

Diversity, equity, and inclusion with Suzanne Wertheim.

Chapter 5: gender bias in law

In this six-part series Dr. Suzanne Wertheim, of Worthwhile Research & Consulting, talks to *The Trademark Lawyer* about diversity, equity, and inclusion: what it means; the current challenges; DEI in law; gender bias; and what we can all do to improve.

What has your recent research found about women's experiences in the legal workspace?

My research shows that women's experiences in the law are not good, and really quite parallel to other problems that show up in other white-collar work spaces. In fact, I think gender bias in the law is a bit amplified because of how law firms are structured, how promotions go about, and how work is distributed – work allocation in law firms is just so personal rather than being systematized. Any time you don't have a system and are instead relying on personal connections and personal judgments, it's very, very easy for bias to sneak in. The more that you can be systematic and build "bias interrupters" into decisions involving work allocations and promotions, the more that you can have predetermined criteria, the more equitable your workplace will be.

What I see in legal practice is a whole host of thwarted opportunities and numbers that get thinned out every level you go up. I also see a lot of denial that gender bias exists, let alone that it is pervasive throughout law firms and other legal practices.

This relates to the serious problem of the "perception gap," which we find again and again. For most demographic categories, there is a dominant group and an underrepresented group. And again and again, we will see that the dominant group thinks things are fine while the underrepresented group will tell you that things are really not ok. This is true for gender as well as other demographic categories. I'll give you an example from a few years ago.

In a 2016 survey, the Florida Bar found that fully 29% of the female lawyers who responded had been called 'sweetie' or 'honey' by a male lawyer. That's almost a third! In contrast, less than 1% of men responding had something



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similar happen. Also in that same survey, while nearly half of all female lawyers said male lawyers get to partner faster, only 12% of male lawyers said that was true. What's more, half of the female lawyers said that they had to work harder than their male counterparts to get to the same level, but only 12% of the male lawyers thought this was the case. So what this survey shows us is: 1) you have pervasive bias, which you can see as a headwind slowing down female lawyers, and 2) there is a perception gap where male lawyers, who dominate the higher levels of law firms, do not believe that this pervasive bias exists. Again, based on my experience, this pervasive gender bias in law seems to be a bit stronger, a bit more entrenched, than in some other fields.

I was once brought in to talk to the writing team for a television show called *How to Get Away with Murder*. They invited me to come in and talk to them for a few hours about bias in legal and medical workplaces. I told them, "I'm not sure that you did this purposely, but having a Black woman run her own law firm is exactly on point. Because what happens again and again is that women of color and white women who try to succeed at law firms get pushed down so much that they give up. Even though it's hard to start and run your own practice, even though in principle it is easier to slot into an infrastructure that somebody else has built for you, Black women leave and set up their own practices. Because they are so tired of the biased and unpleasant things that are said to them on a daily basis. And they are so tired of watching good opportunities pass them by and go to other people." They were delighted to hear that they had been spot on. It's actually a quite unrealistic show, they weren't really aiming for realism, but in this respect they were spot on.

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Law is still a very traditional profession; how do we work to overcome unconscious gender bias that is so ingrained in the profession?

I’ll tell you that in my experience of training, both educating undergrads and in anti-bias training, the topic I find the most resistance to is gender bias. The resistance to believing gender bias is real is almost as pervasive as the many subtle ways gender bias gets openly expressed! For people who haven’t experienced it, gender bias can be completely invisible, and so feel unbelievable. They haven’t seen it, so how can it be real?

And for many people on the receiving end of gender bias, they know they feel bad, but they don’t realize that what’s going on is systemic and widespread. I hear about a lot of internalization, thoughts like, ‘well, it must be me, something that I’m doing.’ I encounter a lot of impostor syndrome. For many, many people, impostor syndrome is a very rational response to ongoing external feedback that tells someone, ‘I see you as less than’. If you’ve had a lifetime of messages saying that you’re less than, why wouldn’t you get impostor syndrome? And then women with impostor syndrome are told, ‘get over it’, ‘be resilient’, ‘have grit.’ This again puts the focus on the individual and ignores the systematic factors that created the impostor syndrome and keep it in place. How am I supposed to get over feeling like I don’t belong when people consistently give me the message that I’m not good enough for them to hire? Or mentor? Or give credit to? Or promote?

I’ve actually created a training where the whole second half is about gender bias. In my early workshops, I was getting so much resistance that I started bringing in data from transgender people. I brought in stories from people who had transitioned as adults, and so had work experience presenting as different genders. These stories can be summarized as “when I was presenting as this gender I was treated this way, now that I’m presenting as this gender I’m treated really differently.” And sometimes men would raise their hands and say, “well couldn’t time be playing a role? Like, it’s not that he’s seen as male now, it’s that he got better because it was three years later. So this doesn’t feel like gender bias to me.” That’s how strong the resistance can be. I thought I had controlled for all variables, but they dug in and found that time was another variable, and so obviously (to them, the resistant people) time was the answer for the different treatment, not gender.

So, I went one step further and worked to remove time as a variable as well. I found data where the people’s interactions were text-based only. And the only thing that changed was someone’s name – sometimes they were

perceived as female and at other times they were perceived as male. And depending on their text-only gender presentation, they would either be treated better or worse. In their “male” persona, they would be treated with respect and evaluated well. And even with this watertight data, where literally the only variable changing is gender – and in text form only! Just a name! – I still found that I needed to give example after example. Piles of examples that show that just being perceived as female skews how some people will negatively evaluate your competency and performance. And then, when you look at the actual performance in the studies, either the man and the woman performed equally well, or the woman did a measurably better job.

Another problem is that gender is such a salient category in the English-speaking world (and elsewhere too, of course). For a long time, everybody’s been forced to choose one of two genders, male or female. Two options, choose one, nothing else. Doctors will sometimes take an intersex infant and perform surgery to force a gender on them, without the ability to know their gender identity. Here in the US, it’s now common to have “gender reveal” parties, which are really sex reveal parties – they’re giving the results of a scan of a fetus’s anatomy and nothing more. That baby may end up with a different gender identity. Only time will tell.

We are socialized so strongly when it comes to gender that it’s very hard to remove those decades of cultural programming and rethink them. We overlay gender on all kinds of things – food, beverages, colors, clothing, posture. You could tell me right now what’s a “girly” drink and what’s a “manly” drink. What’s a “feminine” scent and what’s a “masculine” scent. It’s just everywhere.

I’m on social media a lot for research, and I’m subscribed to a subreddit called ‘Pointlessly Gendered.’ So examples show up on my feed all the time, and even now, after all these years of research, I still find myself surprised at what people put gender on top of. Like recently there was a Twitter thread about how it’s “unmasculine” to be born in the summer. The summer months are feminine? This is the level we’re dealing with! It’s so pervasive and it can go to a level of what feels like satire, but for some people it’s deadly serious. A few years ago, we had an unbelievable wildfire here in California because somebody set off fireworks as part of their gender reveal party. In a forest. During a severe drought. There are really negative outcomes that can result from the cultural need to think about gender all the time, and to have strict ideas about what is and isn’t acceptable based only on gender.

I want to make clear that gender and sexual orientation aren't the same thing. They get kind of lumped together in LGBTQIA, but those letters stand for pretty different things. LGB are about sexual orientation, lesbian, gay and bi. T and I are about gender, transgender and intersex. Q and A can be about gender or sexual orientation – queer, asexual, agender.

So there's gender bias and there's bias against people with sexual orientations beyond heterosexual. In my experience, gender bias is way more pervasive in the workplace – for example, gay men, especially if they are white, often make it to the highest organizational levels. (See, for example, Tim Cook, who heads up Apple.) I believe that we're seeing a generational shift with Gen Z. For example, I've seen different polls with between 33% and 51% of Gen Z respondents saying, 'I'm a member of the LGBTQ+ community.'

A few months ago, JoJo Siwa, 17 at the time and made famous by an ultra-wholesome channel called Nickelodeon for Children, came out via social media. She lip synched the Lady Gaga song "Born This Way" and wore a t-shirt given to her by her cousin that said 'My Best Gay Cousin'. Siwa said, "I don't have a label, I just wanna tell you that I'm super happy." And I was surprised and impressed to see that her coming out video was celebrated by children and their parents everywhere. Sure, not universally. But the overall response was enormously positive. The idea of this announcement happening so unproblematically even a decade ago is incomprehensible. So I suspect that changes in organizational culture when it comes to gender and sexual orientation are going to come from the newest hires, from Gen Z. And in the next few years, Gen Z will start entering law firms. I'm waiting to see the effect that they have.

I see general differences when it comes to pronouns as well. I give trainings on pronouns, and in our discussions what I'm finding is that people who have children between 10 and 18 have really interesting personal examples of new pronoun use. Either their children or their children's friends. I'm hearing stories about 12-year-olds saying to their friends, "I'm nonbinary and I need you to use the pronouns they/them for me." Kids are practicing at home and their parents are helping them. I think the idea of non-binary people and "they/them" pronouns is going to be a new cultural norm as these new generations come up.

When people complain about using "they" for just one person, I like to tell them about the history of English "you." Once upon a time in English, 'you' was plural only, it was used only for a group of people. But now we say 'you' to a single person as well. For me, and for the rest of

speakers of modern English, saying 'you' to a single person is completely unproblematic, because the grammatical shift happened several hundred years ago. So what it looks like is that we're headed for a future where speakers of English don't think twice about using "they" to refer to a single person. Because we're in a moment of cultural and grammatical shift. Grammatical systems get locked in your brain around puberty. And right now we've got 10-year-olds using 'they' for a single person, and then it's going to lock in their brains. And they will have a different grammatical system in their brains than people who are adults today. So that's our near future – people who fluently choose from "she," "he," or "they" to refer to someone. And the sooner you start practicing, the easier it will be for you to use pronouns in that future.

Join us in *The Trademark Lawyer* Issue 2 2022 for Chapter 6.

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