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## **Attorneys**

### **Attorneys Faulted for Scarcity of Female Expert Witnesses**



*By Bruce Kaufman*

Judge Shira Scheindlin presided over hundreds of cases during her 22 years on the federal bench, and observed an uncountable number of expert witnesses.

Yet Scheindlin, who retired from the Southern District of New York in 2016, rarely saw female trial experts.

"I recall an epidemiologist in a very big case. I also think I may have seen a psychologist in one or two cases," she told Bloomberg BNA.

"But most of the doctors (orthopedists or neurologists) who testified to injuries in personal injury cases were men. And most scientists were men. Surely all the economists I saw were men," Scheindlin, now of counsel to Stroock & Stroock & Lavan in New York, said.

An astonishing 80 percent of expert witnesses chosen by attorneys are male, and those male experts get paid on average 60 percent more than their female counterparts, according to a leading provider of courtroom experts across the U.S.

Judges, attorneys, service providers, and professors spoke to Bloomberg BNA about the wide gender gap and paint a troubling portrait of an industry that is wearing blinders when it comes to bias against female expert witnesses.

And though everyone agrees that the sparsity of female expert witnesses is worrisome, the likely explanations for the gender preference are equally troubling.

Chief among them: disparate treatment by the attorneys who make hiring decisions.

These predominantly male attorneys may be biased themselves.

Or they may believe that hiring female experts will put them at a competitive disadvantage when they appear before jurors with outdated views on gender roles, those who talked to Bloomberg BNA said.

Educating attorneys and jurors on their biases, both conscious and subconscious, and coaching experts on how to overcome those prejudices could lead to more female experts and reduce the stark pay gap for female experts, interviewees said.

Part 1 of this two-part series explores the scope of, and reasons behind, the gender gap for expert witnesses. Part 2 looks at possible solutions, all rife with uncertainty.

#### **Men Identify With Male Experts**

Lyle Warshauer, a veteran trial lawyer, can't recall seeing a female expert at trial, for either side, in more than 10 years.

"I am somewhat dismayed to realize that while I have engaged female experts many, many times and have been in countless depositions of these women, I have had very few appear at trial," Warshauer, a partner at the Warshauer Law Group in Atlanta, told Bloomberg BNA.

"I heard the same from several of my female trial lawyer colleagues," she said. "It is disheartening to realize that most of our testifying experts are men."

Trial consultant Katherine James tells a similar tale.

She has personally coached hundreds of expert witnesses over the last 40 years on how to be better courtroom communicators. Yet James "can count on the fingers of both hands the number of women expert witnesses with whom I have worked."

James, the founding director of legal service provider Act of Communication in Culver City, Calif., didn't mince words in assigning blame.

"It is the lawyers," she told Bloomberg BNA.

#### **Snapshot**

- Only 17% of experts are women; pay for men can double that for women
- Attorneys, juror attitudes cited as leading causes
- Possible solutions detailed in Part 2 of this two-part series

"In my experience, in a field dominated by men, men (lawyers) are much more likely to identify with and want to use other men as their experts," James said.

Scheindlin, for her part, said, "Unfortunately, I think the lawyers who select experts just assume that a male has more gravitas and will be more convincing to a jury," she said.

### Legal Industry in Denial

Gender bias in the legal profession isn't new. Its pernicious reach spreads everywhere.

But nowhere is it more pronounced than among the ranks of female expert witnesses who must surmount multiple layers of ingrained stereotypes every day to do their jobs, according to data and those interviewed by Bloomberg BNA.

Women must scale heights in their chosen field to qualify as a trial expert. They then need to persuade mostly male attorneys they should be hired and retained.

And to survive, they must consistently convince skeptical jurors that they are more knowledgeable, credible, confident, and even likeable, than their opposing, usually male, counterparts.



Source: The Expert Institute

To some, the dearth of female experts comes down to availability: There are far more male experts to choose from in almost all specialties—with the prominent exception of nursing.

"In my experience female experts are less common than males except for the soft sciences like psychiatry, psychology and, of course, nursing," Laura Shamp, a partner at Shamp, Speed, Jordan & Woodward in Atlanta, told Bloomberg BNA.

But many attorneys, steeped in juror attitudes, may also believe jurors are more receptive to male experts in cases grounded in science or economics, and may be using that hotly disputed view to guide their hiring of expert witnesses.

Or, as James said, these mostly male lawyers may otherwise be more broadly biased toward their own gender. And they use studies, such as those on juror attitudes, "to support their own biases," she said.

Either way, the harm to female expert witnesses is clear.

### **Pay Gap Greatest for Female Experts**

One of the dirty little secrets in the legal industry is that female expert witnesses earn far less than their comparably skilled male counterparts. The rate is far worse than the 20 percent pay gap for working women in the U.S.

Male expert witnesses across all fields earn 60 percent more than comparably qualified female experts when they are retained for case reviews, depositions, and trial testimony—the lifeblood of an expert witness's duties, Michael Talve, CEO of The Expert Institute in New York, told Bloomberg BNA.

Talve's group, which has provided law firms and corporations with more than 20,000 expert witnesses, says more than 80 percent of the experts retained through his company are male.

The disparity is most apparent in the medical arena, where male experts charge nearly double their female counterparts, he said.

"We see greater parity between what male and female experts in non-medical disciplines make," Talve said. Among non-medical experts, males are paid *only* about 41 percent more than women.

The findings on pay disparity among experts provided by The Expert Institute cover all 50 states and more than 200 specialties, and are detailed at <https://www.theexpertinstitute.com/expert-witnesses-battle-sexes/>. The data, first compiled in 2014, remains accurate, Talve said.

Some of the disparity may be attributed to supply, Talve said. Certain professions that are frequently relied on to provide expert testimony can skew male, he said.

Among physicians in general, 66 percent are male. And women continue to be underrepresented in the science, technology, engineering and mathematics disciplines. In engineering, women make up only 29 percent of the workforce, he said.

"As a result, there are less women available to serve as experts in these key disciplines," he said.

Then there's nursing.

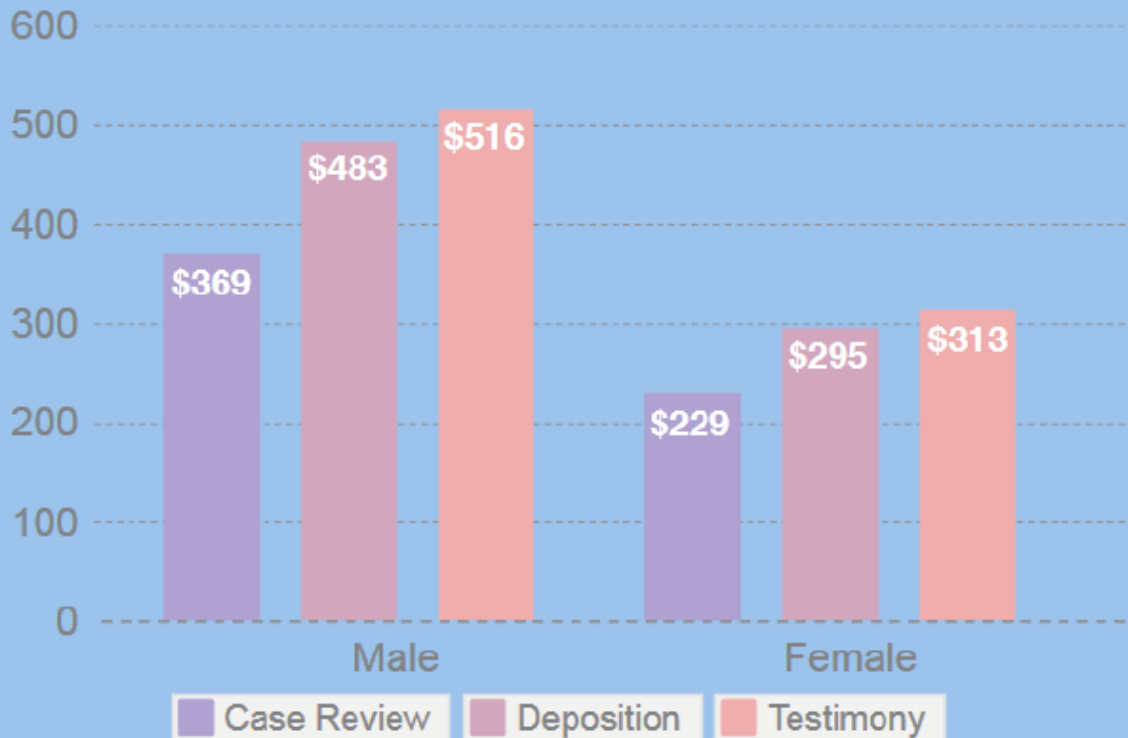
Only 9 percent of registered nurses are men, suggesting the supply of top-notch female nurses should be high for use as expert witnesses, with correspondingly higher fees for those chosen.

But when it comes to fees for retained nursing experts, the familiar pattern reemerges.

Female nurses typically earn about \$160 per hour. For the same work, comparable male nurses earn about \$180 hour.

# Who gets paid more?

On average, male experts are paid about 60% more than female experts.



Source: The Expert Institute

## Attorneys Guided by Juror Attitudes on Gender

No matter where we look, it comes back to attorneys.

"This will of course vary from attorney to attorney, case to case, and venue to venue, but there are certainly some litigators who consider gender as a factor when selecting an expert," Talve said.

Perhaps attorneys are picking men in disproportionate numbers as experts because they think that's what will win cases before jurors. After all, the attorney's loyalty is to the client.

If so, are man-in-the-street jurors really the root cause of what appears to be substantial gender bias against female expert witnesses?

Some professors who have studied the issue think that juror gender bias plays a leading role in why attorneys are choosing so many men.

But others, like Scheindlin, disagree, saying that an expert's gender plays little or no role in a juror's view of an expert.

James took it a step further and said attorneys, time and time again, are choosing men over women because of their own broader prejudices.

"It is only attorneys who are still asking these questions and finding people to do research to prove them right so that they don't have to change," James said.

Tess Neal, a psychological scientist, has explored the issue of juror gender bias for many years and her conclusions are discomfoting.

Empirical data shows that the gender of an expert witness can affect juror perceptions of expert testimony, Neal told Bloomberg BNA.

More troubling, if a “woman expert and a man expert are opposing experts in a given case, and if they are equally qualified and competent, the man will probably be more persuasive than the woman,” she said.

Neal, an assistant professor of psychology in Arizona State University's College of Interdisciplinary Arts & Sciences in Phoenix, and a founding member of ASU's Program on Law and Behavioral Science, has published more than a dozen peer-reviewed articles on expert witnesses and jurors.

In general, the weight of the evidence matters the most to jurors, Neal said. But in close cases, the gender of the expert can make the difference, she said.

In jury pools there is a “double standard of sorts, in which jurors expect women expert witnesses to uphold both their gender role and their occupational role,” she explained.

To be perceived as credible and persuasive by jurors, “women experts must come across as both competent and knowledgeable (i.e., upholding their occupational role as an expert witness), but also warm and likeable (i.e., upholding their gender role).”

Men expert witnesses do not face the same requirements, she said.

Male experts must “come across as competent and knowledgeable (thus meeting the occupational role as an expert), but there is no social role requirement in our culture that expects men to be particularly warm or likeable, and thus men expert witnesses who are competent but unlikeable can be just as persuasive as men who are more likeable. The same is not true for women expert witnesses,” she said.

The quandary is not unique to expert witnesses, Peter Glick, a professor of social sciences at Lawrence University in Appleton, Wis., told Bloomberg BNA.

Glick, a frequent expert witness on sex discrimination, bias, and stereotyping, said that men in all walks of life are generally accorded more status than women, all other things being equal, which can translate to more respect for their views.

“Additionally, there are implicit (nonconscious, automatic) biases against female (relative to male) authority figures that can diminish their perceived credibility,” he told Bloomberg BNA.

### **‘Jurors Not the Problem’**

Talve, who has worked with thousands of experts, says the gender of the witness can affect how that witness is perceived by the jury, but there are a number of other factors at play as well.

“There's no one-size-fits-all answer and the role of gender in selecting an expert is something that attorneys can disagree over sharply,” Talve said.

Ideally, we would not have to be concerned with an expert's gender, but the fact remains that there are some prejudicial biases in our society that can affect an individual's access to justice, he said.

“Perception of an expert's credibility can also be affected by their race, nationality, accent, general appearance, and more,” Talve said.

“Some jurors are going to be more sensitive to some of these factors than others, but it's an unfortunate reality that litigators will consider these things when they select an expert for formal retention,” he said.

“It's not uncommon for a client to specifically request an expert of a certain gender, either,” Talve said.

But Scheindlin, after two decades on the bench, disagreed that jurors are considering witness gender in their deliberations.

“I do not think the gender of an expert witness had any impact (positive or negative) on juror perception of the expert testimony,” she said.

Scheindlin said that in a “very limited group of cases” it is probably both fair and ethical for an attorney to consider the gender of an expert in making hiring decisions.

Preferring a female expert on the traumatic effects of sexual assault or sexual harassment in the workplace can make sense, Scheindlin said. A trial lawyer might reasonably think “this person will have more credibility on the subject than a male.”

“But one would hope that a geologist in a water contamination case or an economist in a securities case can be either gender without any consequence at all,” she said.

James, the trial consultant, said it “isn't the jurors who are the problem here.”

Jurors are used to seeing women in their everyday lives as professionals in all kinds of situations from cops to welders to professors to astronauts, James said.

"In my experience jurors like all experts to be knowledgeable, friendly, impartial, educated, enthusiastic about subject matter, able to stay reasonable when cross examined," James said.

James said it is unfair and unethical for attorneys to forego female experts.

Moreover, "it is short-sighted, foolish, and ultimately bad for business," she said.

Bloomberg BNA examines possible solutions to the expert witness gender gap in Part 2 of this two-part series.

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### **For More Information**

The Expert Institute report is at <https://www.theexpertinstitute.com/expert-witnesses-battle-sexes/>.

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