

## CRIMINAL AND CIVIL JUSTICE

### Introduction

The Task Force reviewed a broad group of issues in civil and criminal justice and determined that the ability of the system to treat all participants fairly would be most constructively addressed by focusing on topics in which stereotypical thinking was likely to have the greatest impact, including:

- domestic abuse in the criminal justice system
- sexual assault
- civil damages
- injuries suffered only by women
- sentencing of adult felons
- treatment of female juveniles
- access to civil justice
- women in the profession
- civil remedies for employment discrimination

These topics were studied by review of currently available data, interviews of practitioners, testimony at public hearings, and inclusion of questions in the Task Force surveys.

In some of these areas, data were surprisingly hard to obtain. For example, after much effort to find useful information, the Task Force determined that adequate data on the topics of injuries suffered only by women and access to the courts in non-family law civil cases could not be found using the means available to the Task Force.

The topics of domestic abuse and women in the legal profession are treated in other parts of this report. This chapter reflects the Task Force's determination of the most significant remaining issues in civil and criminal justice on which information is available.

## SEXUAL ASSAULT

In 1975, the Minnesota Legislature repealed the state's long-standing rape statutes and enacted the Criminal Sexual Conduct Code, embodied in Minnesota Statutes sections 609.341-609.351. The enactment was made in the context of legislative reform of sexual assault prosecutions and was modelled largely on the then-new Michigan statute. The new statute defined sexual offense as the commission of sexual penetration or sexual contact with an element of force. In the statutory scheme, the offense is to be measured by the proof of force, or, in other words, the improper conduct of the accused.

This was a conceptual and statutory shift from years of blaming women for rape under the assumption that as a group women are seductive and misleading in their intentions and that men are not quite at fault for losing control in the confusion of sexual signals. As recently as 1975, the British House of Lords, the supreme appellate body in Great Britain, held that "if a man believes a woman is consenting to sex, he cannot be convicted of rape, no matter how unreasonable his belief may be."<sup>1</sup> Or, as a Minnesota suburban judge was heard to comment in chambers, "Rape is simply a case of poor salesmanship."

The notion that consent is measured by the assailant's interpretation of the victim's conduct, rather than by the victim's assessment of the assailant's conduct, has been at the root of much legal conflict in handling sexual assault cases. It affects attitudes towards charging, using and challenging victims' testimony, and sentencing. The Task Force investigated three areas in which public, judicial, and prosecutorial attitudes towards women significantly affect case outcomes: acquaintance rape, consent issues, and penalties for offenders convicted of sexual offenses.

The data for this section were gathered through the Task Force lawyers' and judges' surveys, testimony at public hearings and lawyers' meetings, and a literature review conducted for the Task Force by Marlise Riffel-Gregor, a sociologist at Rochester Community College.

### Acquaintance and Rape

The prevailing cultural stereotype of rape remains that of the "violent stranger." The stereotypical "real rape" occurs in a scenario in which a white woman is attacked by a black man whom she has never seen before. There is no question of acquaintance or consent in such a scenario. The rape and murder of Honeywell manager Mary Foley in June, 1988, by repeat offender David Anthony Thomas, fit this stereotype and had a profound legislative impact on sentencing guidelines for repeat sexual offenders.<sup>2</sup> Such an act of violence has an equally profound impact on the public's definition of rape itself. The realities of sexual assault present a much more complex picture which often stymies law enforcement agencies and the judicial system by introducing facets of human relationships that do not fit the stereotype.

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1 Director of Public Prosecutions v. Moran, 2 W.L.R. 923 (1975).

2 The 1989 legislature passed legislation under which a sex offender can be imprisoned for at least 25 years after a third conviction and a first degree murderer be sentenced to life without parole, if he or she has a prior conviction for a serious sex offense or murder.

In 1987, the Minnesota Bureau of Criminal Apprehension received reports of 1445 rapes. In approximately the same time frame (July 1, 1987-June 30, 1988), the Minnesota Program for Victims of Sexual Assault, under the state's Department of Corrections, provided services to 5766 sexual assault victims. Only 10% of these victims reported being assaulted by strangers. About half of the remaining victims (41%) reported intrafamilial sexual assault. The remaining half (42%) reported sexual assault by friends, coworkers, employers, neighbors and other acquaintances. Ninety percent of the reporting victims were female.

The figures cited above for the State of Minnesota square with the research gathered in Susan Estrich's comprehensive study of acquaintance rape in *Real Rape*.<sup>3</sup> In her study, Estrich notes that "rape," as it is traditionally defined, is one of the most fully reported crimes, per the FBI Uniform Crime Reports and the Department of Justice Bureau of Justice Statistics. But she goes on to state that according to numerous crime victimization studies the majority of victims sexually assaulted by someone they know do not report – to rape crisis centers, hospitals, or the police. She concludes, based upon the available research, crime report statistics, and victimization studies, that only ten percent of "acquaintance rapes" are reported. And of all reported rape cases, says Estrich, 83% do not fit the cultural rape stereotype.

Riffel-Gregor concluded that the most common educated estimate is that 20% of the country's female population suffers a sexual assault at the hands of an acquaintance. The statistics from the Program for Sexual Assault Services suggest that this percentage applies also in Minnesota.

The Minnesota Attorney General's Task Force on the Prevention of Sexual Violence Against Women (1989) observed as well that the vast majority of sexual assaults perpetrated in Minnesota are by assailants known to the victim.

Estrich, Riffel-Gregor, and the Attorney General's Task Force describe a type of acquaintance rape far broader than "date rape" incidents. Most acquaintance rapes, as discussed in these studies, do not include prior close or sexual relationships between the victim and the assailant.<sup>4</sup>

In its Preliminary Recommendations, the Attorney General's Task Force stated:

Sexual assault is not merely a violent act committed against a person. It is the most extreme manifestation of a set of values and beliefs which prevail in our society. Although attitudes

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3 S. Estrich, *Real Rape* (1986).

4 Riffel-Gregor states: "The term acquaintance, in the research literature, is used to mean that the victim of a sexual assault RECOGNIZES the perpetrator, at a minimum. Most of the research on perceptions of and reactions to acquaintance rape uses scenarios which depict the victim and perpetrator to be dating, either casually, or seriously dating with intimate romantic involvement. However, it is clear that acquaintance rape can also mean sexual assault by a perpetrator who is known by appearance only (i.e., the person who lives down the street, the student in my biology class), by name and appearance, by previous relationship (i.e., ex-dating partner, ex-spouse, coworker at previous job), or by indirect relationship (i.e., father of current dating partner, brother of friend)." *Acquaintance Rape* (1989).

alone do not cause sexual violence, there is evidence that a culture's prevailing belief system can create a climate which is more or less tolerant of sexual aggression.

Rape is not only the spectacular crime perpetrated by a predatory stranger. It is a crime committed by spouses, dates and acquaintances. Not every rapist is a sexual psychopath.<sup>5</sup>

The treatment of rape, and particularly of acquaintance rape, by police, courts, and the public, reflects what Riffel-Gregor calls a "rape-supportive" societal attitude. The Attorney General's Task Force found evidence that a culture's prevailing belief system can create a climate either more or less tolerant of sexual aggression.

Confusion about consent and the potential of blaming the victim is ingrained as early as the early teen years. In a 1988 Rhode Island study<sup>6</sup> of 1500 seventh-, eighth-, and ninth-graders, the results of which have become infamous, the central question asked was under what circumstances a man on a date with a woman was justified in having sexual intercourse with her against her consent. If the woman had allowed the man to touch her above the waist, 57% of the boys and 39% of the girls said the act was justified; if the two had a long-term dating relationship, 65% of the boys and 47% of the girls said it was justified; if the man spent a lot of money on the date, 24% of the boys and 16% of the girls said the act was justified.

Other studies show that for the very same offense, including factors of violence, injury, and preceding events, sample groups viewed acquaintance rape as less serious than stranger rape. In other words, the introduction of acquaintance lessened the perceived severity of the offense regardless of other circumstances. University of Minnesota Psychology Professor Eugene Borgida has conducted many studies on juror responses to rape trials, including isolation of trial variables. The work explores many "rape myths," and whether they result in correspondingly narrow perceptions as to which sexual assaults deserve criminal sanction. Borgida concludes that different prosecutorial tactics may be necessary to effectively present rape cases with an acquaintance factor. In studies that included mock trials testing variable factors, Borgida found that the use of expert testimony early on in the prosecution case can assist prosecutors in the "casual acquaintance rapes," where statutory and procedural reforms appear to be ineffectual.<sup>7</sup>

An Indiana study of 331 jurors in recent forcible rape trials concluded that jurors were more influenced by the biographical and socioeconomic characteristics of the victim and defendant than they were by the facts in the incident.<sup>8</sup> As for judges, Riffel-Gregor cites a 1986 study in which 83% of acquaintance rape victims voiced a view that their assailants should receive imprisonment, while at the same time the sentences varied downward with the degree to which the victim knew the defendant. Riffel-Gregor concludes that, as a

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5 Attorney General's Task Force on the Prevention of Sexual Violence Against Women, Preliminary Recommendation (Nov. 1988).

6 Rhode Island Rape Crisis Center (1988).

7 Brekke and Borgida, Expert Psychological Testimony in Rape Trials: A Social Cognitive Analysis, 55 J. Personality & Soc. Psychology 383 (1988).

8 LaFree, Reskin and Visher, Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials, 32 Soc. Problems 390 (1985).

consequence of such attitudes, acquaintance rapes are likely to be seen by the police as unfounded, dropped or plea-bargained by prosecutors, disbelieved by jurors, and treated leniently by judges in setting bail and sentencing.

Data from the Task Force surveys support this view. A judge responding to the Task Force survey observed:

some jury decisions seem to find 'fault' on the part of women victims notwithstanding [jury] instructions to the contrary . . . I feel unable to remedy the situation as it is in the minds and attitudes of the jurors. (Male judge, Twin Cities)

Forty-three percent of the responding female judges and 19% of the male judges say that whether the parties in a sexual assault know one another is always irrelevant in sentencing – more than half of both male and female judges find it to be relevant at least occasionally. Attorneys' experience is corroborative: 38% of female attorneys and 31% of males stated that judges always or often give more lenient sentences in such cases. Thirty-eight percent of male attorneys and 47% of female attorneys stated that bail is always or often set lower in acquaintance rape cases. About half of the attorneys, both female (65%) and male (51%), perceive that the cross examination of victims in such cases is always, often or sometimes beyond that necessary to present a legitimate consent defense.

The Task Force believes these attitudes, which excuse sexual assault by acquaintances and blame the victims of these assaults, and which directly influence courtroom response to charges must not be glossed over or discounted. The consequences of failing to confront ingrained social conditioning can be tragic.

At about the time this Task Force was created, an eighteen-year old high school girl who had been sexually assaulted by three classmates during a youth hockey tournament committed suicide. After parents of the players and youth hockey officials implored her not to follow through with charges, and classmates verbally and physically harassed and retaliated against her, the victim concluded that she was the outcast and her assailants were heroes. After living with this unremitting pressure for two years, she took her life.<sup>9</sup>

Such an incident illustrates a selective rape-supportive attitude in our society for those sexual assaults which fall outside the stereotype of the predatory stranger. This tolerance raises the question of whether acquaintance rapists are able to rape almost without consequence. Offenders' self-reports indicate that their conduct is seldom limited to one partner, that a major factor in their conduct is the presence of peers engaging in similar conduct, and that their attitude is that prevention is the responsibility of the women who are their targets. As Riffel-Gregor's review concludes:

Historically, the focus for prevention has been on women: learn assertiveness, self-defense. However, as . . . researchers have clearly shown, in societies where rape is rare, even the most unassertive women are not raped. Rape happens in our society because men in our society rape. When women are not available as targets (such as in prisons), or are not the

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9 Minneapolis Star Tribune, July 5, 1987.

preferred sexual partner, men rape other men. Women have little to do with rape, except that they are the most acceptable target. And in the case of acquaintance rape, they are the most available target.

Prevention aimed at women cannot, has not, and will not reduce or stop rape. Rape will not stop until men stop raping.

### Issues of Consent

Evidence before the Task Force suggests that in cases of "stranger rape," especially where there are weapons, infliction of injury, and very violent conduct, the purpose of the Minnesota Criminal Sexual Conduct Code—to focus on offender conduct—is generally realized. In the small percentage of "acquaintance rape" cases that find their way into the court system, there is persuasive evidence that case preparation and trial unfolds as if the case were one in which the victim and the defendant were engaged in an ongoing, sexually intimate relationship, even if they were not. In short, stereotypical notions of how women manifest consent to sex too often become the issue at trial. This appears to be true in acquaintance rape cases even when they involve weapons, personal injury, extreme violence, and no prior intimate relationship.

In a study of practice since the enactment of the reform legislation in Michigan, researchers concluded that the model law had little, if any, impact in this area. The Michigan defense lawyers surveyed said that they continued to investigate the victim's sexual history as a matter of course and to seek ways to use it to discredit the victim.<sup>10</sup> According to lawyers' and judges' survey statistics this use of negative stereotyping is also, sadly, true among Minnesota defense attorneys, as the following Table 3.1 illustrates.

TABLE 3.1  
DEFENSE ATTORNEYS APPEAL TO GENDER STEREOTYPES  
(FOR EXAMPLE, "WOMEN SAY NO WHEN THEY MEAN YES";  
"PROVOCATIVE DRESS IS AN INVITATION") IN ORDER TO  
DISCREDIT THE VICTIM IN CRIMINAL SEXUAL CONDUCT CASES

	<u>Always</u>	<u>Often</u>	<u>Sometimes</u>	<u>Rarely</u>	<u>Never</u>
Male Attorneys	2%	26%	44%	21%	7%
Female Attorneys	8%	35%	34%	14%	9%
Male Judges	0%	7%	29%	42%	22%
Female Judges	0%	32%	31%	32%	5%

Several attorney comments suggest that judges and legislators should not, and cannot properly, interfere with the tactical choices of how to defend sexual assault cases. As a corollary, some attorneys commented that a defense lawyer is obligated to use all legal and ethical means to obtain acquittal, including appeals to the so-called "rape myths," such as women saying "no" when they mean "yes."

Judges' survey comments reflect the court's dilemma in observing that the issue is a very difficult one, taking considerable deliberation to resolve, especially in the context of

<sup>10</sup> Marsh, Giest and Caplan, Rape and the Limits of Law Reform (1982).

cross-examination of the victim in an “acquaintance rape” case. One female judge stated that if the judge takes proper control, both in rulings on section 609.347 evidentiary issues, and on relevancy objections, the line can be properly drawn to allow pursuit of a legitimate consent defense, and to exclude evidence irrelevant to consent.

Estrich’s research and Riffel-Gregor’s literature review indicate in no uncertain terms that culturally pervasive gender stereotypes are at the root of the consent issue as it surfaces in sexual assault court proceedings. Estrich cites jury studies, which show that jurors will go to great lengths to be lenient in sexual assault cases if there is a suggestion of contributory behavior by the victim such as “talking to men at parties.”

This discussion of victim blaming in a cultural context focuses on the unrelated female victim and male perpetrator. It does not address the large percentage of “acquaintance rapes” occurring within the familial unit. Nor does it address the substantial number of difficult sexual assault cases with child victims. Many narrative comments in the Task Force survey responses suggest that Minnesota’s judges are striving to learn more about these issues and to find better means of adjudicating such cases on their merits.

### **Inadequate Penalties**

Sentences for sexual assaults, as for all other felony offenses in Minnesota, are prescribed by the state’s Sentencing Guidelines. Survey results and sociological research about the disposition of criminal cases suggest that despite the aura of objective uniformity bestowed by guidelines sentencing, the provisions of the guidelines themselves, and the manner in which they are applied, impair the criminal justice system’s response to criminal sexual assault. This is an area in which significant problems exist with respect to both “stranger rape” and “acquaintance rape.”

The most serious problem concerning penalties appears to be presumptive sentences for repeat offenders. As a judge commented in his survey response:

The guidelines in sex cases cry to heaven for reform. Only two years with one-third off for “good behavior” is unreal. Recidivism in perpetrators of sex crimes is almost a given. Something must be done.<sup>11</sup> (Male judge, suburban)

The Attorney General’s Task Force has recommended that the presumptive sentences for repeat, violent sex offenders be increased, without regard to the anticipated unavailability of prison space. Legislative proposals were introduced and passed during the 1989 session of the Minnesota Legislature to do just that.

Apart from the adequacy of presumptive sentences under the guidelines, there is evidence that, to some extent, current sentencing practices are perceived as variable, and gender-related, for criminal sexual conduct convictions. Without distinction as to the type

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11 This reference is quite surely to the 24-month presumptive sentence in the Minnesota guidelines for third-degree criminal sexual violence. The guidelines provide a 43-month presumptive sentence for first degree criminal sexual conduct. Reduction of each by one-third results in terms of 16 months and 28 months, respectively. As the Attorney General’s Task Force reported, the recidivism rate for those convicted of sex crimes with force, after three years, is 31 percent.

of criminal sexual conduct case, 45% of the female attorneys responding to the Task Force survey stated that male judges were more lenient than female judges in sentencing; 86% of the male attorneys stated that there was no difference based upon gender of the presiding judge. (The same pattern appeared as to bail in criminal sexual conduct cases. Seventy-eight percent of the male attorneys responded that male and female judges do not set bail differently in such cases. Forty-one percent of the female attorneys responded that bail is set higher if the judge is female.) These results demonstrate that the perceptions of practitioners in the field differ along gender lines, as to whether male judges handle their responsibilities in criminal sexual conduct cases differently than do female judges.

Social science research, discussed both by Estrich and Riffel-Gregor, indicates a significant incidence of charge reduction, which results in lesser sentences, in criminal sexual conduct cases with an acquaintance factor. Riffel-Gregor cites a 1985 study in Michigan showing that such charge reductions are more frequent in sexual assault cases than other crimes, and that the quantum of reduction is greater in sexual assault cases than others. In Minnesota, a 1988 case that made news involved a rural deputy sheriff who pleaded guilty to Fourth Degree Criminal Sexual Conduct and admitted fondling the buttocks of a female Explorer Scout assigned to a police ride-along program under his supervision. This victim and the two other female Explorer Scouts who were the victims of alleged forcible intercourse and oral sex, which had led to initial charges of First and Second Degree Criminal Sexual Conduct, were not consulted about the plea bargain and insisted that they wanted to continue the prosecution.

In addition to the serious problem of sexual assault cases failing to make their way into the judicial system, these plea negotiation and sentencing practices, to the extent that they are prevalent, undermine the ability of the judicial system to dispose of criminal sexual conduct cases in a manner commensurate with their seriousness and to limit criminal sexual conduct before it escalates.

### Findings

1. Significant numbers of serious sex offenses are not heard in court due to gender-based stereotypes about acquaintance rape.
2. Victim blaming pervades the prosecution of sexual assault offenses, unfairly balancing the question of consent on the victim's conduct, rather than on the conduct of the defendant on the issue of force.
3. Penalties imposed against sex offenders in general, and especially against sex offenders known to the victim, inadequately address the seriousness of the crime.

### Recommendations

1. The Minnesota Bureau of Criminal Apprehension and Department of Corrections should determine the incidence of "acquaintance rape" in Minnesota, and ascertain what proportion is formally prosecuted in criminal courts. This examination should be sufficiently detailed to separately examine intrafamilial and nonfamilial cases, and those involving intimate sexual relationships and platonic relationships.
2. County attorneys should increase prosecution of "acquaintance rape" cases.



3. Judicial education programs should be designed and taught, to heighten judicial awareness about the subject of acquaintance rape.
4. A judicial education program should be designed and taught to heighten judicial awareness about the pervasive gender-based stereotypes employed in the trial of a criminal sexual conduct case and to develop judicial skills in distinguishing between the presentation of a legitimate consent defense and the improper assertion of a gender biased defense.
5. Judges should not distinguish in setting bail, conditions of release, or sentencing, in nonfamilial criminal sexual conduct cases, on the basis of whether the victim and defendant were acquainted.
6. Judges should curtail improper reliance upon irrelevant gender stereotypes in criminal sexual conduct cases during the voir dire process, counsel's argument, witness examination, and cross-examination of the victim. They should recognize that this question is considerably more broad in scope than the questions subsumed in Minnesota Statutes section 609.347.
7. Judges should scrutinize proffered plea negotiations in criminal sexual conduct cases to ensure that they are not grounded upon improper gender-based stereotypes about the victim.

## SENTENCING ADULT FELONS

The Task Force explored the question of gender fairness in sentencing by looking at how felony sentencing guidelines are being applied to adult offenders in Minnesota. The primary standard of comparison, in reference to gender fairness, was the Minnesota Sentencing Guidelines.

The Minnesota Sentencing Guidelines prescribe felony sentencing practices statewide. These guidelines make no reference to gender in sentencing applications. The guidelines have been in effect since 1980, and the Minnesota Sentencing Guidelines Commission (MSGC) has maintained and analyzed a complete data base of sentencing practices under the guidelines since 1981. Because no similar statewide guidelines exist governing sentencing practices for non-felony offenses, the Task Force has relied primarily on the MSGC sentencing data in its analysis of gender fairness in sentencing.

The MSGC routinely reports the results of its analysis to the Minnesota legislature, and those reports were made available to the Task Force. In addition, Debra Dailey, director of MSGC, presented a summary of the reports at the first Task Force public hearing and submitted an updated written summary at the close of the Task Force investigative phase. Except as otherwise indicated, the data in this section were taken from these reports and summaries.<sup>12</sup> Additional relevant data on the perceptions of judges, lawyers, and the public were obtained from the Task Force survey instruments, public hearings and lawyers' meetings, and the Minnesota Department of Corrections.

### Case Distribution

The number of both male and female convicted felons has increased since 1981. The rate of increase, however, has been greater for female offenders, who represented 11% of the felony population in 1981, and 16.5% in 1987. Female offenders are most often convicted of property offenses, considered less severe under the guidelines, as opposed to offenses against persons, deemed the most severe offenses under the guidelines. The gender difference between those convicted of crimes against the person and property offenses is illustrated in this breakdown of 1987 data:

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<sup>12</sup> MSGC, Report to Legislature on Three Special Issues, (February, 1989); MSGC, Reports to the Legislature, (January 1989, January 1988, and November 1986); MSGC, The Impact of the Sentencing Guidelines, Three Year Evaluation (September 1984); MSGC, Minnesota Sentencing Guidelines and Commentary (Revised, August 1, 1987); MSGC, Sentencing and Gender (March 1989); testimony of Debra Dailey, Executive Director, Minnesota Sentencing Guidelines Commission, public hearing (March 29, 1988).

TABLE 3.2  
OFFENSE TYPE BY GENDER  
1987

<u>Offense Type</u>	<u>Females</u>	<u>Males</u>
Person	6.4% (70)	27.0% (1507)
Property	80.8% (889)	58.4% (3256)
Drug	10.1% (111)	11.8% (655)
Other	2.7% (30)	2.8% (156)

Three-fourths of the females convicted in 1987 were concentrated, in roughly equal portions, in three property offense types: Welfare Fraud/Food Stamp Fraud; Aggravated Forgery; and Theft/Theft Related Offenses.

### Imprisonment Rates and Duration

While imprisonment rates for both male and female offenders have been increasing since 1981, and while imprisonment rates for men are higher than for women, the lower imprisonment rate for females is explained by the distribution of offenses. Because females tend to be convicted of less serious felony offenses and have lower criminal history scores than men,<sup>13</sup> their crimes do not necessarily call for commitment to prison according to sentencing guidelines.

### Departure Rates

Both the aggravated and mitigated dispositional<sup>14</sup> departure rates for male offenders have consistently been higher than for female offenders. Some of this difference can be attributed to the types of offenses committed by men and women. Although property offenses are the most common crimes committed by both male and female offenders, female offenders are more concentrated in this area, and departure rates tend to be lower for these less severe offenses. No consistent pattern has appeared as to higher durational departure rates for male or female offenders.

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13 The criminal history score is a numerical rating based on prior offenses. The guidelines are a matrix in which criminal history score and current offense severity are considered together to determine the sentence.

14 Judges may depart from sentencing guidelines if there are substantial and compelling circumstances associated with a case. There are two types of departure, "dispositional" (imprisonment v. nonimprisonment) and "durational" (length of imprisonment). A departure that increases the severity of the presumptive guidelines punishment is an aggravated departure, and a departure that decreases the presumptive punishment is a mitigated departure.

### Nonimprisonment Sanctions

Because the state's limited prison space is reserved for violent offenders, most convicted felons are not imprisoned. Instead, the judge may impose any of a number of sanctions, including confinement in a local jail or workhouse, treatment, fines, and restitution. In addition, judges have the option of imposing a prison term which will be served if the offender fails to comply with nonimprisonment sanctions (known as a "stay of execution"), or deciding not to impose such a term as long as the offender complies with the nonimprisonment sanctions (known as a "stay of imposition").

The imposition of nonimprisonment sanctions is not controlled by the statewide sentencing guidelines, and the few local guidelines in existence are narrow in scope.<sup>15</sup> In this relatively unregulated environment, some gender differences exist. The imposition of jail as a nonimprisonment sanction has increased steadily since 1983, with the jail rate for males levelling off somewhat in recent years. As a percentage of all convicted felons, the jail rate for males has consistently ranged from 13% to 20% above that for females.

A greater percentage of females receive a stay of imposition, a policy which is consistent with the guidelines' recommendation of a stay of imposition for felons with low criminal history scores who have been convicted of less serious offenses. However, the MSGC found that gender differences exist across the state as to when stays of imposition are granted.

The differences in nonimprisonment sanctions also appear in the severity of the particular sanction, as indicated by Table 3.3:

TABLE 3.3  
1987 AVERAGE SEVERITY OF NONIMPRISONMENT SANCTIONS

	<u>Jail (Days)</u>	<u>Restitution</u>	<u>Fine</u>	<u>Stay (Months)</u>
Females	73	\$1397	\$559	57
Males	122	\$3137	\$857	59

Not only did fewer females receive jail time, they served less time. In contrast, fewer males were required to make restitution, but the average dollar amount assessed was greater for males. More females were required to make restitution because of the types of offenses they tend to commit, *e.g.*, property offenses such as welfare and food stamp fraud and theft.

The Task Force judges' survey included questions on rationales for lenient jailing of women. Although male judges were more likely than female judges to state that they imposed less jail time for women, a significant percentage of male and female judges agreed that they impose jail less often for women if there are young children at home. Judges

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15 See, *e.g.*, *State v. Lambert*, 392 N.W.2d 242 (Minn. 1986)(upholding guidelines, prepared by four trial court judges, regarding DWI and a number of other misdemeanors and gross misdemeanors); see also Minnesota Judges Association, Uniform Bail and Fine Schedule (June 1985).

indicated that they also considered other factors, such as lack of facilities and inadequate programs.

TABLE 3.4  
I SENTENCE WOMEN TO JAIL LESS OFTEN THAN  
SIMILARLY SITUATED MEN BECAUSE:

Reason	Judges Agree or Strongly Agree			
	<u>Male</u>	<u>Female</u>	<u>Metro Male</u>	<u>Non-Metro Male</u>
Too few facilities	35%	9%	31%	42%
Inadequate programs	24%	4%	23%	24%
Young children at home	63%	39%	70%	58%

Judges also were asked an open-ended question about factors that caused them to sentence males and females to jail differently. Although many judges interpreted this as asking for additional factors beyond those mentioned above, the presence of children was again the dominant factor, followed by the availability of facilities:

TABLE 3.5  
IN SENTENCING OFFENDERS ARE THERE ANY FACTORS  
THAT YOU WEIGH DIFFERENTLY DEPENDING ON  
WHETHER THE OFFENDER IS A MAN OR A WOMAN?

<u>Reason</u>	<u>Judges Responding</u>
Small children, pregnancy, nursing mothers	21%
Availability and cost of facilities	9%
Men more violent than women	5%
Women more likely followers than instigators	2%
Men needed as financial support of family	1%

Jail facilities and programs are operated by local governments according to standards established and enforced by the state. The Department of Corrections indicates that there are 88 facilities operating in Minnesota's 87 counties, but eight counties have no facilities.<sup>16</sup>

Maintaining separate programs for small populations of incarcerated females is expensive. If there are no separate programs, however, the jail experience for a woman can amount to either solitary confinement or participation as a substantial minority in programs with the majority male population. In testimony submitted in writing to the Task Force, Candace Rasmussen, public defender for the third judicial district, stated:<sup>17</sup>

In rural counties, when a woman spends time in jail, it is often essentially solitary confinement. There is rarely more than

<sup>16</sup> Minnesota Department of Corrections, *Statewide Jail Summary—1986*, pp. 3, 5 (June 1986).

<sup>17</sup> Programs for female offenders have been so fragmented and uncoordinated that advisory task forces have been calling for improvements for more than a decade. A critical step was taken in 1986 when Minnesota became the second state in the country to develop a comprehensive plan for women offenders. The philosophy underlying this plan is to support female offenders' right to parity of treatment while recognizing their unique social, economic, and personal needs. S. Hokanson, *The Woman Offender In Minnesota: Profile, Needs and Future Directions* (December, 1986).

one woman in jail at a time in Winona County, and women are segregated from men. This is particularly punitive treatment and makes jail time harder for women than for men.

Grouping females together in various locations takes them farther from their communities and creates other problems as well. One example of the consequences for female offenders occurred in a case in which male and female codefendants each were sentenced to eight months in a facility outside the county. The man, who had been employed full time, served time in a large, multi-district male correctional facility where there was a nominal charge for work release. The woman was unable to take advantage of work release at the available female jail facility, however, because she made only \$79 per week at her job processing mail orders in her own home and the cost of obtaining work release for a nonresident was between \$30 and \$40 per day (compared to \$10 per day for county residents). The woman's jail sentence was eventually reduced to compensate for the inaccessibility of work release.

### **Findings**

1. No identifiable gender bias exists in imprisoning adult men and women convicted of felony offenses in Minnesota; the differing rates of imprisonment for men and women offenders result from the greater percentage of men committing crimes of violence and having higher criminal history scores.
2. Sufficient data do not exist to determine whether the broad discretion available to judges in imposing non-imprisonment sanctions on adult felony offenders results in a gender bias in probationary sentences imposed on men and women.
3. Fewer and less adequate educational, vocational, and rehabilitative programs exist for women than men adult felony offenders in probationary, imprisonment, and supervised release settings.
4. Fewer and less adequate jail facilities exist for women than for men adult felony offenders.

### **Recommendations**

1. The Minnesota Sentencing Guidelines Commission should direct its staff to collect the data necessary to determine whether any gender bias exists in the imposition of non-imprisonment sanctions on adult women and men felony offenders.
2. The Minnesota Sentencing Guidelines Commission data on non-imprisonment sanctions should be made available to the legislative, judicial, and executive branches for the purpose of eliminating any gender bias in non-imprisonment sentences.
3. The Minnesota Department of Corrections should provide a comparable number and type of educational, vocational, and rehabilitative programs for men and women in probationary, imprisonment, and supervised release settings, consistent with the differing needs of men and women adult felony offenders.
4. Local authorities should be encouraged to provide jail facilities that will result in an equal sentencing impact on both men and women adult felony offenders.

## JUVENILE JUSTICE

The Task Force explored two areas of juvenile justice as it relates to female minors. These areas of concern were the apparent disparity in treatment of male and female juveniles within the system and the question of advocacy for child victims of sexual abuse and incest.

The Task Force drew upon national and Minnesota studies, as well as testimony at the public hearings and lawyers' meetings and survey responses. (Although the surveys did not address juvenile justice as a separate topic, some lawyers identified concerns about the juvenile justice system in their responses to questions about overall perceptions of bias in the courts.)

### The Context of the Juvenile System

A decade ago, researcher Coramae Richie Mann found widespread paternalism in the juvenile justice system. She noted:

adolescent females who exhibit behavior inconsistent with their socialized and expected roles are more likely than teenaged males to be punished by the agents of society, in this case the juvenile court.<sup>18</sup>

According to Mann, female juveniles are institutionalized more frequently and for longer periods of time than are males.<sup>19</sup> In a study of juvenile runaways, Mann found that females were more likely to receive a "severe" sentence (commitment) than were boys. Eighteen percent of the boys in the sample were sentenced to commitment as opposed to 28% of the girls.<sup>20</sup>

Though one might hope that the 1980s has brought an easing of the disparity in dispositions, based on broader acceptance of female autonomy, the Task Force found this not to be true. An attorney at the Twin Cities lawyers' meeting expressed it this way: "the juvenile court is the real bastion of sexism and paternalism in the criminal justice system."

### Status Offenses

In an article describing their national study, Katherine S. Teilmann and Pierre H. Landry, Jr. report that young women are more likely to be arrested for status offenses<sup>21</sup> than are boys,<sup>22</sup> giving weight to the theory that certain kinds of behaviors which may be

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18 Mann, The Differential Treatment Between Runaway Boys and Girls in Juvenile Court, 30 Fam. Ct. J. 37 (May 1979).

19 Id. at 38.

20 Id. at 41.

21 A status offense is an offense that would not be justiciable if the offenders were adults, such as curfew violations or "incorrigibility."

22 Teilmann and Landry, Gender Bias in Juvenile Justice, 18 Journal of Research on Crime and Delinquency 47 (January 1981).

dismissed in young men as “boys will be boys” are viewed as socially deviant when the actor is a young woman.

Teilmann and Landry conclude that the harsher treatment and the large numbers of girls arrested for incorrigibility and running away can be ascribed to intensified parental concerns about the appropriateness of minor female children’s behavior. Those working with juveniles in both the social services and the judiciary confirm that incorrigibility, truancy and running away (absenting) are the most often parent-referred offenses. Incorrigibility and absenting are the categories most often charged to deal with children who do not measure up to parental expectation. In Hennepin County Juvenile Court, juvenile females outnumber males in these two categories.

TABLE 3.6  
STATUS OFFENSE CITATIONS  
For the Period 1/1/87 through 12/31/87

	Male	Female	Total
Absenting	228	467	695
Curfew	507	189	696
Incorrigibility	168	219	387
Possession/Consumption of Liquor	531	254	785
Possession of Liquor	453	204	657
Liquor - Miscellaneous Offense	18	8	26
Possession/small amount Marijuana	143	16	159
Smoking	94	44	138
Other Status Offense	47	6	53
SUBTOTALS	2189	1407	3596
Truancy			1207
TOTAL CITATIONS			4803

Source: Hennepin County Juvenile Court

The simple fact of a girl being in juvenile court marks her as inappropriately socialized to traditional female standards of decorum and behavior. One attorney stated in her survey response:

Mostly I have observed gender bias in our juvenile courts’ comments in disposition hearings involving girls, i.e., “You are very attractive” is often said by one of our judges to almost every juvenile female during a disposition hearing . . . In one female juvenile theft case where the girl had stolen some makeup, the judge ordered her to reappear at a separate disposition hearing without any jewelry or makeup. He basically described the way the girl looked in court as “you look like a whore with all that makeup on anyway.”



### Detentions and Dispositions

Another attorney commented on the lawyers' survey:

In general, juvenile court treats boys and girls very differently because of their sex. The juvenile court is willing to remove girls from their homes for longer periods and to place them in more remote areas of the state in the name of "protecting" the girls from themselves. This is especially true if there is any hint that the girl has worked as a prostitute (even if she has not been charged with or convicted of that crime). (Female attorney, Twin Cities)

Professor Barry Feld of the University of Minnesota Law School, who has extensively studied the Minnesota juvenile court system,<sup>23</sup> has found gender-based disparities in the detention rates for male and female juveniles:

Even though female juveniles have less extensive prior records and are involved in less serious types of delinquency than are male offenders, still a larger proportion of female juveniles are detained.

The following Table 3.6 represents data drawn from Professor Feld's research.

TABLE 3.7<sup>24</sup>  
Detention by Sex of Juvenile

	Statewide	
	<u>Female</u>	<u>Male</u>
OVERALL % DETENTION	7.4	8.3
Felony Offense Against Person	24.2	25.0
Felony Offense Against Property	12.0	16.1
Minor Offense Against Person	11.6	10.7
Minor Offense Against Property	5.7	6.9
Other Delinquency	5.1	9.4
Status	3.2	7.1

Professor Feld also found gender-based differences in juvenile dispositions:

When the disposition rates of detained males and females charged with less serious offenses . . . are examined, a gender-related pattern emerges. Larger proportions of detained

23 Feld, Right to Counsel in Juvenile Court, 79 J. Crim. L. & Criminology 1276 (1989).

24 Id. at 1277.

female juveniles receive more severe sentences than their male counterparts.<sup>25</sup>

Similarly, the Wisconsin Juvenile Female Offender Study Project, looking at youth who had been placed in a secure institution, found that young women were committed following fewer and less serious prior offenses than those committed by young men. The females who were detained averaged four prior offenses while the young males averaged seven prior offenses.<sup>26</sup>

At lawyers' meetings in both the Twin Cities and Duluth, attorneys commented on this disparity. "Girls get detained 'for their own good' while boys are detained for the crime they've committed." Another attorney noted, "Girls' parents request detention more often than boys' parents do and the request is usually granted." The Duluth lawyer added, "Parents seem to be more concerned about a runaway daughter than a runaway son."

### Statutory Revision

The current Juvenile Code places the status offenses of Absenting and Incurability within the purview of the CHIPS provisions.<sup>27</sup> The revised code discards the term absenting, replacing it with the term runaway.<sup>28</sup> The offense of incurability no longer exists under the revised code. Situations previously labeled "incurability" are now handled under the umbrella of the CHIPS provision defining a child in need of protective services as "one whose occupation, behavior, condition, environment, or associations are such as to be injurious or dangerous to the child or others."<sup>29</sup> As data become available, they can be examined to determine whether a disproportionate number of juvenile females continue to be charged and/or detained for these status offenses.

### Findings

1. Interviews and research reveal disparate treatment by gender in cases involving juvenile females in Minnesota.
2. Girls are more likely than boys to be arrested and detained for status offenses.
3. There is a tendency to punish girls for status offenses at a rate both higher and harsher than that applied to boys.
4. The factors which account for their difference are difficult to identify and may reflect unstated cultural expectations to which girls are supposed to conform.

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25 *Id.* at 1277.

26 R. Phelps, U.S. Department of Justice, Wisconsin Female Juvenile Offender Study Project.

27 Minn. Stat. § 260.015, subd. 2a (Child in Need of Protective Services).

28 "Runaway" is defined under subdivision 20 as "an unmarried child under the age of 18 who is absent from the home of a parent or other lawful placement without the consent of the parent, guardian or lawful custodian."

29 Minn. Stat. § 260.185, subd. 1 (1988).

5. Based on the research of Feld and others, it is apparent that the courts are influenced in their disposition by societal pressures, specifically the wishes of parents and guardians.

### Recommendations

1. The Office of the State Court Administrator should collect additional data on gender disparities in juvenile dispositions. The Task Force Implementation Committee and juvenile court judges should determine what additional information is needed to overcome current deficiencies.
2. A study should be conducted with the enlarged data to determine if disparities still exist for juvenile female status offenders.
3. Juvenile court personnel should receive education to make them aware of their possible biases.

### Advocacy on behalf of Female Minor Sexual Abuse Victims

The possibility that juvenile sexual abuse victims, the majority of whom are female, are at risk of secondary victimization when their cases come to court, came to the attention of the Task Force through a review of a Minnesota Sentencing Guidelines report on dispositional departures for sex offenders sentenced between November 1986 and October 1987. In the cases studied, 75% of all criminal sexual conduct offenses involved sexual abuse of children. Some of the cases involved intrafamilial sexual abuse, while others did not specify a significant relationship between the offender and the child.<sup>30</sup>

The data showed both higher mitigated and higher aggravated durational departure rates for cases involving a minor female victim than for cases involving minor male victims where the presumptive disposition was imprisonment. The Task Force became concerned with the circumstances of the mitigated departures.

The MSGC study examines dispositions for criminal sexual conduct in the first degree, involving penetration with a minor victim under the age of 13, including intrafamilial abuse. It found that imprisonment rates decreased in 1987 in this particular category when other categories of criminal sexual conduct had higher imprisonment rates.<sup>31</sup> In cases of offenders convicted of Criminal Sexual Conduct with Force, for example, 95% of those at Guidelines Severity Level VIII were imprisoned, while the overall imprisonment rate for Level VIII offenses with a minor victim in 1987 was 47%.<sup>32</sup> The Task Force inferred that in a social and legislative context which generally supports increasing sentencing guidelines for criminal sexual conduct, some special factors must be at work in cases involving minor female victims.

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30 Minnesota Sentencing Guidelines Commission, Departure Rates for Criminal Sexual Conduct Offenses By the Sex of the Victim (March, 1989).

31 Mitigated dispositional departures (lesser sentences) were the highest for child sexual abuse offenses at Severity Level VIII of the sentencing guidelines grid.

32 Minnesota Sentencing Guidelines Commission, Summary of Sentencing Practices for Offenders Convicted of Certain Serious Person Offenses at Severity Levels VII and VIII (August, 1988).

Testimony offered at Task Force lawyers' meetings identified these special factors as the conflict of family unit concerns with victim concerns, especially when the perpetrator resides within the family. Attorneys commented on the burden placed on mothers when confronted with dependency and neglect proceedings related to sexual abuse allegations. These same problems appear when custodial mothers are faced with the abandonment of support through imprisonment of the sexual abuse offender.

The system puts women in the middle; where the man is dysfunctional, the problem is addressed by requiring the woman to choose between her relationship with the man and her children. (Twin Cities lawyers' meeting)

Social service sources suggest that victimized children are subjected to extreme pressure by families and offenders. A child who wishes to reestablish her sense of worth, her place in the family, her destroyed sense of security, is extremely vulnerable to overt and covert requests that she understand and place overall family concerns above her own less well understood needs for recovery. The Task Force concluded that during criminal proceedings, the introduction of an adult whose sole responsibility is advocacy of the child's interests can reduce the stress on child victims of sexual abuse and increase the court's awareness of the child's interest in dispositions that protect the victim. In cases where abuse has occurred beyond the family unit, the child's advocate can help alleviate concern over victim vulnerability and present a detached viewpoint.

### Finding

The interests of the child victim in criminal sexual conduct cases are not always adequately protected under the current system.

### Recommendation

A procedure should be established which would encourage the appointment of a guardian ad litem for the minor child whenever a child is a victim in a criminal sexual conduct case. The guardian ad litem would not be a party to the action, but would provide information to all parties regarding acceptance or rejection of plea agreements, as well as assisting in the preparation of the victim impact statement for sentencing.

## CIVIL DAMAGE AWARDS

The Task Force sought to examine the possibility of bias in civil damage awards by gathering statistical data and testimony. Lawyers suggested that the issue is a serious one:

Women have a harder time than men getting a fair shake from the system when it comes to damages. (St. Cloud lawyers' meeting)

In one county, a male banker got \$250,000 for a whiplash while a woman got no damages for the same kind of injury. (St. Cloud lawyers' meeting)

Gender Bias Task Forces in New York and New Jersey also had found this to be an issue.

Even though lawyers were eager to provide experiential data, statistical data that would have corroborated their information have been impossible to obtain. The search for data disclosed an information gap so significant that in response to the Task Force's request the Rand Corporation's Institute for Civil Justice expressed a willingness to consider including this question in relevant future studies. Such response is encouraging, and leads the Task Force to conclude that there is a need for further investigation. Discussions with the Minnesota Civil Rights Department and State Insurance Commissioner suggest that empirical data do exist, but that they are either in the hands of organizations that consider the information to be proprietary or are not collected in a form usable to the Task Force.

Even without insurance tables and columns of award figures, the seriousness of the issue is evident from the statements of those most closely involved, litigation attorneys who represent claimants in personal injury actions and the judges who hear these cases.

The Task Force concentrated on several elements of damages: the valuation of homemaker services, the loss of future earning capacity, and awards for disfiguring injuries. A matrix of cultural attitudes and judicial response emerged.

### Valuation of Homemaker Services

There is a clear consensus among Minnesota attorneys and judges that homemakers receive less than the economic value of their services in actions involving claims for lost wages. Lawyers' responses to the survey support this thesis:

I believe if I were to represent a high salaried career female that she would be treated as well as a similar male. But, homemakers are definitely discounted in the process. (Male attorney, Greater Minnesota)

Since Rindahl v. National Farmers Union. Ins. Cos., 373 N.W.2d 394 (Minn. 1985) [permitting homemakers to recover no-fault benefits for "lost wages"] was decided in late 1985, we always review auto accident cases for this kind of claim

under no-fault. Only about half of the defense attorneys are initially aware of the nature of Rindahl claims. The defense always places the value of homemakers service at minimum wage up to \$4.50 per hour. Where the homemaker, usually a female, also works outside the home, it has been very difficult to get the defense to recognize that they owe anything more than 10-15 hours per week for loss of value of these services in addition to wage loss. In practice this means we routinely receive offers of \$40.00 to \$60.00 per week tops to compensate a working mother for the entire amount of time she spends each week performing her duties as a homemaker. This is patently absurd, but is very pervasive. (Male attorney, Twin Cities)

The New Jersey Task Force concluded that homemakers were undercompensated for lost earnings because they work without wages. "In short, the major components of a personal injury damage award are closely tied to wage earning and thus relegate many women to modest awards because their work is not compensated."<sup>33</sup> The report pointed out the irony that in New Jersey, a suit filed by a homemaker's family could result in a higher award for the loss of the homemaker's services than the homemaker might receive in a suit for lost wages.

The New Jersey Task Force pointed to the New Jersey jury instruction on damages for disability as a potential cause of this inequity. This is of particular concern to the Minnesota Task Force because the New Jersey instruction, Model Charge 6.10 is, in its operative language, virtually identical to Minnesota Civil JIG 160.<sup>34</sup>

### Loss of Future Earning Capacity

According to the Task Force surveys, there is a less clear consensus among lawyers and judges concerning whether or not women are being properly compensated for the loss of future earning capacity.

Survey responses suggest that lower awards for loss of future earning capacity reflect societal bias:

Judges are not as receptive to submitting loss of future earning capacity to juries in female child injury cases without substantially more proof of "capacity to earn" when compared to those child injury cases involving males. On the other hand, based on first-hand experience, female children of minority or majority age receive more money in a wrongful death case

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33 The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts - June 1984, 9 Women's Rights Law Reporter 145 (Spring 1986).

34 New York's Task Force reported fewer problems due to trial court failure to award damages for loss of earning capacity by homemakers because the decision in DeLong v. County of Erie, 60 N.Y.2d 296, 469 N.Y.S.2d 611 (N.Y.Ct.App. 1983) approved a jury charge which allows the valuation of homemakers' services.

It is simply accepted that a “female face scar” is worth a fortune. Male facial scars are [of] very little value. An adjuster just paid policy limits to my injured female client because the scar was “such a shame on such a pretty lady” and it would bother the jury. (Female attorney, Twin Cities)

In these situations, it appears that verdicts are a reflection of an inappropriate gender bias. However, juries may simply be fairly reflecting a societal bias that places a greater value on female than on male appearance. In this cultural context disfigurement is considered a greater loss to women than to men.

### **Findings**

1. Judges and attorneys are concerned that there are gender-based disparities in civil damage awards; however, the full extent of the problem could not be documented based on the data available to the Task Force.
2. Because homemakers work without wages, Minnesota Civil Jury Instruction Guide 160 is a potential cause of the undervaluation of homemakers’ claims for lost earnings.

### **Recommendations**

1. The Task Force implementation committee should investigate the best methods to collect data on the effect of gender-based stereotypes on personal injury awards.
2. Minnesota Civil Jury Instruction Guide (JIG) 160 should be examined by the jury instruction committee to determine the appropriateness of a modification of the JIG to provide for valuation of lost wage claims by homemakers.

involving their parent than do the male children. (Male attorney, suburban)

A 1988 Rand Corporation report<sup>35</sup> analyzed wrongful termination awards in California between 1980 and 1986. The report made two conclusions pertinent to the issue of gender bias in awards for future earning capacity. First, the report found that the awards to women were considerably lower than the awards to men. Secondly, the report found that post-trial reductions of awards to women were smaller than the post-trial reduction of awards to men. The report hypothesized that the second factor somewhat mitigated the first. It inferred that the net effect of women receiving smaller awards remained even after post-trial reductions were taken into consideration. Because awards were smaller for women, even after adjusting for salary level differences, the report hypothesized that either a gender bias existed or that the difference in awards levels reflected expectations of a lower salary growth curve or lower expected labor force participation by women.<sup>36</sup>

### Disfiguring Injuries

In contrast to the downward discrepancies in awards to women for wage and work valuation, an overwhelming percentage of both male and female judges and attorneys responding to the surveys believed female plaintiffs receive higher amounts for disfiguring injuries than do male plaintiffs.

TABLE 3.8  
OTHER FACTORS BEING EQUAL, PLAINTIFFS  
RECEIVE HIGHER AMOUNTS FOR DISFIGUREMENT IF THEY ARE:

	<u>Male</u>	<u>Female</u>	<u>No Difference</u>	<u>No Basis For Judgment</u>
Male Attorneys	1%	94%	5%	-
Female Attorneys	2%	90%	8%	-
Male Judges	-	90%	10%	-
Female Judges	7%	72%	21%	-

Narrative survey responses reinforce this perception:

Facial scar cases are considered to be worth much more if female. Try to collect on a scar or [sic] leg if you represent a man. (Male attorney, Twin Cities)

One young woman I represented recently received what I consider to be a somewhat excessive award for a scar on her stomach – she obviously would not wear a bikini in public – however, a male would not have received a \$50,000.00 award for such a scar! (Female attorney, Greater Minnesota)

35 Dertouzos, Holland & Ebner, The Legal and Economic Consequences of Wrongful Termination (1988).

36 At 31, at 37.



## GENDER BASED EMPLOYMENT DISCRIMINATION

State law prohibits employment discrimination based on sex. This includes such conduct as refusal to hire or promote, discharge of an employee because of gender, and sexual harassment. Victims of gender discrimination have the option of filing a civil action in state court or filing a charge with the state Department of Human Rights or similar local agency within one year of the occurrence of the discriminatory conduct.<sup>37</sup> The statute appears to offer considerable protection of civil rights. The Task Force sought to determine whether these rights are indeed protected in Minnesota's courts.

The Task Force examined this question by meeting with lawyers in specialty practice groups and by asking questions about the subject on the lawyers' and judges' surveys.

Studies indicate that more than two-thirds of the citizens who experience employment discrimination simply do nothing about the situation, and very few even contact an attorney.<sup>38</sup> People experiencing this kind of discrimination tend to be fearful that seeking legal remedies will only aggravate their situation, and studies have shown that the nominal rewards (such as back pay, promotion, or elimination of harassing conduct) do not outweigh the victims' fears about job security.<sup>39</sup> Despite statutory rights, claimants perceive that the risks of filing a claim outweigh possible benefits. Moreover, these cases are expensive to pursue and plaintiffs are often deterred by the inadequacy of fee awards to prevailing parties.

### Filing a Complaint – The Process

When a charge of employment discrimination is filed with the Human Rights Department, the Department makes an investigation and, if it finds probable cause, files a complaint that is heard before an administrative law judge. Decisions of the administrative law judge may be enforced through the trial courts or appealed to the Minnesota Court of Appeals.<sup>40</sup>

When an action is brought in state court, it is heard by a judge sitting without a jury. The court in its discretion may authorize the commencement of the action without fees, costs, or security; appoint an attorney for the plaintiff; and allow the prevailing party a reasonable attorney's fee.<sup>41</sup>

Since federal law also prohibits employment discrimination based on gender, claimants may bring an action in federal court, which also is authorized to award a

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37 Minn. Stat. § 363.06, subd. 1, 3 (1988).

38 B. Curran, *The Legal Needs of the Public* 260 (1977) (final report of a national survey jointly undertaken by the American Bar Association and the American Bar Foundation); Bumiller, *Victims in the Shadow of the Law*, 12 *Signs: Journal of Women in Culture and Society* 421 (1987).

39 Bumiller, *supra*, note 38.

40 Minn. Stat. §§ 363.06, subd. 4; 363.071, subd. 1; 363.091; 363.072, subd. 1; 14.63 (1988).

41 Minn. Stat. § 363.14 (1988).

reasonable attorney's fee to the prevailing party.<sup>42</sup> A jury trial is available in certain situations.

Most employment discrimination cases are handled in federal court or by administrative agencies. Fewer than one-tenth of the attorneys in the survey sample, and fewer than one-quarter of the state's judges, have handled gender-based employment discrimination cases in state court within the last two years (1986-1988). Among those attorneys, male or female, who had handled such cases, the median number of cases was two; for judges handling such cases the median number was four. Only seven female judges had heard any cases. This low number of cases in state courts during this time could indicate either the reluctance of victims to seek legal redress or a preference for other forums.

### **Stereotypes and the System**

Some attorneys felt that, in general, women are hesitant to use the legal process to resolve grievances and that the system actively discourages women from pursuing their claims. In written responses to the survey, attorneys stated:

I believe women are far more hesitant than men to go to court or to use legal processes to solve their problems. My women clients have expressed fears that the judges won't listen to them. They are quite intimidated by male lawyers. (Female attorney, Twin Cities)

Most major law firms [are] controlled by men and are most sympathetic to men's cases . . . Also, "boys club" syndrome means male partners and their male friends stick together. (Female attorney, Twin Cities)

The Task Force also is concerned about the atmosphere in which discrimination cases are tried. The surveys indicate that some defense attorneys appeal to gender-based stereotypes. The majority of female attorneys (54%) handling these cases felt that defense attorneys appeal to stereotypes such as "women complain a lot" always or often, while less than half as many male attorneys (24%) felt that way. Two-thirds of the male judges said that gender stereotyping does not occur. Too few female judges have handled these cases to draw a statistically significant conclusion about their responses.

### **Judicial Attitudes**

Male and female attorneys substantially agreed that, at least some of the time, judges give the same consideration to employment discrimination cases that they give to other cases.

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42 U.S.C. §§ 1981-1983, 1985, 1986, 1988.

TABLE 3.9  
 JUDGES GIVE THE SAME CONSIDERATION  
 TO CLAIMS OF GENDER DISCRIMINATION IN EMPLOYMENT  
 AS THEY DO TO OTHER TYPES OF CIVIL CASES

	<u>Always</u>	<u>Often</u>	<u>Sometimes</u>	<u>Rarely</u>	<u>Never</u>
Women Attorneys	10%	28%	43%	16%	3%
Male Attorneys	33%	33%	21%	12%	1%

From their side of the bench, judges see gender-based discrimination cases as different: about half the judges agree that these claims are more difficult to prove than other civil cases. Employment discrimination cases are complex and frequently turn on the credibility of one person. Credibility of female witnesses may be an issue here in the same ways that female credibility is challenged when women apply for Orders for Protection, or press sexual assault charges, as discussed elsewhere in this report.

The lawyers' survey also revealed some concern that judges do not award sufficient damages in these cases, which may further discourage claimants from pursuing their claims. Two-thirds of the female attorneys in the survey sample, and slightly less than half of the male attorneys, felt that judges rarely or only sometimes award sufficient damages to plaintiffs.

The surveys and meetings with bar groups revealed instances of inappropriate judicial remarks made in the presence of parties and counsel. For example, one attorney wrote:

On a pre-trial motion in a sexual harassment case (by a female against a male), in which I represented the defendant employer (the defendant accused of sexual harassment was separately defended), a male . . . judge remarked, "What is she complaining about anyway? When my daughter was a cocktail waitress and got her ass pinched, she didn't bring a lawsuit, she just quit her job." He made this remark even though the pre-trial motion had nothing to do with the merits. It was a gratuitous observation. The motion was settled by the parties. (Female attorney, Twin Cities)

Another reported instance involved a judge who referred to sexual harassment cases as "this little Peyton Place" matter.

### Attorney Fees and Awards

The issue of attorney fees presents a major obstacle to pursuit of employment discrimination claims. The lawyers' survey reveals that attorney fee awards to prevailing parties often are insufficient to encourage attorneys to take gender-based employment discrimination cases. One attorney wrote in the survey response:

It seems to be very difficult for females to find attorneys to represent them in employment discrimination actions if they do not have significant income to pay on an hourly basis. I

believe that this difficulty is based at least in part on a perception that potential damages are too low to bother with or that a discrimination claim is somehow inherently frivolous. (Female attorney, Twin Cities)

Congress and the state legislature,<sup>43</sup> recognizing the problem created by the size and nature of relief requested in employment discrimination cases, have sought to ensure access to the judicial system in such situations, and to deter discriminatory conduct, by authorizing trial courts to award a reasonable attorney's fee to prevailing parties.<sup>44</sup> However, 55% of the women attorneys, and 37% of the men attorneys, stated that attorney fees are only sometimes or rarely high enough to encourage attorneys to take these cases. Approximately 60% of the male attorneys and slightly more female attorneys felt that sufficient attorney fees are only sometimes or rarely awarded to successful plaintiffs. About 60% of the judges surveyed indicated that they felt that successful plaintiffs should routinely receive an award of attorney fees. The discrepancy between judicial attitude and attorney experience suggests that plaintiffs are obtaining fee awards, but that they are not high enough to compensate for the amount of work done on the case.

Survey responses and lawyers' testimony suggest that the inability of legal aid organizations to accept employment discrimination cases disadvantages women of lower economic status, because they must appeal individually for *pro bono* consideration, find a private resource for retainer fees, or drop their grievances. This lack of financial resources encourages settlement of cases for less than potential damage value.

### **Findings**

1. Many victims of gender-based employment discrimination never seek relief in the courts.
2. Most attorneys agree that attorney fee awards to prevailing parties are insufficient to encourage lawyers to take gender-based employment discrimination cases.
3. Some defense attorneys appeal to gender-based stereotypes, and a few judges openly express similar biases; some judges are perceived as giving employment discrimination cases less consideration than other civil matters.

### **Recommendations**

1. Judicial education programs should raise awareness of gender-based employment discrimination within the courts and of the impact of sexist, discriminatory remarks on the overall processing of gender-based employment cases in the courts.

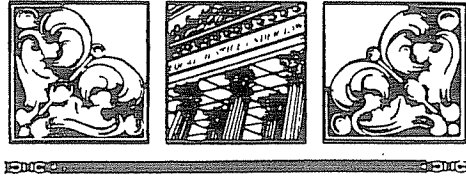
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43 Minn. Stat. 363.14, subd. 3 (1988); 42 U.S.C. (1988).

44 Minnesota courts have generally followed federal law in regard to the determination of attorney fee awards because of the similarities of state and federal anti-discrimination laws. The approach adopted by the United States Supreme Court in 1983, and subsequently adopted by the Minnesota courts, computes a reasonable attorney's fee on the basis of the number of hours reasonably expended multiplied by a reasonable hourly rate. This base amount may be adjusted upward or downward, usually by a percentage multiplier, according to a number of factors, the most crucial of which is the "results obtained" in the lawsuit. *Hensley v. Eckerhart*, 461 U.S. 76 (1983).

2. Judicial and attorney education programs should reflect an awareness of the inappropriateness of the defense tactic of appealing to gender stereotypes.
3. The Bar Association should seek changes that will encourage claimants to come forward. These changes could include, but are not limited to, increased pro bono or legal aid efforts, increased attorney fee awards, improved job security legislation to prevent retaliation by employers, and doubling or tripling the plaintiff's damages.
4. The Bar Association should conduct a comparative study of damage awards and other relief granted by administrative agencies and the courts.
5. Law firms should foster an environment within the firm which encourages increased representation of litigants in employment discrimination cases.





## COURTROOM ENVIRONMENT

### Introduction

The courtroom is the most visible symbol of the legal system, and the conduct and decisions made within it have a profound impact on the legal system and the practice of law. If women, in any of the roles they assume in court, are perceived and treated less credibly than men in those same roles; if their presence is diminished in any way, then women do not, by definition, have equality under the law. The presumed neutrality of the court environment requires that all participants set aside stereotypical beliefs and biases.

In addition to gathering information by means of survey questions, public and lawyers' meetings, and literature reviews, the Task Force conducted a survey of court personnel (those who appear in court at least once a week, including court administrators, deputy clerks, law clerks, court reporters, and bailiffs) on the issues of courtroom behavior of attorneys and judges and on the treatment of court personnel as employees of the judicial system. It conducted two surveys of court administrators: one to examine sexual harassment policies and complaints, and the second, to review jury call procedures.<sup>1</sup> The Task Force convened a meeting of more than thirty women judges and reviewed statistical information on judicial assignments. The Task Force also collected, from the state and all eighty-seven counties, all rules, forms and brochures distributed by the courts and evaluated these documents for gender biased language.

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<sup>1</sup> This examination found isolated instances of jury calls which failed to use multiple sources designed to produce representative juries and jury excuse procedures which systematically excused pregnant women and women with young children.

## THE COURTROOM ENVIRONMENT FOR FEMALE LITIGANTS, WITNESSES AND ATTORNEYS

### Litigants and Witnesses

In the lawyers' survey, attorneys were asked whether, in their opinion, judges assign more credibility to male or female witnesses. Although a majority of men and women attorneys thought that gender played no role in judicial evaluation of witnesses' testimony, 38% of women attorneys reported that they perceived that judges were more likely to believe men as witnesses. With respect to expert witnesses, 55% of female attorneys and 13% of male attorneys said they believed that judges assign more credibility to male expert witnesses.

Written comments on the survey and testimony at lawyers' meetings provide examples of the kinds of experiences that have led attorneys to believe that women's statements, because of their gender, are not treated with equal seriousness.

Women's credibility is undermined when decision-makers have stereotypical views of women's roles because testimony contrary to those stereotypes is disbelieved.

In many circumstances a judge (male) will make a comment like, "Well, this claim wouldn't be cluttering up my court calendar if your client wasn't so emotional." Yet a similar claim brought by a male client does not get the same reaction by the judge. In some cases the judge will refer to a male's claim as "phony," but never in my experience will they say anything about a male being too emotional. (Male attorney, Twin Cities)

A judge (male) made some extremely inappropriate comments regarding women plaintiffs in general in a chambers pretrial conference in which matter my client was a woman plaintiff. The claim was a medical malpractice action. The judge's comments were to the effect that women plaintiffs were unsophisticated regarding business and professional matters and therefore, they were usually unreasonable in their settlement demands. The judge then said, "You know what I mean, don't you counsel?" (Male attorney, Twin Cities)

In addition to references made about them to their attorneys, women litigants and witnesses sometimes receive disrespectful treatment directly from judges, court personnel and attorneys. This kind of conduct is problematic in itself, and also supports the perceptions of women's diminished credibility within the judicial system.

Judicial undervaluation of women's time and competence seriously affects case results. A witness in Rochester reported a case in which a custodial mother had to take time off from work for three child support enforcement hearings that were continued because the nonpaying father did not appear. Each time the hearing was continued; she received neither the requested support order nor respect for the value of her time. A director for a program for displaced homemakers reported to the Moorhead public hearing



a case in which a woman who had managed a dairy and grain operation while her husband was employed off the farm was not awarded the farm upon divorce; the judge said that it was the husband's "livelihood and source of income." Another farm wife, whose ex-husband routinely refused to make payments in distribution of her share of the farm, told the Task Force that the judge said that he was "sick of" seeing her in his courtroom and would not hear her case anymore, even though the ex-husband was the one who was refusing to comply with the court's order.

Attorneys, judges and courtroom personnel observed that female litigants and witnesses were addressed by first names or terms of endearment ("dear," "honey," etc.) when male litigants and witnesses were not. The perceptions of men and women attorneys about forms of address differed markedly, as Table 4.1 illustrates.

TABLE 4.1<sup>2</sup>  
WOMEN LITIGANTS OR WITNESSES ARE ADDRESSED  
BY THEIR FIRST NAMES OR TERMS OF ENDEARMENT  
WHEN MEN LITIGANTS OR WITNESSES ARE NOT

		<u>Always</u>	<u>Often</u>	<u>Sometimes</u>	<u>Rarely</u>	<u>Never</u>
-by judges	M	-	1%	6%	34%	59%
	F	-	7%	22%	42%	29%
-by counsel	M	*	2%	13%	36%	49%
	F	*	21%	38%	25%	16%
-by court personnel	M	-	1%	7%	34%	58%
	F	-	8%	22%	42%	28%
-by bailiffs	M	-	1%	6%	33%	60%
	F	-	6%	19%	43%	32%

Attorneys also were asked whether comments were made about the physical appearance of female litigants and witnesses; similar differences in perception appeared from the answers.

<sup>2</sup> In Tables 4.1 and 4.2, - means none, \* means less than one-half of 1%.

TABLE 4.2  
COMMENTS ARE MADE ABOUT THE PHYSICAL APPEARANCE OR APPAREL  
OF WOMEN LITIGANTS OR WITNESSES  
WHEN NO SUCH COMMENTS ARE MADE ABOUT MEN

		<u>Always</u>	<u>Often</u>	<u>Sometimes</u>	<u>Rarely</u>	<u>Never</u>
-by judges	M	*	2%	13%	29%	56%
	F	*	11%	29%	28%	32%
-by counsel	M	*	6%	24%	27%	43%
	F	1%	22%	35%	20%	22%
-by court personnel	M	*	3%	17%	28%	52%
	F	1%	13%	25%	29%	32%
-by bailiffs	M	*	3%	16%	27%	54%
	F	1%	12%	23%	30%	34%

In general, attorneys and judges thought that court personnel and bailiffs were less likely to be the source of such problems, but court personnel thought that other court personnel and bailiff participation in such behavior was about as common as attorney participation. The discrepancy in these percentages raises, again, questions of perception and self-awareness. Women, who experience inappropriate informality everywhere else, are more likely than men to notice it in the courtroom.

Survey statements provide examples of the types of comments made about the appearance of female litigants and witnesses. A female attorney in the metropolitan area wrote about a judge remarking in chambers about the breasts of a female defendant. A male attorney in the Twin Cities said that he has been engaged in discussions with a judge prior to trial in which the judge was concerned with what kind of appearance the plaintiff would make and asked if she had "good legs."

An expert witness providing testimony in a juvenile sexual abuse case reported the following incident by letter to the Task Force, and later in public hearing testimony.

The occurrence was during the hearing. The judges bench was a table . . . the attorneys' tables were similar and across from the judge. Before the trial began the perpetrator (of sexual and physical violence against his children and step-children) was in the room as was his wife and mother of the children, prosecutor, three guardians ad litem (one male) . . . the judge made a joke about the fact that he really hated it when the tables were on the same level because of the short skirts that the girls wore. He was talking about the [female]

prosecutor and the guardians ad litem, in the presence of the perpetrator who had refused treatment and was recalcitrant to say the least, in my opinion.<sup>3</sup>

Surveys also revealed some reports of verbal or physical harassment of litigants and witnesses. Fifteen percent of women attorneys reported that women litigants or witnesses receive verbal sexual harassment from judges sometimes or often and 33% of women attorneys thought that women litigants or witnesses are verbally harassed by attorneys sometimes or often.

### The Courtroom Environment for Women Attorneys

The role of the attorney before the bench is to act as an advocate for the client by presenting to the court the facts and governing law. If, during these activities, the gender of the attorney is made more of an issue than the interests of the client, the justice system denies the client the opportunity for a fair hearing.

Gender bias in the courtroom environment can distract an attorney from her legal tasks and place a woman lawyer in a dilemma because she always runs the risk, in confronting a judge about stereotypical attitudes or behaviors, of jeopardizing herself, her case and her client.

Many clients will ask me, because I am female, “whether I will have as good a chance as a male lawyer.” In order to secure clients I have to answer them that I will receive no negative bias from our court system, even though I may believe differently or have doubts. (Female attorney, Twin Cities)

[T]here is a failure of male attorneys to accord female attorneys the same mix of respect and clubbiness shown to other male attorneys. This failure affects the effectiveness of women attorneys once they have secured court access on behalf of clients, and when it comes from employers it affects the opportunities for women to develop meaningful access to the courts at all. (Male attorney, Twin Cities)

Women attorneys operate in a legal system which traditionally has been nearly all male and has taken on some of the characteristics of an exclusive male club. Comments submitted on the attorney survey illustrate the way in which the male character of the judicial system adversely affects women and their clients. For example:

A lot of the gender bias I see is in the “old boy network” sense: the judge is very friendly with male attorney, calls him by first name. It’s obvious they have long-standing relationship. Judge and male attorney talk “male” topics while waiting for reporter, etc. — they discuss sports, hunting, etc., and exclude females. This kind of thing leads client to think judge likes

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<sup>3</sup> Testimony of Clayton Sankey, MSW, ACSW, LP, River City Mental Health Clinic, St. Paul, Twin Cities public hearing (March 29, 1988).

the male attorney and doesn't like female attorney. Even though judge is professional and decides case on proper basis, client thinks decision was influenced by personal friendship or "male bonding." Creates client management difficulties and casts shadow on judicial system. Clients don't think they got a "fair deal" even when they did. (Female attorney, Twin Cities)

The Task Force attempted to identify the extent to which female attorneys are subject to different treatment from their male colleagues and the nature of that treatment. The disparity between men's and women's perception of this problem is remarkable. The lawyers' survey asked if women attorneys are addressed by first names or terms of endearment when men attorneys are not. Among attorneys, 35% of women and only 9% of men said that judges always, often or sometimes use differential forms of address.

Female attorneys reported being addressed by such diminutive terms as "girl," "girlie," "little lady," "young lady," and "little lady lawyer" and in terms of endearment such as "sweetie," "honey," "pretty eyes," and "dear." Women noted that they were sometimes referred to by their first names in the same proceedings in which men were addressed by the judge as "counsel" or by their last names.

Male attorneys were thought, by all observers, to be more likely than other courtroom participants to use inappropriate terms of address toward female colleagues. Fifty-nine percent of female attorneys and 43% of female judges said that counsel sometimes, often, or always address female attorneys inappropriately. While male attorneys (18%) and judges (13%) report a much smaller incidence of this conduct by counsel, they also see attorneys as more likely to behave this way than court personnel or bailiffs. Female attorneys also reported being subjected to overly familiar forms of address from bailiffs and court personnel.

The surveys also asked if comments were made about the physical appearance or apparel of women attorneys when no such comments were made about men. Forty-two percent of female attorneys and only 14% of male attorneys said that judges make such comments at least sometimes. Fifty-nine percent of female attorneys and 25% of male attorneys said that other attorneys make comments about physical appearance that often. A woman wrote:

I was told in chambers prior to a guilty plea entry that I dressed feminine[ly]. The defense attorney said he didn't like women who felt they had to wear a man's suit in order to compete with a man. (Female attorney, no geographic data)

Women attorneys were less likely to report court personnel or bailiffs as the source of inappropriate comments about their appearance.

While occasionally comments about appearance can be made in a casual and friendly context, in the judicial setting, comments about appearance are most often an inappropriate signal to women attorneys that judges are paying more attention to how they look than to the substance of their legal arguments. Lawyers described how women attorneys,

seeking post-trial evaluations of their legal performance, received from the judge only comments about their clothing. One example, among several:

In a chambers discussion following a jury trial, the judge commented at great length concerning the apparel and appearance of a woman attorney. He did so to the point of being quite offensive. His remarks were ostensibly for the purpose of "feedback" on trial performance. No similar remarks were made to male counsel present. (Male attorney, Twin Cities)

Comments about appearance made at particularly inappropriate moments can interfere with the effectiveness of an attorney's presentation. Another attorney wrote:

A male judge interrupted a female prosecutor's opening statement and called her to the bench to tell her he liked the way she was wearing her hair that day. (Female attorney, Twin Cities)

Occasionally attorneys reported comments being made about or to women attorneys that were not only inappropriate but entirely offensive. These comments destroy the neutrality of the courtroom environment and effectively institute gender bias as part of the proceedings.

A judge told me in chambers it was hard to listen to female attorneys when "really all you can do is think of screwing them." (Male attorney, Greater Minnesota)

I have heard judges and lawyers agree in chambers that certain female attorneys "needed a good lay." (Female attorney, Twin Cities)

I was walking into chambers from open court a few weeks ago, with the judge walking behind me. My client told me the judge was making lewd expressions in front of everyone sitting in the court. (Female attorney, Twin Cities)

One male judge stated that he was glad a particular female attorney was wearing a pantsuit so that he wouldn't be looking up her dress. (Male attorney, suburban)

I was in the back of a courtroom waiting to be called for motion practice and consulting with my client (male) quietly so not to disrupt ongoing proceedings in another case. For this reason we were close together and trying to keep our voices low. The judge interrupted to ask who the two "love-birds" in the back were. He then congratulated my client on having a good-looking attorney. (Female attorney, Twin Cities)

The clearest evidence of disparate treatment of women attorneys revealed in the survey was in response to the question as to whether women are asked if they are attorneys

when men are not asked. Seventy percent of women attorneys said that they are asked, at least sometimes, by other attorneys and by court personnel whether they are attorneys. Three percent of women said they are “always” asked by bailiffs and court personnel whether they are attorneys. A majority of women attorneys said they are at least sometimes asked by judges whether they are attorneys. Metropolitan area women were significantly more likely than those in smaller communities to face such questioning.

Refusal to accept women in their professional role makes it difficult for women attorneys to carry out their legal responsibilities and undermines their credibility in the courtroom. A number of attorneys commented on the survey that, after identifying themselves as attorneys in response to a judge’s or attorney’s inquiry, women were still required to show their licenses. Sometimes even when their identity is known, judges refuse to accept it.

There were four attorneys sitting at counsel table – three men and myself. The judge said “Would the three attorneys please approach the bench?” The other attorneys, somewhat embarrassed, said, “Which three?” The judge then turned to me and said, “Oh, I’m sorry (first name), you can come, too. (Female attorney, suburban)

I second-chaired a female attorney before a male judge in the past year. At the beginning of argument counsel identified themselves and I was clearly [identified] as second chair and that the female attorney would be arguing the motion. Despite this clear statement the court chose to direct questions to me rather than to the attorney that argued the motion. This placed me in a very difficult position as I tried to direct the judge back to the first chair attorney. I was not successful. (Male attorney, Twin Cities)

Attorneys also make gratuitous reference to women’s nonprofessional roles:

I prosecuted criminal cases through two pregnancies. One judge went on and on to court personnel how women with kids should be at home. (Female attorney, Twin Cities)

I recall hearing [a court referee] say to a woman attorney who had just given birth to a child, in front of clients and opposing counsel, “My, your breasts have gotten big from nursing haven’t they!” (Female attorney, Twin Cities)

Opposing counsel first referred to me as “Ms.” then corrected the reference to “Mrs.” The presiding judge chuckled. (Female attorney, Greater Minnesota)

Attorney for defense insurance company in closing argument kept referring to plaintiff’s attorney (myself) as Mrs. when he had been told previously that I was not Mrs. X but Ms. X, and had used Ms. X in all other matters except in front of the jury. It was clearly done to demean my status – suggesting to this

small town jury that I should be at home rather than in the courtroom. (Female attorney, Twin Cities)

The lawyers' survey asked if remarks or jokes demeaning to women are made in court or in chambers. Forty-seven percent of women and 13% of men said that such comments are made sometimes or often by judges. Sixty-three percent of female attorneys and 19% of male attorneys reported that such comments are made often or sometimes by attorneys. Twenty-nine percent of female judges and 13% of male judges thought that attorneys make demeaning comments and jokes sometimes or often in courtroom and chambers.

Survey commentary provides examples of the comments to which women attorneys in Minnesota have been subjected. Although most of the specific descriptions of demeaning comments reported here came from female attorneys, several male attorneys in the Twin Cities commented generally about the pervasiveness of sexist comments and humor in in-chambers sessions.

I have had suggestive remarks made to me by judges, opposing counsel and court personnel – ranging from “call me when your husband dies” to suggestions that I “slip away” with opposing counsel for a “quickie.” (Female attorney, Twin Cities)

In one instance (rare) the judge in chambers answered the phone; it was for me and he and I were the only ones in the room. I was clear across the room from him yet he said to the male attorney on the phone, “Yes, she’s here, I’ll let her talk to you as soon as she gets off my lap.” (Female attorney, Greater Minnesota)

A judge called me into his chambers and told me a story about the sexual habits of certain African tribes. The same thing had happened to another woman lawyer in my office but male attorneys I have mentioned it to have never been told the story. (Female attorney, Greater Minnesota)

I have endured in-chambers “humor” between male judges and defense attorneys more times than I can count. Jokes of a sexual nature (not directed at me or about me) are told constantly and sexual quips are the rule rather than the exception. I rarely make a big deal out of it, in part because I have other things I need to concentrate on and in part because I don’t want to alienate the judge. (Female attorney, Twin Cities)

As disturbing as these examples are, attorneys thought the problem was significantly more serious outside the courtroom. Of those attorneys who had observed instances of gender bias in the course of their legal experience, both men and women agreed that gender bias is more often encountered outside the courtroom during such activities as depositions and negotiations. A woman attorney reported on her survey, “In a deposition, a male attorney called me a ‘whore’ and told my client to hire a ‘real attorney.’” Another commented:

I have personally on several occasions had opposing male counsel direct demeaning comments to me that appeared to be gender-based. This primarily occurs in depositions, negotiations, and settings outside the courtroom. The purpose usually seems to be to try to gain a tactical advantage by flustering an opposing woman attorney. (Female attorney, Greater Minnesota)

The statistics and commentary reported here were provided in response to questions that asked attorneys and judges to report on their experiences in the last two years (1986-1988). The findings of this report demonstrate a current problem of gender fairness in the courts. It is reassuring, however, that most survey respondents thought that conditions were improving rather than deteriorating. Eighty percent of men attorneys and 66% of women attorneys thought that there is less gender bias now than in the past, although more than a quarter of women judges and women attorneys think that gender bias has not decreased in recent years.

### Judicial Intervention to Correct Gender Biased Behavior

The Task Force sought to determine whether, when gender biased behavior occurs in the courtroom, the judge attempts to correct the behavior. The Task Force was also interested in ascertaining whether, when judges are the source of problematic behavior, attorneys feel they have any remedy available.

There is a significant split between male and female attorneys on the question of whether the judge intervenes to stop gender biased behavior in the courtroom, with 51% of the male attorneys indicating that judges always or often correct the behavior, while only 13% of the female attorneys stated that judges always or often intervene. Fifty-eight percent of the female attorneys say judges rarely or never intervene, and 24% of the male attorneys say judges rarely or never intervene.

There are significant barriers to judicial intervention. First, survey results indicate that men and women have widely divergent perceptions of the occurrence of gender biased behavior. If male judges fail to characterize the behavior they observe or engage in as gender biased they will be unable to correct it. As a metropolitan judge commented on his survey, "If I recognize it on my own, I admonish immediately. As a male, my awareness is not what it could be with education/sensitization."

Second, even if judges acknowledge that certain behaviors occur, they may not recognize how objectionable that behavior may be to women. The judges' survey, for example, posited a number of hypothetical situations involving conduct of a male towards a female and asked judges to rate the extent to which they considered the behavior of the male attorney or courtroom staff to be objectionable. In substantially all instances, female judges found the behavior more objectionable than did the male judges, although their perceptions were more similar when the behavior involved physical sexual harassment or overt sexual language.

A few specific examples demonstrate the significantly different assessments of behavior by male and female judges. Fifty-five percent of female judges but only 28% of male judges thought it was highly objectionable for an attorney to address a female witness by



her first name while addressing male witnesses by their last names. Eighty-three percent of female judges but only 37% of male judges thought it was highly objectionable when an attorney tells a joke demeaning to women in chambers. On the other hand, over 90% of both men and women judges considered it highly objectionable for a male bailiff to make unwanted sexual advances toward a woman attorney.

In general, judges' survey comments suggested that male judges are more likely than female judges to assess the offensiveness of remarks in light of situational context, as opposed to applying a clear standard of offensiveness. For example, 21% of male judges said they would intervene when an attorney told a joke demeaning to women only if women were present when the joke was told.

A third barrier to intervention is the hesitancy of attorneys to object to gender biased behavior. Attorneys on the survey commented that they feared refocusing attention from the case to gender issues, interrupting their concentration on the case, and alienating the judge or opposing counsel. Concerns about possible negative consequences for the attorney or her client were reported in survey commentary as particularly influential in the attorney's decision not to object.

A fourth barrier to judicial intervention is the concern judges expressed – also from survey commentary – that their intervention might affect the outcome of the proceedings or the parties' perception of fairness. If a judge intervenes in the presence of a jury, the jury may perceive the admonished attorney and that attorney's case negatively. Or, the jury might think that the opposing counsel was less competent and needed the assistance of the judge. Judges suggested that it is difficult to decide in the brief moments that a judge has for making a response whether intervention is appropriate. As one Greater Minnesota judge commented, "[T]he judge is torn between fair administration of justice and the offensive conduct or remarks."

### Findings

1. A majority of Minnesota women attorneys have encountered gender-based differential treatment by other attorneys in the courtroom, including different forms of address, demeaning comments, inquiries about professional identity and inappropriate comments about physical appearance. A majority of women report that when such behavior occurs, judges rarely or never intervene to stop it.
2. More than forty percent of women attorneys have observed, or have been subjected, at least sometimes, to gender-based differential treatment by judges, including comments about physical appearance, inquiries about professional identity and remarks or jokes demeaning to women.
3. Discriminatory experiences are more likely to be encountered in informal interactions between attorneys in depositions or negotiations than within the courtroom.

### Recommendations

1. Standards of gender fair behavior for all participants in the judicial system should be incorporated in such documents as the Code of Judicial Conduct, the Rules of Professional Conduct, and the Rules for Uniform Decorum.

2. Sensitivity training for lawyers and courtroom personnel should be provided through law schools, continuing legal education, and employee training programs.
3. Special efforts should be made to present innovative, entertaining and memorable judicial education programs to enhance sensitivity to gender fairness issues. Programs should include specific reference to the complex issue of when judicial intervention is appropriate to correct a gender fairness problem and how that intervention should be accomplished.
4. A guide on "How to Conduct Gender-Fair Proceedings" should be drafted and distributed to all judges. Such a guide could discuss forms of address, provide a uniform method for designating attorneys, and explain how to avoid in-chambers discussion topics which tend to exclude persons of one gender.
5. Evidence of gender-fair attitudes and behavior should be a criterion for judicial selection.

## WOMEN JUDGES

The Task Force investigated a number of issues regarding gender and the judiciary, including the judicial appointment process and the treatment of women judges by attorneys, court personnel and other judges. In addition to gathering survey data, the Task Force held a meeting with over thirty female trial and appellate judges, state administrative law judges, and members of the federal judiciary. The commentary in this report reflects information provided by the state court judges.

The appointment of women judges in representative numbers relative to population is critical to achievement of gender fairness in the courts. Fairness requires that the opportunity for judicial service be equally available to all. The significantly different perspectives of male and female lawyers and male and female judges revealed in the Task Force surveys suggest that a judiciary that represents a largely male perspective may not treat all litigants equally. There is also evidence that the presence of female judges helps to sensitize male colleagues to gender-related issues that judges face both in their roles as decision makers and as supervisors of court personnel. Stephen Cooper, Minnesota Commissioner of Human Rights, made this point in his testimony to the Task Force:<sup>4</sup>

I think the first issue that we have to look at when we are talking about gender bias in the courts is the courts themselves.

One of the major, safest, fastest, most effective ways that you can deal with gender bias in the courts is to make the courts themselves cease to be conclaves of nonrepresentative people. And if you have half of the benches, half of the prosecutors, half of defense attorneys, half of the litigants, and half of the jurors female and half male, a whole lot of problems we are talking about I think will disappear.

I can give you all kinds of war stories over the years about outrageous sexist comments that have been made, outrageous sexist behavior that has been displayed in the courts. That doesn't stop with the first or the second or the third woman on the bench or as a prosecutor, but it starts to stop at the 50th or the 100th or the 500th, and it stops being an issue any more, just like it does in so many other walks of life . . . . Sharing the power, sharing the decision-making, sharing the representation not only has a direct effect, but it means everybody who comes in here starts to view a woman as a power figure, if, in fact, she is the judge.

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4 Twin Cities public hearing (April 19, 1988).

The sharing of decision-making and representation to which Cooper refers has not occurred yet in the Minnesota bench. As of June, 1989, 24 out of 230 trial judges in the state were women, most of them sitting in the Twin Cities metropolitan area.<sup>5</sup> Two of the seven Supreme Court justices and three of the 13 Court of Appeals judges are women.<sup>6</sup> Four out of the ten judicial districts have no women judges.

No doubt, some of the under-representation of women in the judiciary, particularly in Greater Minnesota, can be explained by the differing length of time that men and women have been in practice and the uneven distribution of female attorneys throughout the state.<sup>7</sup> In less populated areas there are fewer vacancies and fewer female attorneys to fill them. However, lawyers in the sixth Judicial District, which includes Duluth, expressed particular concern over the lack of female judges in that district, which has a considerable population of qualified female attorneys.

Judges at the Task Force meeting expressed concern that although the number of female judges is still small, there is a sense within the legal community that the "women's slots" have all been filled and that women will only be considered as vacancies occur in these "women's slots." In districts in which a greater representation of women has been attempted, the increased number has been perceived as "too many women." The following remarks were reported at the meeting of women judges:

At a meeting of male attorneys to decide who should fill a judicial vacancy, when one man asked, "What about women candidates?" another responded, "Screw the women."

Another woman seeking appointment to a judicial position was told by a lawyer that "we don't need any more g-d-damned skirts around here."

Loretta Frederick of the Minnesota Coalition for Battered Women, told the Twin Cities public hearing:

I have personally seen women lawyers who have sought appointment to benches outside the metro area being maligned by attorneys with whom they practice . . . I know of a couple of lawyers who made the comment that a female candidate for a judicial post should not be appointed because "what would we do when she is premenstrual?"

Several women judges noted that local bar judicial selection committees lack female attorney members, who can provide accurate information about a broad range of candidates, even when a significant number of women are available to serve. It also has been observed that current proposals for "merit selection" would transfer the authority for

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5 Twenty percent of the practicing attorneys in the state are female.

6 Governor Rudy Perpich has appointed a very large proportion of these female judges – more than all other Minnesota governors combined.

7 Eighty-five percent of the female lawyers practice in the Twin Cities metropolitan area, while only about two-thirds of the male attorneys practice in the metro area. Male attorneys in the Twin Cities area have practiced five years longer (median) than female attorneys; in Greater Minnesota the difference is eight years.

appointment from the Governor to local bar committees. If such a change is instituted it would be critical to ensure that the committees are free of gender bias and include women attorneys as members.

The women judges reported some concern about the conduct of attorneys, court personnel and other judges. At least one judge indicated that she faces more problems with judicial colleagues than with litigants or attorneys. Another described being introduced as part of a panel of judges where all the male judges were introduced with the title "judge" and their last names while she was introduced by her first and last name without mention of her title. Several judges said that it is difficult for women judges to be heard in judges' meetings. One commented, "I don't think I've ever heard a woman speak at a bench meeting where everyone else kept quiet." A few agreed that sometimes comments made by a woman are later attributed to a man who made a similar comment later in the discussion. One judge said that this difficulty in being heard results in lack of influence within the court.

The judges and the comments on the Task Force surveys suggested that occasionally female judges are not accorded the respect due the bench.<sup>8</sup> Judges report being addressed as "Ma'am" or, in some cases, "sir" by attorneys, rather than as "Judge" or "Your Honor." Several reported excessive familiarity, including being referred to by their first names, by court personnel, bailiffs, and janitors. Problems of second guessing or rudeness were cited. One judge at the meeting remarked that a bailiff commented to her after a hearing in a domestic abuse case that a particular male judge "would have thrown that case out in a minute."

An attorney commented on his survey:

When a young woman took chambers . . . She had a clerk assigned to her who in my opinion discriminated against the judge by word and deed: shouting to the judge, "[First name], get out here to sign these orders." This is in my presence.  
(Male attorney, Twin Cities)

### Findings

1. Women comprise approximately 10% of the state's judiciary, and some districts do not have a single woman judge.
2. Some women judges report that they are not taken seriously within judicial policy meetings.
3. Women judges are sometimes not given appropriate respect from counsel and court personnel.
4. Women attorneys are insufficiently represented on merit selection committees which recommend attorneys for judicial appointments.

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<sup>8</sup> Some male attorneys made remarks on the lawyers' survey which indicated their disrespect for women judges. Other survey responses reported remarks that male attorneys had made among themselves which suggested that women judges could not make up their minds and could not grasp complex financial issues.

**Recommendations**

1. The Governor should increase the number of women attorneys appointed as judges so that the judiciary will achieve a more balanced gender composition.
2. Women should be appointed to vacancies in districts with no women judges.
3. The ability to work with women and men as equals should be a criterion in the appointment of all judges.
4. Chief Judges and court employees should be given training to assure that women judges are given adequate respect and any problems are appropriately remedied.
5. Women attorneys should be fairly represented on all committees considering candidates for judicial appointment.
6. Judicial districts should develop policies for the assignment of judges which treat applicants fairly regardless of gender.
7. The judicial education system should include an opportunity for all new women judges, and especially for those geographically isolated, to learn from more experienced women judges about how best to deal with gender fairness issues.
8. The Supreme Court Information Officer should ensure equal representation of women judges in publicity about the judicial system.
9. In providing speakers at judges' meetings, attention should be paid to obtaining respected women speakers on substantive issues.

## GENDER FAIRNESS IN COURT DOCUMENTS

One of the concerns of the Task Force was the gender fairness or bias expressed in communications from the judicial system to the public. To examine this issue, the Task Force evaluated the gender fairness of documents through which the judicial system communicates with the public. These documents included forms, statements of rules and procedures and brochures.<sup>9</sup>

Unlike a single, relatively ephemeral statement made in a courtroom which may reflect the speaker's personal bias, any gender biased statement made in a document issued by the judicial system affects many more people and is appropriately viewed by the public as a reflection of the system's perspective. Broadly disseminated documents also provide the judicial system with an opportunity to promote gender fairness in the courts. The Task Force developed a definition of gender biased language and evaluated court documents against this standard.

The evaluation revealed that in some documents in which obvious attention has been paid to elimination of masculine pronouns, the masculine pronoun has nevertheless been retained in references to higher ranking officials. In places where documents offer examples, the examples are often unnecessarily gender specific. Many court documents employ nouns which presume that a variety of social roles are filled exclusively by men.

In addition to the problems of overt gender bias identified by this review of court documents, reviewers also observed instances in which court documents could be amended to affirmatively promote gender fairness.

Of thirty-six statements of rules or policy reviewed, twenty-eight contained gender biased language and of the remaining eight there were some which could appropriately be revised to include language promoting gender fairness. Of the more than ninety forms issued by the Minnesota Association for Court Administration, only about seven forms have any gender bias problem and these are generally limited to an isolated use of the masculine pronoun. Of the ten brochures examined, four had gender biased language. The problematic brochures included two judicial district juror handbooks and the widely used juror handbook prepared by the Minnesota District Judges Association.

### Findings

1. A majority of statements of court rules and policy statements contain gender biased language.
2. Gender biased language is used in some court forms and brochures.

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<sup>9</sup> The report of this study is included in the appendix. Detailed statements of gender bias problems and suggestions for amendments for any particular document can be obtained from Professor Laura Cooper, University of Minnesota Law School, 229 Nineteenth Avenue South, Minneapolis, Minnesota 55455.

**Recommendations**

1. The Supreme Court and the Office of the State Court Administrator should issue general directives on the use of unbiased language in court documents, brochures and forms.
2. Such directives should make clear that masculine pronouns are not to be used as if they were neutral words; that all unnecessary gender-specific language should be deleted; and that drafters should consider the inclusion of language to promote gender fairness in court policy statements.
3. The Supreme Court and the Office of the State Court Administrator should appoint committees immediately to review and amend all existing court documents which use gender biased language.



## THE COURT AS EMPLOYER

In addition to making legal decisions, the court system serves a role as employer. The Task Force sought to determine whether the court system provides a gender-neutral working environment which assures all of its employees equal treatment.

In order to gather preliminary information on the working environment for court employees, questions on employment matters were added to a questionnaire on courtroom interaction sent to court employees, which repeated questions on the subject from the lawyers' and judges' surveys. This resulted in a survey of approximately half of the people employed in court administration at the trial court level.<sup>10</sup> Survey forms were sent to 792 court personnel, including court reporters, court deputy clerks, law clerks, electronic court recorders, and court administrators. Responses were received from 691 court employees, a return of 87%; 80% of the respondents were women.

Court personnel were asked a number of questions relating to their work experience. According to survey responses, a majority of both men and women did not think that their opportunities for advancement were limited because of gender. However, 7% of the men and 26% of the women indicated that men were given a preference in such appointments, while 15% of the men and 5% of the women thought that women were given preference.

The most troubling information to come out of the survey was that nearly 10% of the male court personnel and 14% of the female court personnel felt that they had been discriminated against because of gender. Nearly all of those – both men and women – who felt they had been discriminated against did not take action to correct the situation. Comments explaining their reasons for not taking action emphatically asserted that complaints either were unlikely to result in beneficial changes or that even attempting to complain would threaten the employee's work environment or continued employment. "Are you kidding?" was a typical response to the question of whether an employee had attempted to remedy discriminatory treatment. Employees appeared more likely to seek to remedy a problem when it involved a co-employee or a supervisor, than when the action involved a judge. However, to nearly all who felt they had been discriminated against on the basis of gender, the avenues of redress appeared closed.<sup>11</sup>

I had no idea who to talk to or where to go; he had sole authority on hiring and firing and warned clerks never to take our problems to the judges; I didn't want to lose my job.  
(Female deputy clerk)

I knew I wouldn't win in the long run . . . due to vengefulness of my boss and the ability to make my life miserable! (Female deputy clerk)

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10 The survey group was identified by requesting court administrators to submit the names of all persons who appeared in court or in chambers during legal proceedings at least once per week. This particular selection process did not reach those in clerical positions, which are predominately occupied by women. The percentage of men included in the survey is therefore higher than the overall percentage of male court employees.

11 The following quotes are presented without any identifying information due to the confidentiality of the survey instrument.

When you have any employee serving only at the pleasure of another person, the door is open for whatever abuses come along. (Female court reporter)

**Finding**

The Task Force's limited investigation suggested possible problems of gender fairness for employees within the court structure and a lack of effective grievance procedures.

**Recommendation**

The Task Force recommends that the State Court Administrator's office conduct a more comprehensive study of employment practices within the state court system and undertake development of behavioral standards for nondiscrimination, development of effective grievance procedures, and employee training where indicated.

## SEXUAL HARASSMENT

Sexual harassment is defined in the law as including unwanted sexual advances, requests for sexual favors, sexually motivated physical conduct or other verbal or physical conduct or communication of a sexual nature.<sup>12</sup> The law is violated when harassment substantially interferes with a person's work environment or when it denies the person equal access to public services, including access to the judicial system. The courts violate these provisions if sexual harassment affects the work lives of their employees or interferes with the ability of litigants and attorneys to participate in the judicial system. The Task Force found that sexual harassment exists in the judicial system, just as in other private and governmental institutions and places of employment.

A survey of court administrators revealed that ten formal complaints of sexual harassment had been filed with them within the last two years and that nine of these complaints had resulted in the imposition of some discipline. Prior to creation of the Task Force, a Minnesota decision publicly reprimanded judges for engaging in inappropriate conduct.<sup>13</sup> In addition, within the last year one judge was suspended for a year for incidents of sexual harassment of court employees,<sup>14</sup> and another judge resigned from the bench rather than litigate charges of sexual harassment brought by a female court employee.

The Task Force's surveys of judges, attorneys and court personnel, however, indicate that the incidence of sexual harassment is far more widespread than the number of formal complaints and publicly reported cases would suggest. Significant numbers of female attorneys reported verbal and physical sexual harassment from both judges and attorneys. Verbal harassment was more common than physical harassment and lawyers were more likely to be the source of the problem than judges. Forty-five percent of female attorneys reported that they are always, sometimes or often subjected to or have observed verbal sexual harassment from other attorneys. Eleven percent of female attorneys reported that women are subjected to physical sexual harassment by other attorneys often or sometimes. Twenty-six percent of female attorneys identified judges as a source of verbal sexual harassment sometimes or often. When female attorneys were asked if judges subject female attorneys to physical sexual harassment, 19% responded that it occurs, but only rarely, and 6% answered that it occurs "sometimes."

Survey responses from female court personnel indicate that they are subject to harassment. A quarter of female court personnel answered that they are rarely, sometimes or often the victims of verbal or physical sexual harassment from judges. A third of female court personnel said that they are rarely, sometimes or often the victims of verbal or physical sexual harassment from attorneys. In narrative statements, several court employees described being subjected repeatedly to jokes of a sexual nature. One wrote that she was "expected to socialize with a judge I worked for"; another said that "a supervisor threatened to give me a poor work evaluation if I did not 'sleep' with him"; another said a judge made sexual advances to her and insisted that she wear skirts and sit in front of the bench instead of the space designated for the court reporter.

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12 Minn. Stat. § 363.01, subd. 10a (1988).

13 *In re Kirby*, 354 N.W.2d 410 (Minn. 1984).

14 *In re Miera*, 426 N.W.2d 850 (Minn. 1988).

Narrative comments included in the lawyers' survey responses suggest the nature of the verbal sexual harassment that women attorneys have experienced.

Opposing counsel advising female attorney "she must be on the rag," frequent use of the term "dildo" during settlement negotiations; pass made during settlement negotiations. (Female attorney, Twin Cities)

A judge told attorneys in chambers that while he was "bald on top" he has "plenty of thick pubic hair, ha ha ha." (Female attorney, Twin Cities)

Reports that women attorneys had experienced physical sexual harassment came both from women who had served as law clerks to judges and from those who had interacted with judges in their role as counsel to litigants. Reports of physical harassment of women law clerks by judges came from at least four different judicial districts. The following are some examples:

A judge continually pawed, touched, and made inappropriate sexual comments to his female law clerk who he hired based on looks, not credentials. I observed these things and heard daily accounts. I know of the final "explosive" incident of harassment—physical attack—only on a second-hand basis, but based on what I saw previously, I believe it. (Female attorney, Twin Cities)

One judge unzipped his pants and adjusted his shirt in chambers repeatedly in front of his female clerk. She never felt safe enough to report it. She told me about it . . . This had a lasting impact on her self-esteem. (Female attorney, Twin Cities)

I worked for a judge who kissed me on the mouth and patted my rear very suddenly one day . . . I recently became aware of two secretaries who he has similarly harassed. (Female attorney, Twin Cities)

Some female attorneys representing litigants also described in the survey their experiences of physical advances from judges, some of which occurred in the courthouse and others at bar association social events.

Judge put his arm around [a] woman attorney, hugged her, [and] made flirtatious remarks when she requested information on how to proceed in completing forms for court. (Female attorney, no geographic cite)

At a bar dinner, a judge began stroking the arm of a woman attorney whom he had just been introduced to, then started pulling her toward him, with his arm around her shoulder. The woman was upset. (Female attorney, Greater Minnesota)

Surveys of attorneys and court personnel reported some incidence of verbal and physical sexual harassment of witnesses and litigants, although no narrative examples were reported to suggest the precise nature of these incidents. Few observers reported problems of physical sexual harassment of litigants and witnesses, but 15% of female attorneys reported that litigants or witnesses receive verbal sexual harassment from judges sometimes or often and 33% of female attorneys thought that litigants or witnesses are verbally harassed by attorneys sometimes or often.

Women attorneys thought that court personnel were more likely to experience both verbal and physical harassment from lawyers and judges than either attorneys or witnesses. For example, 38% of female lawyers responded that court personnel are verbally harassed by judges sometimes or often and 47% of female lawyers said that court personnel are verbally harassed by attorneys sometimes, often or always. Survey responses from female court personnel report that they are subject to harassment. A quarter of female court personnel answered that they are rarely, sometimes or often the victims of verbal or physical sexual harassment from judges. A third of female court personnel said that they are rarely, sometimes or often the victims of verbal or physical sexual harassment from attorneys.

Some attorneys and court employees who felt that they had been subjected to harassment described their reasons for not reporting it, while others who attempted to report it described the barriers they faced in seeking to have the behavior corrected.

I was unwilling to say anything outside of the office, because I have to practice in front of that particular judge all of the time. (Female attorney, Greater Minnesota)

I sought intervention by two judges they just laughed and asked what I did to encourage him. Experience was a nightmare. (Female attorney, Twin Cities)

[There's] no grievance procedure. As a will and pleasure employee what could be done? Why bother – it won't help but could hurt. (court employee)

A supervisor threatened to give me a poor work evaluation if I did not "sleep" with him. I told a female superior – she talked me out of reporting it. She said she'd talk to him. This happened twice with the same person. I had just started working for the court system – I needed the job, my female superior was on his side, and I didn't think anyone else would believe me. (court employee)

### **Remedies for Sexual Harassment of Court Employees**

The primary structural barrier to investigating and combating sexual harassment in the court system is the lack of clarity regarding who has the authority and responsibility to do so. Court personnel in many cases are deemed to have different employers for different purposes. For example, individual judges hire and fire their own court reporters and law clerks. Thus, these court personnel are in some respects employees of an individual judge.

However, court reporters are also considered state employees for worker's compensation purposes, district court employees for salary purposes, and local court employees for purposes of certain working conditions.<sup>15</sup>

The confusion over the employee's identity results in confusion over responsibility for investigating sexual harassment complaints. In some cases, court personnel who have sexual harassment complaints against judges do not know whether the Chief Judge, District Administrator, or local administrator or some other county entity has responsibility for investigating the complaints.

Even if a court employee can identify the appropriate person to whom to report a sexual harassment complaint, the remedies may be limited if the complaint involves a judge. Neither the Chief Judge of the judicial district nor the District Court Administrator has the capacity to take formal disciplinary action against a judge or to provide alternative employment for a court reporter or law clerk who alleges the judge for whom he or she works has engaged in sexual harassment. The Chief Judge or District Court Administrator, as well as the complainant may, however, file a complaint with the Board of Judicial Standards. Even though the Board may take disciplinary action against a judge, it does not have the ability to provide alternative employment for court personnel.

The Conference of Chief Judges attempted to address these problems by approving a policy statement (April 10, 1987) declaring that it is the duty of the Chief Judge of each judicial district to establish detailed procedures to provide a mechanism for reporting and acting upon grievances brought by court employees. The policy statement also declared that the following hierarchy for reporting sexual harassment should be established: Court Administrator, District Administrator, Chief Judge, and Chief Justice.

The grievance and sexual harassment policies adopted pursuant to the Conference of Chief Judges statement vary widely. For example, in some cases the policies merely state to whom the sexual harassment complaint should be reported and that appropriate investigative and disciplinary action should be taken. Other policies include detailed statements of suggested methods of investigating such complaints, timetables for completing the investigations, and specific remedies that may be appropriate if sexual harassment is found.

Even in the districts that have detailed sexual harassment policies, it is not clear how these policies are coordinated with other grievance procedures provided by the counties or provided under collective bargaining agreements. Unionized court employees are represented by over ten different bargaining representatives. The courts do not participate in the collective bargaining process. County Board members or County Administrators often negotiate such agreements without input from court personnel. More coordination is needed between the procedures provided under collective bargaining agreements and court grievance procedures.

In most judicial districts the personnel responsible for implementing sexual harassment policies have received little or no training in investigating and handling such com-

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15 Judith Rehak, State Court Administrative Services Director, Charles Friedman, attorney representing a court reporter who brought a sexual harassment complaint and Mark Levinger, Office of Solicitor General, Attorney General's Office, all contributed information through interviews for this section.

plaints. Training is needed in order for investigators of complaints to identify what constitutes sexual harassment as well as to sensitize investigators to the special difficulties experienced by victims of sexual harassment.

### Findings

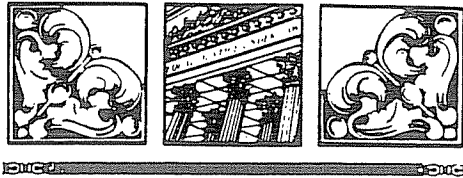
1. Although sexual harassment policies have been widely adopted throughout the court system, there is evidence that sexual harassment occurs at all levels and that some of it is unremedied.
2. Court personnel are more likely than other participants within the system to be subjected to sexual harassment. Some women attorneys are subjected to verbal sexual harassment by judges, but more often by other attorneys. There are reports of sexual harassment, both verbal and physical, by judges.
3. The present grievance system for sexual harassment complaints is inadequate in part because of the special vulnerability of court personnel, some of whom are employees at will, and because of the perceived power of judges which makes attorney victims fear negative consequences for themselves and their clients if they pursue complaints.

### Recommendations

1. The State Court Administrator should seek consultation with experts in sexual harassment policy development to establish a policy and grievance system which can work in a structure where there are people with unusual power and people with unusual vulnerability.
2. The variety of sexual harassment policies and disciplinary systems for different categories of court employees should be coordinated so that genuine remedies are available which satisfy the needs of the victims as well as protect the rights of those against whom accusations are made.
3. Court employees at all levels should be given specific training to assure that they understand what sorts of behaviors will not be tolerated and to encourage reporting of problems of sexual harassment.
4. The Canons of Judicial Ethics should be amended to prohibit sexual harassment.







## LOOKING FORWARD

This report represents the culmination of two years of effort on the part of the members of the Minnesota Gender Fairness Task Force. But in a very real sense, it is just the beginning of the Task Force's work. Ultimately, the value of the Task Force's contribution to the elimination of gender bias from Minnesota's courts, and to fair treatment for all of Minnesota's citizens in those courts, will be measured by future responses to the Task Force report, and especially to the Task Force's recommendations for change.

Recognizing this, the Minnesota Supreme Court has established a standing committee which will continue to exist after the Task Force has disbanded, and which has been directed to monitor implementation of the Task Force's recommendations. A copy of the Supreme Court order establishing this implementation committee is included in the Appendix.

The implementation committee will be chaired by the Honorable Rosalie E. Wahl, Associate Justice of the Minnesota Supreme Court, who also chaired the Gender Fairness Task Force. Members include several state district court judges, a member of the state legislature, the State Court Administrator, a social scientist and an attorney. The Director of Continuing Education for State Court Personnel and the Director of Continuing Legal Education for the Minnesota State Bar Association are *ex-officio* members. The committee will submit a yearly report to the Chief Justice and the Court.

The Court has specifically directed the implementation committee: 1) to work closely with those organizations which develop continuing education programs for judges and lawyers to ensure that gender fairness concerns are integrated into future programs; 2) to work with the office of the State Court Administrator to establish a permanent statistical data base that can be used to monitor the changes resulting from the Task Force's work; and 3) to evaluate the Task Force's overall effectiveness. These functions are all crucial to the committee's mission.

Equally vital to the success of the implementation committee's efforts, and to the overall success of the Task Force, are Minnesota's judges.

The Task Force recognizes that, as Norma Wikler and Lynn Hecht Schafran have emphasized in their evaluation of the work of the New Jersey Task Force, "eliminating gender bias from the courts is a long-term enterprise."<sup>1</sup> The Task Force's goals will not be achieved within the next year, or two years, or even within the next five years. But with the cooperation of a judiciary strongly committed, as Minnesota's most certainly is, to principles of equality and fair treatment, the ultimate success of this "long-term enterprise" is assured.

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<sup>1</sup> Learning from the New Jersey Supreme Court Task Force on Women in the Courts: Evaluation, Recommendations and Implications for Other States (October, 1988).