



A NEWSLETTER FROM THE PENNSYLVANIA BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION

Looking forward to new ideas, new year for WIP

By Shira Goodman,
Communications Co-chair

This was a busy fall for the Commission on Women in the Profession and for many women in the profession themselves. I am excited to be co-chairing the Communications Committee with Phyllis Horn Epstein. We are eager to present some new ideas to the Commission this year and hope that we will continue to find new ways to keep our members connected and in closer communication and contact with each other, the Commission and the Pennsylvania Bar Association.

The Fall Retreat

Once again, members gathered in Hershey for an excellent weekend of programs, networking and some much deserved relaxation. Thanks go to Kathryn Cooper for her full report on the retreat on page 4 and to Nancy Conrad and Melinda Ghilardi for co-chairing this special weekend. The retreat has become a very important part of our annual programming, and we look forward to continued success in the future.

Constitutional convention – to study the issue or not

Much of the PBA’s attention this fall was focused on the proposed resolution regarding whether or not to urge the Legislature and governor to appoint a commission to study

and make recommendations about whether or not to hold a constitutional convention. This is addressed in the report of Cheryl Young, at-large woman governor, on page 3. Although the WIP did discuss the issue and convened a smaller group to determine whether to recommend that the WIP stake out a particular position on the issue, the WIP determined not to take a specific position on the resolution in advance of the October meeting of the House of Delegates.

The 2009 judicial elections

It was a good year for women running for the appellate courts. Six of the seven open appellate court seats, including the only vacancy on the Supreme Court, were won by women. The newest Supreme Court justice is Republican Joan Orié Melvin, whose victory created a new vacancy on the Superior Court. She is only the third woman ever elected to Pennsylvania Supreme Court.

The close results in the election for four vacancies on the Superior Court led to the first ever statewide recount. The newest Superior Court judges are Judge Judith Olson of Allegheny County, attorney Sallie Mundy of Tioga County, President Judge Paula Ott of Chester County, and Philadelphia Common Pleas Judge Anne Lazarus, the only Democrat to win a seat on the appellate courts this year.

Finally, the two Commonwealth Court seats will be filled by Pittsburgh

attorney Patricia McCullough and by the lone male to win an appellate court seat this year, Harrisburg attorney Kevin Brobson.

We are proud to count many of these women as members of the Commission, and we congratulate them on their success.

Conclusion

We are excited that this issue of *Voices and Views* includes articles from several of our members about Commission business, as well as other

(Continued on Page 7)

In this ISSUE

‘Women of Color in U.S. Law Firms’ study.....	2
WIP Leadership	2
Report of Cheryl L. Young.....	3
WIP member directory.....	3
Commission’s Fall Retreat in Hershey.....	4
Snapshots from the 2009 Fall Retreat	5
Considerations for a social media policy.....	6
Committee happenings.....	8
Communications Committee Policy/Mission.....	8
Join a Committee or Task Force.....	9
ABA’s WIP speaks out for equal pay.....	10
The power of women	17
When will we women stop being pawns of the health care debate?.....	18
Book review.....	18
Commission members in the news.....	19
Yale Law Women announce ‘Top 10 Family-Friendly Firms List’ for 2009.....	20

Catalyst publishes 'Women of Color in U.S. Law Firms' study

By Phyllis Horn Epstein, editor

As reported in the press on July 21, 2009, Catalyst's new study, "Women of Color in U.S. Law Firms," concludes that women attorneys of color face unique challenges in the workplace that contribute to job dissatisfaction and attrition. Catalyst's study demonstrates that more than 75 percent of women of color will leave the firm where they are working within the first five years. Some of these challenges include lack of opportunities for important work assignment and client interaction, lack of mentoring or feedback, a sense of "outsider status" and sexism.

Catalyst is a nonprofit organization

and a resource for research, information and advice about women at work. This report was based upon 1,242 individual survey responses, law firm survey responses, interviews with senior partners of U.S. law firms and focus groups with women of color (Asian women, black women and Latinas).

In order to retain women of color attorneys, the report recommends, among other things, educating law firms to recognize when stereotyping in the workplace occurs, increasing opportunity for dialogue within the workplace, monitoring the advancement of women of color and holding senior management accountable.



The editors of *Voices and Views* encourage our membership to contribute articles and announcements, including articles on your area of practice, topics relating to women and the law, book reviews, save the date notices, members in the news and photos of members at events.

Submission deadlines:

Spring 2010 Edition: April 1, 2010
Fall 2010 Edition: July 31, 2010

Please send information, news and articles to:

Phyllis Horn Epstein,
Epstein Shapiro & Epstein
1515 Market St., 15th Floor,
Philadelphia, PA 19102-1979
(215) 563-1200, fax (215) 564-5132,
e-mail: phyllis@eselaw.com

The *Voices and Views* Editorial Board also includes Shira Goodman as co-editor, Karoline Mehalchick as contributing editor, Shirley Makuta as Committee Reports editor, Joann Jofery as Book Review editor and Kellie MacCready as Special Events editor.

PBA Commission on Women in the Profession Leadership

CO-CHAIRS:

Shelley R. Goldner
Bernadine J. Munley

CO-VICE CHAIRS:

Janis L. Wilson
Lisa M.B. Woodburn

SECRETARY: Lisa Watson

ASSISTANT SECRETARY: Aly Oswald

TREASURER: Danielle Bacco

SUBCOMMITTEES

2010 ANNUAL CONFERENCE:

Kim Jessum
Renee Myers

AWARDS:

Hon. Susan Gantman
Kelly Stapleton

COMMUNICATIONS:

Phyllis Horn Epstein
Shira Goodman

GOVERNANCE:

Alyson Oswald
Hon. Norma Shapiro

MEMBERSHIP:

Maria Feeley
Brenda McBride

NOMINATIONS:

Dana Baiocco
Hon. Maureen Lally-Green

PROMOTION OF WOMEN:

Mary Doherty
Lisa Watson

QUALITY OF LIFE:

Sara Austin
Molly Gilligan

REPORT CARD:

Penina Lieber
Lila Roomberg

2009 RETREAT:

Nancy Conrad
Melinda Ghilardi

MEMBERS-AT-LARGE:

Hon. Donetta Ambrose
Wanda Flowers
Kathleen Wilkinson

BOARD OF GOVERNORS LIAISON:

Cheryl L. Young

NEWSLETTER EDITOR:

Phyllis Horn Epstein

PBA NEWSLETTER LIAISON:

Amy Kenn

PBA STAFF LIAISON:

Tammie Spicjarich

Report of Cheryl L. Young, PBA at-large woman governor, 2009

This is my first report after being appointed the at-large woman governor earlier this year. It is an honor for me to serve in this position; however, it is equally intimidating, as I am following Penina Lieber as the woman governor, and as I am sure you are all aware, those are big shoes to fill. Lieber's goal during her tenure was to ensure the leadership of women within the PBA and make sure that our standards in determining leadership for the women were objective. Lieber was largely successful in this role, as women are much more visible and have been much more successful in achieving leadership positions than they have at any time in the past. Last fall, in this publication, Lieber submitted the statistics, which are very impressive in light of where we came from only a few years ago. Of course, we will be looking at our second woman president in May, which is an achievement that cannot be underestimated. Gretchen Mundorff, PBA president-elect, will be serving with a female Chair of House of Delegates, as well. I have attended several Board meetings since my appointment, and there are numerous women who aren't just in attendance but contribute regularly to each and

every substantive discussion. Of course, we cannot get too comfortable and relax our diligence, as it is only through our hard work and concerted efforts that we have made the progress we have. We cannot risk taking a step backward, and therefore, we must continue with the programs that have been so successful in the past, such as the Annual Report Card ("ARC"), as well as the programs we sponsor, including our annual retreat.

The year 2009 was a very interesting year for women and all members of the bench and the bar. PBA President Cliff Haines had brought to the attention of the Board of Governors, as well as the House of Delegates, that he wanted to study whether or not to request a constitutional convention to amend and modify the Pennsylvania Constitution. Toward that end, he appointed a commission headed by PBA Past President Andy Susko and state Rep. Kathy Manderino. The resulting debate was both controversial and intellectually challenging. After numerous meetings of the Board, as well as various discussions by e-mail, the House of Delegates met and decided to appoint a new internal commission, which will

make specific recommendations as to the details of proposed changes to the constitution. We are looking forward to the appointment of this committee, and we have been assured that it will be a diverse committee in many respects, including gender, race and geography. On behalf of the WIP, I will be submitting the names of interested candidates.

Under Haines' leadership, there was a strong emphasis on diversity in the year 2009 by the PBA. There was a Diversity Summit, which was followed by a dinner and meeting with the Board of Governors and various representatives of a number of minority bar associations both within and without the Pennsylvania Bar Association. The summit was extremely successful, as was the subsequent meeting, and we believe it opened a dialogue that will continue into the future and certainly during Mundorff's reign as president.

The WIP continues to provide collegiality and other resources for women, both in their day-to-day practices, as well as those who strive for leadership positions within the PBA. The retreat in 2009 emphasized

(Continued on Page 19)

WIP member directory

The directory of the members of the Commission on Women in the Profession is available on the PBA Web site, www.pabar.org. You can reach the directory from the home page by entering your PBA membership number to log in to the members-only area, clicking on "Committees/Commissions" at the upper left and then clicking on the "Women in the Profession Commission" button. On the WIP page, click on the "Membership" button. The online WIP directory lists everything that appeared in the hard copy, including indices by county and area of concentration.

If you are not yet in the directory, you can simply fill out the form online. The button for the form is on the same Web page as the WIP directory. If possible, also send your photograph in digital format to patricia.graybill@pabar.org.

The directory is a great source for referrals to hundreds of women lawyers skilled in every area of the law. These women are also available to answer questions you might have about practice in other areas of the commonwealth. This network of friends can be of immeasurable help in enhancing your satisfaction with and success in the law.

Commission's Fall Retreat in Hershey focuses on surviving stressful times

By Katie Cooper, Beck & Thomas, P.C., Pittsburgh

The PBA Commission on Women in the Profession held another successful Fall Retreat, "Survival Strategies in Stressful Times," at The Hotel Hershey, Nov. 6-7, 2009.

The retreat started Friday evening with a wine reception, dinner and a dessert reception. The Hotel Hershey's kitchen is a "scratch kitchen," and attendees had the unique opportunity to hear a presentation from Ken Gladysz, the hotel's executive chef. Gladysz gave a detailed description of how the meal was made. PBA President Clifford Haines gave friendly welcoming remarks, and Judge Diane Welsh (ret.) gave a warm and insightful keynote address at the dinner.

Approximately 20 women started Saturday morning with a brisk fitness walk/run led by a hotel fitness trainer through Hershey Sweet Lights, a holiday lights display located on two miles of wooded trails on the hotel grounds. Following breakfast, the Commission on Women in the Profession Business Meeting was led by Commission Co-Chairs Bernadine

Munley and Shelley Goldner. During the business meeting, each committee provided a report on their progress and recent activities.

Two CLEs followed the business meeting: "Distinguishing Yourself in the Practice of Law Through Everyday Public Relations," presented by Gina Rubel, and "Client Service and Marketing for Women Attorneys with Ethical Boundaries," presented by Ellen Freedman.

PBA President-elect Gretchen Mundorff gave an inspirational message during lunch. The retreat concluded with an emphasis on women's health. Several organizations sponsored tables with information and resource materials on their services. Nancy Schmitt of Aviana Inc. gave a presentation titled "From Crisis to Calm; Effective Stress-Reducing Strategies for Quality Living."

The 2010 WIP Annual Conference will be at the Hershey Lodge on May 12, 2010.



Katie Cooper can be reached at kcooper@beckthomas.com.

Commission members network at the Friday evening dessert reception at The Hotel Hershey.



Snapshots from the 2009 Fall Retreat in Hershey



PBA President-elect Gretchen Mundorff (from left), Kathleen Wilkinson and Judge Diane Welsh (ret.), Friday's keynote speaker.



The Saturday morning Commission Business Meeting, led by co-chairs Shelley Goldner and Bernadine Munley.



Commission members network at the Friday evening dessert reception.



PBA President-elect Gretchen Mundorff and PBA President Clifford Haines.



PBA President-elect Gretchen Mundorff speaks at Saturday's luncheon.

LinkedIn, Facebook, Twitter blogs & more: considerations for a social media policy

By Shelley R. Goldner

Everybody's doing it! Doing what? Using social media. Thirty-five percent of adult Internet-users now have a profile on at least one social networking site. The sites are used for valid business purposes, but they are also used to broadcast intimate details (sometimes embellished) of users' private lives. Social media also is used extensively as the vehicle of choice for recruiting employees and searching for jobs today.

Individuals express opinions and comments on these sites. Sometimes this is good. But sometimes postings disparage an employer or an industry or defame or harass customers, clients or co-workers, potentially exposing employers to an assortment of legal claims. Personal information disclosed on these sites can create additional problems that may expose an employer to yet other claims.

When used properly, social media is a good thing for businesses, something employees should be encouraged to use. But it also poses risks. What is an employer to do?

In 2008, 90 percent of businesses did not have social media policies. In 2009, more than one-third of employers have adopted a social media policy. One thing is clear: When it comes to social media policies, one size does not fit all. The best social media policies reflect the company's philosophy, culture and goals.

Guidelines and Rules. An effective social media policy should provide both guidelines and rules. Since many businesses benefit from their employees' use of social media, unlike typical employment policies, the policy should focus on what employees can do rather than what they can't. Too many rules and not enough guidance may discourage employees from using social media to promote the company's business. Training is vital, including

explaining what social media is and educating employees about the rewards and risks of its use. Ideally, a social media policy should be aimed at building the company brand while also protecting the company's legal interests.

During and After Hours. A policy should advise employees that the company reserves the right to monitor employee social networking activities *both during and after business hours*. Why

When used properly, social media is a good thing for businesses, something employees should be encouraged to use. But it also poses risks. What is an employer to do?

is this important? Online behavior that harasses, discriminates, disrupts or interferes with another's work performance or creates an intimidating, offensive or hostile environment, whether done during work hours or personal time, can expose an employer to liability. For example, if an employee bashes the company or badmouths or harasses co-workers or clients, the business can be hurt and risks claims ranging from discrimination and harassment to defamation. What if an employee discloses information that affects his or her ability to do the job? A surgical intern boasted on Facebook of being so hung over from her activities the night before that it compromised her use of a scalpel. What about employees who brag about using illegal drugs or engaging in other illicit conduct? The possibilities are endless. Employees must be told that they can be disciplined or fired for this type of activity. Employee social networking activities should not conflict with any company policies and procedures. This includes such things as discrimination,

harassment and retaliation policies, as well as confidentiality and conflict of interest.

Who's Seeing This? Anyone who engages in social networking should consider who their audience is and recognize that readers include current and potential clients, as well as current, past and future employees.

What Concerns Should An Employer Consider? Productivity. It's easy to waste many hours on social media sites. Recognize that social networking can range from legitimate business purposes to purely personal. Employers should impress upon their employees that use of social networking sites at work, just like use of the computer or the telephone, should be primarily for business purposes and that social media use should not get in the way of job responsibilities. **Other concerns.** Online statements may disclose confidential business information or violate intellectual property laws, expose conflicts of interest or unlawful activity. Employees should be encouraged to use good judgment and always think twice before hitting "send."

Rules. Here are some suggestions for rules:

- Employees are prohibited from using social media to harass or cyber-bully one another.
- Disparagement and defamation of the company is not tolerated.
- Abide by copyright laws. Always give others proper credit for their work, and make sure you have the right to use something with attribution before you publish.
- Disclosure of proprietary or confidential information is not allowed.

The employer should explain that

(Continued on Page 7)

LinkedIn, Facebook, Twitter blogs & more

(Continued from Page 6)

violating the social media policy may result in discipline up to and including termination of employment.

Blogs. Some companies use blogs to talk about what's hot in the company, including products or services. Employees who have personal blogs must make sure that readers know that their blogs contain their own views and that they are not speaking as a representative of the company when blogging about matters relating to the company or its business. Employers should make employees aware that when they use social media, they may be representing the company, either explicitly or implicitly, to the entire world.

Twitter. Twitter is a social medium in which people can post short statements limited to 140 characters. Many people who use Twitter "tweet" (post statements) repeatedly during the day. It is not realistic for an employer to review (or have a legal department review) "tweets" prior to publication. Employees should be advised to be professional and remember that they can't take it back once they hit "update."

Social Media Policy. As the prior discussion reflects, employers need to balance policies that encourage use of social networking sites to advance business goals while protecting the company from liability. Policies will vary widely depending on the nature of the company and industry. One Web site suggests the following policy reflecting these competing interests:

DAXKO encourages team members to be active in social media as a representative of our

company.

Only three rules – be real, add value and don't say anything that would embarrass your mom.

If your mom has low standards, then don't say anything you wouldn't want to see on the front page of *USA Today*. Simple enough.

P.S. - You're responsible for all the other stuff in the handbook when you're twittering, blogging, facebooking or whatever it is that you crazy kids are doing these days.

www.hrcapitalist.com

Friending Subordinates. Bosses who friend subordinates open a Pandora's box of legal claims including harassment, discrimination, wrongful termination and favoritism. Three rules apply to friending subordinates: don't, don't and don't.

More than you wanted to know. Social networking sites are loaded with personal information. A Facebook page may contain information about the person's religious affiliation, age, ethnicity, political or social affiliations, union activity or health problems — information that is not supposed to influence employment decisions but does appear on social networking sites. A manager may learn things about organizations employees belong to, their sexual orientation, medications they take and more. When a manager learns personal information from a site, the employee may argue that any later adverse employment decision was based on this personal information. Further, if a manager discovers information about things such as a severe medical condition, disabilities, references to being drunk at work, or discriminatory remarks about co-workers, the manager may be required to investigate and report it. If the employee is later fired and believes

that it was the result of the company knowing about an illness or union activity, a routine termination may result in discrimination, retaliation or Unfair Labor Practice claims.

LinkedIn Recommendations. LinkedIn is a social networking site often used for business purposes. One of its features allows the posting of recommendations from clients, colleagues, customers and others. LinkedIn encourages its members to solicit and post these recommendations as a means of self-promotion. Although such recommendations can attract clients and boost business, supervisors and managers should beware: Many employers have written policies against giving out anything other than neutral job references to current and former employees.

Using Social Media in Recruiting. Social media is the latest craze in recruiting. It often results in high candidate quality, provides high job visibility, attracts hidden candidates, minimizes vacancy days to fill a spot and minimizes cost per hire. In today's world, a hiring manager would be remiss not to check out a candidate online. However, as discussed earlier, social networking sites are loaded with personal information, and an employer may discover information that he or she is not permitted to ask in an interview, exposing the employer to potential claims of discrimination for failing to hire the applicant.

Now is the time. Although the nature and culture of a business will dictate what should be contained in a social media policy, one thing is clear: Social media is here to stay, and the time for a social media policy is NOW.



Shelley Goldner is an attorney specializing in employment law and business disputes.

Looking forward to new ideas, new year for WIP

(Continued from Page 1)

issues of concern to our members.

Please let either Phyllis or me know if you would like to write for an

upcoming issue of *Voices and Views*. We look forward to an exciting year for the Commission and for women lawyers in Pennsylvania.



Committee happenings

Annual Conference Committee (2010)

Volunteers are needed to assist with the planning of the conference that's scheduled to be held on May 12, 2010, at the Hershey Lodge.

Membership Committee

The committee met on Nov. 5, 2009, to continue discussions about its three primary initiatives for the year (mock interviews, mass mailing and creation of a speaker's bureau). The committee is looking for volunteers willing to conduct on-site mock interviews at their job location for law students.

Promotion of Women Committee

The general theme dates for the Midyear Meetings is "Effective Self-Promotion." The committee is working to define a communication strategy for reporting accomplishments of WIP members.

Diversity Task Force

The task force is working to establish its own information tab on the WIP's Web page so it has more of a presence within the Commission. The intent is to have links on the Web page to various diversity events, organizations and other programs with a similar mission. The task force has also revised its mission statement.

Mentoring Task Force

In the past, the committee has focused on pairing mentors and mentees together; however, they would now like to evaluate the pairing and determine what worked and what didn't work with the process. The committee is also partnering with the Promotion of Women committee on the Midyear Meeting.

Public Service Task Force

The PSTF received the results of a public service survey and are currently tabulating the information.

Pennsylvania Bar Association Commission on Women in the Profession

COMMUNICATIONS COMMITTEE EDITORIAL POLICY

Voices & Views is a publication of the Pennsylvania Bar Association (PBA) Commission on Women in the Profession and is published by the Communications Committee three times per year. The purpose of the publication is to facilitate communication among the membership of the Commission on topics and events of general interest to women lawyers. The editors of *Voices & Views* reserve the right to accept or reject any submission and to edit any submission to ensure its suitability for publication, its adherence to the Mission Statement of the Communications Committee and its furtherance of the objectives of the Commission on Women in the Profession.

The articles and reports contained in *Voices & Views* reflect the views of the writer and do not necessarily represent the position of the Commission, the editors of *Voices & Views*, or the Pennsylvania Bar Association.

MISSION STATEMENT

It is the mission of the PBA WIP Communications Committee to foster improved communication among its members in the furtherance of the goals of the Commission. To this end, the publication, *Voices & Views*, provides a forum for professional and open exchange among the WIP membership on all issues related to women and the law. *Voices & Views* shall be utilized for the following purposes:

- To publicize opportunities and events that may be of interest to the WIP membership;
- To provide information to the membership on topics that may be of general interest to women lawyers;
- To reach a wider audience and increase the visibility of the Commission;
- To inform the WIP membership of the projects and goals of the Commission; and
- To share information with the WIP membership regarding accomplishments of the members, other women lawyers and public figures.

www.pabar.org

Join a committee or task force

We have more than 750 attorneys as members of the Commission on Women in the Profession (WIP), and welcome the involvement of each member in the committees and task forces of the WIP. The committees and task forces are as varied as the women who populate the Commission. Please study the list of committees and task forces and contact either the Membership chairs, or the individual co-chairs listed.

See below for a synopsis of what each committee/task force does, and find your niche. Participation is generally by conference call, with face-to-face meetings as needed.

Thank you for your involvement in the Commission. Involvement in the committees and task forces are critical in order to make a difference in the PBA and in our legal community.

Annual Conference Committee:

Plans the Annual Conference, which is held on one day in May or June, as part of the three-day PBA Annual Meeting. Helps plan the conference programs and select the luncheon keynote speaker. Kim Jessum kjessum@stradley.com or Renee Myers rmyers@eckertseamans.com

Awards Committee:

WIP confers two awards at the PBA Annual Meeting: one for leadership/mentoring of women; the other for a woman litigator. This committee considers nominees and recommends recipients to the Executive Council for its consideration and approval. Hon. Susan Peikes Gantman kate.dunn@pacourts.us or Kelly Stapleton kstapleton@traxi.com

Communications Committee:

Publishes our newsletter, *Voices and Views*, and plans and oversees the public relations activities of the Commission. Phyllis Epstein phyllis@eselaw.com or Shira Goodman goodman@pmconline.org

Governance Committee:

Makes recommendations related to governance, including the policies and operating procedures of the Commission. Hon. Norma Shapiro judge_norma_shapiro@paed.uscourts.gov or Aly Oswald alyson.oswald@dechert.com

Membership Committee:

How do we attract new members? With more than 750 WIP members, how can we serve them better? How do we encourage greater participation? Maria Feely feeley@pepperlaw.com or Brenda McBride mcbride.mcbride.pc@zoominternet.net

Nominating Committee:

Makes recommendations for the appointment of co-chairs and co-vice chairs of the Commission. Can also make recommendations for the appointment of secretary, treasurer and committee chairs. Hon. Maureen Lally-Green lallygreen@yahoo.com or Dana Baiocco dbaiocco@jonesday.com

Promotion of Women Committee:

Develops programs to promote and showcase women attorneys. Has helped plan the Mid-Year Meetings in Philadelphia, Harrisburg and Pittsburgh. Mary Doherty mcdoherty@highswartz.com) or Lisa Watson (lwatson@aessuccess.org)

Quality of Life Committee:

Women together can identify the stressors and the solutions involved in the practice of law. WIP takes a leadership role to defend the right of lawyers to have balanced lives. This committee addresses issues relating to gender equity and flexibility within the workplace. Sara Austin saustin@austinlawllc.com or Molly Gilligan mgilligan@danielsiegel.com

Report Card Committee:

Surveys the status of women in the legal profession in the commonwealth including law firms, government, judicial, legislative and political office, and prepares an annual report card as to how we are doing. Annually recognizes one firm for promoting women to leadership positions. Penina Lieber penina.lieber@obermayer.com or Lila Roomberg roomberg@ballardspahr.com

Retreat Committee:

Plans our annual Fall Retreat which is usually held in October or November. Helps develop the retreat's theme and programs. Nancy Conrad conradn@whiteandwilliams.com or Melinda Ghilardi melinda_ghilardi@fd.org

Diversity Task Force:

Our legal community needs to reflect the diversity of our greater community – WIP seeks to identify opportunities for diverse women and encourage leadership. Stacy Hawkins stacyhawkinsesq@comcast.net or Dolly Shuster dollyshuster@dejazzd.com

Mentoring Task Force:

Helps seasoned and less experienced lawyers meet and provide support and guidance. Lynn Rzonca rzoncal@ballardspahr.com or May Sue Ramsden mramsdn@rrblaw.com

Public Service Task Force:

Identify service opportunities and provide support for causes that affect women. Roberta (Bobbi) Jacobs-Meadway rjacobsmeadway@eckertseamans.com or Andrea Tuominen andrea.tuominen@pacourts.us

ABA's Commission on Women in the Profession speaks out for equal pay

The American Bar Association's Commission on Women in the Profession, under the leadership of Philadelphia's Roberta Leibenberg, has voted to present to the ABA House of Delegates at its 2010 Midyear Meeting, a recommendation in support of the enactment of legislation by Congress to amend the Fair Labor Standards Act of 1938 (FLSA) and the Equal Pay Act of 1963 (EPA) to provide for additional remedies that are designed to insure that women are afforded the right to equal pay for equal work as Congress originally intended. Women in all professions continue to earn less than men. The U.S. Census Bureau reported in 2007 women

earned an average of only 78 cents for every dollar earned by men in nearly every occupation and level of education. The Commission report notes: "In fact, just one year after graduating from college, female graduates working full-time earn only 80 percent of the salary of their similarly educated male peers." The significance of this gap goes beyond pay inequities. As the Commission recommendation points out: "[W]age disparities undermine women's benefits and retirement security, which are often tied to salary." The full recommendation which provides the background and legal history of the EPA appears below.

AMERICAN BAR ASSOCIATION
Commission on Women in the Profession
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, that the American Bar Association urges Congress to enact legislation that would amend the Fair Labor Standards Act of 1938 ("FLSA") and the Equal Pay Act of 1963 ("EPA") in order to provide more effective remedies, procedures and protections to those subjected to pay discrimination on the basis of their gender, and to help overcome the barriers to the elimination of such pay discrimination that continue to exist. Such enhanced remedies and procedures should include, *inter alia*:

1. Allowing prevailing plaintiffs to recover compensatory and punitive damages.
2. Enabling EPA lawsuits to proceed as opt-out class actions pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.
3. Prohibiting employers from retaliating against employees for sharing salary information.
4. Permitting an employer to assert an affirmative defense for a pay differential between men and women only where the employer can show that the differential is caused by a factor other than gender, is related to job performance, and is consistent with business necessity.
5. Allowing wage comparisons between female and male employees in facilities within the same county or similar political subdivision, not merely within the same facility.
6. Enhancing the United States Equal Employment Opportunity Commission's ability to collect and survey pay data from employers.
7. Reinstating the United States Department of Labor's collection of gender-based data in the Current Employment Statistics Survey.

Report

For decades, the American Bar Association ("ABA")

has strongly opposed discrimination in employment based on race, gender, national origin, and other characteristics irrelevant to individual merit; supported strong enforcement of the civil rights laws; and sought appropriate remedies for victims of discrimination. The anti-discrimination laws that the ABA has endorsed have resulted in extraordinary advances for women in the workplace, and there is much progress to celebrate.

Evidence demonstrates, however, that sex discrimination is still far too pervasive in the workplace and that current anti-discrimination laws are inadequate to address the persistent barriers that women face in employment, in both the private and public sectors. In particular, the promise that women will receive equal pay for equal work — first guaranteed to them in the Equal Pay Act of 1963 (29 U.S.C. § 206(d)) — has never been fully realized.

The House of Representatives has already passed, and the Senate is presently considering, the Paycheck Fairness Act (S. 182/H.R. 12), which would amend the Fair Labor Standards Act of 1938 ("FLSA") to provide more effective remedies and procedures for those subject to sex-based wage discrimination, and require the federal government to be more pro-active in combating wage disparities. The Paycheck Fairness Act would strengthen the Equal Pay Act of 1963 ("EPA") by closing certain loopholes that have prevented the EPA from fulfilling Congress' intent to eliminate discrimination in the payment of wages on the basis of sex. For example, under the pending bill, women who are victims of sex-based wage discrimination would be able to recover compensatory and punitive damages and could also participate in a Rule 23(b)(3) opt-out class action lawsuit. Such remedies are not presently available to those who file EPA lawsuits, even though they are afforded to those who suffer wage discrimination based on race or national origin. Thus, the Paycheck Fairness

(Continued on Page 11)

ABA Commission on Women in the Profession recommendation

(Continued from Page 10)

Act would place victims of sex-based wage discrimination on the same legal footing as others who experience wage discrimination.

It is vitally important that the ABA speak out to support appropriate legislation strengthening the EPA as a means to realize Congress's intent to eradicate sex-based wage discrimination and achieve the promise of "equal pay for equal work."

I. SEX-BASED DISPARITIES IN PAY STILL PERSIST

As former ABA President Karen Mathis has written, "America's fight against workplace discrimination in the last 50 years is an important piece of social and legislative progress. It is the clear goal of Congress, and of society, to make sure that able workers doing the same work are paid equitably regardless of race, sex, or other demographic trait."² Nonetheless, significant disparities persist between the earnings of women and men, with one study finding that over the course of a career, women earn hundreds of thousands of dollars less than their male counterparts as a direct result of wage discrimination.³ Notwithstanding the passage of the EPA more than 45 years ago, women in 2007 earned on average only 78 cents for every dollar earned by men.⁴ This differential gets larger as women get older and also increases as women gain more education.⁵ Also, women of color experience even greater pay disparities.⁶ Moreover, the wage gap between women and men exists across a wide spectrum of occupations, including the legal profession,⁷ at every educational level, and in every State and the District of Columbia.⁸

Wage disparities are of particular concern in light of the present economy, especially for families headed by single parents, 8 of 10 of which are headed by women.⁹ Yet, the median income of female-headed families with children is 57 percent less than the median income of all families with children.¹⁰ Moreover, wage disparities undermine women's benefits and retirement security, which are often tied to salary.

Congress has recognized the importance to the economy of eliminating these pay disparities. Indeed, the Paycheck Fairness Act passed by the House of Representatives specifically finds that the elimination of pay discrimination based on sex would "substantially reduc[e] the number of working women earning unfairly low wages, thereby reducing the dependence on public assistance," and "promot[e] stable families by enabling all family members to earn a fair rate of pay."¹¹

II. SEX DISCRIMINATION IS A SIGNIFICANT FACTOR IN THE WAGE GAP

Despite the arguments that have sometimes been made, the wage gap cannot be explained solely as the result of "women's choices" in career and family matters. Although the issue is complex, numerous authoritative studies demonstrate that discrimination is a significant factor in the persistent wage gap.¹² A 2003 study by the U.S. General Accounting Office found, for example, that even when all the key factors that influence earnings are controlled for – demographic factors such as marital status, race, number and age of children, and income, as well as work patterns such as years of work, hours worked, and job tenure – women still earned, on average, only 80 percent of what men earned in 2000.¹³ Thus, a 20 percent pay gap remains that cannot be explained or justified other than as a result of sex discrimination. Another extensive

study that examined the pay gap between men and women found that about one-half of the wage gap is due solely to the individual's gender.¹⁴

Significantly, the wage gap begins when women first enter the workforce, even before factors such as professional experience, family, or parenthood could be expected to have an impact. In fact, just one year after graduating from college, female graduates working full-time earn only 80 percent of the salary of their similarly educated male peers. Among part-time workers the gap is even larger, with women earning only 73 percent of their male colleagues' salary.¹⁵

Bolstering the conclusions of these studies, numerous recent cases illustrate the prevalence of sex-based wage discrimination. For example, in *EEOC v. Woodward Governor Company*, a federal judge approved a \$2.6 million settlement in a class action lawsuit against Woodward Governor Company for sex discrimination with respect to pay, promotions and training.¹⁶ In December 2008, the Court of Federal Claims found in favor of a plaintiff who had filed an EPA claim against a federal government agency and awarded \$466,000 in back pay and liquidated damages.¹⁷

III. THE EPA PROVIDES INADEQUATE PROTECTION AGAINST SEX-BASED WAGE DISCRIMINATION

The EPA amended the Fair Labor Standards Act and was signed into law by President Kennedy in 1963. The EPA was the first major anti-discrimination statute passed by Congress, and made it illegal for employers to pay unequal wages to men and women who perform substantially equal work. As the Supreme Court has recognized, the Act was designed:

to remedy what was perceived to be a serious and endemic

(Continued on Page 12)

ABA Commission on Women in the Profession recommendation

(Continued from Page 11)

problem of employment discrimination in private industry – the fact that the wage structure of ‘many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.’ . . . The solution adopted was quite simple in principle: to require that ‘equal work will be rewarded by equal wages.’¹⁸

Congress’s intent to ensure equal pay for equal work has not been achieved because the effectiveness of the law has been diluted virtually since its enactment. The EPA predates Title VII and other major civil rights laws that further informed Congress’s understanding about how to construct effective anti-discrimination statutes. Also, some courts have watered down the effectiveness of the EPA through restrictive interpretations of the law. Consequently, contrary to Congress’ intent, the EPA simply fails to provide effective protection against sex discrimination in compensation.

Under the EPA, an individual subject to wage discrimination must make out a *prima facie* case by establishing that “an employer pays different wages to employees of opposite sexes ‘for equal work on jobs the performance of which requires equal skill, effort, and responsibility; and which are performed under similar working conditions.’”¹⁹ This is a demanding standard, which has been further heightened by the stringent proof courts have required for EPA plaintiffs to demonstrate that they perform work equal to that performed by their male colleagues

with whom they are being compared for pay purposes. As one appellate court emphasized, a plaintiff’s showing under the EPA

is harder to make than the *prima facie* showing [in other cases] . . . because it requires the plaintiff to identify specific employees of the opposite sex holding positions requiring equal skill, effort and responsibility under similar working positions [sic] who were more generously compensated.²⁰

Even if a plaintiff meets this demanding standard, an employer may avoid liability by proving that the wage disparity is justified by one of four affirmative defenses – that is, that the employer has set the challenged wages pursuant to: “(1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex.”²¹

A. Courts Have Undermined the Substantive Standards of the EPA

1. Courts Have Narrowed the Scope of the “Establishment” Requirement

As an element of their *prima facie* case, plaintiffs making EPA claims must demonstrate that a wage disparity exists between employees of the same “establishment.”²² Generally, courts define an “establishment” as “a distinct physical place of business rather than . . . an entire business or ‘enterprise’ which may include several separate places of business.”²³ Courts “presume that multiple offices are not a ‘single establishment’ unless unusual circumstances are demonstrated.”²⁴ But this interpretation precludes the comparison of wages paid in different facilities or offices of the same employer even where the plaintiff has shown, as is required by the elements of the *prima facie*

case, that the employer is paying workers different wages for the same work.²⁵ The inability to compare salaries between different facilities is particularly problematic in the case of managers or supervisors, where there are often no similarly situated employees of the opposite sex at the plaintiff’s work location. Courts’ unwillingness to allow EPA plaintiffs to compare their wages to those of male employees performing the same work at other physical locations thus can preclude plaintiffs from making out a *prima facie* case even where the employer does in fact pay them less than similarly situated male employees in other nearby office buildings.

2. Courts’ Broad Interpretations of the “Factor Other Than Sex” Defense Have Created Loopholes in the Law

The first three of the affirmative defenses specified by the EPA – that a pay disparity is based on a seniority system, a merit system, or a system that bases wages on the quantity or quality of production – are relatively straightforward and have been applied with reasonable consistency by the courts. However, the defense that a pay differential is based on a “factor other than sex” has been interpreted by some courts in a manner that has undermined the fundamental principles of the Act.

In *Corning Glass Works v. Brennan*, the Supreme Court explicitly rejected the use of “market forces” – that is, the value assigned by the market to men’s and women’s work, or the greater bargaining power that men have historically commanded – as a justification for sex-based wage disparities.²⁶ Nevertheless, employers have continued to argue, and some courts have continued to accept, a “market forces” theory to justify pay differentials. For example, in *Merillat v. Metal Spinners, Inc.*, the court held that an employer could

(Continued on Page 13)

ABA Commission on Women in the Profession recommendation

(Continued from Page 12)

take market forces into account when determining an employee's salary, endorsing the theory that the different market forces that influence the hiring of a male or female employee – including the prevailing wage specified in trade journals – was sufficient to justify wage discrimination.²⁷

Some courts have gone a step further, even permitting employers to raise *any* factor that is not explicitly sex-based, no matter how tangentially the factor is related to a job, as a justification for unequal pay for equal work. The Seventh Circuit, for example, has explicitly stated that it “does not require that the factor other than sex be related to the requirements of the particular position in question, or that it be a ‘business-related reason.’”²⁸

B. The Law Does Not Protect Employees from Retaliation for Discussing Their Wages

Because pay scales are often confidential, pay discrimination can be particularly difficult to detect. Compounding the problem, significant numbers of employers discourage, and may even prohibit, the sharing of salary information between employees. As a result, workers are often unaware that they are being paid unequally. For example, Lilly Ledbetter was paid less than her male co-workers for years but did not realize it because a company policy prohibited her from discussing her pay with her co-workers. She discovered the pay discrimination only when a colleague sent her an anonymous note informing her of the disparity. According to the Supreme Court, by that time it was too late for her to sue under the EPA.²⁹

C. The Remedies and Procedures of the EPA Are Inadequate

The goals of the EPA are also substantially undermined by the limitations set on the remedies that are available to plaintiffs. Although plaintiffs who successfully challenge wage disparities based on race or ethnicity are entitled under other anti-discrimination laws to receive full compensatory and punitive damages, plaintiffs who prevail in suits alleging sex-based wage discrimination under the EPA can obtain only back pay and, in limited cases where a willful violation is proven, liquidated damages as well.

These limitations have multiple effects. First, the ultimate award of damages for sex-based wage discrimination may be insufficient to adequately compensate the plaintiff. In fact, limits on remedies penalize those who are the most seriously injured – plaintiffs who suffer the greatest injury as a result of discrimination are the ones most likely to end up not being fully compensated for their losses.

Moreover, these limitations undermine the deterrent effect of the EPA. Limits on the amount for which employers can be liable create perverse incentives, allowing employers to decide that the cost of an adverse verdict in an EPA suit may be less than the savings created by wage discrimination. This defeats the Congressional intent to deter employers from engaging in wage discrimination on the basis of sex.

The EPA's class action procedures are also inadequate to protect women employees whose employer has engaged in systemic wage discrimination. Class actions are important because they ensure that relief will be provided to all who are similarly injured by an unlawful practice. But under the EPA, which was enacted prior to the adoption of Rule 23 of the Federal Rules of Civil Procedure, plaintiffs are required to

take affirmative steps to opt *in* to a class action lawsuit. This is unlike other civil rights claims, governed by Rule 23(b)(3), where class members seeking damages are automatically considered part of the class unless they choose to opt *out*. This difference is significant, subjecting EPA plaintiffs to a substantial burden that can dramatically reduce participation in wage discrimination class actions and, once again, frustrating Congressional intent to incentivize employers to provide equal pay for equal work.

D. The Federal Government Has Not Had The Ability To Enforce The EPA Effectively

The federal government has not had the resources and information necessary to challenge violations of the EPA and to effectively monitor employer compliance with its requirements. For example, the federal government currently lacks any means to collect data on employer pay scales and the wages paid to categories of employees based on their race, national origin and gender. In fact, although the Department of Labor established an Equal Opportunity Survey in 2000 to collect compensation data from federal contractors broken down by race, sex, and ethnicity, the Department failed to implement the Survey and ultimately rescinded it altogether in 2006.³⁰ The collection and analysis of such data would have enabled the Office of Federal Contract Compliance Programs (“OFCCP”) to detect and remedy wage discrimination and EPA noncompliance.³¹ It also would have improved the likelihood of voluntary compliance by providing employers with a useful tool for self evaluation and accountability.

IV. THE PAYCHECK FAIRNESS ACT REMEDIES THE DEFICIENCIES OF THE EPA

(Continued on Page 14)

ABA Commission on Women in the Profession recommendation

(Continued from Page 13)

A. The Paycheck Fairness Act Clarifies the Substantive Standards of the EPA

1. The Paycheck Fairness Act Clarifies the “Establishment” Requirement

In order to remedy the courts’ overly restrictive interpretation of the “establishment” requirement, the Paycheck Fairness Act clarifies that the “establishment” provision of the EPA allows for reasonable comparisons between female and male employees within clearly defined geographical areas to determine fair wages.³² This sensible change will allow plaintiffs who are being paid less for substantially equal work to bring claims under the EPA which might otherwise have been precluded under current case law.

2. The Paycheck Fairness Act Closes Judicial Loopholes Relating to the “Factor Other Than Sex” Defense

Under the Paycheck Fairness Act, an employer relying on the “factor other than sex” defense must show that: (1) the defense is based on a *bona fide* factor, such as education, training or experience, that is not based upon or derived from a sex-based differential; (2) the factor is job-related for the position in question; and (3) the factor is consistent with business necessity. Furthermore, the defense will not apply if the employee can demonstrate that an alternative employment practice exists that would serve the same business purpose without producing a pay differential and that the employer has refused to adopt the alternative. These reasonable changes rely on concepts with which employers are familiar since they mirror the

requirements under Title VII.³³

3. The Paycheck Fairness Act Expands Anti-Retaliation Provisions

The Paycheck Fairness Act clarifies that employees are protected from retaliation if they make a charge, file a complaint or participate in any way in a government- initiated or employer-initiated investigation, or if they have served or plan to serve on an industry committee. The Paycheck Fairness Act would also prohibit retaliation against employees who inquire about employers’ wage practices or disclose their own wages. Significantly, however, employees whose “essential job functions” involve access to wage information, such as human resources personnel, will be prohibited from disclosing wage information of other employees except in limited circumstances. Such employees are not protected from retaliation if they disclose wage information to individuals who would not otherwise have access to the information, unless the disclosure is in response to a complaint or charge or in furtherance of an investigation, proceeding or hearing.

B. The Paycheck Fairness Act Conforms the Remedies and Procedures of the EPA to Those Available Under Other Civil Rights Laws

1. The Paycheck Fairness Act Allows Prevailing Plaintiffs to Recover Compensatory and Punitive Damages

The Paycheck Fairness Act puts victims of sex-based wage discrimination on an equal footing with those who experience wage discrimination based on race or national origin, for whom compensatory and punitive damages are already available.

Moreover, providing compensatory and punitive damages to victims of sex-based wage discrimination will not unduly

burden employers. In employment discrimination cases based on race or national origin – where such damages are already available – there have not been egregious damage verdicts. The damage awards provided in cases brought under Section 1981 show that juries are using reason and calculated judgment to provide fair redress to those who are the victim of discrimination.³⁴ This is, in part, due to the numerous existing limitations in current law that guard against improperly high verdicts. Punitive damages are awarded only if the employer acted with “malice or reckless indifference” to the plaintiff’s federally protected rights – a standard the Supreme Court has construed very explicitly and narrowly in *Kolstad v. American Dental Assoc.*³⁵ Additionally, a trial judge or appeals court can reduce or vacate any jury award that is deemed excessive. Finally, there are constitutional limitations, rooted in the Due Process Clause and the requirement that a defendant be on notice regarding the severity of potential penalties, on the amount of punitive damages that a plaintiff can receive.³⁶

2. The Paycheck Fairness Act Allows EPA Cases to Proceed as Opt-Out Class Actions

The Paycheck Fairness Act would provide more effective remedies to combat systemic sex-based wage discrimination. Women who seek to bring class actions under the EPA will be afforded the choice of proceeding with an opt-out class action, like those who have experienced wage discrimination on the basis of race or national origin.

C. The Paycheck Fairness Act Strengthens The Government’s Enforcement Mechanisms

1. The Paycheck Fairness Act Reinstates Pay Equity Programs

(Continued on Page 15)

ABA Commission on Women in the Profession recommendation

(Continued from Page 14)

and Enforcement at the Department of Labor

The Paycheck Fairness Act reinstates the collection of gender-based data in the current Equal Opportunity Survey. It sets standards for conducting systematic wage discrimination analyses by the OFCCP. Additionally, it directs the implementation of the Equal Opportunity Survey, thereby facilitating the enforcement of the EPA.

2. The Paycheck Fairness Act Improves the Collection of Pay Information

The Paycheck Fairness Act requires the Equal Employment Opportunity Commission ("EEOC") to survey pay data already available and issue regulations within 18 months that require employers to submit any needed pay data identified by the race, sex, and national origin of employees. This data will enhance the EEOC's ability to detect violations and improve enforcement of the EPA.

3. The Paycheck Fairness Act Establishes Salary Negotiation Skills Training

The Paycheck Fairness Act would create a competitive grant program to develop salary negotiation training for women and girls.

V. RELEVANT ABA POLICIES

In 1965, the ABA adopted a policy of not discriminating against any person because of race, color, creed or national origin. In 1972, the ABA strongly condemned all forms of discriminatory hiring practices within the legal profession, whether on the basis of gender, religion, race or national origin. In 1972 and again in 1974, the ABA urged ratification of

the Equal Rights Amendment to the Constitution.

In 1988, the Association recognized that the persistence of overt and subtle barriers denies women the opportunity to achieve full integration and equal participation in the work, responsibilities and rewards of the legal profession. The ABA affirmed the fundamental principle that there is no place in the profession for barriers to the full integration and equal participation of women in all aspects of the legal profession, and the Association called upon members of the legal profession to eliminate such barriers.

In 1995, the ABA endorsed legal remedies and voluntary actions that allow race, national origin, or gender to be taken into account as a factor in order to eliminate or ameliorate discrimination. And in 1998, the House of Delegates urged Congress to provide resources sufficient to enable the EEOC to carry out its Congressionally-mandated duties to investigate, conciliate and, where appropriate, take legal action to enforce laws prohibiting discrimination in an effective, fair and efficient manner.

In 2007, the ABA House of Delegates approved a report urging Congress to pass the Lilly Ledbetter Fair Pay Act to overturn the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.* The Paycheck Fairness Act, which builds on the momentum of the Lilly Ledbetter Fair Pay Act, seeks to further the same fundamental goals, which the ABA has supported for decades in its mission to eradicate discrimination in the workplace.

VI. CONCLUSION

The EPA is of fundamental importance in our nation's efforts to eradicate wage discrimination. The intent of Congress to eradicate sex-based wage discrimination in 1963 has not yet been fulfilled, as women continue to earn significantly

lower pay than men for equal work. The EPA has not worked as Congress originally intended, and therefore certain improvements and modifications to the law are necessary to provide more effective protection and remedies to those subjected to pay discrimination on the basis of their gender. Such modifications are the necessary next step to ensure that women will finally receive equal pay for equal work.

¹ H.R. 12, Sec. 3 (a), 111th Cong. (2009).

² Karen J. Mathis, *Op-Ed: Congress Needs to Make Its Intent Clear: Equal Pay for Equal Work*, June 1, 2007, available at <http://www.abanet.org/abanet/media/oped/oped.cfm?releaseid=140>.

³ Jessica Arons, Center for American Progress Action Fund, *Lifetime Losses: The Career Wage Gap* (December 2008) at 2, 7 available at http://www.americanprogressaction.org/issues/2008/pdf/equal_pay.pdf (finding that a significant career wage gap exists no matter where women live, with the smallest gap being in Vermont, where the median gap, added up across 10-year age groups, equals \$270,000. In 15 states, the disparity tops \$300,000; 22 states pass \$400,000; and 11 states have career gaps over \$500,000).

⁴ U.S. Census Bureau, *Current Population Survey, 2007 Annual Social and Economic Supplement, Table PINC-05: Work Experience in 2006 – People 15 Years Old and Over by Total Money Earnings in 2007, Age, Race, Hispanic Origin, and Sex*, available at http://pubdb3.census.gov/macro/032007/perinc/new05_000.htm.

⁵ http://www.americanprogress.org/issues/2009/01/wage_gap_numbers.html.

⁶ Bureau of Labor Statistics, U.S. Dep't of Labor, *Highlights of Women's Earnings in 2003* (2004), at 1, 30 available at <http://www.bls.gov/>

(Continued on Page 16)

ABA Commission on Women in the Profession recommendation

(Continued from Page 15)

cps/cpswpm2003.pdf (median usual weekly earnings in the first quarter of 2007 for white men were \$783, African-American women, \$540, Asian women, \$743, and Hispanic women, \$471).

⁷ According to the Institute for Women's Policy Research, the median weekly earnings of female lawyers are only 80.5% of those of their male counterparts. Institute for Women's Policy Research, *The Gender Wage Gap by Occupation* (April 2009) at 4, available at <http://www.iwpr.org/pdf/C350a.pdf>.

⁸ National Women's Law Center, *Congress Must Act to Close the Wage Gap for Women: Facts on Women's Wages and Pending Legislation* (April 2009), at 2, available at <http://www.nwlc.org/pdf/PayEquityFactSheetFinal.pdf>.

⁹ U.S. Census Bureau, *Families and Living Arrangements: 2006* (2007).

¹⁰ National Women's Law Center, *Women Hit by Economic Downturn Need Quick and Targeted Assistance*, (January 28, 2008), at 1, available at <http://www.nwlc.org/pdf/WomenStimulusFactsheet.pdf>

¹¹ H.R. 12, Sec. 2, 4(C) (ii) and (iii).

¹² See, e.g., Council of Econ. Advisors, *Explaining Trends in the Gender Wage Gap* (1998).

¹³ U.S. General Accounting Office, *Women's Earnings: Work Patterns Partially Explain Difference between Men's and Women's Earnings 2*, GAO-04-35 (Oct. 2003), available at <http://www.gao.gov/new.items/d0435.pdf>.

¹⁴ See Kimberly Bayard, Judith Hellerstein, et al., *New Evidence on Sex Segregation and Sex Differences in Wages from Matched Employee-Employer Data*, 21 J. Labor Economics 887, 904 (2003).

¹⁵ Judy Goldberg Day and Catherine

Hill, American Association of University Women Educational Foundation, *Behind the Pay Gap* (2007), at 10, available at <http://www.aauw.org/research/upload/behindPayGap.pdf>

¹⁶ Press Release, Judge Approves Settlement of Job Bias Lawsuits Against Woodward Governor (Feb. 20, 2007), available at <http://eeoc.gov/press/2-20-07.html>.

¹⁷ *Cooke v. United States*, 85 Fed. Cl. 325 (Ct. of Fed'l Claims, Dec. 22, 2008).

¹⁸ *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

¹⁹ *Id.* at 195.

²⁰ *Ingram v. Brink's, Inc.*, 414 F.3d 222, 232 (1st Cir. 2005) (citations omitted).

²¹ 29 U.S.C. § 206(d)(1).

²² *Id.*

²³ *Ingram v. Brink's, Inc.*, 414 F.3d at 232 (citing 29 C.F.R. § 1620.9).

²⁴ *Meeks v. Computer Ass'n Int'l*, 15 F.3d 1013, 1017 (11th Cir. 1994) (citing 29 C.F.R. § 1620.9(a)).

²⁵ See e.g., *Wetzel v. Liberty Mut. Ins. Co.*, 449 F. Supp. 397, 407 (W.D. Pa. 1978).

²⁶ *Corning Glass Works*, 417 U.S. at 205. See also *Siler-Khodr v. Univ. of Texas Health Science Ctr. San Antonio*, 261 F.3d 542, 549 (5th Cir. 2001) (noting that "This court has previously stated that the University's market forces argument is not tenable and simply perpetuates the discrimination that Congress wanted to alleviate when it enacted the EPA." (citations omitted)).

²⁷ *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 697, n6 (7th Cir. 2006).

²⁸ *Fallon v. State of IL*, 882 F.2d 1206, 1211 (7th Cir.1989) (citing *Covington v. Southern Illinois University*, 816 F.2d 317, 321-22 (7th Cir.1987)).

²⁹ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). Subsequent to the *Ledbetter* decision, the ABA passed a resolution urging Congress to overrule it legislatively. (ABA Report No. 302, August 2007). In January 2009, Congress passed the

Lilly Ledbetter Fair Pay Act and President Obama signed it into law. Pub. L. No. 111-2.

³⁰ Dept. of Labor Affirmative Action Programs Rule, 41 C.F.R. § 60-2.18 (2009).

³¹ Marc Bendick, Jr., John J. Miller, et al., *The Equal Opportunity Survey: Analysis of a First Wave of Survey Responses* (Bendick & Egan Economic Consultants, Inc., Sept. 2000).

³² The Paycheck Fairness Act defines an "establishment" to include "employees [who] work for the same employer at workplaces located in the same county or similar political subdivision of a State." H.R. 12, Sec. 3(a) (C). The legislation explicitly provides that the definition of establishment "shall not be construed as limiting broader applications of the term 'establishment' consistent with rules prescribed or guidance issued by the Equal Employment Opportunity Commission."

³³ Under the comparable Title VII "business necessity" standard, an employer must demonstrate that a practice is job-related for the position in question and consistent with business necessity. The final question in the business necessity analysis is whether the employer rejected an alternative employment practice that would both have a less disparate impact and satisfy its legitimate business interest. This standard is familiar to employers and courts, since it has been judicially applied since first announced in 1971 in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and was expressly codified in the Civil Rights Act of 1991.

³⁴ *Pavon v. Swift Transportation Co.*, 192 F.3d 902 (9th Cir. 1999) (affirming jury award of \$250,000 in compensatory damages and \$300,000 in punitive damages as not excessive in light of the evidence); *Brown v. Hillcrest Foods, Inc.*, 2006 U.S. Dist. LEXIS 85090 (W.D.N.C. 2006)

(Continued on Page 17)

The power of women

By Shira Goodman,
Deputy Director, Pennsylvanians for Modern Courts

In late October, I had an experience that reaffirmed the power that can be exercised by women working together. I led a mission of women from two groups within the Jewish Federation of Greater Philadelphia (the Women of Vision and Women's Philanthropy) to Washington, D.C. Although I do advocacy work as part of my position at Pennsylvanians for Modern Courts, I had not before participated in a lay person's lobbying mission. The day energized me and the women who attended and made clear how important our views and votes are to those whom we entrust with power to govern.

The purpose was to advocate for specific legislation of special concern to the women assembled. The focus was on three pieces of legislation related to women's health and long-term care: the Community Living Assistance Services and Supports (CLASS) Act, the Education and Awareness Requires Learning Young (EARLY) Act, and the Breast Cancer Patient Protection Act. We met with a significant portion of the Pennsylvania delegation to Congress, including Sens. Bob Casey and Arlen Specter and Reps. Allyson Schwartz, Patrick Murphy, Joe Sestak and Jim Gerlach. We also met with Florida Rep. Debbie Wasserman Schultz, the prime sponsor of the Early Act.

I was impressed not only with the attention paid our delegation by the elected officials, but also with the preparation, knowledge and passion of the women who attended the mission. Although some of the women were lawyers, most were not. These were regular citizens, who took time out to bring their concerns to their elected officials. The women spoke eloquently about issues of great concern to them, challenging officials to act, and questioning delays and also hesitations by specific officials to support particular legislation. The women all exercised their rights to address and question their elected officials.

Our day in Washington, D.C., concluded with a moment



Justice Ruth Bader Ginsburg (from left), Shira Goodman and Renee Sackey (Women of Vision).

that will hold particular meaning for women lawyers – a private tour of the Supreme Court and a meeting with Justice Ruth Bader Ginsburg. I had the honor of introducing the justice, a moment I will always remember. She has reached the pinnacle of our profession, always remaining true to her passion for justice and her advocacy for women. She is a role model to all of us.

Too often, we complain about the government and politics, perhaps forgetting that our elected officials work for us. Or, we become so wrapped up in the daily work of our jobs and families that we don't take time to remember our obligations as citizens. This special mission was a reminder to all of us that we are responsible for the government we have chosen, and it only works when we are active participants. It also demonstrated that when women come together, people in power listen and pay heed. This is one of the key functions of the Commission on Women in the Profession, to unite women lawyers from across the commonwealth in pursuit of shared goals of advancing women in our profession.



ABA Commission on Women in the Profession recommendation

(Continued from Page 16)

(affirming jury award of \$70,000 for emotional pain and mental anguish and \$250,000 in punitive damages because of employer's overall 'indifference' regarding compliance with federal anti-retaliation/anti-discrimination laws).

³⁵ 527 U.S. 526 (1999).

³⁶ In *BMW of North America Inc. v. Gore*, the Supreme Court explained that whether a lack of notice renders a punitive damages award excessive and therefore unconstitutional is determined by: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the award and the civil penalties authorized or imposed in comparable cases. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996).



When will we women stop being pawns of the health care debate?

By Arline Jolles Lotman

Since this nation's founding, we have seen women's rights traded off for a "more important" cause. Left behind at the altar of the Constitution; always a bridesmaid and never a bride. Always subject to either a gender stereotype – case in point: "always a bridesmaid..." – or outright disrespect in demanding our right to vote; or in being omitted from the Fourteenth Amendment's penumbra of protection for our civil rights. Women lost five more generations to non-voting, 50 years after we finally passed the Fifteenth Amendment for Black suffrage – males only. The Nineteenth Amendment passed in 1920 gave women the right to vote.

Well, here we are. And still not accorded equal rights under the Constitution. So now it is time to confront what that means to our right to equal health care. It means we are once again pawns of a minority vote that would deny women the right to health care reform to include abortion. Why? Because we must sacrifice our civil rights, once again, to satisfy the

minority will of the Congress. What is more, we are to be silent about it and be the stereotypical "good girl" for the greater good. How can a good be greater when it denies an individual's rights? Every state explicitly or implicitly contains a clause in its own constitution that guarantees the "health, welfare and safety" of its citizens, but not all states have adopted an Equal Rights Amendment to their state constitution. Will those without that amendment be able to deny health care reform to its female citizens if there is no federal mandate?

Women attorneys have a special responsibility to act on this legislation. We are not only the personal beneficiaries of our protest to the House and Senate, but we are the custodians of the laws by our very profession. We have a duty to see to it that this new legislation does not exclude women's civil rights, and we must act publicly to explain, once again, that the "greater good" is when our nation acts on behalf of all of its citizens – that is the greatest good that women have always believed in and campaign for. If we can succeed here, perhaps we can once again work

for the ratification of a federal Equal Rights Amendment. Having worked to change the laws in Pennsylvania in conformity with our state's ERA*, I believe the "politics of indignation," in which we currently must operate, is exactly the climate that could allow us to finally prevail, much to the chagrin of those who choose indignation over deliberation. How ironic. But that is left for another campaign that we women attorneys will deliberate – once we become appropriately indignant.

*Lotman previously served as first executive director of the Pennsylvania Governor's Commission on the Status of Women.



Lotman is a Philadelphia practicing attorney in Gender Discrimination and writes on gender policy and other public policy issues. She is an adjunct professor at Georgetown Center for Study of Sex Differences in Health, Aging and Disease. Lotman served in the Pennsylvania Governor's Commission on the Status of Women as its first executive director and chaired the first health hearings on gender discrimination in the U.S.

Book review

By Mary Kate Coleman

Reading Lolita in Tehran

Random House/New York, 2003

By Azar Nafisi

This is a fascinating book about educated and professional women in Iran. The author, a former university professor in Tehran, writes about her life in Iran and also about a book club she started with some of her favorite women students.

She and her students met secretly at her home from 1995-97 to discuss forbidden western literature. The

books they read included, among others, *The Great Gatsby* and *Pride and Prejudice*. The author discusses their reactions to the books and also finds parallels between the books and her students' lives.

I found the author's account of life in Iran, both before and after the revolution, to be very interesting. At one point, the author was removed from her teaching position because she did not want to wear the veil as required by Islamic law. She later relented, returned to teaching, and wore the veil (albeit improperly in protest!) at the

urging of a fellow female academic. Eventually, the author and her family left the oppressive climate of Iran to come to America, where she currently teaches and writes. She still maintains ties with some of the women in the book club.

In addition to being informative, the book provoked thinking about freedom, women's rights and many other things about our lives that are easy to take for granted. A good read, especially if you like learning about other cultures.



Commission members in the news

Danielle M. Bacco, of The Bacco Law Group LLC in Pittsburgh and current treasurer for the WIP, was named one of Pittsburgh's 40 Under 40 via *Pittsburgh* magazine and Pittsburgh Urban Magnet Project (PUMP). There is more information at www.40under40pittsburgh.org, but it is essentially recognition of young, local community leaders who help shape the region.

Judge Phyllis W. Beck spoke before the New York County Lawyers' Association on Nov. 20, 2009. Her topic was "The Barnes Foundation: Deviations from the Trust Indentur."

Ann L. Begler was part of a small group of women honored by the Women & Girls Foundation of Western Pennsylvania at their recent fifth anniversary celebration, The Art of Justice. The foundation honored female lawyers and public policy makers from Pittsburgh and surrounding areas for their advocacy and contributions

Report of Cheryl L. Young

(Continued from Page 3)

wellness and balance during these stressful economic times, as well as in general.

By the time this article is published, the PBA's Leadership and Recruitment Development Committee will have concluded their leadership training institute on Dec. 3, 2009, in conjunction with the PBA's Committee/Section Day. I am sure that this event will be well attended by members of the WIP, and we look forward to our committee members' continued involvement in the PBA at all levels. While we still have much work ahead of us, we have made enormous strides recently, and we have much to be proud of and to look forward to.



made throughout their careers for and on behalf of women. Begler's noted contributions included more than a decade of appellate work that secured the right to confidentiality on behalf of victims of sexual assault, her leadership role in numerous organizations, her facilitation of collaborative work among executive directors of sexual assault and domestic violence centers, and her pioneering efforts and ongoing work in the fields of mediation and dispute resolution.

Jeanine L. DeBor, director of Law Alumni Relations at Duquesne University, was elected to the board of SharpVisions, a non-profit organization that customizes support for people with challenging disabilities.

Phyllis Horn Epstein of Epstein, Shapiro & Epstein, P.C., spoke at the 10th annual Characteristics of Successful Women program, sponsored by the Pennsylvania Institute of Certified Public Accountants, on Oct. 22, 2009, in Philadelphia. Epstein was recently appointed to the executive board of the Louis Brandeis Law Society, which is dedicated to advancing and enriching the personal and professional interests of its members of the bench and bar.

Superior Court Judge Susan Peikes Gantman officiated at a swearing-in of new attorneys in October. In November, she honored the 50-year members of the Montgomery County Bar Association. In December, she was a guest lecturer for the Montgomery County CLE in which she spoke on appellate practice.

Shelley R. Goldner, co-chair of the Commission on Women in the Profession, presented "Social Media for Employment Lawyers and HR Professionals: Developing Social

Media Policies and Use of Social Media for Recruiting" at the Philadelphia Bar Association Human Resources and Employee Relations Committee on Nov. 13. Goldner also served as a panelist addressing "Diversity Initiatives in Minority Bar Associations and Committees" at the Pennsylvania Bar Association Diversity Summit on Oct. 29.

Penina Kessler Lieber, of Obermayer Rebmann Maxwell & Hoppel LLP, spoke at the Law School for Nonprofit Organizations on Oct. 21, 2009, in Washington, Pa. The event was sponsored by The United Way of Washington County, the Washington County Bar Association and the Washington County Community Foundation. The topic of her presentation was "Mergers and Collaborative Efforts." Lieber was also reappointed by the Pennsylvania Supreme Court to the IOLTA (Insurance on Lawyer Trust Accounts) Board of Directors for a second three-year term, ending in 2012. An article she recently wrote, titled "Mapping a Process for Successful Nonprofit Mergers," will be published in the upcoming issue of *Nonprofit World* magazine.

Superior Court Judge Joan Orie Melvin was elected as a justice of the Pennsylvania Supreme Court on Nov. 3, 2009. In September 2009, Orie Melvin was inducted into the Allegheny County Bar Foundation Fellows Program. She also recently collaborated on a program with the Allegheny County Bar Association's Young Lawyers Division, titled "Staying out of E-Trouble." The program is designed to educate students about how their conduct on the Internet, social networking Web sites and other electronic communication can affect others, as well as have an impact on their future.



Save the Dates

PBA Commission on Women in the Profession 2010 Midyear Meetings

The theme: "Marketing Yourself From the Inside Out: Show Your Professionalism, Know Your Talents and Promote Your Legal Skills."

Harrisburg Midyear Meeting

Facilitated by Lisa M. Watson
Tuesday, March 2
Panel Discussion: 3-5 p.m.
Networking Reception 5-6 p.m.
PBI Headquarters, 5080 Ritter Road, Mechanicsburg, PA 17055

Philadelphia Midyear Meeting

Facilitated by Mary Cushing Doherty
Thursday, March 11
Panel Discussion 3-5 p.m.
Networking Reception 5-6 p.m.
PBI's CLE Conference Center, The Wanamaker Building, Suite 1010, 100 Penn Square East, Philadelphia, PA 19107

Pittsburgh Midyear Meeting

Facilitated by Stephanie Taylor
Tuesday, March 23
Panel Discussion 4-6 p.m.
Networking Reception 6-7 p.m.
PBI's Professional Development Center, Heinz 57 Building, 7th Floor, 339 6th Ave., Pittsburgh, PA 15222

Registration details coming soon.

Women in the Profession 17th Annual Conference

Featuring keynote speaker Claire Shipman, national correspondent, ABC News and co-author, "Womenomics: Write Your Own Rules for Success."

**Wednesday, May 12,
Hershey Lodge,
Hershey**

Yale Law Women announce 'Top 10 Family-Friendly Firms List' for 2009

By Phyllis Horn Epstein, editor

On Aug. 20, 2009, Yale Law Women (YLW) announced its fourth annual "Top 10 Family-Friendly Firms List." The 2009 top 10 firms, in alphabetical order, are:

Arnold & Porter; Cleary Gottlieb Steen & Hamilton; Covington & Burling Jenner & Block; Katten Muchin Rosenman; Mayer Brown; Munger, Tolles & Olson; Patton Boggs; Sidley Austin; WilmerHale

YLW is a student organization dedicated to promoting the interests of women lawyers and law students. Lauren Gerber, top 10 list co-chair, was quoted as saying: "(O)ur survey demonstrated that a significant gender disparity remains in how family friendly policies are designed and used in practice. Additionally, women continue to lag behind men in attaining partnership and leadership positions, indicating that firms still do not accommodate attorneys acting as primary caregivers."

Selected statistics from the 2009 survey include the following:

- On average, women receive 15 weeks parental leave, compared to 6 weeks for men.
- 92 percent of mothers used the maximum parental leave offered, compared to 55 percent of fathers.
- 99 percent of requests for part-time work were granted.
- 7 percent of attorneys work part-time, on average, of whom 81

percent are women.

- 91 percent of firms make their part-time attorneys eligible for bonuses; 59 percent of part-time attorneys received bonuses in 2008, compared to 46 percent of full-time attorneys.

The full YLW report expressed concern "about the dearth of women in leadership positions, the gender gap in those who take advantage of family friendly policies, and the possibility that working part-time can derail an otherwise successful career." The negative impact of part-time work continues to derail careers. As the report states: "The question of whether part-time work still carries the stigma or career-limiting effect it once did remains elusive. Only 5 percent of the partners promoted in 2008 had worked part-time in the past, on average, and only 3 percent were working part-time when they were promoted."

Emily Oldshue, top 10 list co-chair, emphasized that in the view of YLW "the desire to maintain a challenging and engaging career while spending meaningful time with one's family is and should be a gender neutral issue.... The adoption and promotion of gender neutral leave and flex-time policies are an important component of this evolving vision."

Additional statistics, innovative practices, survey methodology, a summary report and more information about Yale Law Women can be found at www.yale.edu/ylw.



WANTED: Women lawyers in search of a mentor relationship

PBA WIP presents the LINK MENTORING PROGRAM

We're looking to match women attorneys seeking advice about career development, leadership, networking and work-life balance with those who have wisdom to share. Please join the program as a mentor, a mentee, or both — we all can learn from each other.

For more information and to join the program, go to www.pabar.org/public/committees/womenprf/Membership/mentoringprogram.asp