorneys of the status of assignments.

*Comments:* John missed a couple of deadlines and I didn’t know he was behind until the deadline passed. I spoke to John about this and he has assured me that he will stay on top of deadlines and he will let me know in advance if he is going to need more time on an assignment.

*Rating:* __ 5 - Outstanding  
____ 4 - Exceeds Expectations  
 3 - Meets Expectations  
____ 2 - Below Expectations  
___ 1 - Poor

**Interpersonal Skills:** Gains the respect and confidence of clients, opposing counsel, and colleagues within the firm; exhibits ability to work in a group setting.

*Comments:* John gets along well with clients and opposing counsel and other firm lawyers. There have been some grumblings from staff members that John can be short and rude at times. John has been under a lot pressure recently at work and at home. I am sure this is the source of his poor attitude. Nonetheless, I spoke to John about his attitude and he agreed to keep his in check.

*Rating:* __ 5 - Outstanding  
____ 4 - Exceeds Expectations  
 3 - Meets Expectations  
____ 2 - Below Expectations  
___ 1 - Poor

**Summary Comments:** John missed his hours this year. I am sure his low hours are due to the fact that he took on a lead role in a pro bono matter. I understand that he recently wrapped up that matter with a good a result for the client. I am sure we will see his hours back up to where they should be.
ANNUAL ASSOCIATE PERFORMANCE EVALUATION

Associate: Peter Pistol
Evaluator: Kate Jones

Writing Ability: Written communications are accurate, well-organized and clear. Work product addresses all key issues and, where appropriate, cites to supporting legal authority. Associate’s written work requires an appropriate amount of editing.

Comments: Peter is blind, and therefore he requires accommodations when it comes to his researching, writing, and editing. HR has permitted Peter to use a screen reading software program and a personal reader for accessing materials. Yet there were a small handful of times when Peter does not have these accommodations (e.g., impromptu meetings, when the reader is at lunch), and his work slightly suffers. Other than those rare instances, his work is top-notch.

Rating:  
5 - Outstanding
4 - Exceeds Expectations
3 - Meets Expectations
2 - Below Expectations
1 - Poor

Oral Communication Skills: Communicates effectively in all settings (internal meetings, client interactions, presentations to outside organizations, courtroom, etc.), tone is appropriate, engages the audience, and comments are clear, well organized, and concise.

Comments: Peter has excellent communication skills. His presence in the room, whether at court or the board room for a presentation, is always felt. His awards from his years as a national champion college debater shine through on a daily basis, and appear to only be enhanced by his lack of sight.

Rating:  
5 - Outstanding
4 - Exceeds Expectations
3 - Meets Expectations
2 - Below Expectations
1 - Poor
**Time Management & Dependability:** Meets deadlines, spends appropriate amount of time on tasks, and informs supervising attorneys of the status of assignments.

*Comments:* Peter has no problem seeing the big picture. He knows when deadlines come up, and has met them all. Sometimes his reader is there to remind him of important deadlines, and I can in no way complain about Peter’s time management and dependability.

*Rating:*  
- [X] 5 - Outstanding  
- [ ] 4 - Exceeds Expectations  
- [ ] 3 - Meets Expectations  
- [ ] 2 - Below Expectations  
- [ ] 1 - Poor

**Interpersonal Skills:** Gains the respect and confidence of clients, opposing counsel, and colleagues within the firm; exhibits ability to work in a group setting.

*Comments:* Peter is always willing to seek help. He is also willing to provide important advice during meetings or in online collaboration sessions. There appears to be a problem in that most of Peter’s fellow associates do not approach him for collaborative efforts. I suggested to Peter that he join firm after-work activities, like its diversity committee, this coming year to reach out to other associates.

*Rating:*  
- [X] 5 - Outstanding  
- [ ] 4 - Exceeds Expectations  
- [X] 3 - Meets Expectations  
- [ ] 2 - Below Expectations  
- [ ] 1 - Poor

**Summary Comments:** Overall, Peter appears to be a potential asset to this firm. The company’s investment is completely offset by the amount of additional side work he brings in from already-existing clients. He is easy to get along with, but just needs to make sure he reaches out more to learn about this firm’s great culture. In all, however, we are proud to have him as a part of our firm.
A. Getting Started: Initial Steps in the Development of a Bias-Free Evaluation Process

(i) Establish and publish a performance evaluation policy

Publishing a performance evaluation policy in the firm’s employee handbook for attorneys is an excellent starting point for developing a bias-free evaluation process. The policy encourages the firm to keep its evaluation process on track and to deliver a fair and objective report of performance on established criteria over the past year and a plan for improving performance and advancing to the next level of professional development. The policy discusses the purpose of the process and includes a time line for and description of the evaluation program. In addition, the policy sets out general evaluation criteria for all attorneys. The policy alerts supervising attorneys to their obligations with respect to the evaluation process: provide a detailed, factual, and unbiased evaluation of job-related criteria in a timely manner and develop a forward-looking improvement/advancement plan. Similarly, the policy lays out the obligations of attorneys being evaluated: complete a candid self-evaluation and upward reviews of their supervising attorneys and be prepared to discuss strengths and areas of improvement, as well as long- and short-term goals and suggestions for advancement. Finally, the policy sets out the firm’s commitment to consistent, unbiased treatment for all attorneys regardless of gender. (Appendix 5, Model Performance Evaluation Policy)

(ii) Set the stage through firmwide communication

Organizational development experts counsel that any change to how business is done will likely be more successful if the people in the organization understand from the outset what the change is and why it is being made. Educating the firm about the business case set out in Chapter I through departmental or firmwide meetings would give a new bias-free evaluation system a strong start.

(iii) Obtain buy-in

As with any administrative process that depends on securing the time and attention of busy attorneys, buy-in is critical. In the case of performance evaluations, the buy-in has to come from the evaluating attorneys, particularly the partners. When rolling out an evaluation process for the first time or reviewing the process with an incoming partner or senior lawyer, stress the benefits to the firm from a performance evaluation system. Specifically, discuss the connection between the performance evaluation process and the firm’s long-term business objectives, cost savings, and client satisfaction.

Once senior lawyers and partners understand the importance and benefit of an evaluation program, it is important to get them invested in the process. One strategy is to convene an evaluation committee composed of partners from the various practice areas. During the meeting, partners will discuss each of their associates’ performance and solicit feedback on themes that come out of the evaluations, areas for improvement, and professional development goals for the coming year. Also, mentors should attend their mentees’ formal evaluation meetings and then work with them to implement the suggestions received through the evaluation process.
Finally, provide incentives for senior attorneys and partners to mentor, train, supervise, and evaluate junior lawyers. For instance, establish separate billing categories for these functions. This communicates that the firm is committed to proper evaluation procedures and the professional development of its attorneys and increases the probability that a greater number of senior attorneys and partners will support the new integrated evaluation system.

(iv) Have a representative team design and implement the new evaluation program

The next step in developing a bias-free evaluation process is pulling together a team to design, implement, and monitor the program. The team will be most productive and credible if members of the team are representative of all levels of seniority and several different practice groups. It would be particularly useful to have women lawyers from all levels of seniority on the evaluation process teams.

(v) Determine who will administer the process

The most effective evaluation processes are coordinated and managed by non-lawyer administrators who will devote substantially more energy and attention to logistics, paper flow, and follow-up than their lawyer colleagues. It is important, however, that the administrators have direct access to the managing partner or management committee of the firm so they will have the authority necessary to manage the program.

If attorneys administer the program, they should be recognized for their administrative contribution in the evaluation process via compensation, bonus, or a reduced billable-hour requirement. This communicates the importance of the evaluation process to all individuals involved and also ensures that the attorneys will be able to make time in their schedules to administer the program.

The administrative system should include procedures for distributing and collecting evaluation forms, summarizing comments, scheduling feedback interviews, maintaining a form filing system, and following up when completed forms are late.

B. Components of an Effective Bias-Free Evaluation Program

Often a firm hires attorneys without clear job descriptions or statements of requirements for the position. Later, the firm penalizes attorneys for not meeting unstated and/or vague expectations. For example, a mother with young children joins the firm as a senior associate in the corporate group. The practice leader of the corporate group expects all associates in the group to take the initiative to get involved in bar associations or other client development activities. This expectation is not expressly communicated, nor is it a written job requirement. Because the new associate is a mother with young children, the supervising partner assumes that she will barely be able to meet her billable requirements let alone participate in non-billable client development activities. As a result, the supervising partner does not communicate his expectations, and the associate does not get involved in any non-billable activities.

The associate is shocked when she receives her first performance evaluation. Her supervising partner stated that she showed no initiative and exhibited no interest in developing a client base of her own. As a result, the associate’s practice group leader did not think she was partner material.

The lack of explicit performance expectations led to bias in the performance evaluation process of this firm. The phenomenon that ambiguity in criteria leaves the door open to stereotyping has been extensively documented by both organizational and social psychologists.  

(i) An integrated employment process begins with detailed job descriptions

“A good evaluation system includes support, motivation, communication, collaboration, fair treatment, documentation, formality, and accountability, and is consistent with the [firm’s] core values and purpose.”

A recent National Association for Law Placement (NALP) Foundation national study on associate evaluation programs found that the principal objectives for associate evaluations are to provide positive feedback and encouragement, assess the training and development needs of associates, and improve associate performance. The firm can best meet these objectives if it establishes a program that integrates hiring criteria, performance evaluation objectives, promotion requirements, and professional development goals. An efficient and effective evaluation system is part of an integrated employment process that takes the entire employment relationship into account.

An “integrated employment process” ensures that all employment decisions are based on a common set of business objectives. These objectives drive the firm’s definition of “success” and consequently highlight the skills attorneys need to succeed at the firm.

Assuming the firm has a clear sense of its business goals, the next step is to develop job descriptions for junior, midlevel, and senior associate and counsel positions. Effective job descriptions include the knowledge, skills, and abilities (KSAs) necessary to successfully perform as an attorney at any level of seniority. The KSAs are the foundation for the performance competencies against which the non-partner attorneys will be evaluated.
(ii) Job-related performance competencies

“Discrimination against women who violate gender prescriptions takes the form of global evaluations rather than more objective evaluations of specific skills and behaviors.”136

The foundation of a bias-free evaluation process is objective, job-related performance criteria based on detailed job descriptions. Once the job requirements are identified in job descriptions, review the performance objectives the firm already applies in both formal and informal evaluation processes. Determine whether these objectives truly assess attorneys’ performance of the actual job requirements and modify as necessary.

To identify additional performance objectives, the firm should consider asking partners, associates, counsels, and clients to identify the characteristics that they value most in an attorney. Use the job requirements and other information gathered to develop a comprehensive list of skills for each non-partner attorney position, and then translate the skills into competencies or performance objectives.

(iii) The performance evaluation form

There is a wide variety of performance evaluation forms. When reviewing sample evaluation forms and developing a form for a specific firm, keep in mind that the form should reflect the firm’s professional development goals for attorneys at every level.137 Seek out sample forms before designing an evaluation form. In addition to the samples provided in Appendices 2 and 3 of this manual, other samples can be obtained from outside consultants.

With that said, an effective evaluation form generally includes three components:

DEVELOPING JOB DESCRIPTIONS

1. Analyze the job. Look at how the various attorney positions fit within the firm’s overall business goals.

2. Identify the responsibilities, essential tasks, and necessary accomplishments for each attorney level.

3. Consider the firm’s mission and values. The job requirements for each attorney position should “dovetail with these core descriptions of the qualities [the firm] holds in high esteem and the goals [the firm] has identified for itself.”


DEVELOPING COMPETENCIES

Step 1: Focus on specific behaviors that are telltale signs of the related skill or job requirement. Identify the conduct or behaviors related to each skill or job requirement.

Step 2: Specificity of the performance criteria is critical. Ambiguous evaluation criteria open the door to stereotyping. “[I]t is difficult to distort outcomes of test performance . . . but quite easy to distort outcomes of being a good team player . . .” (Heilman, 1995) Further, without specificity, attorneys will not know what to expect.


Step 3: Plan to reassess regularly and readjust competencies as positions evolve and change.

Design Component 1: Performance criteria. (Discussed in section (ii) above.)

Design Component 2: A rating scale to identify the relative quality of the attorney’s performance vis-à-vis the performance criteria. The attorney’s performance on each competency is rated on a multipoint scale ranging from “poor” to “excellent” (or some similar arrangement). One of the primary advantages of the rating scale system is the standardized structure, which allows for those within the workforce to be easily compared to and contrasted with their colleagues. The ability to compare an attorney against her fellow peers is an important function of performance appraisals. Therefore, the comparative aspect of rating scales is an attractive feature. The comparison, however, is not as simple as comparing one evaluatee’s numerical ratings against another’s.

There is an inherent difficulty in placing a numerical value on a particular task or action and comparing it to a different task or action done by another employee. Further, it is quite a complex task to define each interval in the continuum of a rating scale in such a way that all evaluators grasp the type of performance associated with each interval on the scale, and then uniformly quantify evaluatees’ behavior to match a particular point on the rating scale. Some rating scale evaluations solve this issue by identifying particular examples of what constitutes a “poor” or “excellent” rating. The amount of clarity provided by offering examples of poor and excellent behavior is highly dependent on an evaluator’s ability to consistently analogize the evaluatees’ behavior to the examples provided. The subjective nature of this method stems from the fact that it is very difficult to precisely define each interval on a rating scale in a manner that produces uniform and comparable results. Accordingly, rating scale evaluations are highly susceptible to biases and inaccuracies in drawing comparisons between the ratings, the attorney’s actual performance, and the results of other attorneys’ evaluations. These drawbacks create the need for the third design component: space for narrative comments.
• **Design Component 3:** An evaluation form should include space for narrative comments that provide concrete examples of behavior and subtleties of performance. An evaluator’s narrative comments are critical to the process. An evaluation that consists only of circled rates on a scale is fertile ground for unchecked stereotyping unless it also has narrative comments that explain the basis for the scoring. The comments tend to provide a more accurate and holistic measure of an attorney’s performance than a rating scale. Chapter IV discusses techniques for writing a performance evaluation. (Appendix 2, Sample Annual Associate Performance Evaluation)

(iv) **Attorney self-evaluations**

Attorney self-evaluations are a common component of a performance evaluation process. Typically, the self-evaluation is the initial step in the evaluation process, followed by the supervising attorneys’ completion of the associate and counsel evaluation forms. Non-partner attorneys should be required to complete the self-evaluation as a necessary step toward an effective performance review. The self-evaluation gives attorneys the opportunity to identify their strengths, key contributions, and developmental goals. Also, it allows the firm to compare associates’ views of their performance against those of their supervising attorneys. Inconsistencies between the two evaluations “serve as a red flag that the associate does not have an understanding of his or her development” or “that the associate is receiving inferior [or biased] feedback from one or more supervising attorneys.”

Also, self-evaluations are a tool for assessing morale and satisfaction as well as training needs. An additional advantage of including self-evaluations in the overall performance evaluation process is that it involves the attorneys as equals in the review process. This is more likely to increase commitment to action plans, which can make the entire process more satisfying and productive.

Although self-evaluations have a number of advantages, they also have a significant pitfall. Studies show that women evaluate themselves under much stricter criteria than men, often underestimating their contribution to work. Thus, self-evaluations of female evaluatees often underestimate their actual job performance. Women also are less likely to question negative feedback.

Many firms use different self-evaluation forms for junior and senior attorneys. Different forms for each attorney position allow the firm to focus the questions on the performance standards specific to each level of seniority. Among the questions that should be included on a self-evaluation form is a request that the attorneys identify their professional development goals for the coming year, areas for improvement, and a plan for enhancing their proficiency in these areas. Also, senior lawyers should be asked to assess their partnership potential as compared to the firm’s promotion criteria.

Self-evaluations provide an excellent opportunity to involve mentors in the evaluation process. Mentors can assist the attorneys with completing the self-evaluations, including determining their goals, developing a strategy for achieving those goals, and, most important, realistically and accurately evaluating their performance. (Appendix 3, Sample Associate Self-Evaluation Form)

(v) **Upward reviews and their role in minimizing gender bias**

An “upward review” is a process by which non-partner attorneys evaluate their supervising attorneys’ management skills. Upward reviews provide the context within which the attorneys performed their work, including the nature of the work, the environment, and the quality of supervision. Upward reviews are also a tool for identifying hidden gender bias. For example, an upward review may show that a particular partner is well-liked by both male and female associates. The female associates enjoy working with him but express disappointment that the partner does not take them to lunch as he does the male associates.

Although there are similarities between an evaluation of a subordinate by his supervisor and upward reviews, there are significant differences as well. First, confidentiality is a critical element. Attorneys will not review their supervising attorneys unless they are assured that their comments will remain confidential. Accordingly, small offices or practice groups should not consider an upward review process because the identity of the evaluators may be easily determined. Further, all feedback should be provided to the partners in summary form. Supervising attorneys should not receive copies of the individual reviews completed by their subordinates.

Second, performance criteria should focus on the “supervisor’s approach to managing work and the performance of others as opposed to focusing on the quality of his legal skills.” The attorneys completing the evaluations “should be asked to comment on skills such as describing an assignment, setting appropriate timelines, giving clear directions, providing feedback, answering questions, pointing out resources, and maintaining ongoing communications regarding the work.”

A final word of caution: In order for the process to be credible and to encourage participation, the firm must follow up on the results. There must be clearly stated rewards for good performance as well as consequences for poor reviews. For example, poor reviews may have an impact on the supervising attorneys’ compensation or promotion to partner if they are non-partners.
If a firm is interested in conducting upward reviews, all interested parties (associates, partners, practice group leaders, development professionals, etc.) should be involved in designing the upward review process and determining the performance standards to be evaluated. Further, all participants should be trained on the process, how to complete the form, the firm’s expectations, how the information will be used, and the firm’s plan for following up on the results. (Appendix 5, Sample Upward Review Form for Supervising Attorneys)

(vi) Training

Once the firm has buy-in and has designed its process and forms, the evaluating attorneys need to be trained on how to conduct proper performance evaluations. Accordingly, all supervising attorneys should be required to attend a brief (no more than 60-90 minutes) meeting to discuss the evaluation procedures. During this session, the presenter should review the benefits of the process to the individual attorneys and the firm generally as well as the steps in the process.

Other issues to be covered during the training session include a review of the various evaluation forms and a discussion of the interpretation of the performance criteria and rating scale. “[O]rganizations can reduce the discriminatory effects of automatic in-group favoritism by ensuring decision-makers use only job-relevant criteria in evaluations and that they have valid, unbiased, individualizing information for all evaluatees on job-relevant criteria.” The presenter should review appropriate techniques for writing an evaluation and the importance of consistency in the application of performance criteria and rating scales.

Four firms surveyed by NALP reported using incentives to engage supervising attorneys to complete evaluations. Such incentives include nominal fines for submitting evaluations after the deadline, compensation is withheld until evaluations are completed, and those who complete all evaluations in a timely manner receive a bonus. (Review state wage and hour laws before withholding compensation.)

Most important, the session must include a discussion of the potential for bias and practical tips for avoiding the biased application of performance criteria and rating scales to the performance reviews. The firm must stress that all evaluations will be specifically reviewed for bias, among other things. Evaluators who fail to complete the evaluations as directed will suffer certain consequences, such as reduced compensation. “There is a good deal of research that demonstrates that if individuals are motivated to be accurate in their impression formation, they will be less likely to rely on stereotypes.” Further, if evaluators anticipate having to justify their ratings, those ratings will show more complexity and accuracy. Indeed, research shows that evaluators with gender biases are less likely to allow their biases to affect their evaluation of attorneys’ performance if they know that they “have no right” to use stereotypes when evaluating others. (Appendix 6, Training Checklist; “Performance Evaluation Training Materials for Supervising Attorneys” packet)

In addition to training the evaluators, the firm should also meet with the attorneys who will be evaluated to discuss the firm’s expectations, performance objectives, rating scales, steps in the process, and the evaluatees’ role in the process. During the meeting, the presenter should review the reason for the self-evaluation and the upward reviews (if applicable). Also, evaluatees must prepare for the evaluation meeting by reviewing their completed written evaluation and developing a list of questions, professional development goals, and an action plan for the coming year. Finally, they must attend the evaluation meeting.

74% of law firm managing partners’ organizations review associate evaluations to ensure consistent standards and equity in assessments. —NALP, How Associate Evaluations Measure Up, p. 98.

(vii) Monitoring the evaluation process

Before the evaluations are finalized and the results are shared with the evaluatees, a member of the executive committee, a firm administrator, or the professional development officer should review the evaluations (all female lawyers and then all male lawyers) completed by each supervising attorney to ensure accuracy, consistent application of the performance criteria, and reliance on legitimate, unbiased performance evidence. The reviewer should look for trends across the firm and individual practice groups or supervising attorneys. This review is critical to identifying
and eliminating gender bias in performance evaluations. (“Instructions for Supervising Attorneys for Completing Performance Evaluations” packet can be distributed to all supervising attorneys at the outset of the evaluation period as a reminder of best practices for completing evaluations.) Common evaluation errors and indications that the results may be based on gender bias include:

(1) **The presence of overtly gendered comments or stereotypes.** For example, “I considered Kate’s performance to be average overall. She is a new mother and just can’t give 110% to the job.”

(2) **Leniency error.** or rating certain attorneys higher than their performance merits. For example, “Jeff must focus on improving his research and writing. These skills are not where they should be at this stage in the game. He consistently misses key cases and his writing frequently requires major revisions. Admittedly, he has had some very complex cases this year. I give him a 10.”

(3) **A focus on first impressions.** For example, “Gwen joined the antitrust group about six months ago. I was very disappointed by her performance on her first assignment, a white paper for ABC Corp. on a potential merger with Apex. Her other work has been acceptable. Overall, I rate her a 2 (on a 5-point scale).”

(4) **“Someone like me.”** The evaluator rates attorneys who are like him higher than those attorneys who are different from him. The legal profession has a well-earned reputation for being a male-dominated occupation with an organizational structure that is more favorable to male upward mobility. This organizational structure gives rise to the development of what some scholars have labeled role-incumbent schemas, which favor the characteristics held by those who have fulfilled the position successfully in the past. The abstract schema of a successful role incumbent can overlap with certain gender stereotypes in positions that are said to be “sex-typed” or include stereotypically masculine or feminine traits. For instance, in the legal profession, reaching partnership involves being perceived as having certain sex-defined traits, such as aggressiveness, strong business development skills, and professional commitment. These traits are generally seen as masculine traits, and even when women evaluatees exhibit such characteristics through their work, evaluators who function within gender schemas do not associate a woman’s positive work performance with these factors. Role-incumbent schemas play a significant part in a male evaluator’s ability to identify with a male evaluatee because of a perceived “closer fit,” assuming the role-incumbent schema is defined by male traits, and thus evaluate the male more positively.

For example, John Smith, a partner in the litigation practice group, is known for his “take no prisoners” approach to litigation. John made the following comment in Jane’s evaluation: “Jane has strong research and writing skills. She also has a very nice demeanor. She is a great backroom gal. But she doesn’t have the hard-charging personality it takes to be a major player in the litigation field.”

(5) **The “halo/horns” effect.** The evaluatee excels in one area. The evaluator allows this aspect of the evaluatee’s performance to affect his overall rating and evaluates the attorney’s performance in other areas higher than he deserves. Take the example of Greg, whose evaluation highlights his strong writing skills. Despite the fact that he has been repeatedly counseled about his poor verbal communication skills, his practice group head gave him outstanding marks on “strong overall communication skills.”

(6) **Evaluator weights performance competencies differently depending on the gender of the person being evaluated.** For example, John receives a higher overall score based on his strong research skills. Jessica’s similarly strong research skills do not have much of an effect on her overall score.

(7) **The “out crowd’s” or women’s mistakes from years past affect current evaluation scores.** Typically, women’s prior mistakes are used as evidence of a pattern of conduct or performance. Men’s past mistakes, however, do not affect their current evaluations.

(8) **Evaluatee’s scores are negatively affected by her failure to conform to traditional female stereotypes.** For example, Katherine receives a low score for interpersonal skills because she is too demanding of her legal assistants. However, Jeffrey receives high marks for interpersonal skills because he holds his legal assistants to high standards.
Other common evaluation errors occur irrespective of gender, but firms should watch out for them because they can allow bias to creep in undetected and result in evaluations that are lower/higher than merited. These errors include the absence of detailed, behavior-based comments to support rating scores. For example, David gave Joe very high marks for his technical expertise in tax. David’s only comment to support this score was “Joe knows the tax code inside and out.” Firms should also look out for evaluations where the evaluator gives the attorney the same rating score for all criteria.

(viii) Delivering the feedback: the evaluation meeting

Evaluations completed but not communicated and discussed are useless. The typical and most effective feedback process is the evaluation interview. An evaluation interview provides an opportunity to offer and receive feedback on the work performed during the evaluation period. It also is an occasion to establish an action plan to enhance the evaluatee’s professional growth. Deficits identified in the appraisal should be discussed with the evaluatee, and she should be given an opportunity to respond. Additionally, an action plan should be derived from the firm’s goals for the evaluatee and from the list of skills the evaluatee wishes to improve. The plan should include clearly established time frames for completing each step. A date for a follow-up meeting on the evaluatee’s progress under the action plan should be set during the evaluation meeting.

Because of the importance of the evaluation interview, evaluating attorneys should be trained on how to deliver the results of the evaluation, and evaluatees should be trained on how to make the most of this meeting. The “Instructions for Supervising Attorneys for Completing Performance Evaluations” packet attached to this manual contains, among other things, a guide to conducting an evaluation interview that can be provided to evaluators. Evaluatees should be given a copy of their review prior to the meeting and told to come prepared to discuss the weaknesses noted in their review, any disagreements they have with the findings in the evaluation, their long-range goals and objectives for the coming year, and their plan for achieving those goals and objectives, including any specific needs they have for assistance from the firm.

(ix) Checks and balances

As a final check on the validity of the process, evaluatees should have an opportunity to formally disagree with the results of their evaluations. A checks and balances process provides an additional safeguard against discrimination claims based on discriminatory evaluations. In the event of a claim, evidence that the firm reviewed the employee’s complaint and found no basis for the concerns or that the employee did not disagree with the evaluation makes for a strong defense.

The checks and balances process should afford all attorneys the opportunity to raise any disagreements they may have with their evaluations. The firm should appoint a partner to review the attorneys’ concerns and to speak to the evaluators, if necessary. However, attorneys should not be required to bring their concerns to the partner whose review is at issue. The process should also afford all attorneys the opportunity to place their concerns in writing and to have that document added to their personnel file.

(x) Periodically review the effectiveness of the evaluation process

All attorneys who participate in the evaluation process should be surveyed periodically regarding their experiences with the program. Professional development administrators should also provide their feedback. When gathering comments on the effectiveness of the process, ask about strengths and weaknesses; quality, frequency, and sufficiency of the feedback; effect on attorney development; and efficiency. This review will be most helpful if attorneys are allowed to respond anonymously to an administrator or outside consultant who will collect and summarize the comments.

After compiling this information, develop a meaningful action plan for revising the evaluation process. Include all interested parties, associates, partners, and administrators in evaluation of the information gathered and the development and implementation of the revised process.
FAIR MEASURE: TOWARD EFFECTIVE ATTORNEY EVALUATIONS, SECOND EDITION (Includes CD-ROM)

Prepared and written for the Commission by Joan C. Williams, Distinguished Professor at Hastings College of the Law-University of California and Co-Director of the Project for Attorney Retention, and Consuela A. Pinto, Director of Education of the Project for Attorney Retention

This completely revised and updated second edition outlines a step-by-step process for implementing and conducting performance evaluations that are free from bias. Additional material includes sample evaluation forms, performance evaluation training materials for supervising attorneys, and instructions for completing performance evaluations. It also contains a current, comprehensive review of the psychological literature on stereotyping.

Gender bias continues to prevent women from achieving parity with their male counterparts. Developing an evaluation system that controls for hidden bias is crucial, given that attorneys' performance evaluations have a direct impact on their professional development, assignments, compensation, and, ultimately, partnership potential.

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Appendix 7

Types of Hidden Gender bias

The Maternal Wall:
Motherhood and Part-Time Work Linked to Lack of Competence and Commitment

- **Negative competence assumptions.** Studies show that once women have children, assessments of their competence tend to fall sharply. (See page 18)
  
  Ex: “When I returned from maternity, I was given the work of a paralegal, and I wanted to say, ‘Look, I had a baby, not a lobotomy.’”

- **The pregnancy plummet.** When a pregnant professional acts authoritatively, she may evoke discomfort, confusion, or even hostility in subordinates expecting the kind of stereotypically feminine (nurturing, supportive) behavior associated with motherhood. (See page 18)
  
  Ex: Jane’s evaluation last year: Jane is maturing into a very effective litigator. She knows when to hold her ground and is not afraid to challenge opposing views.

  Jane’s evaluation this year: Jane continues to be a hard-charging litigator, and her pregnancy has not slowed her down at all. She needs to maintain awareness of her tone in her oral arguments, however. In several recent motions hearings, she has sounded strident and somewhat condescending. I think it is great that she is so confident in her arguments, but she needs to work on how she presents them.

- **The good mother v. the norm of work devotion.** When being a “go-getter” is seen as being always on call, lawyers who need to place limits on their availability may be judged as lacking in commitment. (See page 18)

  “Mothers belong at home.” This sends a message about what mothers should do, often combined with hostility toward mothers who don’t. (See page 18)

- **“Killing moms with kindness.”** A benevolent variant again sends an old-fashioned message about “the good mother,” as when a mother (or part-timer) is passed over for a matter that requires travel on the assumption she will not want it. (The solution? Avoid untested assumptions: offer the assignment and let the lawyer decide whether she wants it.) (See page 19)
  
  Ex: “Jane, please get John up to speed on the Smithson depositions. He’s going to take them so you don’t have to travel now that you have a little one at home.”
• **Role incongruity.** Role incongruity sends the message that one cannot be a good mother and hold a certain job. (See page 19)

• **Others, but not mothers, get the benefit of the doubt.** This is called leniency bias. (See page 19)

  **Ex:** Lately, David has been difficult to get hold of when he is out of the office. But I am not too concerned. Up until a month ago, David was working extremely long hours. He is probably taking some much needed R&R. I am sure he will be back on track soon.

  Ever since Christina came back from maternity leave, she has been hard to reach when she is out of the office. If this is how her flexible work schedule is going to play out, I think it is time we rethink this arrangement.

• **Mothers are assumed to be uncommitted.** When men need time off to handle family matters, people think it reflects well on them. When women need time off to handle family matters, it may be seen as a lack of commitment or a weakness. (See page 19)

  **Ex:** Two months ago, Joe started working from home a few hours every day. His wife was seriously injured in a car accident and he is helping out while she is undergoing rehabilitation. Joe’s attitude throughout this time has been incredible. Despite all he has on his plate at home, he has managed to not let any of his matters slide. His commitment to firm and family should be applauded.

  Stacey recently adopted a part-time schedule so that she can take a greater role in caring for her disabled son. I am reserving judgment on her future with the firm until I have an opportunity to assess whether she is still willing and able to give her work the level of attention it requires.

• **Double jeopardy.** Women attorneys of color may face additional bias in terms and conditions of employment and evaluations because of racial biases operating in conjunction with maternal wall biases. For example, African-American mothers may be offered less attractive leaves or flexible work arrangements than white mothers based on racial stereotypes relating to family needs, and then may be rated more negatively than white mothers when they take the leave or work flexibly. (See page 19)

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**Double Standards:**
Women Have to Work Harder to Prove Competence

• **He’s skilled, she’s lucky.** Men’s successful performance of masculine tasks tends to be attributed to stable personality traits (he has the right stuff), while women’s success tends to be attributed to transitory situational factors (she lucked out or drew a receptive judge). (See page 20)

  **Ex:** “John, congratulations on getting the Connor case dismissed on summary judgment. Your creative thinking and strong research skills really paid off.”

  “Sarah, I heard about the decision in the XYZ, Inc. motion you argued. We really got lucky—I don’t know that any judge other than Judge Sanders would have ruled that way.”

• **He’s busy, she has trouble with deadlines.** Men’s failures tend to be attributed to situational factors (he’s busy working on other matters), while women’s failures tend to be attributed to stable personality traits (she has trouble with deadlines). (See page 20)

  **Ex:** David’s work on this latest brief is not a good example of the general quality of his work. He has a lot on his plate at the moment. His mother has been sick and he is traveling to
Chicago every weekend to see her. I am sure his work will improve once his home life goes back to normal.

Kate was late giving me a draft of the brief in the Bennett appeal. I know she is juggling work and family responsibilities and I'd like to help, but recently her work just doesn't meet our standards.

- **Men are given larger rewards for the same accomplishment.** When men's successes are attributed to personality traits while women's are attributed to transitory factors, men will be seen as deserving of larger rewards than women for the same accomplishment. (See page 20)

  *Ex:* Consider the example of John and Sarah above. John was given the lead attorney role in the next piece of litigation that came into the office. Sarah continued to have a backroom role in the cases she was assigned.

- **He's thoughtful, she's hesitant; he's prudent, she's passive.** The stereotype of men as competent leads to the assumption that, though a man may hesitate, he's just being thoughtful. A woman may not be given the benefit of the doubt in the same way. (See page 20)

- **Women need to prove their competence over and over again.** Women may have to work harder to establish competence if they do not benefit from a default assumption that they are competent. (See page 20)

- **Women's mistakes are remembered long after men's are forgotten.** Stereotype-consistent information is recalled better than stereotype-inconsistent information, so that women's mistakes (confirming their lack of competence) may be remembered long after men's are forgotten. (See page 20)

- **Men are judged on their potential, women strictly on their achievements.** When men are judged on their potential, they benefit from the default assumption that they are competent until proven otherwise. Women who are judged strictly on their achievements find they do not trigger the same assumption. (See page 20)

  *Ex:* Steven needs to get his confidence up. The fact that he is unsure of himself really comes through in his client interactions. As a result, clients do not feel comfortable dealing directly with Steven. Steven is an excellent attorney, and I know he will have a successful practice at some point. He just needs to work on being more confident.

  Karen lacks the kind of commanding presence a successful attorney needs. Because of her lack of confidence, she has been unable to develop independent relationships with the clients with which she works. I just don’t think Karen has a future at this firm.

- **Leniency bias revisited.** Are men, but not women, given the benefit of the doubt? (See page 20)

- **Only the superstars survive.** While superstar women may fare very well, women who are merely excellent tend to get sharply lower evaluations than comparable men. This explains why women tend to get polarized evaluations. (See page 20)

  *Ex:* Kate and Scott are both fourth-year associates in the corporate group. Both received similar comments on their evaluations. After reading the evaluations, the comments suggested that both were strong performers overall but they both had room to improve. Scott received an overall rating of 5 on a 5-point scale. Kate received a 3 on the same scale.

- **Pesto change-o.** Researchers found that when a male candidate had stellar educational credentials, evaluators tended to hire him, citing those credentials. But when the same group of
evaluators encountered a female candidate with similar educational credentials, they again chose the man, this time arguing that experience was more important than education. (See page 21)

- **Double jeopardy.** When African-American women trigger stereotypes of blacks in general as well as stereotypes of women, two sets of negative competence assumptions may mean they have to work even harder than white women to establish competence. One stereotype of Asian women is that they are deferential and passive, a characterization that also may trigger negative competence assumptions. (See page 21)

### Double-Binds and Deference-Challenged Women:
When the Job Requires a “Go-Getter” but Assertive Women Are Disliked

- **What a witch.** Behavior that would be acceptable in men often is considered unacceptable in women. (See page 22)

- **He’s incisive; she’s abrasive.** The same critical remark may be seen as abrasive coming from a woman, but incisive and direct coming from a man. (See page 22)

- **She’s a shameless self-promoter; he knows his own worth.** Women who speak in a direct, self-confident manner, highlight past accomplishments, and attribute successes to skill rather than luck are viewed less positively than women who are modest about their skills and accomplishments and include disclaimers (“I’m no expert”) and hedges (“Don’t you think?”). This places women at a particular disadvantage if men are free to self-promote. (See page 22)

### Good Girls/Bad Girls:
Ambivalent Sexism at Work

- **In some workplaces.** Women can get ahead only if they play a limited number of traditional feminine roles: the good girl who makes men feel comfortable, the mother who takes care of everyone around her, the princess who aligns with a powerful man (but does not threaten his dominance). In this context, women who refuse to play these feminine roles may well be seen as lacking in interpersonal skills. (See page 23)

Source: Project for Attorney Retention
DEGREES OF EQUALITY
A NATIONAL STUDY EXAMINING WORKPLACE CLIMATE FOR LGBT EMPLOYEES
In recent years, businesses have engaged in sustained efforts to implement policies aimed at creating safe and productive workplaces for lesbian, gay, bisexual and transgender employees. The majority of Fortune 500 companies have prohibited discrimination based on sexual orientation since 1995 and have offered partner benefits since 2006. More than one-third prohibit discrimination based on gender identity. The number of companies that receive top ratings on the Human Rights Campaign Foundation's Corporate Equality Index, the pre-eminent benchmark on LGBT policy, rose from just 13 in 2002 to 305 in the 2010 report. These policies have had a positive impact on productivity, recruitment and retention of a diverse and motivated work force.

Nevertheless, significant numbers of LGBT employees continue to experience a negative workplace climate that appears to be unaffected by organizational policies and which varies by location, manager and work team. The majority of LGBT workers (51 percent) hide their LGBT identity to most at work, the simplest indication that more work needs to be done to translate inclusive policies into an inclusive climate. Hiding one’s LGBT identity is even more pronounced among younger workers. Only 5 percent of LGBT employees ages 18 to 24 say they are totally open at work, compared to more than 20 percent in older age cohorts.

Employees who are not open at work experience more negative outcomes from their workplace environment that affect productivity, retention and professional relationships. For example, 54 percent of LGBT employees who are not open to anyone at work report lying about their personal lives, compared to 21 percent of employees open about their LGBT identity. LGBT workers’ inability to participate honestly in everyday conversations hinders trust and cohesion with their co-workers and superiors.

An employee’s sexual orientation or gender identity are often unavoidable in casual, non-work-related conversations among co-workers. A total of 89 percent of LGBT employees say conversations about social lives come up at least once a week; 80 percent confront conversations involving spouses, relationships and dating at least once per week; and, 50 percent say the topic of sex arises at least once a week. These frequent conversations are the most likely to make LGBT employees feel uncomfortable: Fewer than half feel very comfortable talking about any of these topics.

Derogatory comments and jokes still happen at work and are a major indicator that it is unsafe to be open about their sexual orientation or gender identity at work. A total of 58 percent of LGBT workers say someone at work makes a joke or derogatory comment about LGBT people at least once in a while. Similarly, jokes and derogatory comments about other minority groups are equally indicative of a negative climate. About two-thirds (62 percent) of LGBT employees say negative comments about minority groups are made at least once in a while at work.
Many LGBT workers also view their employer’s use of the words “spouse” or “partner” as an indication of whether or not a climate is open and accepting. More than half of LGBT employees (51 percent) say their employer rarely (13 percent) or never (38 percent) uses terms such as “partner” or “significant other” instead of or alongside “spouse” in communications.

While non-discrimination policies that include sexual orientation and gender identity are fundamental to establishing a productive workplace climate, their presence alone is not an indicator of employee experience. Even with inclusive employment policies, significant numbers of employees report negative consequences of an unwelcoming environment for LGBT employees. Moreover, the vast majority of LGBT workers do not report instances when they hear an anti-LGBT remark to human resources or management. On average, 67 percent ignore it or let it go, 9 percent raise the issue with a supervisor and only 5 percent go to human resources.

While these issues can have a costly impact on LGBT employees, most workplaces can improve with targeted assessments and teachings around everyday opportunities to signal an inclusive workplace. Providing an anonymous and confidential method for employees to identify as LGBT, along with other demographic information, allows businesses to gauge success and target areas for improvement. Seven in 10 (72 percent) LGBT employees say they would self-disclose their sexual orientation or gender identity along with other demographic information in an anonymous human resources survey.

The HRC Foundation has devised and piloted the first-ever LGBT workplace climate assessment tool to assist organizations in identifying LGBT employees and improving their work environments. In addition, the HRC Foundation is developing a series of toolkits that focus on three core tiers of influence in an organization — senior leadership, human resources and diversity and inclusion professionals; middle managers and supervisors; and individual employees — designed to help improve workplace climate for LGBT employees.
Excerpted from Degrees of Equality: A National Study Examining Workplace Climate. Copyright © 2009 by the Human Rights Campaign Foundation. Reproduced with permission. All rights reserved.”

To download the full report, visit the following link: http://www.hrc.org/degrees_of_equality/index.asp

An article published on the 365gay.com website discusses the HRC report can be accessed at the following address: http://www.365gay.com/news/study-majority-of-workers-hide-sexual-orientation-gender-identity-at-work/
Report of The Bar Association of San Francisco
Equality Subcommittee on

LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ISSUES

November 2007
PREFACE

The Bar Association of San Francisco ("BASF") has been a pioneer among bar associations working to ensure workplace equity for lesbian, gay, bisexual, and transgender ("LGBT") lawyers. Law firms in the Bay Area and beyond have actively embraced our initiatives.

In 1986, BASF established a Committee on Equality which made recommendations to BASF's Board of Directors on how to eliminate barriers to the advancement of racial minorities, women, lesbians and gay men, and lawyers with disabilities in the San Francisco legal community. BASF established its Committee on Sexual Orientation Issues in 1990 to address the specific needs of gay and lesbian lawyers, and later broadened its focus to include all LGBT lawyers.¹ In 1991, BASF produced a comprehensive Report entitled Creating An Environment Conducive to Diversity. A Guide for Legal Employers on Eliminating Sexual Discrimination. Responding to the call to create new policies to promote LGBT inclusion, many San Francisco firms pledged to embrace the recommendations in this groundbreaking Report.

While BASF periodically has gathered and circulated information about employment issues facing LGBT lawyers, BASF's most recent guidance on best practices was released in 1996. Much has changed since then in the legal landscape—as well as in our law firms. The Bay Area legal community has been a leader in pushing for progress in workplace equality, and while many think of San Francisco as a place where LGBT people thrive and are integrated into all aspects of civil life, much remains to be done.

This Report reflects the need to focus on best practices to ensure that the doors are open to LGBT lawyers and that promotion and retention goals also are embraced. The Board of Directors of BASF thanks the Equality Subcommittee for its extraordinary work and congratulates the Bay Area's legal employers for the progress we have made together.

As the Rev. Dr. Martin Luther King Jr. wrote, "The time is always right to do what is right." We have more to accomplish, and the time to do so is now. We look forward to working with the greater legal community to achieve full workplace equality, diversity and inclusion for all attorneys.

Nanci Clarence, BASF President 2007

ACKNOWLEDGEMENTS

The Bar Association of San Francisco (BASF) thanks the contributors to the Lesbian, Gay, Bisexual and Transgender Equality Report, listed in Appendix D. A special thanks to Morgan, Lewis & Bockius LLP for underwriting the cost of printing this Report.

¹ The Committee on Sexual Orientation Issues was established as a Subcommittee of the Equality Committee. It was known as the Committee on Gay and Lesbian Issues until 1995.
EXECUTIVE SUMMARY

We address this report to you, the leaders and managers of law firms and corporate law departments. Your colleagues — all volunteers — wrote the Report. Some of us are lesbian, gay, bisexual, or transgender. Some of us are heterosexual. Some of us either now are or have been managers in our firms or companies. All of us have insights into how the legal workplace looks from the LGBT perspective.

Today and for the foreseeable future, the talent pool from which legal employers draw will scrutinize the personnel practices of law firms and corporate law departments for fairness and inclusiveness. A similar trend exists among clients, who more and more consider the demographics, culture, and policies of their outside counsel when selecting representation. How well a legal office treats its LGBT attorneys increasingly matters to a broad spectrum of potential stakeholders — not just to LGBT attorneys. To these people, a firm’s stand on LGBT issues in the workplace is emblematic of the institution’s overall fairness, inclusiveness, and flexibility.

So in 2007, while BASF acknowledged the tremendous advances legal employers have made in creating hospitable workplaces for LGBT employees, BASF recognized the time had also come to consider areas still needing improvement. BASF delegated the task of reviewing those areas to our Subcommittee. We’ve tried to include in this Report facts you may not have known, points of view that you may not have considered, and concrete suggestions for enhancing fairness toward your LGBT attorneys.

We cite results from a California State Bar survey showing that many LGBT attorneys continue to suffer discrimination, but do not report it to management. The same survey revealed that significant percentages of people in other groups who experienced discrimination did report it to supervisors. This may surprise you, but it did not surprise us. Despite the great advances in equality of opportunity for LGBT lawyers in the last 20 years, problems persist, even in the Bay Area.

We understand and respect the demands on your time. If you are the manager or senior partner of a large legal office, we ask that you personally read at least the Introduction and the detailed discussions on:

- Leadership and Culture; and
- Professional Development.

Only your personal involvement in these areas will make the critical difference in your office’s performance. For example:

- Whether you know it or not, your organization probably includes LGBT professionals. You, as a leader, should acknowledge in plain English that you welcome LGBT employees in your workforce, and that your institution values them. This simple gesture of communicating expressly that you value the contributions of LGBT employees on the same basis as the contributions of others can do wonders for the productivity and morale of LGBT attorneys.
Almost no junior lawyer develops properly without mentoring. For a host of subtle reasons, LGBT lawyers may face extra obstacles in finding mentors. Do not allow lack of mentoring to stifle the development of your talented junior LGBT lawyers. The discussion on Professional Development tells you how to set the right tone for fair and inclusive mentoring, and how to avoid squandering talent that your office may have worked hard to recruit.

On the topics of Benefits, Training, Recruiting/Hiring, Marketing/Philanthropy/Pro Bono, and Transgender Lawyers and Transgender Issues, we ask that you assign the careful review and study of each section to the appropriate manager or leader in your organization. Give each manager or leader a mandate to report back to you promptly on whether your office already follows best practices in these areas, and — if not — when it will take steps to do so. Appendix E provides a useful checklist that your organization can use to audit its practices.

One topic above all others — Benefits — requires intense scrutiny and careful attention to detail in forging solutions. At the risk of belaboring the obvious, this is owing to the serious financial consequences that LGBT attorneys, their partners, and other family members face when they encounter a gap in benefits coverage. An employer’s commitment to providing LGBT employees with benefits equal to those it provides its non-LGBT employees is the single most important and objective litmus test of the organization’s commitment to inclusiveness and fairness toward LGBT people.

As the Report describes, many employers also lack familiarity with transgender issues. Preliminary data suggest that transgender lawyers may face even more difficult barriers to workplace fairness. Throughout the Report, and in the section on Transgender Lawyers, there are recommendations to assist you in understanding the issues and achieving a truly inclusive workplace.

This Report, properly used, will benefit your business. It will help you recruit, retain, and advance excellent lawyers, and create a flourishing culture of inclusion and fairness. We learned a lot by researching and writing this Report. We hope you’ll learn interesting and valuable things by reading it.

**CONTACT**
For more information about this report, please contact Yolanda Jackson, BASF Diversity Director, at yjackson@sfbar.org or 415-782-9000 x8736.
Excerpted from the Report of the Bar Association of San Francisco Equality Subcommittee on Lesbian, Gay, Bisexual, and Transgender Issues. Published November 2007 by the Bar Association of San Francisco. For copies of the entire report, please contact the Bar Association of San Francisco at: 301 Battery Street, Third Floor, San Francisco, California 94111, Phone: (415) 982-1600 Fax:(415) 477-2388.

Or visit the following link to download the document:
http://www.sfbar.org/diversity/lgbt_reports.aspx?print=1
Creating a Model Work Environment for Lesbian, Gay Bisexual and Transgender Individuals
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For additional copies of this brochure:
Call 415-538-2328 or e-mail at programdevelopment@calbar.ca.gov

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Creating a Model Work Environment for Lesbian, Gay, Bisexual and Transgender Individuals

This brochure is designed to provide model practices for legal employers to follow in promoting a nondiscriminatory workplace for employees who are lesbian, gay, bisexual and/or transgender (“LGBT”). The brochure has three components:

1) an introductory section of basic definitions;
2) a set of specific recommendations regarding employment policies and procedures, benefits and training; and outreach, hiring and retention; and
3) model practices or policies currently used by some employers in California.
Definitions

Substantial portions of these definitions are taken from publications of the Transgender Law Center.

LGBT is an umbrella term that stands for lesbian, gay, bisexual and transgender.

Sexual Orientation refers to a person’s emotional and sexual attraction to other people based on the gender of the other person. A person may identify his or her sexual orientation as heterosexual, lesbian, gay, bisexual or queer. It is important to understand that sexual orientation and gender identity are two different things. Not all transgender people identify as gay, lesbian, bisexual or queer. And not all gay, lesbian, bisexual and queer persons display gender non-conforming characteristics.

Gender Identity refers to a person’s internal, deeply felt sense of being either male, female, something other or in between.

Gender Expression refers to an individual’s characteristics and behaviors such as appearance, dress, manners, speech patterns and social interactions that are perceived as masculine, feminine or androgynous.

Gender Non-Conforming refers to someone who has or is perceived to have gender characteristics and/or behaviors that do not conform to traditional or societal expectations.
Transgender is an umbrella term that can be used to describe people whose gender expression is non-conforming and/or whose gender identity is different from their birth-assigned gender. “Trans” is often used when speaking, as an abbreviated version of “transgender.”

Transition in the transgender context often consists of a change in style of dress, selection of a new name and a request that people use the correct pronoun when referring to a transgender person. Transition may, but does not always, include necessary medical care like hormone therapy, counseling and/or surgery.

Coming out of the closet describes the voluntary public announcement of sexual orientation. Being “out” means not concealing one’s sexual orientation. Being “out” can sometimes look different for transgender employees as some will choose not to be open about the fact that they are transgender. However, this does not mean the employee is concealing his or her gender identity. For instance, someone who has transitioned from male-to-female is very “out” about being a woman; she just may not be comfortable being “out” as a transgender woman.
What should be an organization’s first steps toward creating a model work environment for LGBT individuals?

- If not already present, add “sexual orientation” and “gender identity” to your organization’s non-discrimination policy.

  > Model Language: “This organization is committed to promoting diversity and does not discriminate based upon race, color, religion, sex, gender identity, sexual orientation, national origin, marital status, age, political affiliation or disability.”

- Prohibit derogatory statements or actions directed against LGBT individuals and communities, and quickly admonish those who make such statements.

- Do not discriminate against LGBT clients in the provision of services or agree to the discriminatory demands of clients.

- Do not wait for LGBT individuals to make a formal complaint before acting against discrimination, derogatory statements or actions.
How does an organization show its commitment to promoting LGBT equality in the workplace?

• Create and adopt policies that clearly state the organization’s commitment to promote diversity, end discrimination and prevent violence and harassment of any kind on the basis of sexual orientation or gender identity.

• On an annual basis, ensure that all policies and procedures, including those regarding complaints/grievances, are updated to include sexual orientation and gender identity when appropriate and ensure that the updated policies and procedures are distributed to all employees.

How can an organization address transgender workplace equality concerns in particular?

• Include both “gender identity” as well as “sexual orientation” in your organization’s non-discrimination policy. The inclusion of “sexual orientation” alone is insufficient, as discrimination based on sexual orientation is different from discrimination based on gender identity.

• Be sure that job descriptions are not gender-specific.

• Refrain from gender-specific dress codes. If your organization has a dress code, ensure employees may dress according to their gender identity, in compliance with professional dress codes and rules applicable to all employees.

• Create a bathroom access policy which allows access based on a person’s gender [someone who has transitioned from female-to-male has a male gender identity, for instance]. In addition, installing and/or designating single-use bathrooms as gender neutral increases access for a wide variety of employees and clients.
How can an organization ensure that its work benefits provide for LGBT employees?

- Provide equitable benefits and privileges to all employees, including health benefits (medical, dental and vision), relocation benefits, care-taking and bereavement leave, access to facilities and services, access to employee assistance programs and retirement and survivor benefits.

- Ensure your organization’s health insurance plans cover transition-related care for employees who are transgender.

- If your organization has a life insurance benefit, ensure the plan will recognize a registered domestic partner as the default beneficiary.

- Provide the domestic partners, dependents and children (biological, adopted or step) of LGBT individuals and couples the same benefits as the organization grants the spouses, dependents and children of heterosexual individuals and couples.

- Recognize all employee affinity groups equally, including LGBT groups.

- Pay for employee time and fees for attending diversity awareness trainings and conferences.

- Recognize, sponsor and support involvement in LGBT professional organizations, events and pro bono efforts.
What steps can an organization take to educate all employees about LGBT workplace issues?

• Require periodic training of all employees, including appropriate training for human resources, managerial and supervisory personnel, on diversity and anti-discrimination-related issues. The training should include content specific to sexual orientation and gender identity.

• Training content on sexual orientation and gender identity should be designed to increase knowledge, awareness and sensitivity toward LGBT employees and their work-related concerns, such as coming out, health benefits, gender transition, diverse family structures, co-worker relations, information and referrals to resources in the LGBT community, and availability of materials and resources (through an in-house library if possible) for interested individuals.

• Include content on how your organization can prepare for a transgender employee’s on-the-job transition.
How can an organization attract LGBT applicants and retain LGBT employees? What should an organization do to show its commitment to LGBT diversity in the workplace?

- Promote an equal opportunity workplace culture by encouraging nondiscriminatory recruitment, hiring and promotion of openly LGBT and LGBT-sensitive managers and employees throughout the organization.

- Ensure recruitment materials include information about nondiscrimination policies, domestic partner benefits and statistics on the number of openly LGBT employees.

- If possible, include LGBT personnel on the hiring committee.

- Offer the names of LGBT and LGBT-sensitive personnel within the organization to speak to new recruits. If your organization has a mentorship program, allow a new employee to request a mentor who is LGBT or LGBT-sensitive.

- Recruit through LGBT bar associations, law student groups and career days at colleges and universities, as well as by advertising in LGBT media. Network with LGBT organizations and LGBT recruitment services.
• Provide LGBT employees equal opportunities to network and socialize, such as inviting domestic partners whenever spouses are invited and listing domestic partners when spouses are listed.

• Create career development and mentoring programs inclusive of LGBT employees.

• Not all LGBT employees will bond together simply because of their sexual orientation or gender identity. Be sensitive to the unique personalities of individual employees, mindful that sexual orientation (like gender identity) is only one aspect of a person’s personality.

• Also, not every LGBT employee will be interested in working on LGBT recruitment or personnel policies. Some LGBT employees may want to contribute to the organization in other ways and may feel tokenized if they are asked to be the “lesbian voice” or the “transgender voice” on an issue or organization effort. Avoid this dynamic by making opportunities open to everyone and by not having expectations about an LGBT employee’s desire to participate or reasons for not participating.
MODEL PRACTICES

Please visit the Human Rights Campaign’s Report “Best Practices to Work for GLBT Equality” at http://www.hrc.org/placestowork/ for a listing of organizations that have model practices in place.


RESOURCES

Federal Globe (Gay, Lesbian, Bisexual, Transgender Employees of the Federal Government)
Post Office Box 23922
Washington, D.C. 20026

Human Rights Campaign
1640 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 628-4160
http://www.hrc.org/

Lambda Legal
3325 Wilshire Boulevard, Suite 1300
Los Angeles, CA 90010-1729
(213) 382-7600
http://www.lambdalegal.org/
Minority Corporate Counsel Association
1111 Pennsylvania Avenue N.W.
Washington, D.C.  20004
(202) 739-5901
http://www.mcca.com/

National Center for Lesbian Rights
870 Market St. , Suite 370
San Francisco, CA 94102
(415) 392-6257
http://www.nclrights.org/

Out & Equal™ Workplace Advocates
155 Sansome Street, Suite 450
San Francisco, CA 94104
(415) 694-6550
http://www.outandequal.org/

Transgender Law Center
870 Market Street, Suite 823
San Francisco, CA  94102
(415) 865-0176
http://www.transgenderlawcenter.org/
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The purpose of this booklet is to provide general information on the law, which is subject to change, and is not intended to provide legal advice. If you have a specific legal problem, you may want to contact a lawyer.
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Also recommended by the California Bar Association is the following:
Online Survey Report and Recommendations that includes feedback from LGBT attorneys and recommendations re: responding to the challenges...
[the LGBT sections start on pages 16 (challenges) and 26 (recommendations)]