

# ATTORNEY PROFESSIONALISM FORUM

## To the Forum:

I am an income partner at a 100-lawyer firm. I was made partner just two years ago. Six months after making partner, I became pregnant with my third child. After making it through my first trimester, I started to share the happy news with my colleagues. When I told a senior partner in my group that I was expecting, he remarked, "Wow! Haven't you already done your fair share of overpopulating the earth?" I didn't know how to respond. I felt both defensive and uncomfortable, but I chuckled along anyway, hoping to dissolve the awkwardness. In the months and weeks leading up to my maternity leave, I made sure to communicate effectively both internally at the firm with my colleagues, and externally with my clients, about my anticipated three-month leave and made sure that all of my cases would be accounted for and covered during my absence.

Upon returning to work three months later, I was greeted with further offensive comments. On my first day back to work, the managing partner casually strolled into my office asking, "How was your vacation?" I responded that I was not on vacation, but on maternity leave for the birth of my son. The managing partner laughed and stated, "Same difference!" and walked out.

The following week, I attended a meeting with a client at opposing counsel's office on a case that I had been working on before my maternity leave. When I made a suggestion about a possible resolution of the matter that I felt would achieve the client's goals, my adversary's snide response was, "Did it take you nine months to come up with that idea?" I honestly did not know what to say and did my best to ignore the comment.

I have also noticed that the quality and quantity of my workload have changed since I've returned from maternity leave. Not only do I have a lower volume of work, but the level of interesting work is also lower. Even though I have returned to the firm full-time, my billable hours have decreased

significantly. During my first year as partner, I billed 2,500 hours. During my second year as partner, when I had my son and was on maternity leave for three months, I billed 1,800 hours. This leads me to what happened at my end-of-the year meeting with the firm's Compensation Committee. During that meeting, one of the partners remarked that my hours were very low for the year. When I responded by reminding the Committee that I had been on maternity leave for three months, another partner said something along the lines of: "Well, if you had spent as much time billing as you did breastfeeding, you would have had more billables this year."

I cannot believe that in this day and age I should be subjected to these types of comments and behavior. I am outraged. Is the conduct described above acceptable professional behavior?

Sincerely,  
Pumped Up

## Dear Pumped Up:

Your question raises issues involving gender discrimination, a hostile work environment, and unequal pay for women in the legal profession. We will primarily focus on the ethical and professional implications of your question and will also briefly touch upon some of the legal issues.

The behavior you have described is not only offensive, it is unethical and unlawful. Many studies have documented the challenges facing working mothers in the legal profession and have revealed that the problems are far from eradicated, even in 2016. *See, e.g.,* Marlis Silver Sweeney, *The Female Lawyer Exodus*, *The Daily Beast* (July 31, 2013), <http://www.thedailybeast.com/witw/articles/2013/07/31/the-exodus-of-female-lawyers.html>; Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 *Duke J. Gender L. & Pol'y* 1, 4-5 (2010). Indeed, the concept of a "maternal wall bias," which refers to stereotypes and various forms of gender discrimination that working mothers may encounter, continues to

be pervasive in the workplace. The so-called "maternal wall" typically arises at one of three points: when a woman gets pregnant, after a woman gives birth, or when a woman begins working either part-time or on a flexible schedule. *See* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 *Harv. Women's L.J.* 77, 78 (2003).

The comments made to you about your pregnancy and maternity leave and the fact that the quality of your assigned work and quantity of your workload have sharply declined since returning from maternity leave are clear examples of the maternal wall bias at play. This bias can often have severe consequences for a woman's career. According to the chair of the American Bar Association Gender Equity Task Force, Roberta Liebenberg, even star attorneys may be relegated to the sidelines because of what is known as benevolent paternalism. Sweeney, *The Female Lawyer Exodus*, at 3. "Partners will assume that the young moth-

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er won't be interested in cases that take travel or more time away from the house. But the same assumptions often are not made about new fathers." *Id.* This type of discriminatory case assignment can have long-term career repercussions for women lawyers. Every decision, whether it be to staff a woman attorney on a case, or alternatively to leave her off, will impact that individual's professional development, including her development of valuable skills, experience and contacts. These are the building blocks and necessary professional development milestones that will eventually become vital to a woman's career advancement to partner. Ashley Kissinger, *Civil Rights and Professional Wrongs: A Female Lawyer's Dilemma*, 73 Tex. L. Rev. 1419, 1432-33 (1995).

Unfortunately, this type of behavior also often leads to gender disparity in compensation. Several studies have identified a large compensation gap between male and female lawyers, which tends to widen over time as attorneys gain seniority. Gender discrimination, whether conscious or unconscious, has been identified as one of the reasons male lawyers have a significant earnings advantage over female lawyers. Lauren Stiller Rikleen, *Closing the Gap: A Road Map for Achieving Gender Pay Equity in Law Firm Partner Compensation*, ABA Presidential Task Force on Gender Equity and the Commission on Women in the Profession 1, 10-11 (2013). Not only are women generally earning less than their male counterparts, but over the past decade, although the number of women entering the profession of law has increased, which logically should have led to significantly more women being promoted to equity partner, women have in fact remained completely underrepresented at the highest levels of law firm practice, consisting as of 2013 of only approximately 15% of the equity partner totals nationally. *See id.* This issue is particularly timely – just recently, a paycheck bias suit was brought by a class of female lawyers who worked in the Farmers Insurance claims litigation

department and allege that they were paid less than their male counterparts. The female lawyers are pursuing a collective action under the federal Equal Pay Act. Marisa Kendall, *Paycheck Bias Suit by Female Lawyers Gets Green Light*, Law.com (Dec. 10, 2015), <http://www.law.com/sites/articles/2015/12/10/paycheck-bias-suit-by-female-lawyers-gets-green-light/>.

So to answer your question in short: Is the behavior of your colleagues and adversary acceptable professional behavior? No! The behavior smacks of gender discrimination and is completely antithetical to an attorney's professional responsibilities and to the values of fairness and justice that are supposed to be the guiding principles of our profession. In our view, this type of behavior violates Rule 8.4(g) of the New York Rules of Professional Conduct (NYRPC). In the language of the rule, a lawyer or law firm shall not "unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation." Rule 8.4(g) further provides that

[w]here there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

While the rules of professional conduct vary from state to state, many of these rules prohibit discrimination in four categories: (1) in all professional activities; (2) in the representation of a client; (3) in a tribunal; and (4) in employment. *See Kissinger, Civil Rights*

*and Professional Wrongs: A Female Lawyer's Dilemma*, 73 Tex. L. Rev. at 1453. Some states, like New Jersey, have rules similar to New York prohibiting discriminatory treatment based on sex in the lawyer's professional activities. *See* Rule 8.4(g) of the New Jersey Disciplinary Rules of Professional Conduct (it is professional misconduct for a lawyer to "engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm"). In at least one state, Minnesota, the rules of professional conduct prohibit sex bias not only "in connection with a lawyer's professional activities" but also broaden the prohibition to include a lawyer's personal activities. *See* Rule 8.4(h) of Minnesota's Rules of Professional Conduct (it is professional misconduct for a lawyer to "commit a discriminatory act prohibited by federal, state, or local statute or ordinance, that reflects adversely on the lawyer's fitness as a lawyer"). Other states have rules more limited in scope, which prohibit gender discrimination only in the courtroom. *See, e.g.,* Rule 3.4(i) of the Massachusetts Rules of Professional Conduct (a lawyer shall not "in appearing in a professional capacity before a tribunal, engage in conduct manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel, or other person"); New Mexico's Rule 16-300 Prohibition Against Invidious Discrimination ("[i]n the course of any judicial or quasi-judicial proceeding before a tribunal, a lawyer shall refrain from intentionally manifesting, by words or conduct, bias or prejudice based on race, gender, religion, national origin, disability, age, or sexual orientation against the judge, court personnel, parties, witnesses, counsel or others").

The harder question to answer here is, what can or should you do about

this behavior? One option is to do exactly what you have done, which is to bring awareness to the problem and to promote an open dialogue about it. Another option is to pursue litigation or report certain individuals to the Disciplinary Committee. As discussed below, some women have sued their law firms and have brought claims under Title VII, the Americans with Disabilities Act, the Family and Medical Leave Act, and/or various other state and federal laws. Nancy Levit, *Lawyers Suing Law Firms: The Limits on Attorney Employment Discrimination Claims and the Prospects for Creating Happy Lawyers*, 73 U. Pitt. L. Rev. 65, 94-95 (2011). We note that in 2013 New York City passed the Pregnant Workers Fairness Act, which expands the city's Human Rights Law to require most New York City employers to provide reasonable accommodations to pregnant workers. The goal of the new legislation is to protect pregnant women from workplace discrimination. KJ Dell'Antonia, *New York City Passes Law Defending Rights of Pregnant Workers*, N.Y. Times (Sept. 24, 2013), <http://parenting.blogs.nytimes.com/2013/09/24/new-york-city-passes-law-defending-rights-of-pregnant-workers>.

The facts you have described are similar to those addressed in several decisions in New York state and federal courts. Below we will discuss three pregnancy discrimination cases in the past 10 years commenced by women lawyers in those courts. First, in *Todaro v. Siegel Fenchel & Peddy, P.C.*, No. 04-CV-2939 JS/WDW, 2009 WL 3150408 (E.D.N.Y. Sept. 25, 2009), Jacquelyn Todaro, an associate attorney at Siegel Fenchel & Peddy, P.C., brought claims against her former firm and its partners asserting constructive discharge due to sex and pregnancy discrimination and a hostile work environment. *Id.* at \*1. Between 1996 and 2002, Todaro received a salary increase each year. In November 2002, she told the firm she was pregnant, and on January 1, 2003, the firm cut Todaro's salary by 25% while at the same time increasing the compensation of

another male associate. Todaro began maternity leave on April 25, 2003, and continued to receive her reduced salary through May 24, 2003. On July 21, 2003, Todaro resigned from the firm, claiming constructive discharge due to sex and pregnancy discrimination and a hostile work environment. *Id.* at \*2.

The court held a jury trial in 2008, during which Todaro, and another female employee (a paralegal), presented evidence that the firm's employees made recurrent offensive comments about women and that the firm itself treated women differently. For example, testimony at trial revealed that defendant Bill Siegel consistently made comments about female attorneys being "difficult" and "obnoxious," and asked why "they let women into the courtroom." On one occasion, Siegel approached Todaro and two other female attorneys and asked, "What are you ladies doing here so late? Don't you have husbands or boyfriends to go home to?" And on another occasion, Siegel suggested that Todaro buy a "very skimpy . . . playboy bunny outfit" for her upcoming trip. Another attorney, Andy Cangemi, commented to female attorneys about paying them too much. Moreover, when a female associate left on maternity leave, the firm transferred her to a smaller office and awarded her larger office to a newly hired male associate. *Id.* at \*2. The jury found in favor of Todaro's Equal Pay Act claim, awarding her \$16,499.75 in damages. The Court ultimately ordered a remittitur of Todaro's compensatory damages to \$8,089.25, but doubled the award as liquidated damages under the Equal Pay Act, and granted Todaro a total award of \$16,178.50. *Id.* at \*8.

Second, in a more recent case before the Appellate Division, *Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 A.D.3d 18, 20 (1st Dep't 2014), an action was brought by Ji Sun Jennifer Kim, an associate attorney, alleging gender and pregnancy discrimination, hostile work environment, and retaliatory treatment against her former law firm. Kim alleged that while she was visibly pregnant, she was reprimanded

by a partner for allegedly reading a book during work hours and that the partner had screamed at her while standing so close to her that she was fearful he would hit her. *Id.* at 21. Kim emailed a complaint about the incident to two law firm partners explaining that while two other attorneys, both male, were engaging in similar behavior at the same time, they were not admonished. She expressed concern that she was singled out and treated unfairly due to her pregnancy. It was alleged that one of the partners told the plaintiff that she had exacerbated the situation by complaining about it. After returning to work following her maternity leave, she started to pump breast milk at the office. Kim alleged that in February 2010 she overheard a partner make an inappropriate gender based comment. Kim complained to this particular partner about the offensive comment, and after she did so, the partner barely spoke to her again. In April 2010, Kim was terminated, supposedly because of budget cuts. However, the record in this case contains evidence that the firm's tax certiorari department was actually expanding during the time that Kim was terminated. *Id.* at 19, 21, 25. The Appellate Division affirmed the trial court's decision denying defendants' motion to dismiss Kim's retaliation claims based on New York State and City Human Rights laws. However, Kim's hostile work environment and gender/pregnancy discrimination claims were dismissed on the basis that Kim cited only isolated remarks or incidents or otherwise vague allegations of unequal treatment.

Finally, in *In re Goldberg*, 487 B.R. 112, 118 (Bankr. E.D.N.Y. 2013), Mary J. Rocco, an attorney, filed a complaint against her former law firm for pregnancy discrimination and retaliation under the New York State Human Rights Law (NYSHRL). After filing the complaint with the New York State Division of Human Rights (NYSDHR) against Jeffrey L. Goldberg, his law firm, Jeffrey L. Goldberg, P.C., and

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