MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS

FINAL REPORT

SEPTEMBER 1989

In Memoriam

SUSANNE C. SEDGWICK

On April 8, 1988, during the course of the Task Force's work, we were deeply saddened by the death of our friend and Task Force Vice Chair Susanne C. Sedgwick.

Judge Sedgwick was a pioneer in the law throughout her career, having been Minnesota's first woman assistant county attorney, first woman lawyer elected to a judicial position, the first woman appointed to the district court, one of the first women appointed to the Minnesota Court of Appeals.

During her life Judge Sedgwick demonstrated a vital and continuing devotion to the welfare of the community through her work with the United Way, as a founding member of the Minnesota Women's Political Caucus, a founding member of the National Association of Women Judges, and participation in organizations throughout the community.

"Some leaders have a way of casting a shadow and those who follow walk in that shadow. But with Sue, we always walked in her sunshine."

The work of the Gender Fairness Task Force was the last work she laid down. This report is dedicated to her memory.

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And many thanks to the judges and lawyers who assisted in pretesting the surveys.

PREFACE

The work of the Minnesota Task Force for Gender Fairness in the Courts has culminated in this report to Chief Justice Peter S. Popovich. The Task Force was established by Chief Justice Douglas K. Amdahl and the Minnesota Supreme Court in June, 1987. Its work has been funded by the Minnesota Legislature, the loving friends of Judge Susanne Sedgwick, grants from the State Justice Institute and the Minnesota State Bar Foundation, and in-kind contributions.

The mandate of the Task Force has been to explore the extent to which gender bias exists in the Minnesota state court system, to identify and document gender bias where found, and to recommend methods for its elimination.

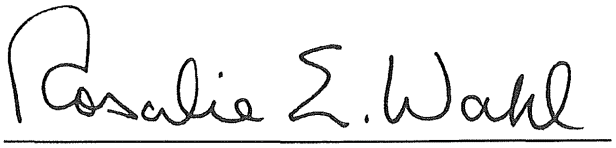
The thirty members of the Task Force, carefully chosen on the basis of ability, gender, and geographic location, represent the judiciary—sixteen members from all levels of the courts; the bar—eleven members including a law school professor, the state court administrator, and practitioners of family, juvenile, civil and criminal law; and three public members, including a social scientist skilled in data collection. The time, the talent, the expertise, the commitment and the enthusiasm of this incredibly hard-working Task Force could never have been purchased. Nor could the work of even so gifted a task force have been accomplished without the essential contributions of our staff director Mary Grau and members of the staff of the office of the State Court Administrator and the Supreme Court.

The work of the Task Force concerned the judicial system examining itself to determine whether gender unfairly affects the application, interpretation and enforcement of the law. To accomplish this purpose the Task Force, under the guidance of our consultant, Dr. Norma Wikler, gathered a great wealth of information and materials in a number of ways and from a number of sources: six public hearings and four lawyers' meetings around the state, surveys of lawyers and judges, a survey of court employees who spend at least part of their time in the courtroom, written comments from citizens throughout the state, and research projects and studies. All of this data was digested, analyzed, organized and discussed first by the substantive committees of the Task Force and then by the Task Force itself. From this data emerged the findings and recommendations adopted by the Task Force en banc.

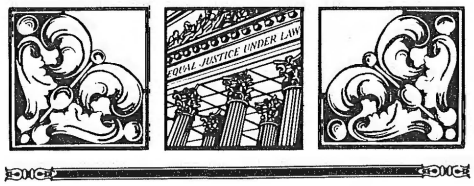
The entire process was educational but of particular note was the impact of the public hearings on the Task Force members. Each member sat for three hours a night at two or three hearings around the state. We heard much evidence from organizations and scholars. But most instructive and sobering was the experience of sitting and listening as ordinary, indeed extraordinary, citizens—women and men—came forward with great difficulty and obvious effort to share their agonizing experiences of how the court system had dealt with them and their perceptions of the quality of justice which had been afforded them. Thus did "some power the giftie gie us to see oursels as others see us" (Robert Burns).

This "gift" we now give back to the Supreme Court and Chief Justice Peter S. Popovich and the people of Minnesota.

We trust that through the continuing leadership of this court and its implementation committee, the increasing sensitivity of the bench and the support of the bar, the problems identified in this report will be addressed and resolved.



Rosalie E. Wahl
Associate Justice
Minnesota Supreme Court
Chair, Minnesota Task Force for
Gender Fairness in the Courts
June 30, 1989



INTRODUCTION

> What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias . . . (Learned Hand)

> "There are two principles," says Whitehead, "inherent in the very nature of things, the spirit of change, and the spirit of conservation." If life feels the tug of these opposing tendencies, so also must the law which is to prescribe the rule of life. (Benjamin Cardozo)

The Minnesota Task Force for Gender Fairness in the Courts was created by order of the Minnesota Supreme Court in June, 1987. Thirty judges, lawyers, and public members were appointed to the Task Force by the Chief Justice. The Task Force conducted a two-year internal evaluation of the courts to determine whether gender bias affects the fairness of Minnesota courts.

The Task Force relied on qualitative data gathered at a series of public hearings, meetings with lawyers, written comments, relevant literature, and expert studies commissioned on particular issues. The primary sources of quantitative data were surveys of lawyers, judges and court personnel. The Task Force's information-gathering methods are set out in more detail in the Appendix.

The cooperation of Minnesota judges, attorneys, and court personnel in completing the Task Force surveys was of enormous help in meeting the Task Force mandate. The return rate for the surveys was considerably greater than those in other states that have engaged in similar efforts. The lawyers' survey questionnaire was sent to all registered attorneys in the state, numbering about 13,000. A smaller sample was randomly selected, prior to mailing, for statistical analysis. The return rate for the selected sample was 83.5%, with all categories (metropolitan area and Greater Minnesota, male and female) returning at least 82%. One factor in this return rate was the effective cover letter written by then-Chief Justice Douglas K. Amdahl to encourage participation.

The Task Force judges' survey was sent to all 281 judges in the state. The return rate of 93% indicated a significant commitment by the judiciary to this inquiry. The same was true of court employees, whose response rate to their survey was 87%.

Expectations and Surprises

The Task Force investigation of gender issues was a voyage of discovery for all its members and staff. While the question of gender bias proved to be as significant as the Task Force had expected, some other areas the Task Force originally set out to explore proved to be less significant than the experience of other states and the preliminary data had led the Task Force to expect. The Task Force investigation in the areas of sexual assault, sentencing, civil justice, and family law opened unforeseen issues and demonstrated the inaccessibility of data in some areas.

The Civil, Criminal, and Juvenile Justice Committee of the Task Force found, for example, that contrary to expectation, sexual assault in the form of "stranger rape" – assault by a person entirely unknown to the victim – is well-reported in Minnesota, and the victims are treated with some respect in the court system. Rape by a person known in some way to the victim, however, is a major problem as to both reporting and treatment of the victim by the courts. According to the Task Force study, judicial procedures for handling "acquaintance rape" promises to be one of the major issues with which the legal system must learn to deal effectively and with fairness to the victim.

Similarly, while the state's domestic abuse statutes were determined, as expected, to be among the most progressive in the country, investigation revealed a weakness in enforcement of civil Orders for Protection that had not been systematically discussed up to now.

On the other hand, while felony sentencing was suspected to be an area in which gender disparities would become evident, the practices under the state's sentencing guidelines appear to be gender-neutral. And in family law, the area of property division, which has been a major issue in other states, proved to be one in which our courts have treated both female and male parties fairly by regarding the contributions of the spouses to marital property as essentially equal regardless of who has generated income.

In several areas of civil justice, suspected issues proved to be almost impossible to document. Information about gender disparities in civil damage awards, based on under-valuation of women's economic contributions or potential, either is not regularly compiled or is held by inaccessible private sources. Unfair treatment of women who assert personal injury claims pertaining to birth control devices or similar gender-specific injuries, in the form of unnecessary questioning about personal history and practice, could be documented, if at all, only by mounting a case-by-case investigation beyond the resources of this Task Force. And treatment of female litigants with employment discrimination claims is not intensively documented at the state court level because most such claims are heard administratively or in federal court.

What We Heard

A primary concern of this Task Force, confirmed by the data, is the necessity that the legal system treat women and women's concerns as seriously as men and men's concerns

are treated. This issue of equal credibility before the law was raised consistently by witnesses at the public hearings, attorneys speaking at attorney meetings and in written commentary, written submissions from members of the public, and survey responses.

Family law practitioners reported that the failure to fully consider women's socioeconomic circumstances results in inconsistent tendencies to overvalue traditional female roles when granting child custody and then to underestimate the financial needs and employment constraints on women moving from traditional roles to economic independence. Female litigants in divorce and domestic abuse cases testified that they felt the court did not treat their testimony with seriousness or did not value the time and effort required to pursue claims that would have been unnecessary if the men involved in these actions were held to their legal obligations. Lawyers and domestic abuse advocates suggested that the emotional stress of the victim seeking a domestic abuse Order for Protection sometimes appears to be underestimated or dismissed by court personnel and judges.

In the criminal justice context, the data suggested that women's credibility as witnesses in rape cases is harshly questioned if they were even minimally acquainted with the alleged perpetrator. Juvenile females appeared to be taken less seriously as individuals capable of regulating their actions than juvenile males, as evidenced by rates of detention for status offenses.

Both attorneys and judges reported courtroom and chambers incidents and attitudes that, while not necessarily representative of a majority attitude, suggest that women litigants, witnesses, and attorneys face credibility issues that men do not. Disrespectful forms of address, inappropriate comments on dress, marital status or parental roles, and sexual harassment undermine women's credibility and effectiveness.

What We Learned

Lawyers are trained to understand that perception has an enormous effect on our comprehension of the world. People tell the truth about their experience as they perceive it. It is commonplace in the profession that witnesses' versions of events may differ in important details even when they are telling the truth about their observations.

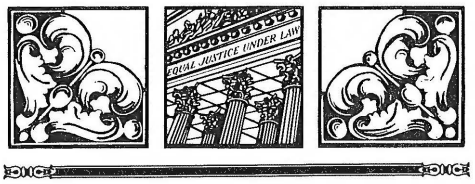
The answers of female and male attorneys and judges to some of the questions on the Task Force surveys indicate a significant difference in the perceptions of women and men as to the treatment of women in the judicial system, the courtroom, and the legal profession. For example, half of the male attorneys but only 9% of the female attorneys said that they had never seen gender bias exhibited in the courtroom. Similarly, in response to a question about attorneys' perceptions of gender bias against women in the Minnesota courts at the present time, 48% of the female attorneys, but only 10% of the male attorneys, said that gender bias in the courts is widespread but subtle and hard to detect, while 63% of the male attorneys, but only 45% of the female attorneys, thought that gender bias exists only with a few individuals in isolated instances.

The failure of men to notice as many incidents of gender bias as women notice may be the result of differing perceptions or the result of women's experience in courtroom and professional transactions. Women are not "observers" of bias in the way that men may be.

Both may be participants in acts of bias, but women are more likely than men to be its unwilling participants.

Irrespective of any factors of perception, the Task Force found much evidence of gender bias that is concrete and difficult and must be addressed in order to insure fairness in our judicial system. This evaluation was undertaken as a commitment to our judiciary. The examples of problems found in this study are offered in the spirit of change, which Benjamin Cardozo recognized as an integral part of the legal landscape. They are also included to help us understand and, as Learned Hand would urge us, to see a little farther.

The following topical sections discuss those gender issues that the Task Force determined to be the most significant at this time in the Minnesota courts. Out of thousands of pages of documentation, preliminary findings, and committee reports, this is the material that has remained the most challenging, conclusive, and compelling.



FAMILY LAW

Introduction

For many Minnesotans, the only contact they will have with the state's judicial system occurs at the time of divorce. The decisions that judges make in family law cases have a profound and lasting impact on the daily lives of the men, women and children who appear before them. In public hearings conducted by the Task Force, family law was the number one area in which concerns were voiced. And in the Task Force survey, a significant proportion of Minnesota lawyers report family law as part of their practice.

The Task Force examined judicial decision-making in the areas of spousal maintenance, property division, child support, custody determinations and access to the courts. A number of different data sources were used to investigate these issues. Both the judges' and attorneys' surveys contained questions on family law issues. Witnesses at each of the Task Force's public hearings spoke about family law topics. Witnesses included representatives from the Minnesota Child Support Commission, the Hennepin County Bar Association Family Law Section Executive Committee, the Minneapolis Legal Aid Society, and programs for displaced homemakers and fathers' rights groups. A number of individual men and women also testified about their personal experiences in the family court system. At the lawyers' meetings, attorneys reported observations about their experiences representing clients in family law matters.

The Task Force also received reports from Professor Kathryn Rettig of the University of Minnesota Department of Family Social Science, from Alice Berquist, an attorney who also has an adjunct appointment at William Mitchell College of Law, and from the Minnesota State Bar Association Committee on Legal Assistance to the Disadvantaged (LAD). Professor Rettig, together with Lois Yellowthunder, is conducting a longitudinal study on the economic consequences of divorce in Minnesota. Preliminary results of the study's first phase, which involved an examination of the court files in 1153 cases in which divorces were granted in Minnesota during 1986, were made available to the Task Force. (This study will be referred to throughout this report as the Rettig study.) Ms. Berquist reviewed the cases decided by the Minnesota Court of Appeals during 1987 in the areas of spousal maintenance, child support and custody. The LAD committee study addressed the availability of legal representation in the family law area for Minnesota's low income citizens.

SPOUSAL MAINTENANCE

Spousal maintenance is ordered much less frequently than most people, including lawyers, generally assume. Its significance as a gender issue is much greater than its incidence might indicate, however, because the questions involved in determining maintenance awards are pointedly representative of issues that affect women in every aspect of family law: credibility, trivialization of their circumstances, and access to justice.

Permanent Maintenance

In 1986, maintenance was awarded in only ten percent of Minnesota divorces, according to preliminary findings of the Rettig study. Permanent maintenance was awarded in only four (less than one-half of one percent) of the cases in the sample. These numbers are lower than the national figures, which indicate that in 1985 approximately fifteen percent of all divorced women were awarded maintenance.[1]

Minnesota family law attorneys have concluded that permanent maintenance is so difficult to obtain that they come close to dismissing it as a possibility. A male lawyer from Greater Minnesota wrote on the Task Force lawyers' survey that in his practice "no judge has awarded permanent maintenance in the past six years." A representative from Minnesota Women Lawyers testified in a public hearing that an informal survey of women lawyers conducted several years ago found that permanent maintenance was difficult, if not impossible, to obtain, even in long-term marriages. And a female lawyer noted on the attorneys' survey that "male judges have very little idea how difficult it is for a woman who had previously been a homemaker to get a good job; it's particularly difficult to get permanent maintenance."

Furthermore, when maintenance is awarded in Minnesota, it is rarely high enough to allow the economically dependent spouse, who in the great majority of cases is the woman, to maintain her previous standard of living. As family law practitioners see it:

> Older women are left with enough to sustain and not to maintain a lifestyle – many women settle for a smaller amount because they are unable to afford to contest the issue. (Rochester lawyers' meeting)
>
> It's very hard to get more than nominal amounts in support, even for people who've been out of the labor force for ten years or more. (St. Cloud lawyers' meeting)

"Rehabilitative" Maintenance

The rationale for an award of rehabilitative or short-term maintenance lies in the statute, which provides that one of the factors to be used in determining awards shall be

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1 U.S. Department of Commerce, Bureau of the Census, Current Population Reports: Child Support and Alimony: 1985.

the amount of time required for the economically dependent spouse to become self-supporting.[2] The evidence presented to the Task Force, however, showed that where rehabilitative maintenance is awarded, the awards are rarely sufficient in either amount or duration to adequately provide for education or training for the economically dependent spouse.

"Rehabilitative" is an unfortunate and limiting label for an award designed to help the economically dependent spouse move forward into a new stage of life. The term carries the connotation that a married woman – and it is usually women who receive it – has been disabled by the marriage and needs rehabilitation to become a productive member of society, a concept that demeans both marriage and women. It also suggests that there is a specific point at which one can be pronounced "rehabilitated," when in reality, a person may never totally recover economically from spending many years outside the paid labor force. If the purpose of short-term maintenance is to help people become economically independent, the goal is not well served by characterizing it as rehabilitation.

The phrase "short-term maintenance" also is problematic. When this term is used, judges tend to underestimate the period of time required for the financially dependent spouse to adjust and re-educate or become employed.

Statewide, male and female lawyers practicing in the area of family law agree that maintenance awards are inadequate. Of the respondents to the lawyers' survey, less than half of the men and only 11% of the women think that in awarding rehabilitative or short-term maintenance judges commonly have a realistic understanding of the likelihood of the economically dependent spouse finding employment. Over 60% of the male lawyers, and 90% of the female lawyers, believe that short-term maintenance awards usually are not sufficient to allow for education or training.

> One of the most difficult problems is that of women who have been in twenty year marriages, have high school educations, have been homemakers, and whose husbands can earn $30,000 at the time of divorce. Generally, she will not get more than two to three years of rehabilitative spousal maintenance because she is young (less than 45 years of age) and "employable," despite the fact that she will be earning minimum wage and can never reach parity for years lost in the labor market. (Female attorney, Twin Cities)

> Rehabilitative maintenance is a rather meaningless concept where the husband's income is not substantial. The wife does not receive an amount sufficient to allow any meaningful rehabilitation. She simply goes out and gets a job, any job. I think its "gender bias" for the system to hide behind this label as though we were giving her some golden opportunity to pursue an education. (Male attorney, Twin Cities)

Another male practitioner described what happened recently to one of his clients:

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2 M.S.A. § 518.552, subd. 2(6) (1988).

> I had a couple that were married for thirteen years with a yearly marital income of $54,000 per year. I represented the wife, 41 years old, who was a traditional homemaker the last three years of marriage. Wife was given a property settlement of $18,000 and rehabilitative maintenance for 2 years at $300 per month. Husband was given the house and lake cabin and wife was forced to live a much lower standard of living while she attempted to go back to school. Incidentally, the wife never graduated from high school. (Male attorney, Twin Cities)

The perception that maintenance awards are too low and are issued for unrealistically short periods of time is confirmed by data from the Rettig study: researchers found the median amount of maintenance in Minnesota to be only $250 per month ($3,000 annually), with a median duration of three years. The Minnesota figures fall below the (1985) national average of $3,730 per year.[3]

Judicial Attitudes Toward Maintenance

The Task Force received a substantial amount of testimony suggesting that maintenance awards are inadequate because Minnesota judges do not have an accurate perception of the earning capacity and educational needs of women who have been out of the paid labor force for a significant period of time.

A majority of both male and female lawyers in the state think that, in considering permanent maintenance, judges lack a realistic idea of the likely future earnings of a homemaker who has not worked outside the home for many years; in the lawyers' survey, only 42% of the men and 21% of the women reported that judges always or often understand the economic realities facing these women. A number of witnesses at the public hearings and lawyers' meetings also told the Task Force that judges seem to lack a full understanding of economic reality.

It appears from the judges' survey data, however, that judges may have a better understanding of current economic realties than might be concluded from looking at maintenance awards. In the survey, judges were asked to estimate the likely earning capacity of a 50-year-old homemaker with a high school degree who had been out of the labor force for 25 years. Forty-six percent of the male judges and 39% of the female judges responded that this woman would be able to earn less than $10,000 per year. Another 43% of the male judges and 61% of the female judges thought her earnings would be between $10,000 and $15,000 per year. Only 11% of the male judges, and none of the female judges, thought that the woman was likely to earn more than $15,000 per year.

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3 U.S. Department of Commerce, Bureau of the Census, Child Support and Alimony: 1985.

These responses are generally in line with the most recent available Census Bureau data on earnings. According to the data, in 1987 the median income of all U.S. women between the ages of 45 and 64 was $11,219 per year. For women between the ages of 55 and 64, the median yearly income dropped to $7445.[4]

Judges also were asked to answer a hypothetical question about the length of time necessary for retraining of a 42-year-old homemaker with a non-specialized B.A. degree who had never held a job outside the home. Although there were some differences between the responses of male and female judges, a majority of both women and men felt that the period for retraining would have to last four or more years in order to be considered adequate. Fifty-three percent of the male judges and 70% of the female judges were of the opinion that the woman would need at least four years for retraining.

In the hypothetical questions, judges also were asked what additional factors they take into account in determining maintenance. Although most judges mentioned more than one factor in their responses to this question, very few indicated that they would consider all of the statutory factors which must be taken into account in determining maintenance. This tendency to focus on one or two of the statutory maintenance factors underscores a need for more complete findings in dissolution decrees.

The Rettig study indicates that maintenance awards do not reflect the apparent judicial awareness of the economic plight of the long-term or marginally employed homemaker facing a divorce. For example, the median duration of a maintenance order in Minnesota is three years, while a majority of the state's judges think that a minimum of four years is necessary in most cases to allow for adequate training.

One theme recurring in testimony about maintenance was expressed this way by an attorney at the Twin Cities lawyers' meeting:

> The concept of how much money it takes to be self-supporting is different for women and men. Women are expected to be self-supporting on less income than men would be.

A female judge wrote to the Task Force to say that in her experience some of her fellow trial court judges

> are of the opinion that a 47-year-old woman, who has been a homemaker for over 20 years, should be satisfied if she can, after a period of retraining and on the job experience, obtain a job which requires 40 hours of work on a $20,000 salary—this perception of what her level of expectation should be seems to obtain even where her husband had been, throughout the marriage, earning upwards of $100,000 or $200,000 annually.

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4 In contrast, the median yearly income for all males was $17,752, and for men between 45 and 54, it was $28,685. Female workers with a high school education had a median yearly income of $8,954. These figures are from the U.S. Department of Commerce, Bureau of the Census, Current Population Reports, Money, Income of Households, Families and Persons in the United States: 1987. Median is the middle value when a set of scores is ranked from high to low.

Several men expressed the opinion that maintenance awards, especially long-term awards, are not fair to the man:

> Suppose that after supporting the traditional mother and children for twenty years, the traditional father finds that his wife . . . wants a divorce . . . the father will end up paying alimony for the rest of his life. This doesn't seem to be fair treatment of a person who has supported his wife for twenty years, particularly where spousal maintenance is awarded without fault. (Male attorney, Twin Cities)

These attitudes about maintenance are demonstrated graphically in the cases appealed to the Court of Appeals in 1987 on maintenance issues. Nineteen of the 37 appeals from dissolution orders were by husbands, a substantial number of whom were appealing awards that left the wife, and frequently the wife and minor children, with a lower monthly income than the husband. In a substantial number of the cases appealed by wives, the circumstances were similar. Well over half of the judgments were upheld as within the discretion of the trial court (several were remanded for further findings; only a few were reversed).

Given the broad discretion of the trial court in determining maintenance issues, trial courts must exercise care not to act on unacknowledged assumptions that women need less to live on than men or that maintenance awards are a division of "his" income rather than a sharing of family resources to help the economically dependent spouse through a period of economic adjustment.

This point of view is suggested in the concern articulated at the Duluth lawyers' meeting that "in attempting to treat people equally, there has developed a reluctance to impose long-term obligations on males." A lawyer attending the St. Cloud meeting concurred. She testified that in her experience, the judge's attitude towards maintenance was often, "okay, you want to be equal, so now be equal," resulting in denial of maintenance.

Data presented to the Task Force do not support the perception that the husband suffers at the expense of his former wife when he is ordered to pay maintenance. Quite the contrary appears to be true. Lenore Weitzman did much to raise the nation's consciousness on this point with her finding that in California, the standard of living of the female spouse and children decreased by 73% in the first year after divorce, while that of the male increased by 42%.[5] Studies in other states also have demonstrated that after divorce, the standard of living of the man increases, while that of the wife and children

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5 L. Weitzman, The Divorce Revolution, xii (1985).

declines.[6] The preliminary data from the Rettig study confirm that this pattern holds in Minnesota as well.

The reluctance to impose long-term financial obligations on men is illustrated by a series of Minnesota Supreme Court cases dealing with spousal maintenance. In Otis v. Otis,[7] the court affirmed a trial court award that limited maintenance to four years for a woman who was 47 years old and had not worked outside of the home for more than 20 years. At the time of the divorce, the husband's annual salary was over $120,000.

The Otis decision appeared to conclude that legislative provisions enacted in 1978 intended maintenance for rehabilitative purposes only. The legislature responded by amending the maintenance statute in 1982 to make it clear that this was not the case. However, in 1984, the Court decided two companion cases, Abuzzahab v. Abuzzahab[8] and McClelland v. McClelland,[9] which revealed its continuing preference for rehabilitative over permanent maintenance. In these cases the Court reversed trial court awards of permanent maintenance to two homemakers in their mid to late forties, each of whom had been married for over 20 years. In a dissent, two justices pointed out the purpose of the spousal maintenance law:

The legislature intended permanent maintenance to be, not a "lifetime pension" in every case, but an option in those cases where the earning capacity of a long-term homemaker has become permanently diminished during the course of marriage. (Abuzzahab, at 18.)

The legislature responded by adding further language to the statute, making it clear that any questions about the appropriate duration of a maintenance award were to be resolved in favor of permanent maintenance. Finally, in a recent case, Nardini v. Nardini,[10] the Court has adopted this position. In that decision, the Court reversed an order of short-term maintenance for a 50-year-old woman who had been married 30 years and remanded the case to the trial court with instructions to award permanent maintenance. Several witnesses appearing before the Task Force expressed the hope that the Nardini decision would result in an increase in the number of permanent maintenance awards in Minnesota. Only a dramatic change in the courts' approach to all maintenance issues, however, will increase the number, duration, and amount of maintenance awards.

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6 McLindon, Separate but Equal: The Economic Disaster of Divorce for Women & Children, 21 Family Law Quarterly (Fall 1987)(New Haven, Connecticut); Wishik, Economics of Divorce, An Exploratory Study, 20 Family Law Quarterly (Spring 1986)(Vermont); Bell, Alimony & the Financially Dependent Spouse in Montgomery County, Maryland, 22 Family Law Quarterly (Fall 1988); McGraw, Stein & Davis, A Case Study in Divorce Law Reform and Its Aftermath, 20 Journal of Family Law 443 (1981-1982)(Ohio); B. Baker, Family Equity at Issue: A Study of the Economic Consequences of Divorce on Women and Children (October 1987) (available from the Alaska Women's Commission).

7 299 N.W.2d 114 (Minn. 1980).

8 359 N.W.2d 12 (Minn. 1984).

9 359 N.W.2d 7 (Minn. 1984).

10 414 N.W.2d 184 (Minn. 1987).

Findings

1. Spousal maintenance is rarely ordered in Minnesota, even in long-term marriages.
2. When maintenance is awarded, it may sustain the economically dependent spouse at a minimal level but generally does not permit that spouse to maintain a previous standard of living.
3. Courts are reluctant to impose long-term maintenance obligations.
4. Maintenance awards are not sufficient in duration or amount to adequately provide for education or training of the economically dependent spouse.

Recommendations

1. Judicial education courses and continuing education courses for lawyers in family law should address spousal maintenance. These courses should contain: 1) information about the economic realities faced by women attempting to reenter the labor market after extended absences, including practical exercises dealing with spousal maintenance determinations; and 2) information emphasizing the need to make specific findings on all of the factors which state law requires courts to consider in awarding maintenance.
2. Courts should discontinue the use of the terms "rehabilitative" or "short-term" and adopt the term "maintenance" as standard usage.

PROPERTY DIVISION

Minnesota law requires that marital property be distributed equitably upon divorce. The Task Force found that, by and large, equitable distribution works well in the state, with courts usually achieving close to a 50-50 division of the marital assets. This differentiates Minnesota from those states in which statutorily mandated "equitable" property distribution has not been interpreted to result in equal distribution.

Problems which have been identified in other states, such as the failure to properly value and apportion pension benefits, do not appear to arise with any frequency in Minnesota. And, although exceptions exist, most Minnesota judges appear to recognize that under state law the efforts of a homemaker spouse must be treated as a contribution to the marital estate.

Judges were asked on the survey whether the husband's income producing contribution entitled him to a larger share of the marital property than a spouse whose primary contribution to the marriage was as a homemaker. Eighty-nine percent of the male judges and 95% of the female judges responded that this should rarely or never happen. Judges were also asked whether, when one spouse has built and run a privately owned business during the marriage, the contribution of the homemaker spouse should be considered a contribution to the business. Ninety percent of the male judges and 100% of the female judges reported that it should be.

The Task Force found that while property is divided equally in most cases, the nature of the property division, with the wife usually receiving the home or non-liquid assets, and the husband receiving the majority of the couple's income-producing assets, can create inequities.

A judge with experience in family law emphasized the difficulties encountered by women who do not have access to liquid assets while the dissolution is pending:

The perception that a man can manage the parties' assets more appropriately during the pendency of a dissolution proceeding works against a preliminary distribution to the woman so that she can, for example, pay her own attorney's fees, invest and manage her own portion of the estate, etc.

Of course, in many cases the wife, as the parent who most often has custody of the children, wants the house and plans to remain there, if she can, until the children are grown. And many couples do not have substantial liquid or income-producing assets. However, where cash or other liquid assets and income-producing property do exist, the Task Force believes that judges should be encouraged to divide it so that each of the parties have some liquid assets, both while the dissolution is pending and after divorce.

Finding

While property is divided equally in most instances, the nature of the property division, with the husband receiving the majority of the liquid and income-producing assets, can create inequities.

Recommendation

Judicial education programs should address the need for judges to divide marital property so that each of the parties retains some liquid and income-producing assets after divorce.

CHILD SUPPORT

Minnesota established statewide guidelines for the payment of child support in 1983.[11] Uniform guidelines represent a legislative effort to improve the financial well-being of the children of divorce and to bring increased consistency and fairness to the system.

The guidelines call for the non-custodial parent to pay a percentage of net monthly income as support, with the percentage increasing as the payor's income and the number of children to be supported increases. Payors with net monthly incomes over $4,000 pay no more support than those at the $4,000 level unless, as rarely happens, the court justifies a higher award.

Although there is general agreement that use of the guidelines has resulted in more consistent awards, it is clear that the goal of improving the financial well-being of children has not yet been reached. The Task Force found compelling evidence that custodial parents in Minnesota, who are most often women, and their children, often face a bleak financial future after divorce.[12]

The Child Support Guidelines

The Task Force found that the payment levels established by the guidelines are not high enough to provide adequately for the support of children. Testimony presented to the Task Force by Nancy Jones, an assistant Hennepin County attorney and staff attorney to the State Child Support Commission, indicated that Minnesota's guidelines are significantly lower at both the low and high end of the payor's income range than the guidelines of other states. Ms. Jones also testified that under the Minnesota guidelines, the percentage of the non-custodial parent's monthly income that is paid in support is far less than the percentage of income that parent would have been expending on the children if the family had remained intact.

The inadequacy of the dollar amounts of the guidelines is aggravated by the fact that in some cases Minnesota judges are not even ordering support at guideline levels. Ms. Jones testified that a 1985 study performed by the State Child Support Commission in conjunction with the office of Senate Counsel found that, while most judges issued support

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11 See Minn. Stat. § 518.551 (1988). The 1983 statute was based on guidelines that had been developed several years earlier for use in cases where the custodial parent received Aid to Families with Dependent Children.

12 Women received sole physical custody of the children in 81% of the divorces analyzed in the Rettig study.

at the guidelines amount, the most common deviations were downward. The preliminary findings of the Rettig study confirm this.[13]

Families with comparatively high pre-divorce incomes appear to be the most severely affected by downward deviations from the guidelines. The Rettig study researchers identified a pattern in which the extent of the downward deviation increased as the payor's income level increased. They found, for example, that where the payor's net monthly income was $4,001 or above, the average deviation downward from the guidelines was $434 per month. Where the payor's income was between $3,001 and $4,000, the downward deviation was $145. By way of comparison, where the payor's net monthly income was between $1,500 and $2,000, the average downward deviation was $22.[14]

A number of witnesses at the public hearings and lawyers' meetings, and in written comments submitted to the Task Force, attested to the inadequacy of child support orders. A male family law practitioner commented:

> judges and referees have a tendency to blindly follow the guidelines . . . the result is that the mother gets less child support than is appropriate and the burden is much less on the father who is able to pay. (Male attorney, Twin Cities)

A prosecutor from southeastern Minnesota said at the Rochester lawyers' meeting that in four years of prosecuting child support cases she estimated that downward departures occurred in approximately one in every five cases; she had never seen a judge deviate upward. A custodial mother of two children told the Task Force that she had received no child support for seven years, and then received an order of $275 per month when the guidelines called for $700. She said that her ex-husband has a higher monthly income than she and the two children combined.

A family law practitioner testified that one of the reasons for low child support awards was that judges too often address the problem from the non-custodial parent's point of view. They look primarily at what they think the non-custodial father can pay, regardless of the needs of the custodial mother and children. A family court judge in the metropolitan area told the Task Force that in her experience

> these gender-based stereotypes influence child support awards and skew them unfairly against custodial parents:
>
> a) a working man needs a certain basic level of income in order to provide clothing, a car, etc., commensurate with his position in the work force; and

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13 The Rettig study determined that the median child support award in Minnesota for 1986 was $300 per month; the median number of children in the sample was two. This represented an average overall discrepancy downward from the guidelines of $15 per month. Eighty-two cases in the sample specifically mentioned deviation from the guidelines in the court records; of these, 17 cases involved an upward deviation and 65 cases involved downward deviations. In those cases where the amount of child support was a contested issue ultimately resolved by the judge, the median child support award was $317; this represented an average deviation downward from the guidelines for this population of $158 per month.

14 The sole departure from this pattern occurred in cases where the payor's net monthly income was between $2,001 and $3,000; for these cases there was an average deviation upward of $4.

> b) a man is not handy in the kitchen, therefore he needs between $200 and $300 a month for food for himself alone; on the other hand, a woman and her two or three or more children can survive on the same or a lesser amount of food because she knows how to make things stretch in the kitchen.

Judges' survey responses suggest that they see themselves as more willing to deviate upward from the guidelines than attorneys think they are, or than the Rettig study suggests.

TABLE 1.1
UNDER WHICH OF THE FOLLOWING CIRCUMSTANCES WOULD YOU DEVIATE UPWARD FROM THE CHILD SUPPORT GUIDELINES

	Judges	
	Male	Female
1. When the income of the non-custodial parent allows it?	70%	82%
2. When the child has special needs?	95%	95%
3. To cover day care expenses?	43%	68%
4. If the standard of living of the parties warrants it?	3%	9%
5. If the parties agree?	2%	5%

However, when asked to estimate the percentage of cases in the last two years in which they had actually deviated upward from the guidelines, the majority of Minnesota judges – both male and female – said that they had done so in less than 5% of the cases.

The reluctance of judges to deviate upward is especially disturbing in light of the legislative purpose of the statute. The guidelines were intended to be used as a floor for setting support levels, not as a ceiling. They were designed to create a minimum rather than a maximum level of obligation for non-custodial parents.[15]

The Effect of Inadequate Awards

The most serious consequence of inadequate child support awards is the severe economic dislocation that results for women and children after divorce.

> The custodial parent (usually female) definitely gets the short end of the stick financially. For example, a father takes home $1,500 monthly and the mother takes home $500 monthly. This average family with two children have $2,000 a month to support 4 people ($500 per person). Now the parents divorce, mom gets the kids, child support is set in accordance with the guidelines of $450 per month. Dad now has $1,050 for him-

15 Johnson, Do Minnesota Child Support Guidelines "Support" Children, 3 J. L. & Inequality, 357, 358 (1985).

> self. Mom and the kids live on $950 a month for the three of them. If she has the option of working more hours, she also pays increased child care costs. (Female attorney, Greater Minnesota)

Data from the Rettig study on the economic consequences of divorce also support the finding that women and children in Minnesota suffer financial hardship after divorce at a greater rate than men. The Rettig researchers compared post-divorce incomes of custodial and non-custodial parents to U.S. poverty level figures using the median amounts for net yearly income and child support found in their study. They determined that after divorce, if the non-custodial father pays the support as ordered, the income of a typical custodial mother of two children in Minnesota is 1.45 times the poverty level, while that of the non-custodial father is more than double the poverty level:

TABLE 1.2
INCOME EQUIVALENCE OF HOUSEHOLDS BASED ON
MEDIAN INCOMES AND ACTUAL CHILD SUPPORT AWARDS
FOR 1986 MINNESOTA DISSOLUTIONS, SOLE PHYSICAL CUSTODY

	Custodial Parents	Child Support Obligors
Yearly Net Income	$9,600[a]	$14,442b
Yearly Child Support Awards	+$3,600[c]	-$13,600
Post Divorce Net Income After Transfer	$13,200	$10,842
Poverty Level (1986)	$9,120 (3 persons)	$5,360 (1 person)
Ratio of Income to Needs:[d]	$\frac{\$13,200}{\$9,120} = 1.45$	$\frac{\$10,842}{\$5,360} = 2.02$

[a] = 420 cases
[b] = 504 cases
[c] = 495 cases
[d] = poverty level, 1.25 = near poor

The Rettig study also indicates that failure of the guidelines and divorce decrees to deal with factors such as post-secondary education, dental care, and verification of health coverage, results in a situation where these costs are often borne by the custodial parent, which serves to widen even further the gulf between the parties' post divorce standards of living.

The Special Problems of Low Income Parents

Low income custodial parents face additional disadvantages in establishing child suppport. At the St. Cloud lawyers' meeting witnesses told the Task Force that when a custodial parent receives Aid to Families with Dependent Children (AFDC) it is easy for the other parent to negotiate a low child support award. When these custodial parents stop receiving public assistance they are left with the bare minimum in support. A practitioner

from the Twin Cities metropolitan area described an experience that he had with a client with five children receiving AFDC:

> The judge in chambers at the temporary hearing expressed the fact that the poor husband could not afford to pay even though he had a good job with the state. The judge said he was not going to award temporary support because the mother was on AFDC so was getting money already and didn't really need the money. (Male attorney, Twin Cities)

This attorney also noted that the judge told the husband's counsel in chambers that "women are always whining about something."

The Concerns of Non-Custodial Parents

Members of groups representing non-custodial parents, including R-Kids and Divorce Reform, Inc., contended at the public hearings that Minnesota's child support guidelines are too stringent and that the duty to support children after divorce falls disproportionately on non-custodial fathers. The evidence presented to the Task Force demonstrates that this is not the case; that in fact, it is custodial parents who have been assuming more than their share of the financial burden of caring for children once the family is no longer intact. In a comment addressed to attempts by certain groups to reduce the guidelines, a family law practitioner from rural Minnesota stated:

> The legislature . . . is being pressured to undo what the guidelines have provided and this is unfortunate, because women and children still do not receive fair treatment in child support cases. (Male attorney, Greater Minnesota)

Child Support Enforcement

The plight of custodial parents and children after divorce is further exacerbated by the fact that courts are too often inconsistent and unfair in their enforcement of child support awards.

Nancy Jones of the State Child Support Commission testified that nationally, less than 50% of custodial parents receive their court ordered support and that within Minnesota, local child support agencies have reported collecting support in approximately 40% of their cases. Mandatory automatic income withholding of child support will be implemented by November of 1990 in Minnesota for all cases in which the child support enforcement agency is collecting support. In addition, federal law requires the implementation of mandatory withholding for all child support cases statewide by January 1, 1994. These measures will go a long way toward ameliorating the problems that occur when non-custodial parents do

not pay their support. However, a number of witnesses testified that child support enforcement is especially difficult when the payor is self-employed. For these parents, automatic wage withholding may never be a viable option and custodial parents will continue to rely on the courts' enforcement powers.[16]

Witnesses at the public hearings and lawyers' meetings told the Task Force that the courts are too reluctant to use contempt to enforce support orders, that stays and continuances are too easy to obtain, and that judges may find non-paying parents in contempt but often balk at incarceration.

A participant in the Twin Cities lawyers' meeting commented:

> There is an unwillingness to use the contempt sanction where appropriate and a reluctance to use remedies, such as the appointment of special masters and sequestration of assets, that would routinely be considered in other civil matters.

Another lawyer attending the meeting emphasized that when judges do not enforce child support orders aggressively they give non-paying parents the message that child support is not the kind of obligation that needs to be taken seriously, and that this encourages some to defy the system.

The survey data reinforce the view of those who do not believe that support orders are adequately enforced. Only 28% of the male lawyers and 6% of the female lawyers responding to the survey think that judges always or often jail non-payors of support.

A former family law practitioner commented on the survey:

> One of the reasons I got out of family law was because I didn't enjoy working in an area where the clients, most of mine were female, were starting out at a disadvantage because of their sex. I had at least seven clients forced onto AFDC because of the courts' unwillingness to use their enforcement powers. It became too disillusioning to continue to watch. (Female attorney, Twin Cities)

Another lawyer wrote:

> One client's ex-husband refuses to pay child support. In the past three years we have brought six contempt motions. He has never been penalized, never ordered to pay attorney fees, but merely given extra time to pay or had his arrearage amount reserved. He now has close to $3,000 in arrearages reserved, but no judge will reduce the amount to judgment for

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16 Minnesota's judges are enthusiastic supporters of automatic wage withholding. On the survey, 74% of the male judges and 77% of the female judges agreed with the statement, "mandatory income withholding for those ordered to pay child support is a good policy." This appears to contrast sharply with the attitudes of the state's family law attorneys. Only 19% of the male attorneys and 20% of the female attorneys said that they always or often encourage their clients to use wage withholding where it is not mandatory. Fifty-nine percent of the male lawyers and 48% of the female lawyers said they rarely or never do so.

> collection and no judge will jail him. There are three children involved. (Female attorney, Twin Cities)

And from another lawyer:

> I believe that most judges have much more sympathy and understanding for non-custodial men who are (purposely) unemployed, underemployed or change careers voluntarily and cannot or will not pay child support. The judges rarely mention the fact that the custodial mother and children are often forced to live on small AFDC grants, food stamps and subsidized housing. This is subtle but pervasive discrimination against women and children on an economic basis. (Female attorney, suburban)

While the majority of Minnesota judges responding to the judges' survey say that they are willing to use their contempt powers to enforce child support awards, they do not do so very often. Judges were asked how many non-paying parents they had found in contempt within the last two years and how many of those found in contempt had been jailed. The median number of non-paying obligors found in contempt was only 10 for male judges and 11 for female judges. The median number of non-payors jailed was two for male judges and three for female judges. Nine percent of the male judges and 17% of the female judges said that they had not found anyone in contempt in the last two years.

Those who do use the contempt power note its effectiveness. One family court judge from the metropolitan area commented, "They all seem to find their checkbooks on the way to the holding room." Or as a judge from rural Minnesota put it, "They all paid when the sheriff picked them up." However, the small number of contempt findings remains troubling, especially in light of the figures indicating that less than half of the nation's custodial parents are receiving regular support payments.

Findings

1. Minnesota's child support guidelines are too low.
2. Courts are misinterpreting the guidelines as a maximum level of support for non-custodial parents, rather than the minimum level as intended by the legislature.
3. Deviations downward from the guidelines are much more common than upward deviations.
4. The standard of living of the custodial parent and children decreases substantially after divorce, while that of the non-custodial parent often improves.
5. Low income custodial parents are especially disadvantaged in establishing child support.
6. Inconsistency in the enforcement of child support awards results in unfairness to custodial parents and their children.

Recommendations

1. Judges should enforce child support orders through the use of contempt.

2. In keeping with the original legislative intent, judges should interpret the child support guidelines as the minimum level of the non-custodial parent's obligation, rather than the maximum.

3. When the Minnesota Legislature reexamines its child support guidelines, as required by federal law, it should adopt an approach to establishing child support levels that reduces the disparity between the standard of living of custodial parents and children and non-custodial parents after divorce.

4. Judges should calculate the effects of a downward deviation from the guidelines on the post-divorce standard of living of both parties before ordering a downward deviation. Judicial education courses in family law should contain information on how to perform these calculations.

5. Judges should use other statutorily authorized judicial sanctions for failure to pay child support, such as the appointment of receivers, where appropriate, and should consider developing additional creative sanctions, all of which should be incorporated into statewide enforcement policies.

CHILD CUSTODY

Some of the most heartfelt testimony presented to the Task Force addressed the issue of child custody. The Task Force found that gender-based stereotypes about proper roles for women and men, and about their capacity to serve as caretakers for children, are prevalent throughout Minnesota's judicial system. These stereotypes work to the disadvantage of both fathers and mothers.

Stereotypes That Disadvantage Fathers

The primary stereotype about fathers that affects judicial decision-making is that they are not capable of caring for young children. A number of witnesses told the Task Force that it is very difficult for men to prevail in custody disputes because judges assume that mothers are the more appropriate caretakers for young children. Data from the lawyers' survey support this: 69% of the state's male lawyers and 40% of the female lawyers think that judges always or often seem to assume that children belong with their mother. Ninety-four percent of the male attorneys and 84% of the female attorneys think that judges make this assumption at least some of the time; only 6% of the men and 16% of the women think that judges rarely or never favor the mother.

A lawyer commented on the survey that "out here on the prairie, children belong with their mamas—at least that seems to be the prevailing notion." (Male attorney, Greater Minnesota) Another lawyer noted that part of the reason for judges' reluctance to give fathers custody may be the unreasonable expectations that society places on mothers:

> The biggest problem facing this area of family law may be society's view that a mother cannot and should not give up custody of her children. (Male attorney, Greater Minnesota)

Judges were asked on the survey whether they agreed with this statement: "Other things being equal, I believe young children belong with their mother." Fifty-six percent of both male and female judges said that they did agree.[17] A judge noted on his questionnaire that:

> In most cases mothers receive custody, but this probably reflects contemporary cultural standards. There is a tendency to require fathers of young children to prove their ability to parent while mothers are assumed to be able. (Male judge, Greater Minnesota)

Another judge made his position on the subject quite clear with this observation:

> I believe that God has given women a psychological makeup that is better tuned to caring for small children. Men are

17 Caution must be used in interpreting these responses, however; a number of judges said that they found the question difficult to answer in the absence of a more precise description of the "other things" referred to in the question.

> usually more objective and not as emotional. (Male judge, Greater Minnesota)

On the other hand, a number of lawyers pointed out the dangers of oversimplification in this area; judicial reluctance to award fathers custody is not always the result of stereotypical thinking.

> I tend to discourage fathers from seeking physical custody because they seldom are successful. Generally, they are not successful because their motivations are poor – i.e., seek custody to spite wife, not for best interests of children. (Male attorney, suburban)

> I believe that it is very difficult for a man to obtain custody, but I believe this is due to the fact that, in this culture, men traditionally do much less of the caretaking during the marriage, even if the woman works outside the home. When I do an initial interview with men in a custody case, I am amazed with their lack of involvement with and knowledge of their children's day-to-day needs. Most of these men love their children and are well-intentioned, but they don't have the background to pursue custody . . . So I don't perceive this as "gender bias," but as reality. Why would a judge take children away from a person who has been providing day to day care of the children? (Female attorney, Twin Cities)

The picture is further complicated by the preliminary findings of the Rettig study on disputed custody cases. Only two percent of the cases in the sample went to trial. In almost all of the cases in the study in which women obtained sole physical custody of children at the time of divorce, the parties themselves agreed that this was in the children's best interests. In those cases that did not settle and were decided by a judge, the mother obtained sole physical custody of all children exactly half of the time. The husband obtained sole physical custody 33% of the time, joint physical custody was ordered in 8% of the cases, split (siblings split up) in 4% of the cases, and other arrangements were made in the remaining 4% of the disputed cases.

Stereotypes That Disadvantage Mothers

Judges also make stereotypical assumptions about women that improperly affect custody determinations. In some cases, mothers who work outside the home are penalized for non-traditional behavior. A male family law practitioner wrote, for example, that in his experience the most flagrant examples of gender bias in Minnesota's courts involve "certain male judges who believe it is inappropriate for custodial mothers to pursue a career."

In other cases, judges apply a double standard to personal behavior:

> I believe that judges generally hold women to a far stricter standard of ethics and morality than they do men. This varies with each judge, but the biases of society do not disappear

> when the robe is donned. (Male attorney, Greater Minnesota)

> Judges will attach to females the stigma of "mentally unfit" if the person has sought some form of treatment or even just counseling. (Male attorney, Twin Cities)

> Mother who had a single extra-marital relationship lost custody and homestead rights to father even though he had a history of philandering. (Female attorney, Twin Cities)

> My client, the wife, and her husband were investigated by child protection for having a messy house. Both parents lived in the home at the time, yet the husband's argument that the wife was unfit because of a messy house hit home with both the judge and the custody evaluator. Judges in general seem to have much higher moral standards for mothers than for fathers. (Female attorney, Greater Minnesota)

In a third category of cases judges sometimes overestimate the father's parenting contributions. A respondent to the lawyers' survey observed that:

> Fathers seem to get more weight given to their direct care activities than do mothers. Mothers may do 90-95% of the actual caretaking, but if father does anything at all then he often gets credit for more than his 5-10%. (Male attorney, Greater Minnesota)

Participants in the Twin Cities lawyers' meeting described it as giving fathers extra "parenting points" for doing things like changing the baby's diapers or putting the children to bed. Several people observed that this tendency to exaggerate the father's involvement may be due to the fact that in our culture women are still expected to care for children and men are not.

A number of respondents to the lawyers' survey also spoke of the additional onus placed upon poor women in custody disputes, especially when the woman is on public assistance. Lawyers noted that these women often face an uphill battle when they try to convince a judge that their children should live with them rather than with a more financially secure father. As one male attorney put it, "Being poor is a cardinal sin in our society." Others commented:

> One referee is famous for his statement to female AFDC recipients appearing before him: "How much of the taxpayers money are you currently receiving?" (Female attorney, Twin Cities)

> The poor women I have represented do receive unequal treatment—not because they are poor per se, but because of all the consequences of poverty such as frequent moves (read as a stability problem), an inability to manage money (read as an incapability to provide for the needs of children), attempts

> at schooling and jobs (again instability), frequent babysitters, etc. These factors are a result of poverty—as is therapy, etc.—but are often ignored as such, giving way to bias in favor of the most financially secure (read stable). (Male attorney, Greater Minnesota)

The Role of the Custody Evaluator

The Task Force found that misconceptions about sex roles in the judicial system are not limited to the courtroom; court personnel who perform custody mediation services and custody evaluations are subject to the same stereotypes that affect judges. A participant in the Twin Cities lawyers' meeting described a custody evaluation that contained this statement:

> (The father) appears to have adopted a feminine lifestyle and rejected the male sex role . . . he claims many interests that are traditionally considered feminine and seems insecure in the masculine role.

The evaluator was commenting on the fact that the father did the housework and cared for his children during the day.

Court personnel are also just as likely as judges to be biased against working mothers or AFDC recipients, to apply a double standard regarding personal morality, or to, as one lawyer said, go "overboard with enthusiasm" for fathers who take any interest in caring for their children.

Family law practitioners also expressed concern about the difficulty they often have in determining whether the individuals performing custody evaluations are familiar with the appropriate legal standard for determining the best interests of the child. This is especially important because of the crucial role that the evaluator plays in a custody dispute. Judges rely heavily on the opinions of court services workers; on the judges' survey 74% of the male judges and 63% of the female judges said they often followed the recommendations of the custody evaluator in making custody decisions. Under these circumstances it is crucial that the people who perform custody evaluations be knowledgeable about the law and sensitive to the impact of stereotypical thinking on their decision-making.

Custody Mediation

The Task Force identified a serious problem of judges ordering custody mediation in cases involving domestic abuse. State law expressly prohibits judges from requiring the parties in a custody dispute to participate in mediation where there is probable cause to believe that domestic abuse has occurred.[18] In spite of this clear statutory prohibition, judges in Minnesota regularly order abused women into custody mediation. A number of witnesses, both at the public hearings and in the lawyers' meetings, testified about the routine nature of this practice, and data from the attorney and judges' surveys confirm that it is widespread.

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18 Minn. Stat. § 518.69, subd. 2 (1988).

Over 75% of both the male and female lawyers surveyed say that judges sometimes order custody mediation in cases where there is a history of domestic violence. And over one-half of the male judges responding to the survey agreed with the statement that custody mediation usually is appropriate in cases where abuse has occurred. Women judges seem more aware of the law in this area than their male counterparts; only 15% of the female judges agreed with the statement. However, a significant percentage of women judges—about one-third—report that they order custody mediation in Order for Protection proceedings at least some of the time. Sixty percent of the male judges provide for custody mediation in Orders for Protection at least sometimes.

Loretta Frederick of the Minnesota Coalition for Battered Women testified about the harm that results when abused women are forced into mediation:

> Battered women go into mediation scared to death to assert themselves, frightened to say what they really think should happen with their children, sometimes getting literally beaten up in the parking lot afterwards for having opened their mouths, and ending up with custody and visitation [agreements] that are not in the best interests of the children.

Joint Custody

Minnesota law contains a rebuttable presumption in favor of joint legal custody where at least one of the parents has requested it.[19] There is no corresponding statutory presumption favoring joint physical custody, although the court may impose a joint arrangement if doing so would serve the child's best interests.[20]

According to data from the Rettig study, joint legal custody was awarded in 49.6% of the divorces granted in Minnesota in 1986. Joint physical custody was awarded 6.1% of the time. In cases in which the custody issue was litigated, joint legal custody was awarded 62.5% of the time; joint physical custody was court-imposed in 8.3% of the cases. The Task Force found that some judges are too willing to impose joint custody in situations where the parents cannot agree and there is no evidence that joint custody would be in the children's best interests.

Data from the judges' survey indicate that judges view court-imposed, as opposed to stipulated, joint custody as an acceptable option. Over half of the judges surveyed—both male and female—agreed that joint legal custody is sometimes appropriate even if one or both parents objects. About 25% of the judges agree that joint physical custody can be appropriate where there is parental resistance. A number of judges, however, indicated on the survey that they were concerned about the use of joint custody as a panacea and worried about its long-term effects on children.

Family law practitioners also expressed concern about the value of joint custody orders. They saw them being used more as a means of placating the parent who would not

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19 Minn. Stat. § 518.17, subd. 2 (1988).

20 Joint legal custody means that both parents have the right to participate in major decisions about the child's upbringing; joint physical custody means that children will spend time living with each of their parents.

otherwise have obtained custody, usually the father, than as a way to advance the best interests of children:

> The most predominant and overriding example [of gender bias] is the ordering of joint legal custody where the parties get along like oil and water. (Female attorney, Twin Cities)

> I do not encourage joint legal custody (although it ultimately is almost always settled on) as I find a great deal of post-decree litigation. Husbands tend to use this as a means of punishing their ex-wives. (Male attorney, Twin Cities)

Other lawyers observed the tendency of some fathers seeking joint custody to use it as a means of securing economic leverage over mothers in divorce:

> Custody disputes are used as ways to get around the support obligation and as "bargaining chips" in dissolution litigation. (Twin Cities lawyers' meeting)

These commentators also noted that this strategy is frequently successful; women will often accept less child support or property than they are entitled to because they do not want to subject their children to the pain of a custody trial. One participant in the Twin Cities lawyers' meeting suggested that

> lawyers need to establish that it is unethical conduct to assert a custody claim in order to gain a financial advantage in the litigation.

Family law judges and attorneys have good reason to be concerned. The current scholarly literature indicates that, especially where court-imposed, joint custody—whether joint legal, physical, or both—may not be in the best interests of children, or their mothers, and should be used with great caution.

Martha Fineman, Professor of Law and Director of the Family Policy Program of the Institute for Legal Studies at the University of Wisconsin, argues that court imposed joint custody is unfair to mothers in that it has been advocated by fathers' rights groups as a solution to the historic failure of non-custodial parents—usually fathers—to pay child support:[21]

> Joint custody . . . empowers fathers as a group without requiring any demonstration of responsibility . . . in no other area does the law reward those who have failed in their duties as an incentive for them to change their behavior.

Professor Carol Bruch of the Martin Luther King, Jr. School of Law at the University of California at Davis, comments that, "although proponents of joint custody argue that

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21 Fineman, Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking, 101 Harv.L.Rev. 727, 759 (1988).

joint custody enhances both paternal involvement and paternal financial support, research results do not as yet support these claims." She notes the "growing consensus in the research literature that disapproves of joint custody orders that are entered into over the objection of one parent."[22]

And a longitudinal study of families involved in long running custody disputes, performed under the auspices of the Center for the Family in Transition, has found significant emotional and behavioral problems in children who spend time with both disputing parents. The authors caution against encouraging or mandating joint custody where the parents are in conflict.[23]

Findings

1. Some judges make stereotypical assumptions about proper roles for women and men that disadvantage both fathers and mothers in custody determinations.
2. Custody mediators and custody evaluators are subject to the same gender-based stereotypes that affect judges.
3. Some judges continue to order custody mediation in situations where there has been domestic abuse in spite of state law prohibiting mandatory mediation in these cases.
4. Fathers sometimes use the threat of joint custody to obtain an economic advantage over mothers.
5. Judges are sometimes too willing to order joint custody where there is no evidence that it is in the best interests of the children to do so.
6. When the court fails to make custody decisions promptly the children suffer harm.

Recommendations

1. Judicial education programs in family law must sensitize the bench to issues of bias in custody determinations; judges must recognize that fathers can be good custodians of small children and that mothers with careers can be good parents.
2. Judicial education programs in family law should educate judges about the need to make custody decisions promptly.
3. Custody mediation should not be ordered where domestic abuse has been documented by means of sworn statements, an OFP, or arrest records.
4. Counties using court services for custody evaluations should provide rigorous training and evaluation to ensure that social workers are sensitive to issues of bias in their investigation and reporting.

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22 Bruch, And How are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-being in the United States, 2 Int'l. J.L. & Fam. 106, 109 (1988).

23 Paper presented by Janet R. Johnston, Ph.D., Research Director for the Center for the Family in Transition, to the 45th Annual Meeting of the American Orthopsychiatric Association (March 30, 1988).

5. The Office of the State Court Administrator should develop a standardized format to be used throughout the state in custody evaluations and reports.
6. Where other evidence about custody is presented to the court, the court must carefully consider it along with any recommendation from a court services worker or private evaluator.
7. Judicial education programs in family law should examine the effects of joint custody orders.
8. Judges should use great caution in deciding to order joint custody; it should be imposed over the objections of one of the parents only where the court makes specific findings which identify the reasons why such an order is in the children's best interests.

ACCESS TO THE COURTS

The question of access is crucial to any meaningful inquiry into gender fairness in the courts. If women and men do not have an equal opportunity to seek relief from the courts, the fairness of the entire system is undermined. The Task Force learned that, especially in the family law area, women and men do not have equal access to the courts.

The barriers to equal access are primarily financial. As one attorney testified:

> There is an imbalance of economic power between men and women, and those who have economic power have a stronger voice and are heard by the court system. (Duluth lawyers' meeting)

A representative of the Hennepin County Bar Association testified at one of the public hearings that in the Minneapolis area, for example, experienced family law attorneys require retainers of from $1,500 to $10,000 in dissolution cases. And according to the lawyers' survey data, most Minnesota lawyers do insist on retainers. Eighty-two percent of the male lawyers and 86% of the female lawyers in the state require a retainer from their family law clients.

Not surprisingly in this financial environment, it is the poor whose access to the system is most limited. Women, who are disproportionately represented in the poverty population, bear the heaviest burden. The Task Force found that it is extremely difficult for poor women in Minnesota to obtain legal representation in family law matters. Witness after witness at the public hearings spoke of the frustration of long waiting lists for legal representation from legal services programs that aid the poor.

The recent study by the Minnesota State Bar Association's Legal Assistance to the Disadvantaged Committee (LAD) confirms that legal services programs are simply unable to meet the need for legal representation in family law cases with their existing resources. The LAD committee surveyed legal services and volunteer attorney programs throughout Minnesota for a one month period during the fall of 1987 to obtain information about the need for family law assistance for low income people. The survey found that 71% of the people contacting these programs for help with family law matters were women. The committee's report notes that this is close to the ratio of women to men in the poverty population. The committee also found that during the survey period legal services and volunteer attorney programs were able to represent only 47% of the income-eligible people who contacted them for family law assistance. Based on these figures, the committee estimated that nearly 10,000 income-eligible persons will be turned away from these programs each year.

The LAD study concluded, and the Task Force concurs, that it is unrealistic to expect that this problem can be solved by the increased participation of volunteer attorneys, or that the present staff of legal services programs can be expected to substantially increase the amount of family law assistance they provide. The Task Force lawyers' survey confirms that family law practitioners already devote a good deal of time to pro bono representation.

The situation is not much better for those women who are not poor enough to qualify for free legal services. (Legal services programs operate under stringent income and asset

limitations imposed by federal law.) Lawyers told the Task Force about women who had to save money, a bit at a time, for months, and in some cases for years, before they could afford to hire a divorce lawyer. The problem is especially severe for women who do not work outside the home and do not have easy access to the family finances:

> Women often cannot afford good counsel. I consider myself a good trial lawyer. I charge $100 per hour and ask for retainers of $1,000 to $3,000... Even the poorest of men find $3,000 for an attorney. (Female attorney, Greater Minnesota)

Temporary Attorney Fees

Access problems are compounded by judges' reluctance to award temporary attorney fees. Sixty-five percent of the male lawyers surveyed and 93% of the female lawyers reported to the Task Force that the reluctance of courts to award temporary attorney fees in family law cases can preclude the economically dependent spouse from pursuing the litigation. A witness at the public hearing in Moorhead testified about the dilemma that family law attorneys and their female clients face:

> In the area of awarding temporary attorney's fees, women are unfairly prejudiced. It is difficult for an attorney to accept a case knowing he or she will not be paid. Most of the time the husband has control of the finances and if temporary fees are not awarded to the woman she must get whatever representation she can without it.

Data from the judges' survey confirm that temporary attorney fees are ordered infrequently. Although 79% of the male judges and 83% of the female judges report that they award temporary fees at least some of the time, they do not do so regularly. Only 30% of the state's judges – 28% of the men and 44% of the women – responded that they award temporary attorney fees on a regular basis.

A number of family law practitioners told the Task Force that there is a direct connection between the court's failure to award temporary fees and their insistence on a retainer:

> Temporary fees are rare so I cannot economically accept a case without a retainer and ability to pay. If the courts would start ordering temporary fees then I could accept these cases a little more readily. (Female attorney, Twin Cities)

> It used to be that you could take a case without a retainer and know you would get something reasonable at the temporary hearing. This is no longer true. You must get your money up front and this makes it difficult, if not impossible, for some women to obtain representation equal to that of their husbands. Husbands often have access to marital resources or credit that women simply do not have and thus husbands can

> normally come up with a substantial retainer. (Female attorney, Twin Cities)

A serious related problem concerns the reluctance of courts to advance the economically dependent spouse money for costs at the inception of the case. This can have a substantial impact on the ultimate resolution of the issues in divorce cases. Many lawyers told the Task Force they had to advise female clients to accept inadequate settlements because the client could not assume the expenses connected with thorough case preparation. A number of family law attorneys noted that this scenario has become more common as family law issues have become more complex:

> The increasing importance of expert witnesses in family law, such as child psychologists, CPA's, vocational rehabilitation experts, etc. is making the court system much more biased against women without funds. (Male attorney, suburban)

Family law attorneys told the Task Force repeatedly about clients who settled for less spousal maintenance than they were entitled to because they couldn't afford to hire the vocational experts necessary to establish reduced earning capacity, of women who could not afford to hire an independent expert to evaluate a closely held business, and of women who gave up custody or agreed to unreasonably low child support orders because they could not afford to go to trial.

> My experience is limited to the family law situation in which a woman not working outside the home and not having independent assets, is unable to assert her rights effectively because of the inability to finance a long and arduous contested case. Emotional stability of the family unit also contributes to the decision to waive or concede on important issues. (Male attorney, Twin Cities)

> I know personally of a case when a life-long housewife in her 60's finally decided to get a divorce. The husband's company, for which she had also worked, stuck up for the man, hiding the fact that certain bonuses were paid to the husband and paying him in cash for certain services . . . She was left with no money to fight him. (Female attorney, Twin Cities)

Fees in Post-Judgment Actions

A number of witnesses also told the Task Force that judges' reluctance to order attorney fees in post-judgment actions makes enforcement of court orders, once they are in place, problematic as well. Attorneys pointed out, for example, that it is very difficult to persuade courts to award attorney fees in post-divorce actions to enforce child support awards, because judges assume that the fees will be paid out of the accumulated support. A practitioner in rural Minnesota wrote to the Task Force about the frustration she feels when advising clients who are having trouble getting their spouses to comply with the court's orders:

> I continue to find that in court orders there is no way to compel the male spouse to cooperate without burdening the female mid-life spouse with additional legal costs – a Catch 22 situation.

Findings

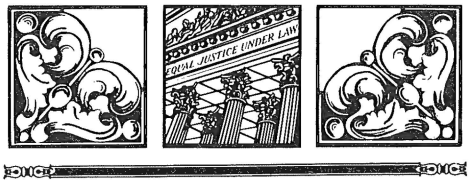
1. It is extremely difficult for poor people in Minnesota to obtain legal representation in family law matters.
2. The inability to obtain counsel affects women more severely than men.
3. The reluctance of judges to award reasonable temporary attorney fees and costs in family law cases prejudices the economically dependent spouse by making it impossible for that spouse in many cases to pursue the action.

Recommendations

1. State resources should be made available for the funding of legal representation for poor people in family law matters.
2. Whenever possible judges should award temporary attorney fees and costs to the economically dependent spouse in an amount that is sufficient to allow that spouse to effectively pursue relief in family court.

General Family Law Recommendations

1. Family law should be one of the subjects covered on the Minnesota bar examination.
2. Since family law and domestic abuse cases make up an ever increasing percentage of the caseload in Minnesota's courts at the trial court level, judges should be required to accumulate at least ten hours of judicial education credit in these two areas during each certification period.
3. Judges and attorneys must include more comprehensive economic information about the parties to a divorce in both temporary and final orders. Court records are often incomplete, and vital statistics data accumulated at the state level are presently not detailed enough to permit thorough analysis of the effects of divorce on families and children.
4. The Office of the State Court Administrator should develop materials which explain the function of the court in family law matters to litigants. These materials could include both pamphlets and videotapes. They should be distributed statewide.



DOMESTIC VIOLENCE

Introduction

Sixty-three thousand incidents of domestic abuse were reported in Minnesota in 1984.[1] Ninety percent of the victims were women. To address this problem, our state has some of the nation's most progressive domestic abuse statutes. It has, along with that, longstanding and knowledgeable advocates—both in the public and private sectors—of enforcement of the domestic abuse laws. In spite of these assets, the Task Force found compelling evidence to conclude that domestic abuse victims do not receive the relief, either civil or criminal, that our legislature intended to provide.

Although civil Orders for Protection (OFPs) are frequently issued and are relatively easy to obtain, they are rarely enforced. Although numerous criminal arrests are made and domestic assault charges brought, discretionary dismissal by prosecutors prevents final resolution of the cases in criminal court. The evidence reveals an enormous problem, much of which is occurring outside the reach of judicial intervention.

The Task Force comes to these conclusions after receiving a considerable amount of data on the subject of domestic violence. In addition to public hearing testimony by officials responsible for the handling of domestic violence cases, there was testimony by attorneys who represent parties in such cases and by victims of domestic assault. Representatives of advocacy projects testified orally and in writing. The lawyers' and judges' surveys included questions on both the civil and criminal aspects of domestic violence cases.

The Task Force gathered statistical data from public agencies, met with interested citizens, attorneys, and judges, and studied reports and proposals of various prosecuting authorities—such as the Hennepin County Criminal Justice Coordinating Committee and the Attorney General's Task Force on Violence Against Women. The Task Force also commissioned a separate study to examine the characteristics of criminal domestic assault cases from six Minnesota jurisdictions during 1987. The study was carried out under the

1 This is the most recent available official figure. The number of incidents is complied by the Minnesota Department of Corrections, Program for Battered Women, based upon mandatory reporting by police agencies.

direction of University of Minnesota Law School Clinical Professor Beverly Balos, who wrote the final report. It is referred to in this report as the Task Force Domestic Violence study.

The Task Force Domestic Violence Study was designed to provide preliminary data on the incidence of prosecutorial dismissal of misdemeanor domestic assault cases prior to trial. Cases from St. Paul, Duluth, Little Falls, Kandiyohi County, Brooklyn Park and Brooklyn Center were included to provide a look at urban, rural, and suburban caseloads. The researchers attempted to trace the effect of intervention projects on case dismissal rates. In addition, the data gathering form provided for the collection of a variety of facts from the case files. The full analysis of the data is appended to the Task Force report.

Task Force meetings have resulted in probing discussion of the subject of domestic violence, and a unanimous conclusion that the Task Force recommend dramatic, meaningful steps to address the matter.

CONTEXT OF THE PROBLEM

In addressing the matter of domestic violence, the Task Force began with two assumptions, both of which were ultimately borne out by the cumulative data. First, was that Minnesota indeed has a progressive statutory scheme to handle domestic violence cases. Second, was that the legal system is ill-equipped to handle the caseload generated by the high incidence of domestic abuse.

Minnesota's domestic abuse laws provide both civil and criminal avenues into the judicial process. Both approaches are available in a given case, either simultaneously, or in any sequence. The Domestic Abuse Act[2] allows a victim of domestic abuse to obtain a civil ex parte order (an order without a hearing based upon the affidavit of one party). This ex parte order may provide relief to a victim who is in immediate and present danger of abuse. The relief may include removal of the alleged perpetrator from the residence, granting of temporary custody of the children to the petitioner, a temporary award of personal property, a no-contact order and a temporary restraining order. While this order provides for immediate relief, it is effective for a maximum of 14 days, after which a hearing is required. At the hearing, the judge has the opportunity to hear from both the alleged abuser and the alleged victim. The judge may then issue a further order, an Order for Protection (OFP). Violation of an OFP is a misdemeanor criminal offense, punishable by up to 90 days in jail, a $700 fine, or both.

While the victim of domestic abuse decides alone whether to go into civil court, only a public prosecutor may decide whether to pursue domestic violence cases in criminal court. A variety of criminal statutes may be used to prosecute an incident of domestic abuse. In addition, special arrest and victims' rights statutes apply to cases of domestic violence.

Minnesota has a comprehensive criminal assault statute which sets forth five degrees of attempted or actual infliction of bodily harm or causing the fear of bodily harm or death.[3] Additionally, as described above, the civil Domestic Abuse Act includes the misdemeanor offense of violating an Order for Protection.[4] The trespassing, criminal damage to property, and witness tampering statutes are sometimes used to prosecute related offenses in the domestic abuse cases.[5]

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2 Minn. Stat. § 518B.01-19 (1988).

3 Minn. Stat. § 609.221 (1988) (felony assault involving great bodily harm); Minn. Stat. § 609.222 (1988) (felony assault involving dangerous weapons); Minn. Stat. § 609.223 (1988) (felony assault involving substantial bodily harm); Minn. Stat. § 609.224 (1988) (misdemeanor and gross misdemeanor assault involving ordinary bodily harm).

4 Minn. Stat. § 518B.01, subd. 14(a) (1988).

5 Minn. Stat. § 609.605 (1988); Minn. Stat. § 609.595 (1988); Minn. Stat. § 609.498 (1988).

Police may, but are not required to, make domestic violence arrests if a reasonable basis exists to believe such a domestic assault occurred in the four hours prior to the police call. If an arrest is made, the arrested person must be removed from the premises and cannot be released without bail or a charge.[6] Individual districts may have local mandatory arrest policies and court rules governing detention and release of criminal domestic violence suspects. Arrest is mandatory for violation of the civil OFP.[7]

Under Minnesota's Crime Victims Rights Act, victims of domestic abuse have the right to be informed of the status of the proceedings and to participate to a limited degree in the disposition of the case.[8] Victims may have input on the issues of pretrial diversion, plea negotiations, restitution, and prisoner release. Also, victims have procedural protection on privacy of their addresses and phone numbers, changes in court schedule, and speedy trial. Finally, victims have the right to have a supportive person in the courtroom and to have the defendant segregated from them in the courthouse.

If a presentence investigation report is used in a given case, the person preparing the report must inform the victim of the requirements of the Crime Victims Rights Act and facilitate the victim's exercise of these rights. However, presentence investigations are not required in domestic abuse cases.

It is clear that both these civil and criminal avenues have produced increasing caseloads,[9] according to figures provided by the State Court Administrator.

TABLE 2.1
Number of OFP
Petitions Filed

1986	7821
1987	8652
1988	9440

Similarly, the St. Paul City Attorney's Office has seen a consistent increase in the number of misdemeanor domestic assault prosecutions, from 451 in 1985 to 636 the next year.[10] The Hennepin County Criminal Justice Coordinating Committee, in its April 1988 Report on Domestic Assault, foresees increasing numbers of such cases.

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6 Minn. Stat. § 629.341 (1988); Minn. Stat. § 629.72 (1988).

7 Minn. Stat. § 518B.01, subd. 14(b)(1988).

8 Minn. Stat. § 611A.01-.68 (1988).

9 It is unknown whether increased caseloads reflect an increase in the number of domestic abuse incidents, an increase in the proportion presenting themselves to the court, or both.

10 Testimony of Gerald Hendrickson, Chief Prosecutor, St. Paul City Attorney's Office, at Twin Cities public hearing (March 29, 1988).

The Task Force Domestic Violence Study showed 88% of the defendants to be male and to be either married or cohabitating with a female victim.[11] In the judges' survey, judges reported that in their experience, 95% of the victims of domestic abuse were women.[12] Significantly, in three-quarters of the cases in the Task Force Domestic Violence study, there was physical injury to the victim.

This evidence leaves little doubt that thousands of Minnesota women suffer seriously from domestic abuse. The Task Force heard numerous accounts of domestic abuse cases in which the victim's efforts to invoke the judicial process resulted in greater victimization. The following two accounts, provided by the victims, reflect that reality in both the civil and criminal contexts. They are representative of a disturbing number of such accounts provided to the Task Force, not only by victims but by judges, domestic abuse advocates, prosecutors, and defense lawyers.

In the civil case, a middle-aged, middle-class homemaker with a 25-year history of abuse wrote to the Task Force of her attempt to use the court system for the first time after her husband threw a golf ball at her twelve-year old son. Her petition for an OFP was denied. She said the judge told her that she was "the type who requested an order one day and asked to have it rescinded the next." The judge suggested that she provoke a more serious incident in order to make sure that her case was strong enough to support the OFP. She said, "I guess I need a knife in my back or at least to be bleeding profusely from the head and shoulders to get an OFP." The judge told her, "That's just about it."

In the criminal case, the victim of the domestic assault testified at a public hearing. She stated that police were present when she was brought to a hospital emergency room by the man with whom she was living. She was bleeding profusely from all ten fingers and required five hours of surgery and forty stitches. According to the police report, she had a cut in excess of six inches on her back and bruises on her body. The man reported that she had attacked him and then self-inflicted the wounds. The woman testified at the public hearing that he had cut the inside flesh of each of her fingers with a pair of scissors in the course of a beating. The case was charged as a third-degree felony assault.

This woman testified that she had called police repeatedly over a four-year period, reporting instances of abuse. Each time no charges were filed. The county attorney's office dismissed this felony case one week before trial, over her vigorous objection.

Frustration over the failure of the court system to provide relief in cases such as these was echoed by members of Minnesota's judiciary. A metro judge commented, "Domestic violence is an outrage. Our system of justice does a very poor job of dealing with this problem." Another judge noted:

> We have a good Domestic Abuse statute, but it is not being enforced by police and sheriff's departments, city and county attorneys or the courts. (Female judge, Twin Cities)

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11 Because of disparities in size, this study sampled cases from different jurisdictions disproportionately. Therefore, these figures should not be generalized to the entire population of domestic violence cases in Minnesota.

12 Figures complied by the Bureau of Justice Standards National Crime Survey indicate that nationally in 1978-1982 about 90% of domestic violence victims were women.

In this context the Task Force examined critical facets of both the civil and criminal process and the handling of domestic abuse cases in both areas.

Stereotyping and Sensitivity

Gender bias results when men or women are perceived as conforming to a single personality profile or a small range of behaviors deemed typical of their gender. The Task Force identified several kinds of stereotypical thinking about both women and men that have a negative effect on the administration of justice in domestic abuse proceedings.

Many of the examples of stereotypes described to the Task Force involved victim-blaming. The "nagging female" stereotype, suggesting that the woman asks for abuse, is evidenced by the police officer's comment, related by a women's advocate, that "the problem with battered women is that their alligator mouths can't keep up with their hummingbird brains." Women who live with men outside of marriage are seen to be asking for trouble by getting into unsanctioned relationships. A number of attorneys, primarily male, responding to the lawyers' survey suggested that women are crafty schemers who use the OFP proceeding to punish men or gain advantage in a dissolution proceeding. Some male attorneys also suggested that sometimes paternalistic judges grant unwarranted OFPs and encourage women to use the victim image to unfair advantage.

Men also may be victimized by stereotypes, such as "wife-beater" or, in the case of male victims, "wimp." In both cases, stereotypes prevent a fair evaluation of the man's position.

Stereotypical thinking about women and men at this entry point in the judicial process, when they are under extreme stress and are at a turning point in their lives, is especially devastating. Connie Fanning of the Minneapolis Domestic Abuse Project testified:

> Court orders of no contact with the victim are repeatedly violated by perpetrators. Judges who are responsible for imposing orders, whether as a condition of bail or as a condition of probation, will often not enforce them . . . Clearly, women are not listened to by court personnel and police . . . At every level of the court system, women's attempts to access the system for their protection are circumvented.

"If you'd have supper on the table this wouldn't happen," was one judicial comment relayed at the Marshall public hearing. "You've been married for ten years, you must like being hit," was a judge's comment reported at the Moorhead public hearing.

A judge's insensitivity to the circumstances of abuse can result in the denial of badly needed relief. A male lawyer wrote to the Task Force about a client who sought an OFP after her husband struck her in the head, threw her to the floor, threatened her life and the lives of her children, and then forced her into his truck while he drove around for an hour while continuing to threaten her. The woman lost consciousness for a short time after her husband hit her. The judge found that the husband had committed domestic abuse and ordered him to move out of the home, but allowed him to return to the property whenever he "deemed it appropriate," in order to feed his dog. Another attorney commented on the lawyers' survey:

> A sitting district court judge once told me in chambers while both sides were trying to reach a stipulation in a final hearing for an OFP that "if my wife slept around I'd kick her butt too." The judge went on to deny the woman's petition. (Male attorney, Greater Minnesota)

Yet another lawyer, a participant at the lawyers' meeting in St. Cloud, told the Task Force of a woman whose boyfriend threatened to kill her if she didn't leave the house. The judge said, "Well, he gave you a choice," and refused to issue a protective order.

THE CIVIL PROCESS: ORDERS FOR PROTECTION

Many victims of domestic abuse attempt to obtain relief from the abuse by requesting a civil Order for Protection. While the OFP process appears to be readily usable by victims, the Task Force found that attitudes of some judges and court personnel and enforcement issues present obstacles to effective implementation of the Domestic Abuse Act.

Problems In Obtaining OFPs

The Minnesota Domestic Abuse Act requires court personnel to assist petitioners in preparing and filing the forms necessary for an OFP.[13] This is an area in which the Task Force found that circumstances vary a great deal from county to county. A number of witnesses made a point of crediting helpful court personnel for their supportive role. In some areas, however, the attitudes of court employees actively discourage petitioners from attempting to use the system.

An advocate testified at the Moorhead public hearing about a battered woman who was told "this county doesn't do OFPs." In other counties court employees will notify the respondent that the petitioner is seeking an order. The Task Force also heard of counties in which court employees improperly screen OFP petitions and unilaterally decide which cases will be presented to the judge. A lawyer from rural Minnesota commented on the survey about the practice in one county:

> The Director of Court Services tells [abused women], "OFP's are a pain in the ass . . ." A petitioner cannot see the judge. She must first see the Director of Court Services who goes over the petition and then on some occasions he will call the abusing party and ask to hear how he feels about the OFP and get his side of what happened. (Female attorney, Greater Minnesota)

Many women who need Orders for Protection are indigent and must obtain an In Forma Pauperis (IFP) order signed by a judge so that they can proceed without paying a filing fee. Witnesses at the public hearings told the Task Force that in some parts of the state these orders are difficult to obtain. Some counties do not accept IFP petitions at all. In others, judges will waive the filing fee for women who receive Aid to Families with Dependent Children, but refuse to do so for other low-income petitioners who are not receiving public assistance.[14]

In some areas of the state battered women's advocates assist the abuse victim in preparing the OFP petition and accompany her to court for the hearing. As a result, some advocates have been accused of engaging in the unauthorized practice of law. When asked on the survey whether they allow victim advocates to speak in court during OFP proceedings, Minnesota judges responded as follows:

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13 Minn. Stat. § 518B.01, subd. 4(e) (1988).

14 This problem has been addressed by legislation passed during the 1989 session which clarifies the standards to be used in acting on IFP petitions.

TABLE 2.2
IF ASKED, I ALLOW VICTIM ADVOCATES TO SPEAK IN COURT
DURING OFP PROCEEDINGS,
EVEN IF THE ADVOCATE IS NOT A LAWYER

	Always	Often	Sometimes	Rarely	Never
Male Judges	38%	23%	17%	10%	12%
Female Judges	25%	6%	38%	25%	6%

Several witnesses recommended to the Task Force that the role of the advocate within the system be clarified. Given the valuable part that advocates for battered women play in the judicial system, as discussed in more detail below with respect to criminal domestic abuse prosecutions, the Task Force agrees that clarification of their role would be beneficial.

Issuance of Mutual OFP's

The Task Force found that, at least in some areas of the state, judges in Minnesota continue to issue mutual OFPs in cases in which only one person has petitioned for an order and there is no evidence of mutual abuse. A 1987 Minnesota Court of Appeals decision, Fitzgerald v. Fitzgerald[15] makes it clear that such orders are improper. In spite of Fitzgerald, 33% of the male Minnesota judges surveyed by the Task Force and 21% of the female judges report that they sometimes issue mutual OFPs when only one party has petitioned. Male judges in the metropolitan area are much more likely to issue mutual orders (42%) than male judges in other parts of the state (24%).

The practice of issuing mutual OFP's appears to vary greatly by county. Some domestic abuse advocates told the Task Force that while mutual orders had been common in the past, judges in their area were aware of the Fitzgerald case and had stopped using them. Other advocates reported that, in their county at least, mutual OFP's are still routinely issued. An advocate said that the staff of the program for battered women where she works knew of seven or eight mutual OFP's within the prior month. In each of these cases the petitioner proved her allegations of abuse and the respondent did not file a petition of his own. The advocate noted that judges will frequently initiate discussion about a mutual OFP by asking the petitioner if she objects. Very few petitioners do so, because they don't want to antagonize the judge. A family law attorney wrote to the Task Force about one county in which, out of eighteen OFPs issued over a period of several months, all but two contained mutual restraining orders.

The harmful consequences of mutual OFPs were illustrated by testimony at the public hearings and lawyers' meetings and in written comments from battered women and advocates. Witnesses told the Task Force that when a judge issues a mutual OFP there is a significant disincentive to seek enforcement. When police officers are called out to enforce the order and learn that it is a mutual OFP they often arrest both parties, "just to be safe," even if there isn't any evidence of mutual abuse. Other witnesses pointed out that issuance of mutual OFPs gives abusers the wrong message. Mutual OFPs suggest that the

15 406 N.W.2d 52 (Minn. Ct. App. 1987).

court is not serious about holding the abuser accountable for the violent behavior. Mutual orders also reinforce the notion that the victim is to blame for the abuse.

Denial of Supervised Visitation

The Minnesota Domestic Abuse Act explicitly authorizes the judge in an OFP proceeding to restrict or condition the time, place, or manner of a non-custodial parent's visitation with his or her children if the court finds that the safety of the victim or the parties' children would be jeopardized by an order that does not provide for supervision.[16]

Battered women and advocates expressed concern that some judges do not issue orders for supervised visitation because they fail to understand the dynamic of an abusive relationship. Judges tend to order "reasonable visitation" where a more structured order, setting conditions or requiring the presence of a third party, would reduce the potential for violence. On the judges' survey less than half of the respondents—46% of the men and 42% of the women—said that they often order supervised visitation during OFP proceedings.

Witnesses at several of the public hearings told of judges who refused to order supervised visitation in cases with long histories of violence. One woman explained what happened when she asked a judge to require that her ex-husband's visitation with their four children be supervised. She had been divorced for about a year when her former husband began harassing her. She told the Task Force that he was chemically dependent and had lost his driver's license as a result, that he was violent towards her and also a danger to himself—he had apparently tried to commit suicide while serving time in jail. She petitioned for an OFP and asked for supervised visitation as part of the order. She said the judge believed her ex-husband's assurances that he wasn't using drugs in spite of her contrary testimony, his long history of drug abuse, and the fact that at the time of the hearing his driver's license had been revoked. The judge denied the woman's request for supervised visitation, and when the ex-husband pointed out that he could not drive and therefore could not pick up the children for visitation, the judge ordered her to transport the children to and from his home—a distance of about forty-five miles each way.

Another battered woman told the Task Force of a judge who threatened to order her to let her child's father take the boy for visitation even if the father was "crawling up the sidewalk drunk." According to this woman, the judge was annoyed with her for objecting to his order, which defined "supervised" as having to contact a third party once a day during visitation. The father in this case had a history of heavy drinking and drug abuse and had threatened the mother's life more than once.

Other witnesses told the Task Force of judges who will issue an OFP excluding the abuser from the petitioner's residence and then order unsupervised visitation to take place at that residence. The witnesses emphasized that this kind of order defeats the purpose of an OFP.

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16 Minn. Stat. § 518B.01, subd. 6(3) (1988).

Enforcement

Witnesses testified at the public hearings and lawyers' meetings concerning poor enforcement of Orders for Protection. While 56% of male judges and 65% of female judges claim that they always or often sentence OFP violators to jail, attorneys are somewhat less likely to perceive judges as willing to sentence violators to jail. Only 21% of male attorneys and 10% of female attorneys say that judges always or often sentence OFP violators to jail.

At the second Twin Cities public hearing, Beverly Balos testified that a study she performed for the Minnesota Department of Corrections raised serious questions about the effectiveness of OFPs and the ability of the system to protect victims. The authors studied 898 OFPs filed in Hennepin County and Beltrami County in 1984. The purpose of the study was to record post-order violence and to track enforcement of the order. One of the most significant study findings was that 22% of the persons who were under the protection of court-issued OFPs were later the victims of violence in documented police reports. Only 22% of those subsequent perpetrators were arrested by police. An additional 35% of the OFP petitioners stated that they had suffered subsequent violence, but had not called the police.

One percent of the cases of subsequent reported violence resulted in prosecution. Of those, in every case in which a not guilty plea was entered, the case was dismissed. This funnel effect, in which civil domestic assault cases disappear from the system in progressive fashion, led the researchers to conclude that in reality domestic violence carries only minimal consequences.

This conclusion also held true when Balos looked at use of the contempt power to enforce OFPs. She found that only 4% of respondents were returned to court on contempt motions, with a contempt order entered in only 16% of those cases.

Proposed Solutions

Two of the significant reasons for difficulty in enforcing OFPs are the inaccessibility of the orders – they are not registered outside the county of issue and are not readily accessible to law enforcement officers – and a lack of systematic compliance supervision. A proposal by the Hennepin County Criminal Justice Coordinating Committee would help solve these problems by establishing a county-wide domestic violence computer bank with access by law enforcement, prosecuting attorneys, probation and the courts. It contemplates entry of OFPs, criminal prosecution data including conditions of release and conditions of probation, and listing under both the petitioners' and respondents' names.

The Task Force suggests that such a data bank be established statewide. The availability of OFP information to a law enforcement officer during a squad-car computer check, for example, will enhance the opportunity for OFP enforcement. Access by prosecutors will provide additional access to evidence for use in criminal prosecutions, and access by probation and court services will ensure the setting of more meaningful bail conditions and better founded sentencing.

Findings

1. Domestic violence is one of the most serious problems faced by our society.
2. Minnesota has strong and progressive statutes which are not adequately implemented or enforced.
3. Judges, lawyers, court personnel, and law enforcement officers are not sufficiently sensitive to the problems of victims of domestic abuse.
4. Some judges in Minnesota continue to improperly issue mutual Orders for Protection in situations where only one person has requested an order and there is no evidence of mutual abuse.
5. Petitioners for OFPs often do not receive adequate relief.
6. In certain cases the process discourages abuse victims from attempting to obtain protective orders.
7. The usefulness of the OFP is undercut at the local level through absence of clear enforcement procedures and standards.
8. Advocates for victims of abuse play a valuable part in the system; their role should be clarified to ensure their continued participation.

Recommendations

1. Judges, attorneys, court personnel and law enforcement officers should be sensitized to the problems of individuals who have been victims of domestic abuse.
2. The topic of domestic abuse and Orders for Protection—including information about the abuse dynamic and the dangers of victim blaming—should be addressed in judicial education programs.
3. Courts should not issue mutual Orders for Protection in cases without cross-petitions.
4. Continuing legal education programs should address domestic abuse issues.
5. The topic of domestic abuse should become part of the curriculum in family law courses in the state's law schools.
6. Domestic abuse issues should be addressed at local bar association meetings. The Minnesota State Bar Association could prepare a videotape presentation for use by local bar associations.
7. Court administrators and their deputies should have training in the area of domestic abuse as well as a good understanding of Minnesota's Domestic Abuse Act.
8. The state's courts should set a uniform standard regarding the role of the domestic abuse advocate at OFP hearings. The advocate should be allowed to attend the hearing, be present at counsel table and address the court. The courts should also take

action to ensure that advocates are allowed to assist in the preparation of OFP petitions.

9. State funding for the hiring and training of advocates should be increased.

10. The forms used to petition the court for an Order for Protection should be simplified. For example, proposed orders could contain more sections which would be checked off by the judge.

CRIMINAL ENFORCEMENT: DISMISSALS

At the heart of criminal enforcement of domestic violence complaints is the phenomenon of discretionary dismissal by the prosecutor, before the charge can be determined on the merits either by guilty plea or by trial. Variability of dismissal rates among jurisdictions suggests that prosecutorial policies and practices are the key determinant of dismissals. The essential prosecutorial issues are the handling of what is commonly referred to as the "victim cooperation" question and the devotion of energy to use of evidentiary tools. The most basic factor may be dedication of adequate prosecutorial resources, especially in the misdemeanor prosecution area. All of these issues must be addressed in a coordinated fashion in order for the judicial system to respond adequately to cases of criminal domestic violence.

The dismissal problem is real. Prosecutors stated in narrative comments on the survey:

> Our dismissal rates for these types of cases run 80 to 90% in a jurisdiction that bills itself as being in the forefront of domestic abuse . . . Prosecution is, largely, a waste of time. (Male attorney, Twin Cities)

> In my 8-9 years as a prosecutor, I would say that approximately 85% of all charges of domestic abuse against a female victim involve the victim requesting dismissal of the charges within one to two weeks after the police issue the tab charges . . . I take the position that I will have an uncooperative witness and will dismiss. (Male attorney, Greater Minnesota)

> In all 15 cases, the victims demanded we dismiss. I have never tried any of the cases because of these witness problems. The cops arrest with probable cause without a warrant; I draft the complaints; the victims demand dismissal. I dismiss. These are all misdemeanor charges. (Male attorney, Greater Minnesota)

These comments indicate not only a pervasive dismissal practice, but a related issue of prosecutorial attitudes which contribute to the problem.[17]

The St. Paul Intervention Project submitted a compilation of cases dismissed by the St. Paul City Attorney's Office. The Hennepin County Attorney, Thomas L. Johnson, testified that although the rate of concluded prosecutions on the merits in felony domestic violence cases has increased in that jurisdiction, it nonetheless continues to lag behind case conclusion or survival rates for other crimes. Judges' narratives corroborated this phenomenon of discretionary dismissal by prosecutors.

The dismissal phenomenon is further verified by the Task Force's Domestic Violence Study of 1987 misdemeanor prosecutions in six jurisdictions. In St. Paul, the dismissal rate

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17 Some judges require the prosecutor to state the reasons for dismissal in a domestic violence case on the record.

of the reviewed group of cases was 73%. In Duluth, the rate was 47%; in Kandiyohi County it was 25%. By comparison, in Brooklyn Park and Brooklyn Center, dismissals accounted for only 6% and 4% of the cases, respectively. There were no dismissals of the small number of charged cases in Little Falls. A full analysis of the dismissal data, including the average time elapsing before dismissal, is set forth in the study report.

Like Balos' study of 1984 OFP violations, the Task Force Domestic Violence Study of 1987 criminal assault cases showed that no cases in which a not guilty plea was entered ever were tried. Of the 224 cases reviewed, not one went to trial by jury. All case dispositions were by guilty plea or dismissal before trial.[18] The Task Force is convinced that dismissal impairs enforcement of the criminal domestic violence laws, and is further convinced that this phenomenon can and must be reversed. The variability of dismissal rates in the study, data from surveys, and further examination of the reasons for dismissal lead to this conclusion.

The dismissal phenomenon can best be addressed by coordinated efforts to bring more victims to court, to use domestic abuse intervention advocates, to vigorously use evidentiary tools, and to commit adequate prosecutorial resources to the problem.

"Victim Cooperation"

If discretionary dismissal is at the heart of the criminal domestic violence enforcement problem, then the issue of "victim cooperation" is at the heart of discretionary dismissal. The term is used in quotations because it connotes a responsibility on the victim for the survival of the case. The views of the three prosecutors quoted at the outset of this section reflect that notion. But as one Twin Cities judge suggested in her narrative comments, that responsibility is misplaced:

> Fifth Degree Assault [the typical charge in domestic abuse cases] is the only crime I know of where we force the victim to see that the system works. These victims, more than others, need support to make it through all the hoops.

The crucial issue is whether the victim shows up in court. The Task Force Domestic Violence Study showed that in almost two-thirds of the cases examined, the victim was the only witness to the charged assault other than the defendant. This is typically true of the misdemeanor assault case, as reflected in narrative comments and testimony. Although it is possible, in some small percentage of cases, to prosecute the case without the victim present, even a resourceful and committed lawyer can be stymied by lack of victim testimony.

The subject of whether the prosecutor bears responsibility for getting the victim to court has raised a complex question of the victim's relationship to the law. The judge who refused the OFP petition of the woman in the golf-ball incident because she was the "type who changed her mind" reflects serious derogatory thinking about victims of domestic abuse. Or, as a female attorney from the Twin Cities reported:

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18 The Balos study also found that those who plead guilty to domestic assault were rarely fined.

> I have had a judge tell me, in chambers, perhaps my female client deserved to be beaten up by her husband; maybe she said or did something that really angered him.

This victim-blaming is similar to the stereotypical thinking about sexual assault victims described later in this report, in which the focus is on the victim's characteristics rather than on the defendant's conduct. In addition, witnesses and survey comments described incidents of intimidation – threatened or actual reprisals and further battery – by criminal domestic assault defendants attempting to force dismissals. The combination of victim-blaming in the legal system and victim intimidation outside of the system can effectively deter prosecution of criminal domestic assault.

The prosecutor's willingness to dismiss criminal domestic assault charges in this milieu is a contributory factor to cycles of violence and the inability of the criminal process to deal with domestic violence. It is, further, a de facto delegation of the prosecutorial responsibility to enforce the domestic violence laws to the victims of the crime.

American criminal law, at its root, is premised on the notion that private citizens may not invoke the criminal process, for fear that the process, with its penal consequences, may be misused for improper purposes. The interposition of a responsible public officer is the institutional aspect of the criminal justice system designed to promote the community's interest in criminal justice. It is contrary to the principles of this system to even indirectly hold victims of domestic violence responsible for law enforcement in the area of their victimization.

If it is incumbent on the prosecutor to get the victim to court, and to treat the victim as a witness, rather than as the associate prosecutor, it may be necessary for the prosecutor to subpoena the victim to appear in court. At least one witness expressed the opinion that use of the subpoena power and its attendant contempt penalties for failure to appear may be a second victimization.[19] Insensitive use of the subpoena can and does result in such victimization in some cases. In a prosecutor-victim relationship where the victim comes to know and trust the prosecutor at the outset of the case, and believes that the prosecutor will do everything possible to pursue the case, the result of subpoena use can be remarkably different. A subpoena could then serve as a means of taking the pressure off the victim, making it clear that the government, rather than the victim, is responsible for the pending prosecution. In two-thirds of the 1987 cases studied by the Task Force, prosecutors did not issue subpoenas to the victims for either pretrial or trial proceedings. (The data on subpoenas issued was available in all but 3% of the cases.)

If, as the Task Force Domestic Violence Study found, two-thirds of the cases involve the victim as the sole witness, and if prosecutors take the responsibility for getting the victim to court, there is a strong basis for concluding that more prosecutions can survive. Minnesota's judges would virtually always let the case go to jury deliberation on the testimony of the victim alone, as the table illustrates:

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19 Testimony of Stephen Cooper, Minnesota Department of Human Rights Commissioner, Twin Cities public hearing (April 19, 1988).

TABLE 2.3
CREDIBLE VICTIM TESTIMONY STANDING ALONE, IS A SUFFICIENT BASIS FOR ME TO DENY A MOTION FOR A JUDGMENT OF ACQUITTAL:

	Always	Often	Sometimes	Rarely	Never
Male Judges	62%	26%	9%	3%	-
Female Judges	80%	20%	-	-	-

Similarly, approximately three-fourths of the attorneys surveyed viewed prosecutors as always or often willing to go forward with victim testimony alone.

Consistent, sensitive use of subpoena power, coupled with the uniform involvement of domestic abuse intervention projects would make a stark difference in dismissal rates.

Intervention and Victim Advocacy

Survey results, narratives, and evidence from the model Duluth Domestic Abuse Intervention Project (DAIP) suggest that intervention and victim advocacy projects are extremely helpful in increasing victim cooperation and case survival rates. Innumerable judges' narratives commented upon the enhanced chances of the case getting to trial if advocates were involved to minimize the intimidation factor, whether express or tacit. The judge's survey results indicate that 100% of female judges think that victim advocate programs are helpful in the prosecution of domestic violence cases, while 88% of male judges agree. Attorneys concur on the question of whether the presence of advocate intervention reduces dismissals. Forty-four percent of male attorneys and 61% of female attorneys stated that they always or often serve that purpose. About 60% of female prosecutors and defense lawyers fall into that category, while lower percentages of male prosecutors and defense lawyers agree.[20]

The Duluth system, which involves both working with offenders to maintain their compliance with dispositional conditions and use of advocates to support the victims, went into effect in 1982. In that year domestic disturbance calls dropped by approximately ten percent. Arrests went up to 105 in 1982, compared to 21 in 1980. The conviction rate rose from 20% of those arrested in 1980 to 82% in 1982. The courts ordered 190 abusers into counseling in 1982, compared to eight in 1980. This is a dramatic rise in arrests and convictions. The program continues to work and is now being cited nationally as an excellent model.

If the two-pronged approach of victim subpoena and victim advocacy is used effectively to increase victim availability, prosecutors still must deal with questions of whether to prosecute in cases where the victim fails to appear or changes her testimony, and presentation of successful cases where the victim is the only witness.

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20 The Task Force Domestic Abuse Study data gatherers were surprised to find that information on participation by advocacy and intervention projects was not available from prosecutors, law enforcement, or court records. Such information could help develop a data base on the role of these projects.

Evidentiary Tools

A number of evidentiary tools are available or can be developed, which may help the prosecutor go forward with the case in the absence of the victim or in cases with recanting victims. Depending on the other evidence that has been preserved, the case may be no less prosecutable than a homicide case, where, by definition, the victim is unavailable. Statutory enactments to allow for the development of evidentiary tools and preservation of evidence can assist in the enforcement of the domestic violence laws.

Medical Evidence. The Task Force Domestic Violence Study showed that physical injury was present in three-fourths of the cases examined, with many such injuries observed by the police. Many victims received outpatient care at a hospital or doctor's office. The police report in all such cases can be required to contain a photograph of all physical injuries. A protocol can be developed with medical care providers for the gathering of photographic and physical evidence in much the same manner that "sexual assault kits" are completed on rape victims. The reporting requirement for medical personnel to report child abuse can be expanded to include mandatory reporting of domestic abuse and submission of medical records to the prosecuting authority. With these measures, the evidence of physical injury can be preserved.

"Prompt Complaint" Evidence. Each domestic assault criminal complaint involves a victim's description of the assaultive encounter. In sexual assault and child abuse cases, such prompt complaint of victimization is often allowed as evidence in trial as an exception to the hearsay rule. A concerted effort to document the original complaint of the domestic violence victim in the victim's own words, whether by videotape or audio record, would make such evidence available to the prosecuting lawyer. A police officer's paraphrase in a written report fails to serve this evidentiary function.

Computerized Data Base. The statewide domestic abuse computerized data base recommended in this report in the civil context would serve the additional function of allowing prosecutors access to knowledge of outstanding or prior OFPs, which may not be otherwise known. The realities of large-volume misdemeanor prosecution eliminate much police investigative follow-up for trial preparation. The data base also would provide access to prior criminal history which the prosecutor may evaluate for use as evidence of the crimes.

Witness Statements. Police interviews of eyewitnesses other than the victim provide valuable assistance in getting the case to disposition on the merits. In one-third of the Task Force Domestic Violence study cases, there were eyewitnesses; of those eyewitnesses, police had interviewed more than three-fourths of them. The majority of the eyewitnesses were adults.

Same Prosecutor. Effective use of these suggested evidentiary tools, including close interaction with the victim, requires that a single attorney be assigned to handle a case from the initial charge through trial. Testimony of victims and intervention project personnel indicates that in some jurisdictions, the identity of the trial prosecutor is unknown until the assigned day of trial. To that end, establishment of special domestic assault prosecutors has been recommended.

Prosecutor Resources. Each of the preceding parts of the discussion on dismissal entails the commitment of prosecutorial resources beyond those normally allotted in the high-volume, fast-paced criminal misdemeanor practice. If prosecution is intensified, more calendar time in the criminal courts will have to be dedicated to these cases. If the domestic violence problem is serious, and if misdemeanor courts are where the most commonly enforceable remedy is available, the Task Force concludes that these resource allocations must be made. The physical trauma to thousands of victims, the familial upheaval, and the secondary consequences in the workplace, the schools, and the cultural environment may well be a greater cost to society than the cost of judicial and prosecutorial resources necessary to deal comprehensively with the problem of domestic abuse.

Addressing Enforcement Issues

The problems of domestic abuse enforcement are not unlike the problem of drunken driving, which the state has just recently confronted. Many of the obstacles to effective enforcement of both civil and criminal domestic abuse laws parallel those that, until recently, prevented effective enforcement of drunken driving laws:

- cultural reluctance to intervene in what was seen as essentially a private matter;
- inconsistent attitudes toward enforcement from prosecutor to prosecutor and judge to judge; and
- insufficient commitment of law enforcement and judicial resources.

Despite these obstacles, a dramatic shift has occurred in public attitudes toward drunken driving. Attributable largely to the public education efforts of nonprofessional individuals devoted to their task, this shift has resulted in changed laws, commitment of law enforcement offices and invigorated prosecution. There is now a pervasive perception in Minnesota that drunken driving will not be tolerated.

Enforcement of domestic abuse laws, if it is to be effective, will occur only when Minnesotans decide that they will not tolerate within families conduct that they will not tolerate on the street. It is a simple truth that in a civilized society, people are not allowed to physically injure one another except in the most extraordinary circumstances. The Task Force recommends that this simple truth be brought home in every sense of the word.

As it now stands, disturbing numbers of Minnesota women suffer physical injury within their homes and family settings, without adequate recourse in the courts. Such systemic inability to consider the merits of domestic violence cases in our courts should cause serious thinking and action by the bench, the bar, and the public.

Findings

1. The survival rate of domestic assault prosecutions is significantly diminished by a practice of dismissal by the prosecutor before trial.
2. Prosecutors' offices are handicapped in their responsibility to enforce the Domestic Abuse Act by the lack of adequate resources and the absence of sufficient evidentiary tools.

3. Lack of coordination between the civil and criminal enforcements of the Domestic Abuse Act often leads to conflicting or confused handling of cases.

4. Domestic abuse intervention projects substantially enhance the number of cases finally resolved on their merits.

Recommendations

1. Legislation should be enacted that mandates funds and makes available domestic abuse advocacy programs in each county of the state.

2. The state should create a statewide computerized data base on domestic violence, available to law enforcement, prosecutors, courts, and probation, to be accessed under both victim and abuser names, to include:

   (a) existing OFPs and their conditions;
   (b) existing conditions of bond or probation;
   (c) pending criminal charges;
   (d) past domestic violence criminal history; and
   (e) past OFPs.

3. Police reporting requirements regarding domestic violence should be expanded to require law enforcement officers, prosecutors, courts and probation officers to report the items above into the statewide data base.

4. Legislation should require medical care providers to report incidents of domestic violence to law enforcement authorities, and to preserve and make available physical evidence of injury to the victim.

5. Legislation should mandate presentence investigations in all cases of conviction for domestic violence, without ability to waive the requirement.

6. Legislation should require all county and city prosecuting authorities to have a plan for the effective prosecution of domestic violence cases.

7. A policy commitment should be implemented to end discretionary dismissals for reasons of "victim cooperation," and to develop effective means of reversing this phenomenon.

8. A single prosecutor should be responsible for each case from initial charge to disposition.

9. Early contact between prosecutor and victim, with earliest possible domestic abuse advocate intervention, should be used to explain the use of subpoenas, and the role of victim as a witness.

10. The use of subpoenas should become standard procedure in all domestic violence prosecutions necessitating appearance of the victim.

11. Coordination should be established with law enforcement authorities to preserve prompt complaint evidence by means of videotape or audio recording.

12. Adequate resources must be allocated to permit prosecutors to execute the foregoing.

13. The Supreme Court should promulgate a rule which provides that domestic abuse advocates do not commit the unauthorized practice of law when appearing with or assisting victims of domestic violence in criminal proceedings.

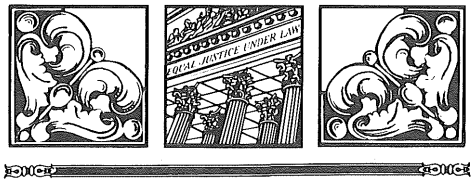
14. The prosecutor's statutory obligation to notify domestic violence victims in advance of case dismissals should be uniformly enforced and coupled with a requirement that prosecutors state the reason for dismissal in open court.

15. Courts should require supervision of conditions of release by court services pending trial in criminal actions and of probationary conditions following sentence.

16. Courts should create uniform forms for statewide use in bail matters for criminal domestic violence proceedings.

17. Courts should enforce the statutory mandatory fine requirement in instances of conviction for domestic violence, except in cases of sworn indigency.

18. Police and sheriff's departments should be encouraged to present in-service training programs concerning domestic abuse. Post Board credit should be offered and the programs should be made as realistic as possible.



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."[1] 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.[2] 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. Moroan, 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.[3] 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.[4]

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.[5]

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[6] 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.[7]

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.[8] 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.[9]

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.[10] 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

	Always	Often	Sometimes	Rarely	Never
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

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10 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.[11] (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.[12] 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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12 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

Offense Type	Females	Males
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,[13] their crimes do not necessarily call for commitment to prison according to sentencing guidelines.

Departure Rates

Both the aggravated and mitigated dispositional[14] 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.[15] 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

	Jail (Days)	Restitution	Fine	Stay (Months)
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

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			
	Male	Female	Metro Male	Non-Metro Male
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?

Reason	Judges Responding
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.[16]

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:[17]

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

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16 Minnesota Department of Corrections, Statewide Jail Summary—1986, pp. 3, 5 (June 1986).

17 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.[18]

According to Mann, female juveniles are institutionalized more frequently and for longer periods of time than are males.[19] 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.[20]

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[21] than are boys,[22] 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,[23] 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/[24]
Detention by Sex of Juvenile

	Statewide	
	Female	Male
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

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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.[25]

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.[26]

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 Incorrigibility within the purview of the CHIPS provisions.[27] The revised code discards the term absenting, replacing it with the term runaway.[28] The offense of incorrigibility no longer exists under the revised code. Situations previously labeled "incorrigibility" 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."[29] 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.[30]

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.[31] 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%.[32] 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."[33] 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.[34]

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.

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

A 1988 Rand Corporation report[35] 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.[36]

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:

	Male	Female	No Difference	No Basis For Judgment
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)

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

36 At 31, at 37.

> 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.

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.[37] 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.[38] 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.[39] 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.[40]

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.[41]

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.[42] 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

	Always	Often	Sometimes	Rarely	Never
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,[43] 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.[44] 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).

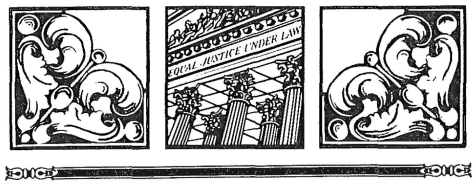
44 Minnesota courts have generally followed federal law in regard to the determination of attorney fee awards because of the similarities of state and federal anti-discrimination laws. The approach adopted by the United States Supreme Court in 1983, and subsequently adopted by the Minnesota courts, computes 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.[1] 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.

1 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[2]
WOMEN LITIGANTS OR WITNESSES ARE ADDRESSED BY THEIR FIRST NAMES OR TERMS OF ENDEARMENT WHEN MEN LITIGANTS OR WITNESSES ARE NOT

		Always	Often	Sometimes	Rarely	Never
-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.

2 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

		Always	Often	Sometimes	Rarely	Never
-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.[3]

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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3 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 "lovebirds" 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:[4]

> 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.[5] Two of the seven Supreme Court justices and three of the 13 Court of Appeals judges are women.[6] 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.[7] 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 difficultly 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.[8] 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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8 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.[9]

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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9 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.[10] 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.[11]

> 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.[12] 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.[13] In addition, within the last year one judge was suspended for a year for incidents of sexual harassment of court employees,[14] 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.[15]

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.

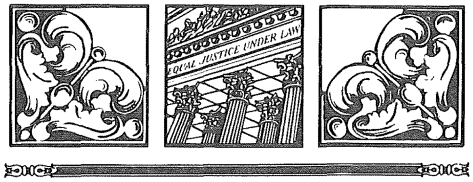
Recommendations

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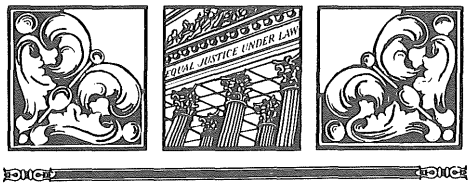
1 Learning from the New Jersey Supreme Court Task Force on Women in the Courts: Evaluation, Recommendations and Implications for Other States (October, 1988).

MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS

REPORT SUMMARY



Introduction

"The spirit of liberty," wrote Learned Hand, "is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias." The Minnesota Supreme Court Task Force for Gender Fairness in the Courts was established in the spirit of liberty, to determine whether the Minnesota courts are indeed weighing interests without bias.

The Task Force was appointed in 1987 to examine the issues of gender bias and gender fairness, of the treatment of women and men who appear in the courts professionally and as litigants and witnesses. The Task Force was established in light of a growing understanding that major social and cultural changes in the last twenty years have presented serious challenges to long-standing assumptions about the fairness of judicial and governmental processes in dealing with gender issues.

These social and cultural changes include women's increased participation in the labor force, increased educational and professional opportunities for women, changes in the structure of the American family, redefinition and increased reporting of sexual and domestic violence, and the rapid increase of women in law schools, law practice, and the judiciary. These changes both caused and were reflected in changes in Minnesota law in the 1970's and 1980's: restructured divorce laws, new approaches to property division and maintenance, revision and recodification of criminal sexual assault laws, and major legislation on domestic abuse.

Background and Structure of the Task Force

The first states to establish task forces to examine gender issues in their court systems were New Jersey, New York, and Rhode Island. In 1985 Minnesota foundations funded a manual to be used in organizing gender bias studies in other states. Minnesota's commitment to gender fairness had been demonstrated by its leadership in legal reform and in judicial appointments by a governor with a clear commitment to diversity on the bench. As the results of studies in other states became available, however, it became clear that the questions at stake were much more comprehensive and subtle than those addressed by specific changes in laws. These studies showed that in a delicately balanced system of

justice, relying heavily on judicial discretion, residual gender bias could circumvent the intent of law reform. The early study results from other states described hardships on individuals resulting in negative perceptions of justice. These studies suggested that gender bias has a widespread influence on participants in the court system and on the potential for just results. Minnesota clearly was not exempt from these issues of contemporary justice.

The first steps to establish the Minnesota Task Force for Gender Fairness followed Chief Justice Douglas K. Amdahl's attendance at a session describing the work and early results of the existing task forces at the 1986 Annual Conference of Chief Justices. A planning group was formed to discuss the task force process and its potential in Minnesota. It recommended establishment of a Task Force and made suggestions for its structure, membership, and focus.

On June 8, 1987, Chief Justice Amdahl, by formal order, created the Task Force and appointed its thirty members. The charge of the Task Force was to:

1. Explore the extent to which gender bias exists in the Minnesota State Court System, by ascertaining whether statutes, rules, practices, or conduct work unfairness or undue hardship on women or men in our courts;

2. Document where found the existence of discriminatory treatment of women or men litigants, witnesses, jurors, and of women judicial, legal, and court personnel;

3. Recommend methods to eliminate gender bias in the courts including the development and provision of necessary judicial education, the passage of legislation, and the promulgation of court rule and policy revisions;

4. Report the findings of its investigation to this Court by June 30, 1989; and

5. Monitor, thereafter, the implementation of approved reform measures and evaluate their effectiveness in assuring gender fairness in our courts' processes.

The Task Force included state appellate and district court judges, a member of the federal court, a state senator, the state court administrator, practicing lawyers, bar leaders, members of the academic community, and citizen leaders. Its membership was selected to reflect geographic, gender, racial, and disciplinary diversity as well as a commitment to the enterprise. Supreme Court Associate Justice Rosalie E. Wahl chaired the Task Force and Court of Appeals Judge Susanne C. Sedgwick was appointed Vice-Chair. Dr. Norma J. Wikler, Associate Professor of Sociology at the University of California at Santa Cruz and a pioneer in the field of judicial education on gender issues, was appointed as consultant to the Task Force.

The Task Force organized its work by establishing six committees. Three of the committees focused on particular subject areas: Family Law; Civil, Criminal, and Juvenile Justice; and Court Administration, Courtroom Interaction, and Judicial Education. The Task Force considered whether to make domestic violence a separate subject of investigation, but recognizing its pervasive nature, determined that its thorough examination required study by each of the subject area committees. A fourth committee, Data Collection and Evaluation, had the substantial task of integrating the work of the committees and supervising the collection and evaluation of data. The Executive Committee assisted the Task Force Chair in directing the work of the Task Force. The Editorial Committee, which

included the Reporter, was responsible for coordinating production of the Task Force's interim and final reports.

Meeting the Mandate

An essential element of the Task Force investigative process was to describe the boundaries of gender-based discrimination. Other gender bias task forces have defined such discrimination as:

> stereotypical attitudes about the nature and roles of men and women, including cultural perceptions of their relative worth and myths and misconceptions about the economic realities encountered by both sexes;
>
> attitudes and behavior based on stereotypical beliefs about the nature and roles of the sexes rather than upon independent evaluation of individual ability and life experiences; and
>
> any situation in which a decision is made or an action taken because of weight given to preconceived notions of sexual roles rather than upon a fair and neutral appraisal of merit to each person or situation.

The Task Force, noting that the essence of gender fairness is the treatment of male and female participants in the system with equal respect, did not develop a limiting definition. The Task Force's full title, however, indicates the nature of the inquiry. The Minnesota Task Force for Gender Fairness in the Courts took a positive approach to informed investigation of the issues and committed itself to positive solutions.

The substance of this investigation was framed on the basis of the members' reading, discussion, and observation. Task Force members worked with reports from other states, scholarly books and articles, and their own experiences. Special emphasis was placed on research studies and reports that addressed gender fairness issues in the context of the Minnesota judicial system. Individual Task Force members and staff also consulted with the authors of some of these studies. This background provided a framework for developing an information-gathering plan that included public hearings, lawyers' meetings, surveys of judges, attorneys, and court personnel, a women judges' meeting, and specialized research studies and surveys.

Public Hearings. The Task Force held six public hearings to give Minnesota citizens the opportunity to discuss their concerns as to gender fairness in the courts and to give Task Force members the opportunity to hear those concerns. The hearings were held in Duluth, Rochester, Marshall, Moorhead, and the Twin Cities.

Task Force members heard testimony from over sixty witnesses, including individual members of the public, representatives of interest groups, heads of commissions and agencies, and scholars. Witnesses testified both by invitation and as volunteers. Additionally, witnesses supplemented their oral testimony with written reports and documentation. Those witnesses unwilling or unable to testify personally were urged to communicate in writing with the Task Force. All written testimony submitted to the Task Force remains

confidential. The public proceedings were tape-recorded, and the Task Force prepared transcripts and summaries of the testimony.

Lawyers Meetings. Lawyers meetings were held in conjunction with the public hearings in the Twin Cities, Rochester, Duluth, and Moorhead locations. These meetings were designed to elicit the perceptions of lawyers practicing in the state's courtrooms. To facilitate discussion, the Task Force prepared and distributed a series of questions used to guide the meetings. A number of lawyers who could not attend the meetings in person submitted written responses to the discussion questions. The lawyers' meetings were tape-recorded and summaries of the testimony were prepared for Task Force members.

Surveys. The role of lawyers and judges as sources of information on gender fairness is so significant that the Task Force resolved early to survey all of the judges and attorneys in the state. In addition to providing the Task Force with valuable information, the surveys increased awareness of gender-related issues. The surveys covered specific subjects such as courtroom interaction, family law, criminal law, employment law, and domestic violence, as well as general attitudes and perceptions concerning gender bias.

The lawyers' survey was distributed to all attorneys (approximately 13,000) registered to practice law in Minnesota. A random sample of approximately 4,000 respondents to the survey, drawn prior to mailing, was statistically analyzed. Canvassing all attorneys in the state and following up on a smaller random sample allowed the Task Force to combine the educational benefits of a statewide survey with intensive analysis of a scientifically drawn sample.

The judges' survey was distributed to all 281 judges, referees, judicial officers, and retired judges registered in Minnesota in 1988. All responses were analyzed as the core sample.[1]

Both of these surveys elicited remarkable response rates. Eighty-three percent of lawyers and ninety-three percent of judges responded, expressing diverse opinions and experience. These return rates indicate an exceptional willingness to address issues of gender bias and a commitment to work toward gender fairness.

Towards Fairness

A study of any system undertaken with this level of commitment reveals both its finest attributes and its most disappointing lapses. Narrative comments in the report, which were taken from surveys and testimony, provide compelling, often disturbing, accounts of the lapses. The statistical analyses in the report effectively, if somewhat less dramatically, indicate the extent of gender fair attitudes and behavior as well as areas in which bias persist. Both comments and survey results reflect the diverse perceptions of participants and observers.

Participants and practitioners in the court system share a number of common goals. One of these goals is equality before the law. Intellectually, every judge, lawyer and court employee understands that this equality is the central focus of the role he or she plays in

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1 The text of both survey instruments and a detailed description of survey methodology prepared by Dr. Nancy Zingale are in the Appendix section of the full report.

the judicial system. This report attempts to analyze judicial practices, procedures and demeanor with respect to that shared goal. Specifically, the report describes the progress towards equality made thus far and provides findings and recommendations to facilitate further progress.

This summary includes some of the most significant and compelling data found by the Task Force. Additional supporting data are found on each topic in the full report.

FAMILY LAW

Spousal Maintenance

Spousal maintenance was awarded in only ten percent of Minnesota divorces in 1986, and permanent maintenance was awarded in less than one-half of one percent of cases sampled. When maintenance is awarded, it is rarely high enough to allow the economically dependent spouse to sustain the standard of living maintained during the marriage. Judges seem to underestimate the difficulty women face when they re-enter the work force after a long period of absence, or to adequately respond to acknowledged differences in the earning capacities of men and women, especially women who have deferred careers during child-raising years.

According to survey responses, a majority of both male and female attorneys think that, in considering permanent maintenance, judges lack a realistic view of the likely future earnings of a homemaker who has not worked outside the home in many years. However, when judges were asked in their survey to estimate the likely earning capacity of a fifty year old homemaker who had been out of the workforce for twenty-five years, the majority of judges were able to estimate her income earning capacity in accordance with Census Bureau statistics.

A current study of the economic consequences of divorce, by Professor Kathryn Rettig and Lois Yellowthunder (the Rettig study), indicates that maintenance awards do not reflect the apparent judicial awareness of the economic plight of the long-term marginally employed homemaker facing divorce. The data and the cases suggest that judges may be hesitant to place long-term financial obligations on males.

Findings

1. Spousal maintenance is rarely ordered in Minnesota, even in long-term marriages.
2. When maintenance is awarded, it may sustain the economically dependent spouse at a minimal level but generally does not permit that spouse to maintain a previous standard of living.
3. Courts are reluctant to impose long-term maintenance obligations.
4. Maintenance awards are not sufficient in duration or amount to adequately provide for education or training of the economically dependent spouse.

Recommendations

1. Judicial education courses and continuing education courses for lawyers in family law should address spousal maintenance. These courses should contain: 1) information about the economic realities faced by women attempting to reenter the labor market after extended absences, including practical exercises dealing with spousal maintenance determinations; and 2) information emphasizing the need to make specific findings on all of the factors which state law requires courts to consider in awarding maintenance.

2. Courts should discontinue the use of the terms "rehabilitative" or "short-term" and adopt the term "maintenance" as standard usage.

Property Division

Minnesota law requires that marital property be distributed equitably upon divorce. The Task Force found that, by and large, equitable distribution works well in the state, with courts usually achieving close to a 50-50 division of the marital assets. However, the nature of the property division, with the wife usually receiving the home or non-liquid assets, and the husband receiving the majority of the couple's income-producing assets, can create inequities.

Finding

While property is divided equally in most instances, the nature of the property division, with the husband receiving the majority of the liquid and income-producing assets, can create inequities.

Recommendation

Judicial education programs should address the need for judges to divide marital property so that each of the parties retains some liquid and income-producing assets after divorce.

Child Support

Minnesota has had legislated statewide guidelines for the payment of child support since 1983. The guidelines call for the noncustodial parent to pay a percentage of net monthly income as support, with the percentage increasing as the payor's income and the number of children to be supported increases. The Task Force found that the payment levels established by the guidelines are not set high enough to provide adequately for the support of children and that dollar figures proposed as the suggested floor for support awards are being used instead as the upper limit.

The most serious consequence of inadequate child support awards is the severe economic dislocation that results for women and children after divorce.

As one attorney noted in the survey:

> The custodial parent (usually female) definitely gets the short end of the stick financially. For example, a father takes home $1,500 monthly and the mother takes home $500 monthly. This average family with two children have $2,000 a month to support 4 people ($500 per person). Now the parents divorce, mom gets the kids, child support is set in accordance with the guidelines of $450 per month. Dad now has $1,050 for himself. Mom and the kids live on $950 a month for the three of them. If she has the option of working more hours, she also

> pays increased child care costs. (Female attorney, Greater Minnesota)

Low-income custodial parents face an additional disadvantage in establishing child support. When a custodial parent receives Aid to Families with Dependent Children, it is easy for the other parent to negotiate a low child support award. When these custodial parents stop receiving public assistance, they are left with a bare minimum in support.

Testimony was offered on the problem of inconsistency of enforcement of payment, which is a problem in Minnesota as it is in other states. Though federally mandated wage withholding will be in effect by 1994, this will not completely ameliorate the problem of collecting from self-employed and deliberately under-employed payors. While the majority of Minnesota judges responding to the survey say they are willing to use their contempt power to enforce child support awards, and that they note its effectiveness when applied, they do not use contempt very often. This is a troubling finding in a national environment in which less than half of all custodial parents are receiving regular child support payments.

Findings

1. Minnesota's child support guidelines are too low.
2. Courts are misinterpreting the guidelines as a maximum level of support for non-custodial parents, rather than the minimum level as intended by the legislature.
3. Deviations downward from the guidelines are much more common than upward deviations.
4. The standard of living of the custodial parent and children decreases substantially after divorce, while that of the non-custodial parent often improves.
5. Low income custodial parents are especially disadvantaged in establishing child support.
6. Inconsistency in the enforcement of child support awards results in unfairness to custodial parents and their children.

Recommendations

1. Judges should enforce child support orders through the use of contempt.
2. In keeping with the original legislative intent, judges should interpret the child support guidelines as the minimum level of the non-custodial parent's obligation, rather than the maximum.
3. When the Minnesota legislature reexamines its child support guidelines, as required by federal law, it should adopt an approach to establishing child support levels that reduces the disparity between the standard of living of custodial parents and children and non-custodial parents after divorce.
4. Judges should calculate the effects of a downward deviation from the guidelines on the post-divorce standard of living of both parties before ordering a downward

deviation. Judicial education courses in family law should contain information on how to perform these calculations.

5. Judges should use other statutorily authorized judicial sanctions for failure to pay child support, such as the appointment of receivers, where appropriate, and should consider developing additional creative sanctions, all of which should be incorporated into statewide enforcement policies.

Child Custody

The area of child custody is one in which stereotypical assumptions about the proper social roles for women and men can affect judicial decisions. The stereotype that fathers are not capable of caring for young children can make it very difficult for men to prevail in custody cases. At the same time, fathers may be given extraordinary credit for showing nonstereotypical skills, such as diapering, feeding children, etc., but penalized as "too feminine" if they take on a highly involved caretaking role. The stereotype that mothers have innate parenting skills and should behave according to the traditional notion of the nurturing mother can work against a woman in a custody challenge; she may be penalized for working outside the home, seeking counseling, dating, etc.

Damaging sex role stereotypes can extend beyond the courtroom to personnel who perform custody evaluations and mediation. Divorcing parents using these court-provided services may experience gender bias in the custody evaluation process. A number of respondents to the lawyers' survey also spoke of the additional onus placed upon poor women in custody disputes, especially when receiving public assistance. Lawyers noted that these women often face an uphill battle to convince a judge their children should live with them, rather than with a more financially secure father.

Though state law expressly prohibits judges from requiring custody mediation in cases where there is probable cause to believe that domestic abuse has occurred,[2] Minnesota judges regularly order abused women into mediation. Loretta Frederick of the Minnesota Coalition for Battered Women testified to the Task Force:

> Battered women go into mediation scared to death to assert themselves, frightened to say what they really think should happen with their children, sometimes getting literally beaten up in the parking lot afterwards for having opened their mouths, and ending up with custody and visitation [agreements] that are not in the best interests of the children.

According to data from the Rettig study, joint legal custody was awarded in almost fifty percent of divorces granted in Minnesota in 1986. The Task Force found that some judges are too willing to impose joint custody in situations where the parents cannot agree and there is no evidence that joint custody would be in the children's best interest.

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2 Minn. Stat. § 518.619, subd. 2 (1988).

Findings

1. Some judges make stereotypical assumptions about proper roles for women and men that disadvantage both fathers and mothers in custody determinations.
2. Custody mediators and custody evaluators are subject to the same gender-based stereotypes that affect judges.
3. Some judges continue to order custody mediation in situations where there has been domestic abuse in spite of state law prohibiting mandatory mediation in these cases.
4. Fathers sometimes use the threat of joint custody to obtain an economic advantage over mothers.
5. Judges are sometimes too willing to order joint custody where there is no evidence that it is in the best interests of the children to do so.
6. When the court fails to make custody decisions promptly the children suffer harm.

Recommendations

1. Judicial education programs in family law must sensitize the bench to issues of bias in custody determinations; judges must recognize that fathers can be good custodians of small children and that mothers with careers can be good parents.
2. Judicial education programs in family law should educate judges about the need to make custody decisions promptly.
3. Custody mediation should not be ordered where domestic abuse has been documented by means of sworn statements, an OFP, or arrest records.
4. Counties using court services for custody evaluations should provide rigorous training and evaluation to ensure that social workers are sensitive to issues of bias in their investigation and reporting.
5. The Office of the State Court Administrator should develop a standardized format to be used throughout the state in custody evaluations and reports.
6. Where other evidence about custody is presented to the court, the court must carefully consider it along with any recommendation from a court services worker or private evaluator.
7. Judicial education programs in family law should examine the effects of joint custody orders.
8. Judges should use great caution in deciding to order joint custody; it should be imposed over the objections of one of the parents only where the court makes specific findings which identify the reasons why such an order is in the children's best interests.

Access to the Courts

The Task Force learned that, especially in the family law area, women do not have adequate access to the courts. The barriers to access are primarily financial and reflect the imbalance of economic power between men and women. Women in poverty, or without access to their own funds, have a difficulty obtaining legal representation. This problem cannot be solved by relying on increased pro bono work or legal assistance. One important element of a remedy could be an increased willingness to award adequate attorneys fees, in temporary hearing and post-judgment orders.

Findings

1. It is extremely difficult for poor people in Minnesota to obtain legal representation in family law matters.
2. The inability to obtain counsel affects women more severely than men.
3. The reluctance of judges to award reasonable temporary attorney fees and costs in family law cases prejudices the economically dependent spouse by making it impossible for that spouse in many cases to pursue the action.

Recommendations

1. State resources should be made available for the funding of legal representation for poor people in family law matters.
2. Whenever possible judges should award temporary attorney fees and costs to the economically dependent spouse in an amount that is sufficient to allow that spouse to effectively pursue relief in family court.

General Family Law Recommendations

1. Family law should be one of the subjects covered on the Minnesota bar examination.
2. Since family law and domestic abuse cases make up an ever increasing percentage of the caseload in Minnesota's courts at the trial court level, judges should be required to accumulate at least ten hours of judicial education credit in these two areas during each certification period.
3. Judges and attorneys must include more comprehensive economic information about the parties to a divorce in both temporary and final orders. Court records are often incomplete, and vital statistics data accumulated at the state level are presently not detailed enough to permit thorough analysis of the effects of divorce on families and children.
4. The Office of the State Court Administrator should develop materials which explain the function of the court in family law matters to litigants. These materials could include both pamphlets and videotapes. They should be distributed statewide.

DOMESTIC VIOLENCE

Sixty-three thousand incidents of domestic abuse were reported in Minnesota in 1984.[3] To address this problem, the state has some of the nation's most progressive domestic abuse statutes, backed by knowledgeable advocates in both the public and private sectors. In spite of these assets, the Task Force found compelling evidence that domestic abuse victims do not receive the civil or criminal relief which the statutes were intended to provide.

Although civil Orders for Protection (OFPs) are frequently issued and are relatively easy to obtain, they are rarely enforced. Although numerous criminal arrests are made and domestic assault charges brought, discretionary dismissal by prosecutors prevents final resolution of the cases in criminal court. The evidence reveals an enormous problem, much of which is occurring outside the reach of judicial intervention.

Civil Process: The Order for Protection

Many victims of domestic abuse attempt to obtain relief from the abuse by requesting a civil Order for Protection (OFP). Though the Minnesota Domestic Abuse Act requires court personnel to assist petitioners in preparing and filing the necessary forms for an OFP,[4] the Task Force found that circumstances vary from county to county and that in some jurisdictions, petitioners may actually be discouraged from filing. In addition, the Task Force found that in some areas of the state, judges continue to issue mutual OFPs in cases in which only one person has petitioned for an order and there is no evidence of mutual abuse.

Battered women and advocates further testified that some judges do not issue orders for supervised visitation when issuing OFPs because they fail to understand the dynamic of an abusive relationship. Judges may order "reasonable visitation" when a more structured order, setting specific conditions of contact, is needed to reduce the potential for further violence. The confusion between an issued OFP which excludes the abuser from the petitioner's residence and an order of unsupervised visitation which may take place at that same residence often defeats the purpose of an OFP.

Findings

1. Domestic violence is one of the most serious problems faced by our society.
2. Minnesota has strong and progressive statutes which are not adequately implemented or enforced.
3. Judges, lawyers, court personnel, and law enforcement officers are not sufficiently sensitive to the problems of victims of domestic abuse.

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3 This is the most recent available official figure. The number of incidents is complied by the Minnesota Department of Corrections, Program for Battered Women, based upon mandatory reporting by police agencies.

4 Minn. Stat. § 518B.01, subd. 4(e) (1988).

4. Some judges in Minnesota continue to improperly issue mutual Orders for Protection in situations where only one person has requested an order and there is no evidence of mutual abuse.

5. Petitioners for OFPs often do not receive adequate relief.

6. In certain cases the process discourages abuse victims from attempting to obtain protective orders.

7. The usefulness of the OFP is undercut at the local level through absence of clear enforcement procedures and standards.

8. Advocates for victims of abuse play a valuable part in the system; their role should be clarified to ensure their continued participation.

Recommendations

1. Judges, attorneys, court personnel and law enforcement officers should be sensitized to the problems of individuals who have been victims of domestic abuse.

2. The topic of domestic abuse and Orders for Protection—including information about the abuse dynamic and the dangers of victim blaming—should be addressed in judicial education programs.

3. Courts should not issue mutual Orders for Protection in cases without cross-petitions.

4. Continuing legal education programs should address domestic abuse issues.

5. The topic of domestic abuse should become part of the curriculum in family law courses in the state's law schools.

6. Domestic abuse issues should be addressed at local bar association meetings. The Minnesota State Bar Association could prepare a videotape presentation for use by local bar associations.

7. Court administrators and their deputies should have training in the area of domestic abuse as well as a good understanding of Minnesota's Domestic Abuse Act.

8. The state's courts should set a uniform standard regarding the role of the domestic abuse advocate at OFP hearings. The advocate should be allowed to attend the hearing, be present at counsel table and address the court. The courts should also take action to ensure that advocates are allowed to assist in the preparation of OFP petitions.

9. State funding for the hiring and training of advocates should be increased.

10. The forms used to petition the court for an Order for Protection should be simplified. For example, proposed orders could contain more sections which would be checked off by the judge.

Criminal Enforcement

The issue of criminal enforcement of domestic violence cases is complicated by two factors: discretionary dismissal by the prosecutor, before the charge can be determined on the merits either by guilty plea or trial, and the burden placed upon the victim to carry responsibility for the survival of the case. The problem was stated in the lawyers' survey by a prosecutor as follows:

> In all 15 cases, the victims demanded we dismiss. I have never tried any of the cases because of these witness problems. The cops arrest with probable cause without a warrant; I draft the complaints; the victims demand dismissal. I dismiss. These are all misdemeanor charges. (Male attorney, Greater Minnesota)

The dismissal problem can best be addressed by coordinated efforts to bring more victims to court, to use domestic abuse intervention advocates, to vigorously use evidentiary tools, and to commit adequate prosecutorial resources to the problem.

The cooperation of the victim is a necessary component in the prosecution of Fifth Degree Assault (the typical charge in domestic abuse cases). The victim usually is the only witness to the charged assault other than the defendant. The question of whether the prosecutor bears responsibility for getting the victim to court raises a complex issue of the victim's relationship to the legal system. Gender bias may show up dramatically in attitudes which blame the victim for the assault or in stereotypical thinking about the victim's characteristics rather than emphasis on the defendant's conduct. Furthermore, victims may face threats, intimidation, or further battery from defendants attempting to force dismissal of charges.

The prosecutor's willingness to dismiss criminal charges, even at the request of the victim, is a contributory factor to the inability of the criminal process to deal with domestic violence. Pressure may be taken off the victim by judicious use of the subpoena, making it clear that the government, rather than the victim, is responsible for the pending prosecution. Further support can be provided to the victim, insuring higher rates of cooperation and case survival, when domestic abuse advocates are involved to minimize the intimidation factor.

Even when the two-pronged approach of subpoena and advocacy is used effectively, prosecutors still must deal with cases where the victim fails to appear or changes her testimony. In these cases the need for well-developed evidentiary tools is obvious. In the same manner that "sexual assault kits" are provided to medical personnel for use in rape cases, "domestic violence kits" could be given to medical personnel for the gathering of photographic and physical evidence. Other remedies recommended by the Task Force include gathering prompt complaint evidence in the victim's own words by video or audio record, the establishment of a statewide computerized data base for OFPs, use of witness statements other than that of the victim, the use of a single prosecutor for each case to allow for personal and supportive interaction with the victim, and the allotment of greater prosecutorial resources to these cases.

Findings

1. The survival rate of domestic assault prosecutions is significantly diminished by a practice of dismissal by the prosecutor before trial.

2. Prosecutors' offices are handicapped in their responsibility to enforce the Domestic Abuse Act by the lack of adequate resources and the absence of sufficient evidentiary tools.

3. Lack of coordination between the civil and criminal enforcements of the Domestic Abuse Act often leads to conflicting or confused handling of cases.

4. Domestic abuse intervention projects substantially enhance the number of cases finally resolved on their merits.

Recommendations

1. Legislation should be enacted that mandates funds and makes available domestic abuse advocacy programs in each county of the state.

2. The state should create a statewide computerized data base on domestic violence, available to law enforcement, prosecutors, courts, and probation, to be accessed under both victim and abuser names, to include:

   (a) existing OFPs and their conditions;

   (b) existing conditions of bond or probation;

   (c) pending criminal charges;

   (d) past domestic violence criminal history; and

   (e) past OFPs.

3. Police reporting requirements regarding domestic violence should be expanded to require law enforcement officers, prosecutors, courts and probation officers to report the items above into the statewide data base.

4. Legislation should require medical care providers to report incidents of domestic violence to law enforcement authorities, and to preserve and make available physical evidence of injury to the victim.

5. Legislation should mandate presentence investigations in all cases of conviction for domestic violence, without ability to waive the requirement.

6. Legislation should require all county and city prosecuting authorities to have a plan for the effective prosecution of domestic violence cases.

7. A policy commitment should be implemented to end discretionary dismissals for reasons of "victim cooperation," and to develop effective means of reversing this phenomenon.

8. A single prosecutor should be responsible for each case from initial charge to disposition.

9. Early contact between prosecutor and victim, with earliest possible domestic abuse advocate intervention, should be used to explain the use of subpoenas, and the role of victim as a witness.

10. The use of subpoenas should become standard procedure in all domestic violence prosecutions necessitating appearance of the victim.

11. Coordination should be established with law enforcement authorities to preserve prompt complaint evidence by means of videotape or audio recording.

12. Adequate resources must be allocated to permit prosecutors to execute the foregoing.

13. The Supreme Court should promulgate a rule which provides that domestic abuse advocates do not commit the unauthorized practice of law when appearing with or assisting victims of domestic violence in criminal proceedings.

14. The prosecutor's statutory obligation to notify domestic violence victims in advance of case dismissals should be uniformly enforced and coupled with a requirement that prosecutors state the reason for dismissal in open court.

15. Courts should require supervision of conditions of release by court services pending trial in criminal actions and of probationary conditions following sentence.

16. Courts should create uniform forms for statewide use in bail matters for criminal domestic violence proceedings.

17. Courts should enforce the statutory mandatory fine requirement in instances of conviction for domestic violence, except in cases of sworn indigency.

18. Police and sheriff's departments should be encouraged to present in-service training programs concerning domestic abuse. Post Board credit should be offered and the programs should be made as realistic as possible.

CRIMINAL AND CIVIL JUSTICE

Sexual Assault

The outdated notion that sexual consent should be 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 conflict in handling sexual assault cases. The statutory shift to measuring the offense by the proof of force, is very new in both a statutory and a cultural sense.

The prevailing cultural stereotype of rape remains that of assault by a "violent stranger." However, the realities of sexual assault present a much more complex picture which often stymies law enforcement agencies and the judicial system by introducing factors of human relationship that do not fit the stereotype.

After a literature review conducted for the Task Force, Marlise Riffel-Gregor, sociologist at Rochester (Minnesota) Community College, concluded that by all common estimates, twenty percent of the country's female population will at some time suffer sexual assault at the hands of an acquaintance.[5] And according to Harvard law professor Susan Estrich, even though the majority of victims sexually assaulted by someone they know do not report, of all reported cases, eighty-three percent still do not fit the "violent stranger" rape stereotype.[6] The vast majority of sexual assaults perpetrated in Minnesota are by assailants known to the victim. These assaults occur in what the Attorney General's Task Force on the Prevention of Sexual Violence Against Women termed a climate of tolerance as to sexual aggression.

In such a climate, rapes that involve an element of acquaintance 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. One judge responding to the Task Force survey commented:

> 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)

In the small percentage of "acquaintance rape" cases that find their way into court, 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. Stereotypical notions of how women manifest consent become the issue at trial. This appears to be true even in cases that involve weapons, personal injury, extreme violence, and no prior intimacy. Defense attorneys continue to use negative stereotyping, prior sexual history, and rape myths to make a case for implied consent in both "stranger rape" and "acquaintance rape" cases. Judges' survey comments reflect the courts' dilemma in handling such situations without interfering with the attorneys' right to make a case.

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5 An acquaintance is defined broadly as one known or simply recognized by the victim.

6 Real Rape, 1986.

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 Minn. Stat. § 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

Minnesota Sentencing Guidelines prescribe felony sentencing practices statewide. The Task Force explored the question of gender fairness in sentencing by looking at how the guidelines were being applied to female adult offenders. The Task Force found that

sentencing guidelines have eliminated gender differences in sentences involving prison terms. However, no guidelines exist for nonimprisonment sanctions (jail, restitution, fines), and gender differences do exist as to those sanctions.

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

An attorney at the Twin Cities lawyers' meeting called the juvenile court "the real bastion of sexism and paternalism in the criminal justice system." Studies at both the state and national level report a higher percentage of arrest and detention for girls than for boys, giving weight to the theory that certain kinds of behaviors which may be dismissed in young men as tolerable are viewed as socially deviant in young women. Those working with juveniles in both the social services and the court system confirm that incorrigibility and absenting (running away) are the categories most often charged to deal with children who

do not measure up to parental expectation. In Hennepin County Juvenile Court, minor females outnumber minor males in both these categories.

Professor Barry Feld of the University of Minnesota Law School 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.[7]

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.
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.

Child Victim Advocacy

Information from the Minnesota Sentencing Guidelines Commission on dispositional departures for sex offenders indicates 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 is imprisonment. Social service sources suggest that victimized children are subjected to extreme pressure by families and offenders to keep the family unit intact, risking revictimization if the offender returns to

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

the family. The Task Force concluded that during criminal proceedings, the introduction of an adult whose sole responsibility is advocacy of the child's interest could reduce the stress on child victims and increase the court's awareness of the child's interest in dispositions that protect the victim.

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. While lawyer testimony could be easily gathered, statistical data which would have corroborated their information have been impossible to obtain. Even without insurance tables and comparative award figures, the seriousness of the problem is evident from the statements of litigation attorneys who represent claimants in personal injury actions and the judges who hear these cases.

Homemaker services are undervalued in actions involving claims for lost wages. Women may not be properly compensated for the loss of future earning capacity. Conversely, disfigurement awards reflecting the cultural bias as to the value of women's appearances appear to be higher for women than for 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 (JIG) 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.

Gender-Based Employment Discrimination

State law prohibits employment discrimination based on sex. Most employment discrimination cases are handled in federal court or by administrative agencies. Studies indicate that more than two-thirds of the citizens who may experience employment discrimination simply do nothing about it and do not contact an attorney. 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. Women pressing discrimination charges may experience special difficulties as to issues of credibility, negative stereotyping, and victim blaming.

A second factor in the decision not to press a discrimination claim may be the issue of attorney fees and awards. Fees often present a major obstacle to pursuit of employment discrimination claims. The lawyers' survey responses suggest that attorney fee awards to prevailing parties are often insufficient to encourage attorneys to take on these cases.

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.

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

The Court Environment for Female Litigants, Witnesses, and Attorneys

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.

Reported experiences of women litigants and witnesses indicate that sometimes their requests for enforcement and the value of their time have not been treated with complete respect; that judges have made remarks trivializing their cases; and that women have been addressed by endearments or first names when men were addressed as Mr. or Sir. Thirty-three percent of women attorneys reported that women litigants or witnesses receive verbal harassment from judges "sometimes or often."

When women appear before the bench in a professional capacity as counsel, the impact of stereotyping is even more severe. The role of the attorney before the bench is to advocate for the client by presenting to the court the facts and governing law. If the gender of the attorney becomes an issue, the justice system denies the client the opportunity for a fair hearing and resolution. Gender bias in the courtroom can distract an attorney from her legal tasks and place her in a dilemma in which she runs the risk of jeopardizing herself, her case and her client. One woman attorney wrote on her survey:

> 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)

The Task Force attempted to identify the extent to which female attorneys are subject to treatment different from their male colleagues. Several areas of noticeable differentiation occur.

In the area of address, women attorneys reported being addressed by diminutive terms and terms of endearment, as well as being referred to on a first name basis in the same proceeding in which men were addressed by the judge as "counsel" or by their last names. Male attorneys were found to be even more likely than other courtroom personnel to use inappropriate terms of address toward female colleagues.

Comments about physical appearance, were found most often in the judicial setting to be an inappropriate signal to women attorneys that judges were paying more attention to how they looked than to how they presented their legal arguments. For example, one 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)

Refusal to accept women in their professional role makes it difficult for female attorneys to carry out their legal responsibilities and undermines their credibility in the courtroom. Seventy percent of women attorneys report that they have been asked if they are attorneys when men are not asked. In some cases, even after verbally identifying themselves, women were still required to show their licenses before being allowed to proceed.

This behavior has not been limited to the courtroom. Both men and women agreed that gender bias is more often encountered in depositions and negotiations.

Lastly, the Task Force sought to determine whether, when gender biased behavior occurs in the courtroom, the judge attempted to correct it. There are significant barriers to judicial intervention. Comments may not be recognized as offensive. Comments may be made unconsciously, such as disparate forms of address. Attorneys may decide not to object to a judge's remarks, for fear of focusing attention away from the case. Judges are also hesitant to intervene concerning remarks by attorneys, not wanting to sway jury perceptions or affect the parties' perception of fairness in the outcome of a case.

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 appointment of women as judges in representative numbers relative to population is critical to achievement of gender fairness in the courts. 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. Two of the seven Supreme Court justices and three of the 13 Court of Appeals judges are women. Four out of ten judicial districts have no women judges. Participants at the Task Force women judges' meeting expressed concern that although the number of female judges is still small, there is a sense in the legal community that the "women's slots" have all been filled and that women will be considered only as vacancies occur in these designated slots.

Once appointed, women judges face some of the same issues of diminished credibility that women attorneys face. They may be addressed by name on panels where male judges are addressed by title, their comments may be overridden in judicial discussions, and they may not be accorded appropriate levels of respect by attorneys appearing before the bench.

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.

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

The Task Force evaluated the gender fairness of documents through which the court communicates with the public. Though the process of neutralizing gender bias and assumption in court documents is underway, evaluation revealed that many court documents still employ terms which presume that a variety of social roles are filled exclusively by men.[8]

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.

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.

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8 The full report of this evaluation is included in the Appendix to the Task Force report.

The Court as Employer

The Task Force sought to determine whether or not the court provides a gender-neutral working environment which assures all its employees equal treatment. Court employees were sent a questionnaire that included the questions on courtroom interaction used in the lawyers' surveys and a section on employment practices.

A majority of court employees did not think their opportunities for advancement were limited by gender. However, about ten percent of male employees and fourteen percent of female employees reported that they felt they had been discriminated against because of gender, and nearly all of them had not attempted to correct the situation.

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 contact or other verbal or physical contact or communication of a sexual nature.[9] The Task Force found that sexual harassment exists in the judicial system, just as in other institutions and places of employment.

The Task Force's surveys of judges, lawyers and court personnel indicate that the incidence of sexual harassment is far more widespread than the number of formal complaints and reported cases would suggest. Verbal harassment was more common than physical harassment, and lawyers were more likely to be the source of the problem than judges. One attorney responding to the survey cited examples she had observed or 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)

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.

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

Some court employees who felt they had been subjected to harassment stated that they did not have a grievance procedure available to them, especially if they served at the pleasure of the bench. Even in districts that have detailed sexual harassment policies, it is not clear how these policies are coordinated with other grievance procedures.

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.

CONCLUSION

The Task Force's examination of gender issues in the courts was undertaken as a commitment by and to the state's judiciary. That it found areas in which the judicial system does not yet meet the goal of consistently treating women and men with fairness and equal respect is not surprising. The judiciary is a human system functioning within a larger human order. In meeting its mandate to explore and document the extent to which gender bias exists, the Task Force has addressed the human frailties in the system. It has cited some of the most egregious examples of unfairness in order to eliminate them. This process is grounded in acknowledgment of the judiciary's continuing dedication to those principles of fairness and equality before the law that remain at the heart of the judicial process.

To monitor implementation of the Task Force recommendations, the Supreme Court has established an Implementation Committee chaired by Associate Justice Rosalie Wahl. The committee is directed in particular to work closely with judicial education programs, to assist the office of the State Court Administrator in establishing a data base that will aid in evaluation of progress, and to generally evaluate the Task Force's effectiveness. Carried out in the context of the judiciary's continuing commitment to gender fairness, the Implementation Committee will help ensure that the Task Force's efforts are indeed effective and that what Learned Hand called the spirit of liberty – the understanding of the minds of other men and women and the unbiased weighing of interests – is felt throughout the system.

APPENDIX

CHARGE TO THE TASK FORCE

IT IS HEREBY ORDERED that the Minnesota Task Force for Gender Fairness in the Courts be, and hereby is, established to:

1. Explore the extent to which gender bias exists in the Minnesota State Court System, by ascertaining whether statutes, rules, practices or conduct work unfairness or undue hardship on women or men in our courts;
2. Document where found the existence of discriminatory treatment of women or men litigants, witnesses, jurors, and of women judicial, legal, and court personnel;
3. Recommend methods to eliminate gender bias in the courts including the development and provision of necessary judicial education, the passage of legislation and the promulgation of court rule and policy revisions;
4. Report the findings of its investigation to this Court by June 30, 1989; and
5. Monitor, thereafter, the implementation of approved reform measures and evaluate their effectiveness in assuring gender fairness in our courts' processes.

From: Order Establishing the Task Force for Gender Fairness in the Courts (June 8, 1987)

Public Hearings

St. Paul, Minnesota	March 29, 1988 and April 19, 1988
Rochester, Minnesota	April 26, 1988
Duluth, Minnesota	May 10, 1988
Marshall, Minnesota	May 24, 1988
Moorhead, Minnesota	June 7, 1988

Lawyers' Meetings

Minneapolis, Minnesota	April 20, 1988
Rochester, Minnesota	April 26, 1988
Duluth, Minnesota	May 10, 1988
St. Cloud, Minnesota	January 18, 1989

Survey Methodology

Most of the gender fairness task forces in other states surveyed attorneys and, in some states, judges, about their perceptions of gender issues in the courts. These surveys generally had quite low response rates, raising questions about how representative the results were and the extent to which they could be generalized to all attorneys or judges. The Minnesota Task Force elected to employ a somewhat different strategy, in the hopes of maximizing the accuracy of survey results with the resources available.

As in other states, the survey questionnaire was sent to the approximately 13,000 registered attorneys in the state in order to raise awareness of the issues before the Task Force and to give all attorneys the opportunity to comment and to relate their experiences. All narrative comments from these surveys were transcribed and are part of the evidence upon which the report of the Task Force is based.

Coterminously with this effort, 4288 of the attorneys were randomly selected to form a representative sample, stratified by gender and geographic location, of the population of all registered attorneys in the state. The list of registered attorneys were divided into four strata—metro males, metro females, non-metro males, and non-metro females—within which names were randomly selected for inclusion in the sample. Placement in to the male and female categories was done on the basis of first names; indeterminate cases were placed in the larger male categories. Placement in the metro (Twin Cities and suburbs) and non-metro categories was based on the zip code of the address under which the attorney was registered. Attorneys with addresses in distant states were assigned to the metro categories under the assumption that they would most likely practice in the metro area, if at all. Attorneys in bordering states—Iowa, Wisconsin, North and South Dakota—were assigned to the non-metro categories. These placement rules inevitably produced some misplacements and incomparabilities. Some attorneys use home addresses, other business addresses. Attorneys may live outside the metro area but practice in it or vice versa. However, cross-tabulation placement in these strata with the responses attorneys gave us in their completed questionnaire showed a high level of congruity.

The proportions of the population of Minnesota attorneys in the four strata are as follows: metro males, 63%; metro females, 17%; non-metro males, 17%; non-metro females, 3%. In order to obtain sufficient cases for analysis in the smaller strata, the strata were sampled disproportionately. Non-metro females were sampled at four times the rate of metro males; metro females and non-metro males were sampled at twice the rate of metro males. Whenever strata are combined in the analysis in this report, responses were weighted to reflect their appropriate proportions in the population as a whole. Because the percentages in the attorneys' survey are based on these weighted numbers rather than the actual number of responses, the number of cases is not routinely shown in tables.

The sampling error for the total is approximately +/- 2% at the 95% level of confidence. This is a pooled estimate of the sampling error of the four strata, using a finite correction factor to take account of the large and varying sampling fraction in the four strata. Since only subsamples answered most portions of the questionnaire, the sampling error for most reported results is effectively larger than this. For example, the sampling error for results in the family law section is approximately +/- 4%.

The overall response rate for the lawyers' survey was 83.5%. The response rates for the four strata ranged from 82% to 86% with the two non-metro strata having slightly higher rates than the two metro categories. This response rate is very high for mailed questionnaires and the evenness of the response rate across strata is very encouraging. Readers should be aware, however, that any bias introduced by non-responses as well as any problems with the validity or reliability of survey items produces error in addition to sampling error. This additional error, unlike sampling error, cannot be estimated.

The judges' survey was sent to 281 people (all Minnesota district court judges, retired judges, referees, and judicial officers). Ninety-three percent responded, an excellent response rate. Since the entire population of judges was surveyed, there is no issue of sampling error in the judges' survey. However, the 7% non-response rate and any problems of question wording may introduce error in the results. Furthermore, because the number of female judges in the population is so small, percentages based on the number of female judges can be unstable (i.e. the shift of one judge from one response category to another can make a difference of five percentage points).

The "total design method" developed by Don A. Dillman was used in both the lawyers' and judges' surveys to obtain as high a response rate as possible. A cover letter from the Chief Justice was sent with the original mailing, stressing the importance of the issues and asking cooperation. Two waves of follow-up mailings were sent to non-responding attorneys in the probability sample and to judges, encouraging participation.

Copies of the questionnaires used in the lawyers' and judges' surveys are included in this appendix. Many of the questions were taken or modified from surveys done in other states. Other questions were developed by the substantive committees of the Minnesota Task Force and reviewed by the Data Collection Committee. Both questionnaires were pre-tested prior to implementation.

The intention of the surveys was to assess the recent experiences and perceptions of attorneys and judges about areas of the court system with which they were most knowledgeable and familiar. To this end, attorneys and judges were asked to fill out only those parts of the questionnaire dealing with substantive areas in which they presently handle or have handled cases during the last two years. Attorneys who had not appeared in court in the previous two years were asked to complete only personal background information.

Percentages of the total sample of attorneys completing the various portions of the questionnaire are as follows:

	Metro Males	Metro Females	Nonmetro Males	Nonmetro Females
Orders for Protection	13	14	35	37
Criminal domestic violence	12	9	28	21
Criminal sexual conduct	8	6	23	13
Family law	22	24	50	56
Child custody	12	15	35	39
Civil damages	26	17	40	18
Gender discrimination	8	8	9	8
Courtroom interaction	62	56	85	81
Not in court in last 2 years (completed background information only)	34	40	15	19

All judges were asked to complete background information and courtroom interaction sections of the questionnaire as well as those substantive sections in which they had handled cases in the last two years. The percentages of judges who responded to the various substantive sections of the questionnaire are as follows:

	% of Judges Responding:
Orders for Protection	79
Domestic violence (criminal)	83
Criminal sexual conduct	80
Family law	73
Civil damages	67
Gender based employment discrimination	23
Adult sentencing	87

Attorneys Survey

Thank you for helping the Minnesota Gender Fairness Task Force by answering this survey. You will need to answer only selected parts of the questionnaire. For example, most attorneys who do not regularly appear in court will answer only Part A (Background). Attorneys who do regularly appear in court will answer Part A, Part G (Access to Representation), Part H (Courtroom interaction), and other parts only if they are involved in that substantive area of the law. As you go through the questionnaire, directions will indicate which parts to complete and which to skip. Questions at the beginning of several sections ask how many times you have "represented a party" in specific types of cases. Please interpret "represented a party" broadly to include first chair, second chair, advised, represented the state, and so on.

Although most questions ask you just to circle a response, please add additional comments wherever you think they would clarify your answer. Some areas of concern to the task force, such as gender fairness in sentencing, are not addressed in this survey because they are being studied by other methods. But if you wish to comment further on any gender-related issue, please do so on the blank pages at the end. You may find that as you go through the questionnaire you wish to change some previous answers or add more comments to a section you have already finished. Please feel free to do so. We're interested in your best thinking on these issues.

All responses will be treated confidentially and no individuals will be identifiable in any reports of the results. Please return the completed questionnaire within one week of its receipt.

Everyone should complete Part A.

A. GENERAL BACKGROUND INFORMATION

Please circle the appropriate response or fill in the information in the space provided.

1. Sex:
   1 MALE
   2 FEMALE

2. Year of birth: _____

3. Year in which you were first admitted to practice (in any state):_____

4. Number of years you have been actively engaged in the practice of law: _____

5. Number of years you have been employed in your current position: _____

6. Number of different jobs you have held in the legal profession (including clerkships): _____

7. Judicial district (or county) in which you primarily practice: _____

8. Number of attorneys in your immediate office: _____

9. Approximately what percentage of your clients are women? _____

10. Which of the following best describes your current employment?

1 ACADEMIC
2 CORPORATE
3 GOVERNMENT/PUBLIC SECTOR
4 PRIVATE PRACTICE -- SOLO PRACTITIONER
5 PRIVATE PRACTICE -- LAW FIRM
6 LEGAL SERVICES
7 OTHER EMPLOYMENT (PLEASE SPECIFY _____)

11. In which area(s) of specialty do you regularly practice? (Circle all that apply)

1 GENERAL PRACTICE
2 FAMILY LAW
3 CIVIL LITIGATION
4 LABOR/EMPLOYMENT
5 APPELLATE
6 CRIMINAL
7 CORPORATE
8 REAL ESTATE
9 OTHER (PLEASE SPECIFY _____)

12. How often were you present in Minnesota state court or in chambers in the last two years?

1 DAILY
2 WEEKLY
3 ONCE OR TWICE A MONTH
4 LESS THAN ONCE A MONTH
5 NEVER (IF NEVER, IT IS NOT NECESSARY TO FILL OUT THE REMAINDER OF THE QUESTIONNAIRE. PLEASE RETURN IT IN THE ENCLOSED ENVELOPE. THANK YOU FOR YOUR HELP.)

PARTS B THROUGH F DEAL WITH SUBSTANTIVE AREAS OF THE LAW. THE DIRECTIONS WILL INDICATE WHICH OF THESE SECTIONS TO ANSWER. PARTS G AND H SHOULD BE ANSWERED BY ALL ATTORNEYS WHO APPEAR IN COURT OR CHAMBERS.

B. DOMESTIC VIOLENCE (BETWEEN ADULTS)

For purposes of this questionnaire, please consider only domestic violence involving spouses or adult partners -- NOT child abuse. The following questions are divided into two sections, the first concerning civil proceedings for Orders for Protection, the second concerning criminal prosecutions for assault. Please circle the response that comes closest to your own experience or observation of these decisions in Minnesota state trial courts during the last two years. IF A QUESTION REFERS TO AN AREA IN WHICH YOU HAVE NO EXPERIENCE, CIRCLE 'NO BASIS FOR JUDGMENT.'

Domestic Violence (between adults) - Orders for Protection.

B-1. In approximately how many Order for Protection proceedings in Minnesota state courts have you represented a party during the last two years? _____ (IF NONE, PLEASE SKIP TO SECTION B-2)

Approximate no. of cases:_____
No. of male clients: _____
No. of female clients: _____

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
1. Petitioners get assistance from court personnel in understanding how to seek an Order for Protection.	1	2	3	4	5	8
2. Respondents get assistance from court personnel in understanding the nature of the proceedings against them.	1	2	3	4	5	8
3. Domestic assault victims are represented by counsel during proceedings for Orders for Protection.	1	2	3	4	5	8
4. Respondents in proceedings for Orders for Protection are represented by counsel.	1	2	3	4	5	8
5. Mutual Orders for Protection are ordered even when only one party has petitioned for the order.	1	2	3	4	5	8
6. Respondents are given the opportunity to contest ex parte Orders for Protection at their initial court appearance.	1	2	3	4	5	8
7. Judges sentence convicted misdemeanor violators of Orders for Protection to jail.	1	2	3	4	5	8
8. During Order for Protection proceedings, judges give serious consideration to requests for supervised visitation.	1	2	3	4	5	8
9. Court personnel discourage potential petitioners from seeking Orders for Protection.	1	2	3	4	5	8

10. Do you have any examples or illustrations of gender bias or gender-related problems in the use and enforcement of Orders for Protection? If so, please describe.

Domestic Violence (Between Adults) - Criminal

B-2. In approximately how many criminal domestic violence proceedings in Minnesota have you represented a party during the last two years? _____(IF NONE, PLEASE SKIP TO SECTION C)

	Approximate no. of cases
Served as Prosecutor	_____
Cases with male victim	_____
Cases with female victim	_____
Served as Defense Counsel	_____
Cases with male client	_____
Cases with female client	_____

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
1. The victim's testimony alone is regarded by prosecutors as a sufficient basis for prosecution of a domestic assault charge.	1	2	3	4	5	8
2. Mandatory arrest policies result in police charging defendants with domestic assault without probable cause.	1	2	3	4	5	8
3. Judges require a statement of reasons by the prosecutor for dismissal of a domestic assault charge prior to trial.	1	2	3	4	5	8
4. Crime victims' rights legislation interferes with the sound exercise of prosecutorial discretion in domestic violence cases.	1	2	3	4	5	8
5. Prosecutors notify victims of domestic assault prior to dismissing criminal charges against the alleged assailant.	1	2	3	4	5	8
6. Judges sentence convicted misdemeanor violators of Orders for Protection to jail.	1	2	3	4	5	8
7. In setting bail or conditions of release, judges take account of the ongoing safety requirements of the victim.	1	2	3	4	5	8
8. In sentencing those convicted of domestic assault, judges take account of the ongoing safety requirements of the victim.	1	2	3	4	5	8
9. The attitudes of law enforcement personnel discourage victim cooperation in domestic assault cases.	1	2	3	4	5	8
10. The attitudes of prosecutors discourage victim cooperation in domestic assault cases.	1	2	3	4	5	8

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
11. The attitudes of judges discourage victim cooperation in domestic assault cases.	1	2	3	4	5	8
12. Prosecutorial offices commit adequate resources to the prosecution of domestic assault cases.	1	2	3	4	5	8
13. Victim advocate programs, such as domestic abuse intervention projects, decrease the rate of dismissals in domestic assault prosecutions.	1	2	3	4	5	8
14. Judges are reluctant to use criminal sanctions as a remedy for domestic violence.	1	2	3	4	5	8

	MALE	FEMALE	NO DIFFERENCE	NO BASIS FOR JUDGMENT
15. Domestic assault cases are more likely to be charged if the prosecutor is:	1	2	3	8
16. Domestic assault prosecutions are more likely to be successful if the judge is:	1	2	3	8
17. Domestic assault prosecutions are more likely to be successful if the prosecutor is:	1	2	3	8

18. Do you have any examples or illustrations of gender bias or gender-related problems in domestic violence prosecutions? If so, please describe. (Use additional pages if needed)

C. CRIMINAL SEXUAL CONDUCT

In approximately how many criminal sexual conduct cases in Minnesota state courts have you represented a party during the last two years? _____ (IF NONE, PLEASE SKIP TO SECTION D)

	Approximate no. of cases
Served as prosecutor	_____
Served as defense counsel	_____
Cases heard by male judge	_____
Cases heard by female judge	_____

The following questions refer to judicial decisions at the trial court level in criminal sexual conduct cases. Please circle the response that comes closest to your own experience or observation of such cases in Minnesota state courts during the last two years. IF A QUESTION REFERS TO AN AREA IN WHICH YOU HAVE NO EXPERIENCE, CIRCLE 'NO BASIS FOR JUDGMENT.'

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
1. Other factors being equal, bail in criminal sexual conduct cases where the parties know one another is set lower than in cases where the parties are strangers.	1	2	3	4	5	8
2. When there is improper questioning about complainant's prior sexual conduct, the judge intervenes if the prosecutor does not.	1	2	3	4	5	8
3. Cross-examination of the complainant in "date rape" cases goes beyond what is necessary to present a consent defense.	1	2	3	4	5	8
4. Other factors being equal, judges give more lenient sentences in "date rape" cases than in "stranger rape" cases.	1	2	3	4	5	8
5. 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.	1	2	3	4	5	8

	MALE	FEMALE	NO DIFFERENCE	NO BASIS FOR JUDGMENT
6. In criminal sexual conduct cases, when the perpetrator is an adult male and the victim is a juvenile, the sentence is more severe if the victim is:	1	2	3	8
7. In criminal sexual conduct cases, bail is set higher when the judge is:	1	2	3	8
8. Questioning about the past sexual conduct of the victim in criminal sexual conduct cases is more likely to be limited by a judge who is:	1	2	3	8
9. Questioning about the past sexual conduct of the victim in criminal sexual conduct cases is more likely to be limited when the defense counsel is:	1	2	3	8
10. Sentences for criminal sexual conduct convictions are likely to be more lenient if the judge is:	1	2	3	8

11. Do you have any examples or illustrations of gender bias or gender-related problems in judicial decision-making in criminal sexual conduct cases? If so, please describe. (Use additional pages if needed.)

D. FAMILY LAW

In approximately how many family law cases in Minnesota state courts have you represented a party in the last two years?_____(IF NONE, PLEASE SKIP TO PART E)

The following questions refer to judicial decisions at the trial court level in family law cases in the Minnesota courts. Please circle the response that comes closest to your own experience or observation of these decisions in Minnesota state courts during the last two years. IF A QUESTION REFERS TO AN AREA IN WHICH YOU HAVE NO EXPERIENCE, CIRCLE 'NO BASIS FOR JUDGMENT.'

Marital Property

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
1. When a wife's primary contribution has been as a homemaker, judges view the husband's income producing contribution as entitling him to a larger share of the marital property.	1	2	3	4	5	8
2. When one spouse has built and run a privately owned business, judges consider the contribution of the homemaker spouse as a contribution to the business.	1	2	3	4	5	8
3. When the family business is a farm, judges give preference to the husband in deciding who should get the farm in the distribution of marital property.	1	2	3	4	5	8

Spousal Maintenance

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
4. In awarding rehabilitative maintenance, judges have a realistic understanding of the likelihood of the economically dependent spouse finding employment.	1	2	3	4	5	8
5. Rehabilitative maintenance awards are sufficient to allow retraining of the economically dependent spouse.	1	2	3	4	5	8
6. Judges are willing to grant increases in maintenance awards when increases are warranted.	1	2	3	4	5	8
7. Judges are willing to grant decreases in maintenance awards when decreases are warranted.	1	2	3	4	5	8
8. The courts adequately enforce maintenance awards.	1	2	3	4	5	8
9. In awarding permanent maintenance, judges appear to have a realistic understanding of the likely future earnings of a homemaker who has been out of the labor force for a long period of time.	1	2	3	4	5	8

10. What minimum definition of a "long-term marriage" do judges usually use in deciding to award permanent maintenance?

1 UNDER 10 YEARS
2 10-15 YEARS
3 16-20 YEARS
4 21-25 YEARS
5 MORE THAN 25 YEARS
6 NO BASIS FOR JUDGMENT

11. In deciding the size of spousal maintenance awards, judges are more likely to sacrifice the current life style of the:

1 HUSBAND
2 WIFE
3 BOTH EQUALLY
4 NO BASIS FOR JUDGMENT

Child Support

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
12. Judges are willing to grant post-judgment decreases in child support when such decreases are warranted.	1	2	3	4	5	8
13. Judges are willing to grant post-judgment increases in child support when such increases are warranted.	1	2	3	4	5	8
14. Judges deviate upward from the child support guidelines when the ability to pay of the non-custodial parent warrants it.	1	2	3	4	5	8
15. Judges deviate upward from the child support guidelines when special needs of the child warrant it.	1	2	3	4	5	8
16. Judges consider day care expenses when determining the amount of child support.	1	2	3	4	5	8
17. Judges are willing to exercise their civil contempt powers to enforce child support orders.	1	2	3	4	5	8
18. Judges are willing to jail non-payers of child support as a final step in the civil contempt process.	1	2	3	4	5	8
19. When wage withholding is not mandatory, I encourage my clients who are non-custodial parents to use voluntary wage withholding for payment of child support.	1	2	3	4	5	8

Child Custody

Approximate number of child custody cases you have handled in the past two years _____. (IF NONE, PLEASE SKIP TO QUESTION 35)

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
20. In awarding custody, judges seem to assume that children belong with their mother.	1	2	3	4	5	8
21. Custody awards are based on an examination of the factors in the primary caretaker standard.	1	2	3	4	5	8
22. In awarding custody, judges favor the parent in the stronger financial position.	1	2	3	4	5	8
23. In awarding custody, judges take into account the father's violence against the mother.	1	2	3	4	5	8
24. In awarding custody, judges take into account the mother's violence against the father.	1	2	3	4	5	8
25. Joint legal custody is ordered over the objections of one or both parents.	1	2	3	4	5	8
26. Joint physical custody is ordered over the objections of one or both parents.	1	2	3	4	5	8
27. I discourage fathers from seeking custody because judges do not give their petitions fair consideration.	1	2	3	4	5	8
28. Judges order custody mediation in cases where there is a history of domestic violence.	1	2	3	4	5	8
29. Non-custodial mothers get more visitation privileges than non-custodial fathers.	1	2	3	4	5	8
30. A change in custody is granted to a father if the mother is employed and there is now a "stay-at-home" stepmother.	1	2	3	4	5	8
31. In looking at Pikula factors, judges give more credit to fathers for carrying out direct care activities than they give to mothers.	1	2	3	4	5	8
32. In looking at Pikula factors, judges penalize mothers for non-caretaking activities, such as working outside the home.	1	2	3	4	5	8

	MALE	FEMALE	NO DIFFERENCE	NO BASIS FOR JUDGMENT
33. In deciding custody, judges are more likely to penalize a parent for chemical dependency if the parent is:	1	2	3	8
34. In deciding custody, judges are more likely to penalize a parent for having extra-marital affairs if the parent is:	1	2	3	8

35. Do you have any examples or illustrations of gender bias or gender-related problems in judicial decision-making in the area of family law? If so, please describe. (Use additional pages, if needed.)

36. In public hearings and lawyers meetings some witnesses have suggested that the unequal treatment of men and women in the area of family law is greater when the individuals are members of minority groups or are poor. If you believe that this is so, do you have any examples that illustrate this problem? (Use additional pages as needed.)

E. CIVIL DAMAGE AWARDS

In approximately how many personal injury or wrongful death cases in Minnesota state courts have you represented a party during the last two years? _____ (IF NONE, PLEASE SKIP TO SECTION F)

The following questions refer to personal injury and wrongful death settlements or awards. Please circle the response that comes closest to your own experience or observation of such cases in Minnesota during the last two years. IF A QUESTION REFERS TO AN AREA IN WHICH YOU HAVE NO EXPERIENCE, CIRCLE 'NO BASIS FOR JUDGMENT.'

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
1. In personal injury or other cases involving damages, homemakers recover the economic value of their lost services.	1	2	3	4	5	8
2. Other factors being equal, women employed outside the home receive higher amounts for pain and suffering than homemakers do.	1	2	3	4	5	8
3. Other factors being equal, husbands receive higher amounts for loss of consortium than do wives.	1	2	3	4	5	8

	MALE	FEMALE	NO DIFFERENCE	NO BASIS FOR JUDGMENT
4. Other factors being equal, plaintiffs receive higher amounts for disfigurement if they are:	1	2	3	8
5. Other factors being equal, plaintiffs receive higher amounts for pain and suffering if they are:	1	2	3	8
6. Other factors being equal, plaintiffs in personal injury cases receive higher amounts for loss of future income earning capacity if they are:	1	2	3	8
7. Other factors being equal, plaintiffs are found to have a greater worklife expectancy if they are:	1	2	3	8

8. Do you have any examples or illustrations of gender bias or gender-related problems in the area of civil damage awards? If so, please describe. (Use additional pages as needed.)

F. GENDER-BASED EMPLOYMENT DISCRIMINATION

In approximately how many gender-based employment discrimination cases in Minnesota state courts have you represented a party during the last two years? _____ (IF NONE, PLEASE SKIP TO SECTION G)

The following questions refer to judicial decisions in cases involving gender-based discrimination in employment. Please circle the response that comes closest to your own experience or observation of such cases in Minnesota state courts during the last two years. IF A QUESTION REFERS TO AN AREA IN WHICH YOU HAVE NO EXPERIENCE, CIRCLE 'NO BASIS FOR JUDGMENT.'

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
1. Judges give the same consideration to claims of gender discrimination in employment as they do to other types of civil cases.	1	2	3	4	5	8
2. Judges give the same consideration to claims of sexual harassment in the workplace as they do to other types of civil cases.	1	2	3	4	5	8
3. Defense attorneys appeal to gender-based stereotypes (for example, "women react emotionally"; "women complain a lot") in defending claims of employment discrimination.	1	2	3	4	5	8
4. Sufficient damages are awarded to plaintiffs prevailing in gender-based employment discrimination cases.	1	2	3	4	5	8
5. Sufficient attorney fees are awarded to plaintiffs prevailing in gender-based employment discrimination cases.	1	2	3	4	5	8

6. Do you have any examples or illustrations of gender bias in judicial decision-making in the area of gender-based employment discrimination? If so, please describe. (Use additional pages as needed.)

G. ACCESS TO REPRESENTATION

The following questions refer to possible problems some clients may encounter in gaining access to representation in the Minnesota courts in any area of law. Please circle the response that comes closest to your own experience, observation or opinion about access to representation in the Minnesota state courts during the last two years.

	MALE	FEMALE	NO DIFFERENCE	NO BASIS FOR JUDGMENT
1. Attorney fee awards are higher if the client is:	1	2	3	8
2. Attorney fee awards are higher if the attorney is:	1	2	3	8

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
3. Attorney fee awards in gender-based employment discrimination cases are high enough to encourage attorneys to take these cases.	1	2	3	4	5	8
4. The reluctance of courts to award temporary attorney fees in family law cases precludes the economically dependent spouse from pursuing the litigation.	1	2	3	4	5	8
5. The reluctance of courts to award temporary attorney fees in family law cases precludes me from taking family law cases.	1	2	3	4	5	8
6. Attorney fee awards in family law cases are high enough to allow the economically dependent spouse to pursue the litigation.	1	2	3	4	5	8
7. The reluctance of courts to award attorney fees in litigation to modify child support awards precludes me from taking such cases.	1	2	3	4	5	8
8. In my practice, a retainer fee is required for family law cases.	1	2	3	4	5	8

	STRONGLY AGREE	AGREE	DISAGREE	STRONGLY DISAGREE	NO OPINION
9. Family law is regarded as lower status work.	1	2	3	4	5
10. The financial rewards are low in family law.	1	2	3	4	5
11. Judges have negative attitudes toward family law.	1	2	3	4	5

12. Approximately what percentage of your potential clients are you unable to represent because of their inability to pay a retainer?
    Approximate % of women clients_____
    Approximate % of men clients_____
    Not applicable -- no private clients _____
    Not applicable -- all clients on contingency basis _____

13. Approximately what percentage of cases do you take pro bono or with little expectation of being paid?
    Approximate % of women clients_____
    Approximate % of men clients_____
    Not applicable -- no private clients _____
    Not applicable -- all clients on contingency basis _____

14. Do you have any examples or illustrations of gender bias or gender-related problems that affect access to representation in the Minnesota state courts? If so, please describe. (Use additional pages as needed.)

H. COURTROOM INTERACTION

Witnesses at public hearings and lawyers at regional meetings have testified to various instances of unequal treatment of men and women in courtrooms and chambers. The following questions ask how often you personally have observed or experienced specific types of behavior in the Minnesota state courts in the last two years. Please circle the response that comes closest to your own observation. IF A QUESTION REFERS TO AN AREA IN WHICH YOU HAVE NO EXPERIENCE, CIRCLE 'NO BASIS FOR JUDGMENT.'

1. If you do civil trial work, approximately what percentage of your work is the following:

    _____ DOMESTIC RELATIONS
    _____ PERSONAL INJURY
    _____ COMMERCIAL
    _____ OTHER (PLEASE SPECIFY_____)
    _____ NO CIVIL TRIAL WORK

2. If you do civil trial work, approximately what percentage of your work is the following:

    _____ FIRST CHAIR
    _____ SECOND CHAIR
    _____ BRIEF WRITING
    _____ NO CIVIL TRIAL WORK

3. If you do criminal trial work, approximately what percentage of your work is the following:

_____ FIRST CHAIR
_____ SECOND CHAIR
_____ CHARGING AND PLEA WORK
_____ OTHER
_____ NO CRIMINAL TRIAL WORK

4. In the last two years, in approximately what number of your court appearances were other counsel women? _____

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
5. Women attorneys are addressed by first names or terms of endearment when men attorneys are not.						
-- by judges	1	2	3	4	5	8
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
6. Women litigants or witnesses are addressed by their first names or terms of endearment when men litigants or witnesses are not.						
-- by judges	1	2	3	4	5	8
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
7. Women attorneys are asked if they are attorneys when men are not asked.						
-- by judges	1	2	3	4	5	8
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
8. Comments are made about the physical appearance or apparel of women attorneys when no such comments are made about men.						
-- by judges	1	2	3	4	5	8
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
9. Comments are made about the physical appearance or apparel of women litigants or witnesses when no such comments are made about men.						
-- by judges	1	2	3	4	5	8
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
10. Remarks or jokes demeaning to women are made in court or in chambers.						
-- by judges	1	2	3	4	5	8
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
11. Women attorneys are subjected to physical sexual harassment.						
-- by judges	1	2	3	4	5	8
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
12. Women attorneys are subjected to verbal sexual harassment.						
-- by judges	1	2	3	4	5	8
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
13. Women litigants or witnesses are subjected to physical sexual harassment.						
-- by judges	1	2	3	4	5	8
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
14. Women litigants or witnesses are subjected to verbal sexual harassment.						
-- by judges	1	2	3	4	5	8
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
15. Women court personnel are subjected to physical sexual harassment.						
-- by judges	1	2	3	4	5	8
-- by counsel	1	2	3	4	5	8
-- by other court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
16. Women court personnel are subjected to verbal sexual harassment.						
-- by judges	1	2	3	4	5	8
-- by counsel	1	2	3	4	5	8
-- by other court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
17. When gender bias occurs in the courtroom, the judge intervenes to stop it.	1	2	3	4	5	8

	MALE	FEMALE	NO DIFFERENCE	NO BASIS FOR JUDGMENT
18. In my opinion, judges assign more credibility to the arguments of attorneys who are:	1	2	3	8
19. In my opinion, judges assign more credibility to the opinions of experts who are:	1	2	3	8
20. In my opinion, judges assign more credibility to the testimony of witnesses who are:	1	2	3	8

21. Gender bias is most often encountered:

    1 In the courtroom
    2 In chambers
    3 Outside the courtroom during depositions, negotiations, etc.
    4 Same amount in all settings
    5 Have seen no instances of gender bias in any setting

22. Which of the following statements best describes your overall perception of gender bias against women in the Minnesota courts at the present time?

    1 There is no gender bias against women in the Minnesota courts.
    2 Gender bias against women exists, but only in a few areas and with certain individuals.
    3 Gender bias against women is widespread, but subtle and hard to detect.
    4 Gender bias against women is widespread and readily apparent.

23. Which of the following statements best describes your overall perception of gender bias against men in the Minnesota courts at the present time?

    1 There is no gender bias against men in the Minnesota courts.
    2 Gender bias against men exists, but only in a few areas and with certain individuals.
    3 Gender bias against men is widespread, but subtle and hard to detect.
    4 Gender bias against men is widespread and readily apparent.

24. Which of the following statements best describes your overall perception of gender bias in Minnesota state courts over the past few years?

    1 There has never been any gender bias, now or in the past.
    2 There is less gender bias now than in the past.
    3 There is more gender bias now than in the past.
    4 There is the same amount of gender bias now as in the past.

25. In the last two years, have you experienced or personally observed any incidents of sexual harassment or discrimination based on gender in the Minnesota courts? If so, please describe the incident(s), without naming specific individuals. Use additional pages, if necessary.

a. Did anyone intervene to correct this behavior?

1 NO
2 YES (If yes, who? -- judge, counsel, other_____)

If yes, how?_____

b. In your opinion, did this behavior affect the outcome of a case?

1 NO
2 YES

If yes, how?_____

THANK YOU VERY MUCH FOR YOUR HELP. PLEASE RETURN THE QUESTIONNAIRE IN THE ENCLOSED SELF-ADDRESSED ENVELOPE OR TO:

Research and Planning
Minnesota Supreme Court
1745 University Ave. Suite 302
St. Paul, MN 55104

Judges Survey

Thank you for helping the Minnesota Gender Fairness Task Force by answering this survey.

Although most questions ask you just to circle a response, space is provided for you to add comments wherever you think they would clarify your answer. Some areas of concern to the task force are not addressed in this survey because they are being studied by other methods. If you wish to comment further on any gender-related issue, please do so on the blank pages at the end. You may find that as you go through the questionnaire you wish to change some previous answers or add more comments to a section you have already finished. Please feel free to do so. We are interested in your best thinking on these issues.

All responses will be treated confidentially and no individuals will be identifiable in any reports of the results nor will any questionnaire be identified with any individual.

Please return the completed questionnaire within one week of its receipt. Sending back the separate postcard at the same time you return your questionnaire will allow us to follow-up on unreturned questionnaires while maintaining the anonymity of responses.

A. GENERAL BACKGROUND INFORMATION

1. Sex:

   1 MALE
   2 FEMALE

2. Age:

   1 UNDER 35 YEARS
   2 35 - 39
   3 40 - 44
   4 45 - 49
   5 50 - 54
   6 55 - 59
   7 60 - 64
   8 65 AND OVER

3. Year in which you were first admitted to the practice of law:

   1 PRIOR TO 1950
   2 1950 - 1959
   3 1960 - 1969
   4 1970 - 1979
   5 1980 OR LATER

4. Year in which you first became a judge:

   1 PRIOR TO 1960
   2 1960 - 1969
   3 1970 - 1979
   4 1980 OR LATER

5. Area in which you serve:

   1 METRO (DISTRICTS 2,4)
   2 SUBURBAN (DISTRICTS 1,10)
   3 GREATER MINNESOTA (DISTRICTS 3,5,6,7,8,9)

6. Before you became a judge, in which area(s) of specialty did you regularly practice? (circle all that apply)

1 GENERAL PRACTICE
2 FAMILY LAW
3 CIVIL LITIGATION
4 LABOR/EMPLOYMENT
5 APPELLATE
6 CRIMINAL
7 CORPORATE
8 REAL ESTATE
9 DID NOT PRACTICE LAW PRIOR TO APPOINTMENT
10 OTHER (PLEASE SPECIFY _____)

7. In the past year, approximately what **percentage** of your time has been spent in each of the following areas?

_____ CRIMINAL
_____ CIVIL
_____ FAMILY
_____ JUVENILE
_____ PROBATE
_____ OTHER (PLEASE SPECIFY _____)

8. In which of the following areas do you prefer to work? (PLEASE RANK, 1 = MOST PREFERRED)

_____ CRIMINAL
_____ CIVIL
_____ FAMILY
_____ JUVENILE
_____ PROBATE
_____ OTHER (PLEASE SPECIFY _____)

Some of the following questions ask about your own decision-making in various types of cases; others ask about your observations of what other parties do. Please circle the response that comes closest to your own experience or observation of your own courtroom during the past two years. IF A QUESTION REFERS TO AN AREA IN WHICH YOU HAVE NO EXPERIENCE, CIRCLE 'NO BASIS FOR JUDGMENT.' Please feel free to expand on your answers to any of the questions in the space immediately below the question or on the blank pages at the end.

B. DOMESTIC VIOLENCE: ORDERS FOR PROTECTION

1. Approximately how many Order for Protection proceedings (ex parte orders and hearings) have you presided over in the past two years?

1 500 OR MORE
2 100 - 499
3 25 - 99
4 1 - 24
5 NONE (IF NONE, PLEASE SKIP TO SECTION C)

a. Approximate percentage of male petitioners _____

b. Approximate percentage of female petitioners _____

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
2. Domestic assault victims are represented by counsel during proceedings for Orders for Protection.	1	2	3	4	5	8

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
3. Respondents in proceedings for Orders for Protection are represented by counsel.	1	2	3	4	5	8
4. When asked, I allow victim advocates to speak in court during Order for Protection proceedings even if the advocate is not a lawyer.	1	2	3	4	5	8
5. I grant requests for supervised visitation during Order for Protection proceedings.	1	2	3	4	5	8
6. I grant mutual Orders for Protection when only one party has petitioned for the order.	1	2	3	4	5	8
a. Under what circumstances would you do so?						
7. Forced, non-consensual sexual intercourse between spouses justifies issuance of an Order for Protection.	1	2	3	4	5	8
8. When custody is an issue, I order custody mediation as part of an Order for Protection proceeding.	1	2	3	4	5	8

9. Do you have any examples or illustrations of gender bias or gender-related problems in the use and enforcement of Orders for Protection? If so, please describe. (Use additional pages if needed.)

10. Are there any topics related to Order for Protection proceedings that you would like to see addressed in judicial education programs? If so, please describe.

C. DOMESTIC VIOLENCE (BETWEEN ADULTS) - CRIMINAL

For purposes of this questionnaire, please consider only domestic violence involving spouses or adult partners -- NOT child abuse.

1. Approximately how many criminal domestic assault proceedings (arraignments, trials, pleas and sentencings) have you presided over during the last two years?

   1 100 OR MORE
   2 50 - 99
   3 25 - 49
   4 10 - 24
   5 1 - 9
   6 NONE (IF NONE, PLEASE SKIP TO SECTION D)

   a. Approximate percentage of male defendants: _____

   b. Approximate percentage of female defendants: _____

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
2. I require a statement of reasons by the prosecutor for dismissal of a domestic assault charge prior to trial.	1	2	3	4	5	8
3. I sentence convicted domestic assault perpetrators to jail.	1	2	3	4	5	8
4. Credible victim testimony, standing alone, is a sufficient basis for me to deny a motion for a judgment of acquittal.	1	2	3	4	5	8

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
5. I sentence convicted misdemeanor violators of Orders for Protection to jail.	1	2	3	4	5	8
6. The ongoing safety requirements of the alleged victim are a crucial element in setting bail or conditions of release in domestic assault cases.	1	2	3	4	5	8
7. The ongoing safety requirements of the victim are a crucial element in sentencing those convicted of domestic assault.	1	2	3	4	5	8
8. If asked, I allow victim advocates to speak in court, even if the advocate is not a lawyer.	1	2	3	4	5	8

9. On balance, do you think victim advocate programs have been helpful or harmful in criminal domestic violence proceedings?

   1 VERY HELPFUL
   2 SOMEWHAT HELPFUL
   3 SOMEWHAT HARMFUL
   4 VERY HARMFUL
   5 NO OPINION OR NO BASIS FOR JUDGMENT

   a. Why do you feel that way?

10. Do you have any examples or illustrations of gender bias or gender-related problems in domestic violence prosecutions? If so, please describe. (Use additional pages if needed.)

11. Are there any topics related to domestic violence that you would like to see addressed in judicial education programs? If so, please describe.

D. CRIMINAL SEXUAL CONDUCT

1. Approximately how many criminal sexual conduct cases (first appearances and bail hearings, pleas and sentencings, trials) have you presided over in the last two years? _____ (IF NONE, PLEASE SKIP TO SECTION E).

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
2. 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.	1	2	3	4	5	8
3. In criminal sexual conduct cases, I intervene to limit the defense's questioning of the complainant's past sexual conduct.	1	2	3	4	5	8
4. Cross-examination of the complainant in "date rape" cases goes beyond what is necessary to present a consent defense.	1	2	3	4	5	8
5. Whether the parties are strangers or know one another is irrelevant in deciding the severity of the penalty in rape cases.	1	2	3	4	5	8

	MALE	FEMALE	NO DIFFERENCE	NO BASIS FOR JUDGMENT
6. In criminal sexual conduct cases, when the perpetrator is an adult male and the victim is a juvenile, I would probably give a more severe sentence if the victim is:	1	2	3	8

7. Do you have any examples or illustrations of gender bias or gender-related problems in judicial decision-making in criminal sexual conduct cases? If so, please describe. (Use additional pages if needed.)

8. Are there any topics related to the area of criminal sexual conduct that you would like to see addressed in judicial education programs? If so, please describe.

E. FAMILY LAW

1. Approximately how many family law cases (temporary hearings, motions, final hearings, post-decree modifications) have you presided over during the last two years?

   1 500 OR MORE
   2 100 - 499
   3 25 - 99
   4 1 - 24
   5 NONE (IF NONE, PLEASE SKIP TO SECTION F)

Marital Property

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
2. When a wife's primary contribution has been as a homemaker, the husband's income producing contribution entitles him to a larger share of the marital property.	1	2	3	4	5	8
3. When one spouse has built and run a privately owned business during the marriage, the contribution of the homemaker spouse should be considered a contribution to the business.	1	2	3	4	5	8

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
4. When the family business is a farm which was not inherited, the husband should be given preference in deciding who should get the farm in the distribution of marital property, regardless of who works the farm.	1	2	3	4	5	8
5. I award attorney fees at temporary hearings.	1	2	3	4	5	8

Spousal Maintenance

6. What minimum definition of a "long-term marriage" do you use in deciding to award permanent maintenance?

1 UNDER 10 YEARS
2 10 - 15 YEARS
3 16 - 20 YEARS
4 21 - 25 YEARS
5 MORE THAN 25 YEARS
6 NO BASIS FOR JUDGMENT

7. Suppose rehabilitative maintenance is being awarded to a 42-year-old homemaker with a non-specialized B.A. degree (earned 20 years ago) who has never held a job outside the home. What length of time would you consider sufficient to allow for retraining?

1 LESS THAN 1 YEAR
2 1 YEAR
3 2 YEARS
4 3 YEARS
5 4 YEARS
6 5 YEARS
7 MORE THAN 5 YEARS
8 NO BASIS FOR JUDGMENT

a. What other factors would you consider in making this award?

8. Suppose permanent maintenance is being awarded to a 50-year-old homemaker with a high school education who has been out of the labor market for 25 years. What would you consider to be the likely future annual earning capacity for such a person?

1 LESS THAN $10,000
2 $10,000 - 15,000
3 $16,000 - 20,000
4 $21,000 - 25,000
5 $26,000 - 30,000
6 $31,000 - 35,000
7 $36,000 - 40,000
8 OVER $40,000
9 NO BASIS FOR JUDGMENT

a. What other factors would you consider in making this award?

Child Support

9. Under which of the following circumstances would you deviate upward from the child support guidelines? (Circle all that apply)

1 WHEN THE INCOME OF THE NON-CUSTODIAL PARENT ALLOWS IT
2 WHEN THE CHILD HAS SPECIAL NEEDS
3 TO COVER DAY CARE EXPENSES
4 OTHER (PLEASE SPECIFY_____)
5 NONE OF THE ABOVE

10. In the last two years, in approximately what percentage of cases have you deviated upward from the child support guidelines? _____

11. Mandatory income withholding for those ordered to pay child support is a good policy.

1 STRONGLY AGREE
2 AGREE
3 DISAGREE
4 STRONGLY DISAGREE
5 NO OPINION

a. Does the judicial district in which you serve have mandatory income withholding for those ordered to pay child support?

1 YES
2 SOME COUNTIES DO, SOME DO NOT
3 NO
4 DON'T KNOW

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
12. I exercise the court's civil contempt powers to enforce child support orders.	1	2	3	4	5	8
13. I jail non-payers of child support as a final step in the civil contempt process.	1	2	3	4	5	8

a. In the last two years, approximately how many non-payers of child support have you jailed?

_____ out of _____ who were found in contempt.

Child Custody

	STRONGLY AGREE	AGREE	DISAGREE	STRONGLY DISAGREE	NO OPINION
14. Other things being equal, I believe young children belong with their mother.	1	2	3	4	5
15. Joint legal custody is sometimes appropriate even if one or both parents object.	1	2	3	4	5
16. Joint physical custody is sometimes appropriate even if one or both parents object.	1	2	3	4	5
17. Other things being equal, non-custodial mothers should have more visitation privileges than non-custodial fathers.	1	2	3	4	5
18. Custody mediation is usually appropriate even in cases where there is a history of family violence.	1	2	3	4	5
19. Women often use allegations of child sexual abuse as a weapon in divorce cases.	1	2	3	4	5

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
20. I follow the recommendation of the court services worker in custody disputes.	1	2	3	4	5	8

21. In general, the child's preference should be taken into consideration in deciding custody if the child is at least _____ years old.

22. In making custody determinations, are there any factors that you weigh differently depending on whether the parent is a mother or a father? If so, please describe.

23. Do you have any examples or illustrations of gender bias or gender-related problems in the handling of family law cases? If so, please describe. (Use additional pages as needed.)

24. Are there any topics in the area of family law that you would like to see addressed in judicial education programs? If so, please describe.

F. CIVIL DAMAGE AWARDS

Questions in this section concern what you have observed about the decisions of juries or settlements in personal injury or wrongful death cases.

1. During the last two years, approximately how many personal injury or wrongful death trials have you presided over, or settlements have you approved? _____ (IF NONE, PLEASE SKIP TO SECTION G).

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
2. In personal injury or other cases involving damages, homemakers recover the economic value of their lost services.	1	2	3	4	5	8
3. Other factors being equal, women employed outside the home receive higher amounts for pain and suffering than do homemakers.	1	2	3	4	5	8
4. Other factors being equal, husbands receive higher amounts for loss of consortium than do wives.	1	2	3	4	5	8

	MALE	FEMALE	NO DIFFERENCE	NO BASIS FOR JUDGMENT
5. Other factors being equal, plaintiffs receive higher amounts for disfigurement if they are:	1	2	3	8
6. Other factors being equal, plaintiffs receive higher amounts for pain and suffering if they are:	1	2	3	8
7. Other factors being equal, plaintiffs in personal injury cases receive higher amounts for loss of future income earning capacity if they are:	1	2	3	8
8. Other factors being equal, plaintiffs are found to have a greater worklife expectancy if they are:	1	2	3	8

9. Do you have any examples or illustrations of gender bias or gender-related problems in the area of civil damage awards? If so, please describe. (Use additional pages as needed.)

10. Are there any topics in the area of civil damage awards that you would like to see addressed in judicial education programs? If so, please describe.

G. GENDER-BASED EMPLOYMENT DISCRIMINATION

1. Approximately how many gender-based employment discrimination cases (motions, trials, settlements) have you presided over during the last two years? _____ (IF NONE, PLEASE SKIP TO SECTION H).

	STRONGLY AGREE	AGREE	DISAGREE	STRONGLY DISAGREE	NO OPINION
2. Defense attorneys appeal to gender-based stereotypes (for example, "women react emotionally"; "women complain a lot") in defending claims of employment discrimination.	1	2	3	4	5
3. Claims of gender discrimination in employment are more difficult to prove in court than other kinds of claims.	1	2	3	4	5
4. Claims of sexual harassment in the workplace are usually just a reflection of other work-related problems the plaintiff is having.	1	2	3	4	5
5. In cases involving a claim of gender-based employment discrimination, the size of the damages awarded should be considered in determining what are reasonable attorneys fees.	1	2	3	4	5
6. Plaintiffs' attorneys who are successful in gender-based employment discrimination cases should routinely receive attorneys fees.	1	2	3	4	5

7. Do you have any examples or illustrations of gender bias in the handling of gender-based employment discrimination cases? If so, please describe. (Use additional pages as needed.)

8. Are there any topics in the area of gender-based employment discrimination that you would like to see addressed in judicial education programs? If so, please describe.

H. ADULT SENTENCING

1. Approximately how many sentencing proceedings have you presided over during the last two years?

   1 500 OR MORE
   2 100 - 499
   3 25 - 99
   4 1 - 24
   5 NONE (IF NONE, PLEASE SKIP TO SECTION I)

	STRONGLY AGREE	AGREE	DISAGREE	STRONGLY DISAGREE	NO OPINION
2. I sentence women to jail less often than similarly situated men because there are too few incarceration facilities for female offenders.	1	2	3	4	5
3. I sentence women to jail less often than similarly situated men because the programs available to incarcerated women are inadequate.	1	2	3	4	5
4. I sentence women with young children to jail less often than similarly situated men because they are needed at home.	1	2	3	4	5

5. In sentencing offenders, are there any factors that you weigh differently depending on whether the offender is a man or a woman? If so, please describe.

6. Do you have any examples or illustrations of gender bias or gender-related problems in the area of sentencing? If so, please describe. (Use additional pages as needed.)

7. Are there any topics in the area of sentencing that you would like to see addressed in judicial education programs? If so, please describe.

I. COURTROOM INTERACTION

Witnesses at public hearings and in regional meetings with lawyers have testified to various instances of unequal treatment of men and women in courtrooms and chambers. The following questions ask how often you personally have observed specific types of behavior in the Minnesota state courts in the last two years. Please circle the response that comes closest to your own observation. IF YOU HAVE NO EXPERIENCE IN A PARTICULAR AREA, CIRCLE THE COLUMN TITLED "NO BASIS FOR JUDGMENT."

1. In the last two years, approximately how many times did women attorneys appear before you in court or chambers?

   1 100 OR MORE
   2 50 - 99
   3 25 - 49
   4 10 - 24
   5 FEWER THAN 10

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
2. Women attorneys are addressed by first names or terms of endearment when men attorneys are not.						
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
3. Women litigants or witnesses are addressed by their first names or terms of endearment when men litigants or witnesses are not.						
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
4. Women attorneys are asked if they are attorneys when men are not asked.						
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
5. Comments are made about the physical appearance or apparel of women attorneys when no such comments are made about men.						
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
6. Comments are made about the physical appearance or apparel of women litigants or witnesses when no such comments are made about men.	1	2	3	4	5	8
-- by counsel						
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
7. Remarks or jokes demeaning to women are made in court or in chambers.						
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
8. Women attorneys are subjected to physical or verbal sexual harassment.						
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8

People often have different opinions about what is appropriate behavior in a particular setting. The following questions offer various hypothetical situations and ask you two things: first, whether you would rate the behavior described as objectionable or not objectionable; and second, what you think is the appropriate response for a judge when confronted with this situation. There are no "right" answers to these questions. You are asked only for your opinions about the behavior and the appropriate reaction by a judge in these circumstances.

9. Suppose during a jury trial, an attorney addresses a female witness by her first name (while addressing male witnesses by their titles and last names.) No objection is made by counsel.

a. Using this scale ranging from "NOT OBJECTIONABLE" to "HIGHLY OBJECTIONABLE," how would you rate this behavior? (Circle the number that best fits your opinion).

NOT OBJECTIONABLE		SOMEWHAT OBJECTIONABLE		HIGHLY OBJECTIONABLE
1	2	3	4	5

b. What do you think would be the appropriate response for the presiding judge?

1 ADMONISH THE ATTORNEY IMMEDIATELY IN OPEN COURT
2 ASK COUNSEL TO APPROACH THE BENCH AND ISSUE A REPRIMAND
3 ADMONISH THE ATTORNEY LATER IN CHAMBERS
4 IGNORE IT

10. Suppose a male attorney makes a comment in chambers about the "great legs" of a female attorney who is present.

a. Using this scale, how would you rate this behavior?

NOT OBJECTIONABLE		SOMEWHAT OBJECTIONABLE		HIGHLY OBJECTIONABLE
1	2	3	4	5

b. What do you think would be the appropriate response for the presiding judge?

1 ADMONISH THE ATTORNEY
2 ADMONISH THE ATTORNEY ONLY IF THE FEMALE ATTORNEY OBJECTS
3 IGNORE IT

11. Suppose a male attorney addresses an opposing attorney as "honey" during a jury trial. No objection is made by counsel.

a. Using this scale, how would you rate this behavior?

NOT OBJECTIONABLE		SOMEWHAT OBJECTIONABLE		HIGHLY OBJECTIONABLE
1	2	3	4	5

b. What do you think would be the appropriate response for the presiding judge?

1 ADMONISH THE ATTORNEY IMMEDIATELY IN OPEN COURT
2 ASK COUNSEL TO APPROACH THE BENCH AND ISSUE A REPRIMAND
3 ADMONISH THE ATTORNEY LATER IN CHAMBERS
4 IGNORE IT

12. Suppose an attorney makes a comment about "bitchy women" in court during a jury trial. No objection is made by counsel.

a. Using this scale, how would you rate this behavior?

NOT OBJECTIONABLE		SOMEWHAT OBJECTIONABLE		HIGHLY OBJECTIONABLE
1	2	3	4	5

b. What do you think would be the appropriate response for the presiding judge?

1 ADMONISH THE ATTORNEY IMMEDIATELY IN OPEN COURT
2 ASK COUNSEL TO APPROACH THE BENCH AND ISSUE A REPRIMAND
3 ADMONISH THE ATTORNEY LATER IN CHAMBERS
4 IGNORE IT

13. Suppose an attorney tells a joke demeaning to women in chambers.

a. Using this scale, how would you rate this behavior?

NOT OBJECTIONABLE		SOMEWHAT OBJECTIONABLE		HIGHLY OBJECTIONABLE
1	2	3	4	5

b. What do you think would be the appropriate response for the presiding judge?

1 TELL THE ATTORNEY SUCH A JOKE IS NOT APPROPRIATE
2 TELL THE ATTORNEY IT IS NOT APPROPRIATE ONLY IF WOMEN ARE PRESENT
3 LAUGH IF IT'S FUNNY
4 IGNORE IT

14. Suppose a female court reporter is the subject of repeated unwanted sexual advances from a male attorney.

a. Using this scale, how would you rate this behavior?

NOT OBJECTIONABLE		SOMEWHAT OBJECTIONABLE		HIGHLY OBJECTIONABLE
1	2	3	4	5

b. If a judge were aware of this, what do you think would be the appropriate response for the judge?

1 ADMONISH THE ATTORNEY
2 ADMONISH THE ATTORNEY ONLY IF THE COURT REPORTER ASKS FOR ASSISTANCE
3 IGNORE IT

15. Suppose a male bailiff makes repeated unwanted sexual advances toward a woman attorney in the courtroom when court is not in session.

a. Using this scale, how would you rate this behavior?

NOT OBJECTIONABLE		SOMEWHAT OBJECTIONABLE		HIGHLY OBJECTIONABLE
1	2	3	4	5

b. If a judge were aware of this, what do you think is the appropriate response for the judge?

1 ADMONISH THE BAILIFF
2 ADMONISH THE BAILIFF ONLY IF THE ATTORNEY ASKS FOR ASSISTANCE
3 IGNORE IT

16. Suppose a male attorney addresses a 45-year-old female attorney as "young lady" during a jury trial. No objection is made by counsel.

a. Using this scale, how would you rate this behavior?

NOT OBJECTIONABLE		SOMEWHAT OBJECTIONABLE		HIGHLY OBJECTIONABLE
1	2	3	4	5

b. What do you think would be the appropriate response for the presiding judge?

1 ADMONISH THE ATTORNEY IMMEDIATELY IN OPEN COURT
2 ASK COUNSEL TO APPROACH THE BENCH AND ISSUE A REPRIMAND
3 ADMONISH THE ATTORNEY LATER IN CHAMBERS
4 IGNORE IT

17. During voir dire, an attorney addresses jurors of one gender by their first names, jurors of the other gender by their last names. No objection is made by counsel.

a. Using this scale, how would you rate this behavior?

NOT OBJECTIONABLE		SOMEWHAT OBJECTIONABLE		HIGHLY OBJECTIONABLE
1	2	3	4	5

b. What do you think would be the appropriate response for the presiding judge?

1 ADMONISH THE ATTORNEY IMMEDIATELY IN OPEN COURT
2 ASK COUNSEL TO APPROACH THE BENCH AND ISSUE A REPRIMAND
3 ADMONISH THE ATTORNEY LATER IN CHAMBERS
4 IGNORE IT

18. Suppose a male judge in your district makes the following comment to a male attorney regarding a woman attorney who is present in the courtroom: "I may not like her arguments but I sure like her body."

a. Using this scale, how would you rate this behavior?

NOT OBJECTIONABLE		SOMEWHAT OBJECTIONABLE		HIGHLY OBJECTIONABLE
1	2	3	4	5

b. What do you think would be the appropriate response for a judge who hears about the incident?

1 ASK THE JUDGE ABOUT WHAT HAPPENED AND EXPRESS DISAPPROVAL TO HIM
2 ASK THE JUDGE ABOUT IT ONLY IF THE JUDGE IS A PERSONAL FRIEND
3 MENTION THE INCIDENT TO THE CHIEF JUDGE AND ASK THAT SOMETHING BE DONE ABOUT IT
4 IGNORE IT

19. If you have observed any gender-based discrimination in your courtroom or in chambers during the last two years, please briefly describe the most serious such incident.

a. In the incident described above, did you intervene? If so, in what way? If not, what considerations influenced you not to intervene?

20. The necessity of occasionally traveling with courtroom personnel makes me reluctant to choose a law clerk or court reporter of the opposite sex.

1 STRONGLY AGREE
2 AGREE
3 DISAGREE
4 STRONGLY DISAGREE
5 NO OPINION

21. Which of the following statements best describes your overall perception of gender bias against women in the Minnesota courts at the present time?

1 There is no gender bias against women in the Minnesota courts.
2 Gender bias against women exists, but only in a few areas and with certain individuals.
3 Gender bias against women is widespread, but subtle and hard to detect.
4 Gender bias against women is widespread and readily apparent.

22. Which of the following statements best describes your overall perception of gender bias against men in the Minnesota courts at the present time?

1 There is no gender bias against men in the Minnesota courts.
2 Gender bias against men exists, but only in a few areas and with certain individuals.
3 Gender bias against men is widespread, but subtle and hard to detect.
4 Gender bias against men is widespread and readily apparent.

23. In your opinion, how has gender bias in the Minnesota state courts changed over the past few years?

1 There is less gender bias now than in the past.
2 There is more gender bias now than in the past.
3 There is the same amount of gender bias now as in the past.
4 There has never been any gender bias, now or in the past.

24. Are there any topics related to courtroom interaction that you would like to see addressed in judicial education programs? If so please describe.

THANK YOU VERY MUCH FOR YOUR HELP. PLEASE RETURN THE QUESTIONNAIRE IN THE ENCLOSED PRE-ADDRESSED ENVELOPE OR TO:

Research and Planning
Minnesota Supreme Court
1745 University Ave. Suite 302
St. Paul, MN 55104

PLEASE RETURN THE ENCLOSED POSTCARD SEPARATELY SO THAT YOUR NAME CAN BE REMOVED FROM THE MAILING LIST.

IN-COURT PERSONNEL SURVEY

Thank you for helping the Minnesota Gender Fairness Task Force by answering this survey.

In recent months, a number of public hearings on the treatment of men and women by the Minnesota court system have been held across the state. Various instances of unequal treatment in the courtroom or in chambers have been reported to us.

As a person who is frequently in the courtroom or in chambers, you are in a unique position to help us evaluate how people are treated by the court system. Many of the following questions will ask about your observations of the way men and women are treated in courtroom proceedings. The court system also has a special responsibility to make sure its own employees are treated fairly. Other questions will ask how you, as an employee of the courts, feel you are treated.

Please complete the questionnaire and return it to us within one week. When you mail the questionnaire, please return the enclosed postcard separately. This method allows us to follow-up on surveys which have not been returned, but assures complete anonymity for your individual reply.

A. GENERAL BACKGROUND INFORMATION

1. Sex: 1 Male 2 Female

2. Year of birth: ____

3. Number of years with the court system: ___

4. Are you a:
   1 Court administrator
   2 Deputy Clerk
   3 Law Clerk
   4 Court Reporter
   5 Electronic Court Recorder
   6 Other (please indicate position _____)

5. In which area do you serve:
   1 Metro (District 2 or 4)
   2 Suburban (District 1 or 10)
   3 Greater Minnesota (District 3, 5, 6, 7, 8, or 9)

6. On the average, how many hours per week are you in court?
   1 0 hrs/wk
   2 1-10 hrs/wk
   3 11-20 hrs/wk
   4 21-30 hrs/wk
   5 31-40 hrs/wk

7. On the average, how many hours per week are you in chambers during official proceedings?
   1 0 hrs/wk
   2 1-10 hrs/wk
   3 11-20 hrs/wk
   4 21-30 hrs/wk
   5 31-40 hrs/wk

B. COURTROOM INTERACTION

The following questions ask how often you personally have observed or experienced specific types of behavior in the Minnesota state courts in the last two years. Please circle the response that comes closest to your own observation or experience.

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
8. Women attorneys are addressed by first names or terms of endearment when men attorneys are not.						
-- by judges	1	2	3	4	5	8
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
9. Women litigants or witnesses are addressed by their first names or terms of endearment when men litigants or witnesses are not.						
-- by judges	1	2	3	4	5	8
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
10. Women attorneys are asked if they are attorneys when men are not asked.						
-- by judges	1	2	3	4	5	8
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
11. Comments are made about the physical appearance or apparel of women attorneys when no such comments are made about men.						
-- by judges	1	2	3	4	5	8
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
12. Comments are made about the physical appearance or apparel of women litigants or witnesses when no such comments are made about men.						
-- by judges	1	2	3	4	5	8
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8

	ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO BASIS FOR JUDGMENT
13. Women attorneys are subjected to physical or verbal sexual harassment.						
--by judges	1	2	3	4	5	8
--by counsel	1	2	3	4	5	8
--by court personnel	1	2	3	4	5	8
--by bailiffs	1	2	3	4	5	8
14. Women litigants or witnesses are subjected to physical or verbal sexual harassment.						
--by judges	1	2	3	4	5	8
--by counsel	1	2	3	4	5	8
--by court personnel	1	2	3	4	5	8
--by bailiffs	1	2	3	4	5	8
15. Women court personnel are subjected to physical or verbal sexual harassment.						
--by judges	1	2	3	4	5	8
--by counsel	1	2	3	4	5	8
--by other court personnel	1	2	3	4	5	8
--by bailiffs	1	2	3	4	5	8
16. Remarks or jokes demeaning to women are made in court or in chambers.						
-- by judges	1	2	3	4	5	8
-- by counsel	1	2	3	4	5	8
-- by court personnel	1	2	3	4	5	8
-- by bailiffs	1	2	3	4	5	8
17. When gender bias occurs in the courtroom, the judge intervenes to stop it.	1	2	3	4	5	8
18. When an attorney makes an offensive gender-based comment, it is the responsibility of the court reporter to make sure the comment is not included in the official transcript.	1	2	3	4	5	8
19. When a litigant makes an offensive gender-based comment, it is the responsibility of the court reporter to make sure the comment is not included in the official transcript.	1	2	3	4	5	8
20. When the judge makes an offensive gender-based comment, it is the responsibility of the court reporter to make sure the comment is not included in the official transcript.	1	2	3	4	5	8

	YES	NO
21. Has a judge ever requested a court reporter outside the proceedings to remove offensive gender-based material from the official transcript?	1	2

	MALE	FEMALE	NEITHER
22. In my opinion, judges assign more credibility to the arguments of attorneys who are:	1	2	3
23. In my opinion, judges assign more credibility to the opinions of experts who are:	1	2	3
24. In my opinion, judges assign more credibility to the testimony of witnesses who are:	1	2	3

C. OVERALL PERCEPTION OF GENDER BIAS IN JUDICIAL PROCEEDINGS

25. Gender bias is most often encountered:

1 In the courtroom
2 In chambers
3 Same amount in both settings
4 Have seen no instances of gender bias in any setting

26. Which of the following statements best describes your overall perception of gender bias against women in the Minnesota courts at the present time?

1 There is no gender bias against women in the Minnesota courts.
2 Gender bias against women exists, but only in a few areas and with certain individuals.
3 Gender bias against women is widespread, but subtle and hard to detect.
4 Gender bias against women is widespread and readily apparent.

27. Which of the following statements best describes your overall perception of gender bias against men in the Minnesota courts at the present time?

1 There is no gender bias against men in the Minnesota courts.
2 Gender bias against men exists, but only in a few areas and with certain individuals.
3 Gender bias against men is widespread, but subtle and hard to detect.
4 Gender bias against men is widespread and readily apparent.

28. In your opinion, how has gender bias in the Minnesota state courts changed over the past few years?

1 There is less gender bias now than in the past.
2 There is more gender bias now than in the past.
3 There is the same amount of gender bias now as in the past.
4 There has never been any gender bias, now or in the past.

29. If you have observed any gender-biased discrimination in the courtroom or in chambers during the last two years, please briefly describe, without naming any specific individuals, the most serious such incident.

29a. In your opinion, did this behavior affect the outcome of a case?
1 NO
2 YES If YES, how?

29b. Did anyone intervene to correct this behavior?
1 NO
2 YES If YES, who? (Judge, opposing counsel, etc.)

29c. If so, in what way?

29d. In your opinion, did this intervention affect the outcome of a case?
1 NO
2 YES If YES, how?

D. COURT ADMINISTRATION

The following questions ask you about your experiences as an employee of the court system. Please circle the response that comes closest to your own experience.

	STRONGLY AGREE	AGREE	DISAGREE	STRONGLY DISAGREE	NO BASIS FOR JUDGMENT
30. I feel I am asked to perform duties that would not be asked of a person of the opposite sex.	1	2	3	4	8
31. I feel that there are duties that I am <u>not</u> allowed to perform because of my gender.	1	2	3	4	8

	STRONGLY AGREE	AGREE	DISAGREE	STRONGLY DISAGREE	NO BASIS FOR JUDGMENT
32. Men's opportunities for job advancement in the court system are limited because of gender.	1	2	3	4	8
33. Women's opportunities for job advancement in the court system are limited because of gender.	1	2	3	4	8
34. In my county or district, men are given preference in appointments to supervisory positions in court administration.	1	2	3	4	8
35. In my county or district, women are given preference in appointments to supervisory positions in court administration.	1	2	3	4	8
36. My opinions on work-related matters are given less weight than those of a person of the opposite gender.	1	2	3	4	8
37. Grievance procedures within the court system are adequate for resolving gender-based problems at work.	1	2	3	4	8

38. As an employee of the courts, do you feel you have ever been discriminated against on the basis of gender?

1 NO
2 YES If YES, please describe the circumstances, without naming any specific individuals.

38a. Did you take any action (e.g., file a complaint) as a result of this?

1 NO
2 YES If YES, please describe what action you took?

38b.If NO, why did you feel action was not advisable or possible?

THANK YOU VERY MUCH FOR YOUR HELP. PLEASE RETURN THE QUESTIONNAIRE IN THE ENCLOSED PRE-ADDRESSED ENVELOPE OR TO:

Research and Planning
Minnesota Supreme Court
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St. Paul, MN 55104

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1/17/89

JURY SUMMONS SURVEY

1. County_____

2. From what lists is jury list drawn (check all that apply)?
   - Voter registration _____
   - Driver license registration _____
   - Motor vehicle registration _____
   - Welfare registration _____
   - Other (please specify) _____

3. How often do you update the jury list? every _____ months

4. Does the summons/qualification form you use allow people to be <u>excused from a term of service</u> if they are (check all that apply):
   - Disabled _____
   - Disabled (with doctor's excuse) _____
   - Woman in advanced state of pregnancy _____
   - Parent with small children _____
   - Other _____

5. If a judge is contacted directly by a juror, does a judge ever <u>excuse anyone from a term of service</u> if they are (check all that apply):
   - Disabled _____
   - Disabled (with doctor's excuse) _____
   - Woman in advanced state of pregnancy _____
   - Parent with small children _____
   - Other _____

6. Does the summons/qualification form you use allow people to <u>defer their service until later in the term</u> if they are (check all that apply):
   - Disabled _____
   - Disabled (with doctor's excuse) _____
   - Woman in advanced state of pregnancy _____
   - Parent with small children _____
   - A teacher _____
   - Have business conflicts _____
   - Other _____

7. Do you:
   - a. Summons and then determine qualifications ____ or
   - b. Determine qualifications and then summons? ____

8. When was your most recent call for jurors who have now completed their service?
   date:_____

9. What time period of service did that call cover?
   From _____ to _____

10. What is the term of service for jurors in your county?
    - _____days
    - _____weeks
    - _____months

11. How many people were <u>initially</u> contacted to determine qualifications or summoned for service during the last term?_____

12. How many of these were males? _____
How many females? _____

13. Of those contacted, how many were not legally qualified for service (e.g. not citizens, not residents, not over 18 years of age...)?
Males not qualified _____
Females not qualified _____

14. How many people never responded to the initial contact in any way?
Male non-responses _____
Female non-responses _____

15. From the qualified pool how many people were excused from the entire term before the term began?
Males excused _____ Females excused _____

16. From the qualified pool how many people were granted deferrals during the term (were deferred for service later in the term)?
Males deferred _____ Females deferred _____

17. How many people actually appeared in response to the summons?
Males appeared _____ Females appeared _____

18. How many people were granted excuses from the entire term once they appeared?
Males excused _____ Females excused _____

19. How many people were granted deferrals to serve later in the term once they appeared?
Males deferred _____ Females deferred _____

20. Overall, how many jurors were granted excuses or deferrals for the following reasons:

	excused		deferred	
	males	females	males	females
medical disability/illness	_____	_____	_____	_____
pregnancy	_____	_____	_____	_____
parent of small children	_____	_____	_____	_____
teachers	_____	_____	_____	_____
business matters	_____	_____	_____	_____
undue hardship	_____	_____	_____	_____
other _____	_____	_____	_____	_____

21. At the time jury service began, how many people were actually available for service?
Males available _____ Females available _____

22. How many people were sent to courtrooms for possible jury service?
Males to court _____ Females to court _____

23. How many jurors actually served on juries?
Males serving _____ Females serving _____

Please return a copy of your qualification, summons, and other pertinent forms with this questionnaire in the enclosed envelope.

3/6/89

COURT ADMINISTRATOR'S SURVEY

NAME OF COUNTY_____

1. Population of County
   (1) Under 10,000
   (2) 10,001-20,000
   (3) 20,001-30,000
   (4) 30,001-40,000
   (5) 40,001-50,000
   (6) 50,001-100,000
   (7) 100,001-200,000
   (8) Over 200,000

SEXUAL HARASSMENT POLICIES AND COMPLAINTS

2. Does your county or district have a formal sexual harassment policy?
   (1) No
   (2) Yes, county
   (3) Yes, district

3. Have you had formal sexual harassment complaints filed in the last two years?
   (1) No
   (2) Yes, but fewer than three times in the last two years
   (3) Yes, more than three but fewer than ten times in the last two years
   (4) Yes, more than ten times in the last two years

4. If so, how many complaints have been against:
   (1) Judges? _____
   (2) Other court personnel? _____
   (3) Other county personnel involved with the courts? _____
   (4) Attorneys? _____
   (5) Others (please specify)? _____

5. If so, how many of the complaints have resulted in:
   (1) Abandonment of the complaint? _____
   (2) Dismissal of the complaint? _____
   (3) Warning or reprimand issued? _____
   (4) Disciplinary proceedings against offender?_____
   (5) Removal or resignation of offender? _____

6. Have you had informal complaints of sexual harassment which did not result in the filing of a formal complaint in the last two years?
   (1) Yes
   (2) No

7. If so, how many complaints have been against:
   (1) Judges _____
   (2) Other court personnel _____
   (3) Other county personnel involved with the courts _____
   (4) Attorneys _____
   (5) Others (please specify) _____

PROFILE OF THE LEGAL PROFESSION

Introduction

The Task Force lawyers' survey included a number of questions that provided a demographic profile of the profession in Minnesota. The growing number of women lawyers has a considerable impact on the profession and on the issues raised in this report.

Demographics of the Profession

Women are, on average, newer to the profession than men, more mobile and slightly more likely to be employed in government or education jobs. Women less frequently become partners in the largest law firms and are paid somewhat less than men. Women perceive that they are often treated unfairly by men in the profession while men perceive that gender unfairness is a rare occurrence.

The percentage of women lawyers is substantially less than the percentage of women in the total population, but it is increasing. Currently the percentage of male attorneys is approximately 80%, and the percentage of female attorneys approximately 20%. The group surveyed by the Task Force consisted of 63% metro males, 17% metro females, 17% nonmetro males, and 3% nonmetro females. Female lawyers thus demonstrated a decided preference for the metropolitan areas.

The number of women in the legal profession continues to increase as the percentage of women in law schools increases. In 1982, it was reported that the percentage of women in law school was 37%, while in 1988 it was reported at 40% and 42%[1]

The Task Force survey indicated that the female members of the profession are considerably younger on average than the males.

TABLE 8.1
MEDIAN AGE AND MEDIAN YEAR OF ADMITTANCE TO PRACTICE

	Metro Males	Metro Females	Nonmetro Males	Nonmetro Females
Median age (in years)	40	35	41	35
Median year in which first admitted to practice	1976	1982	1974	1982

Thus, on average, metro males are five years older than females and have been in practice for an average of six years longer than females.

1 L. Gerstman, et al., The Status Of Women in the Legal Profession; A Profile of Minnesota Attorneys 53 (1984); Still a Long Way to Go for Women, Minorities, The Nat'l L.J. (Feb. 8, 1988), 1; The Bench & Bar of Minnesota (Mar. 1989), 5 (quoting figures from the ABA Office on Legal Education).

TABLE 8.1
MEDIAN AGE AND MEDIAN YEAR OF ADMITTANCE TO PRACTICE

	Metro Males	Metro Females	Nonmetro Males	Nonmetro Females
Median age (in years)	40	35	41	35
Median year in which first admitted to practice	1976	1982	1974	1982

Thus, on average, metro males are five years older than females and have been in practice for an average of six years longer than females.

Employment longevity follows what one would expect based upon a five year difference in average age. Among survey respondents from the metropolitan area, the median number of years in active practice was eleven for metro males and six for females. In the nonmetropolitan areas, the difference was somewhat more pronounced with males in the rural areas practicing a median number of thirteen years, while females had practiced a median number of only five. On average the male population had fewer job changes and more years in the current job.

TABLE 8.2
MEDIAN NUMBER OF YEARS ON JOB:
MEDIAN NUMBER OF JOBS

	Metro Males	Metro Females	Nonmetro Males	Nonmetro Females
Median # of years in current job	7	3	10	3
Median # of different jobs	2	3	2	3

The current employment of male and female lawyers among the sample respondents is set forth below.

TABLE 8.3
EMPLOYMENT DISPERSEMENT

	Metro Males	Metro Females	Nonmetro Males	Nonmetro Females
Current employment (%)				
Academic	1%	4%	1%	4%
Corporate	16%	15%	5%	5%
Government/Public	9%	20%	8%	23%
Private Practice/Solo	15%	9%	19%	13%
Private Practice/Firm	51%	40%	61%	441%
Legal Services	1%	3%	2%	8%
Other	7%	9%	4%	6%
TOTAL	100%	100%	100%	100%

Generally, women are employed in significantly higher percentages than men in government and academic positions. Men are employed in significantly higher percentages in private practice.

These Minnesota figures are very similar to the results of other surveys. A recent survey across a number of states reported 52% of the men and 36% of the women in private firms, with the government employing 17% of the women and 12% of the men.[2] This same study reported a significant difference between the first jobs selected by women and those selected by men. A larger proportion of men accepted jobs in larger law firms, with a larger proportion of women choosing public interest jobs, academic jobs or solo practice.[3]

The survey did not reveal any significant difference in the gender of clients of male and female lawyers. In the metro area, female and male lawyers both report 30% of their clients are female, while in the nonmetro areas, 40% of male lawyers' clients are female and 50% of female lawyers' clients are female.

There were, however, differences between men and women in areas of legal specialization. Respondents were asked to list their specialties (since many listed more than one, the totals equal more than 100%).

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2 L. Liefland, Career Patterns of Male and Female Lawyers, 35; Buffalo Law Review, 601, 606 (1986).

3 Id., 605.

TABLE 8.4
AREAS OF SPECIALTY

Areas of specialty (%)	Metro Males	Metro Females	Nonmetro Males	Nonmetro Females
General	18	10	44	24
Family Law	11	13	27	37
Civil Litigation	34	23	41	25
Labor/Employment	8	10	7	6
Appellate	7	7	10	9
Criminal	11	8	24	18
Corporate	20	13	17	5
Real Estate	17	8	29	14
Other (tax)	4	3	1	2
(probate)	3	4	6	6
TOTAL	133%	89%	206%	146%

Approximately 40% more men report multiple specialties. Only a slightly larger percentage of women than men specialized in family law; however, considering the greater number of specialties reported by men, that difference is greater than is immediately apparent. Significantly fewer women than men report specializing in the area of civil litigation. The same is true in the area of corporate law. Although age may be a factor, while 62% of men report that all their civil trial work is first chair, only 33% of female attorneys make a similar report.

Some Characteristics of Misdemeanor Domestic Assault Prosecution In Six Minnesota Jurisdictions

Beverly Balos[1]

Introduction

Domestic violence is a crime of enormous proportions. The Minnesota Department of Corrections estimates that there are approximately 63,000 incidents of domestic violence in Minnesota each year.[2] Increasingly, the criminal justice system is the arena in which this societal problem is exposed and confronted.

In an effort to begin to discover the characteristics of a misdemeanor domestic assault case as it proceeds through the criminal justice system, the Minnesota Supreme Court Gender Fairness Task Force undertook a study project. The project collected data on defendants arrested for misdemeanor assault in a domestic situation in six Minnesota jurisdictions during 1987.

Data Collection Method

Of the six jurisdictions chosen, two were urban, St Paul and Duluth, two suburban jurisdictions were included, Brooklyn Park and Brooklyn Center, and two rural areas were chosen, Little Falls and Kandiyohi County. These six jurisdictions were chosen not only to obtain diversity in type of area and geography, but also because three of the jurisdictions, St. Paul, Duluth, and Brooklyn Center, had operating intervention projects.[3] The study hoped to include information regarding the functioning of the intervention projects. Unfortunately, the data sought were not available. In St. Paul files of the city prosecutor were examined and every eighth case was pulled from the 1987 closed cases. This process resulted in 51 case files for examination. Once the case is completed, the prosecutor' s office in St. Paul discards the information in the file except for a one page manifold. In Duluth arrest files maintained by the Domestic Abuse Intervention Project were examined and every third case was selected for a total of 51 cases. Assaults outside the city of Duluth were eliminated. Data was collected in Kandiyohi County by reviewing all police records for domestic assaults charged in 1987. Every file was included since only 16 were found. In Little Falls the police department provided every domestic assault case in 1987, a total of 9. Again every file was included due to the extremely small numbers involved. Finally,

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1 Clinical Professor, University of Minnesota Law School.

2 Minnesota Department of Corrections, Program for Battered Women: Summary Data Presentation on Information Obtained from Law Enforcement Agencies, 1984-1985, 2 (Sept. 1987).

3 Intervention projects provide advocacy services to victims of domestic assault. Many of the projects are notified directly by the police department when an arrest for domestic assault occurs. An advocate will then contact the victim as soon as possible after the assault to offer advocacy services during the pendency of the prosecution proceeding.

for the jurisdictions of Brooklyn Park and Brooklyn Center the Court Administration Manager of the Hennepin County District Court provided a computer generated list of all misdemeanor domestic assault prosecutions filed during calendar year 1987. In Brooklyn Center from a total of 79 cases two of every three cases were randomly selected beginning with case number three for a total of 48. In Brooklyn Park from a total of 150 cases every third case was randomly selected beginning with case number two for a total of 50. In both jurisdictions the random selection was generated from a random number chart specifically designed for that purpose. The data gathering procedure described above resulted in a total of 225 misdemeanor domestic assault case files for study from St. Paul, Kandiyohi COunty, Duluth, Little Falls Brooklyn Park and Brooklyn Center. The files examined sometimes indicated that the defendant was charged with more than one crime. This study focuses on fifth degree assault, and all but one defendant in all regions were first charged with fifth degree assault, a misdemeanor offense unless enhanced. See Minn. Stat. 609.224 (1) and Minn. Stat. § 609.224(2) (1988). Few defendants were charged with more than one crime. Only 32 were charged with two crimes, 4 with three crimes and 1 with four. This study will focus on the outcomes and characteristics of those charged with fifth degree assault.

Characteristics of Defendant and Victim

The collected data revealed a number of common characteristics. The vast majority of defendants were male (88.00%). Victims were mostly female (83.11%). Most defendants were married to (29.56%) or cohabiting with (47.29%) the victim of the crime. (22 observations were missing.)

Nature of the Injury

Data was collected on the nature of the injury and the method of assault. Victims suffered bumps and bruises, swelling and cuts. Injuries occurred most frequently to the face, arms, legs, neck and scalp, with injury to the face being the most common (53% of the first injuries). Of the few victims that sought medical attention, none were hospitalized, rather they were treated on an out patient basis. The attacker typically slapped, punched kicked or squeezed, or hit the victim with an object. Of the 225 files examined, 171 or 76% recorded at least one injury to the victim. Multiple injuries were recorded for numerous victims. Second injuries were sustained by 69 victims and 18 of these had a third injury as well.

The first injury was usually observed by the police and noted in their report (73.99% of first injuries).

Available Evidence

In 125 of the incidents, the victim was the only witness to the assault. Files indicate that only 80 (35.56%) of the incidents occurred in the presence of another person. Of the witnesses, only 11 or 15.28% were strangers to the defendant. Most of the other witnesses knew the defendant in some way, as an acquaintance, blood relative, spouse, or cohabitant. (51 of the 72 observations.) With regard to the relationship between the victim and the witness, 56 or 73.68% of the witnesses knew the victim, only 10 or 13.16% of the witnesses were strangers.

Overall, the number of witnesses interviewed by the police was very high. Files indicate that police interviewed 76.92% of the witnesses. (60 of the 78 person sample where the information was able to be determined.) There was no significant variation in interviewing from jurisdiction to jurisdiction. Three witnesses were not interviewed, and the files did not indicate whether the remaining 15 were interviewed. Witnesses ranged in age from 3 to 55 years of age. The majority of witnesses were between the age of 17 and 24 (22 of 46). Almost one-third of the witnesses, 32.61%, were children ranging in age from 3 to 18. Over one-quarter of the witnesses, 28%, were the children of either the defendant or the victim (11% were children of the defendant, 17% children of the victim).

Other than the presence of an observable physical injury or a witness, no other evidence was noted in the files in 157 or 69.78% of the cases. However, in 35 or 15.56% of the incidents the defendant confessed or admitted the incident. Physical evidence was present in 30 or 13.33% of the cases.

In most cases the prosecutors did not subpoena the victim. Only 68 or 31.05% victims were subpoenaed for pretrial proceedings or for trial. One hundred forty-five (145) or 66.21% of the victims were not subpoenaed. (Information was unavailable about 6 or 2.74% of the cases.) It is important to note that if charges are dropped at an early stage of the proceedings, there may be no need to subpoena the victim.

Arrests

The files examined for this study indicated that defendants were almost always arrested. According to the available data, 201 (92.20%) of those defendants charged with domestic assault were arrested. This is not a surprising statistic in light of the nature of the files selected. Since the study used as its source of files not only police files but prosecutors files and arrest records from an intervention project a high rate of arrest is to be expected. However, whether the arrest occurred at the time of the assaultive incident or pursuant to a subsequent complaint was not determined by the study. The arrest rate of victims is of more interest. Nearly one quarter (22.67%, 51) of the victims were arrested. Of those victims arrested, 47.05% (24) were charged.

Disposition of First Charge

Examining all jurisdictions, (224 files where misdemeanor assault was the first charge) only one file indicated a conviction by the Court (.4%). There were no convictions by jury indicated in any of the files. A guilty plea was obtained in 84 or 37.5% of the cases. A guilty plea to a lesser crime was recorded in 17 or 7.6% of the cases. Seventy (70) or 31.3% were dismissed by the prosecutor and 46 or 20.5% were in the category of acquitted/dismissed which includes continuances for dismissal. Four (4) cases were continued and 2 had some other disposition. (See Appendix A.)

St. Paul obtained guilty pleas to the first charge in 23.5% of the cases and guilty pleas to a lesser crime in 3.9%. Duluth obtained guilty pleas in 31.4% of the cases and guilty pleas to a lesser crime in 9.8%. In Brooklyn Park the rate of guilty pleas was 26% and 4% to a lesser crime. Brooklyn Center had a guilty plea rate of 59.6% and a plea to a lesser crime of 4.3%. It is interesting to note the variability in percentage of guilty pleas, from a

high of 59.6% in Brooklyn Center to a low of 23.5% in St. Paul. (See Appendix A.) These statistics should be kept in mind when examining the rate of case dismissal as well.[4]

Rate of Dismissal

Overall, the rate of dismissal by prosecutor was 31.35 for the initial charge.[5] However, the rate of dismissal varied considerably from jurisdiction to jurisdiction. In St Paul, the first charges were dismissed in 72.5% of the cases (37 of 51). Duluth had the second highest dismissal rate of 47.1% (24 of 51). In Kandiyohi County the dismissal rate was 25%. However, the small number of cases, only 16 makes the significance of this figure questionable. Brooklyn Park and Brooklyn Center both had dismissal rates of 6.00% and 4.3% respectively. Little Falls had no dismissals of first charge at all. However, as with Kandiyohi County the small number of cases in Little Falls, nine, renders the lack of dismissals insignificant.

Stated Reason for Dismissal

Lack of victim cooperation was indicated as at least one reason for dismissing 39 charges. Files also indicated that insufficient evidence was a factor in only 5 charges. Yet for a substantial number of charges where a reason for dismissing charges was indicated, the reason was something other than lack of victim cooperation or insufficient evidence.

Sentencing

The examined files indicate that 112 initial charges resulted in some type of sentence. Eighty-eight (88) of these sentences were for assault in the fifth degree. Only 11 charges actually resulted in time being served in jail. Actual time served varied from 1 to 30 days in jail. Twenty-five (25) of the sentences were stayed prior to imposition; execution of the sentence was stayed for 56 of the charges.

Probation was ordered for 74 or 66% of the charges. In 16 instances the probation was unsupervised, and the data indicates that probation was supervised in 58 cases. The supervised probation data however, is somewhat ambiguous. Jurisdictions define supervised probation in various ways. Supervised probation in one jurisdiction may be a stay of imposition with conditions in another jurisdiction. The definition simply is not consistent across jurisdictions.

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4 Due to the small number of cases in Little Falls and Kandiyohi County, the figures regarding percentages of guilty pleas and pleas to a lesser crime are not significant.

5 In 1988 the Minnesota legislature passed an act requiring prosecutors to make every reasonable effort to notify a domestic assault victim that the prosecutor has decided to decline prosecution or to dismiss the charges. See Minn. Stat. § 611A.0315 (1988). This statute was not in effect in 1987, the target year of data collection for this study.

Fines/Costs

Persons convicted, or who plead guilty to domestic assault were not often fined. Indeed, only 41 persons were fined, one of which was for a gross misdemeanor charge. Of those 41 fines 19 were stayed. The fines ranged in amounts from $50 to $1500, the most common fine was $100 (10 of 41 were fined $100). A fine of $700 was pronounced in 8 cases. Costs were imposed in 30 cases. In half of those cases $5.00 was the amount imposed.

Orders for Protection

In 8.89% or 20 of the cases an Order for Protection was in effect prior to the assault in question. After the assault, protection orders were instituted for 54 or 24% of victims. The terms of the protection orders varied. In 14 or 25.45% of the cases the defendant was ordered to have no contact with the victim. In 36 instances, 65.45%, the defendant was removed or excluded from the victims home. In the remaining 5 or 9.09% of the cases other terms were included in the Order for Protection.

Length of Time to Dismissal

When the final dismissal data is broken down by the length of time before each dismissal and by jurisdiction, some interesting results exist. In St. Paul there were 44 instances when the elapsed time between the date of the incident to the date of dismissal as well as the date of arrest to the date of dismissal by the prosecutor could be determined. In St. Paul the mean time between the date of the incident and the date when the case is dismissed by the prosecutor is 37.273 days.[6] The median is 19 days.[7] The mean and median is about the same when we examine the time period between the date of arrest and the date of dismissal. Here, the mean is 36.682 days and the median is 19.00 days. The slight decrease is understandable because some defendants may not be arrested on the date of the incident. In Brooklyn Center only 6 instances of elapsed time were able to be determined. Here the mean time between the incident and dismissal is 148.667 days. The median is 157.000 days. No data was available on the time between the arrest and dismissal. In Little Falls the mean and median between the incident and dismissal and between arrest and dismissal are identical at 176.00 days. However, this was based on only two cases. In Brooklyn Park the mean from incident to dismissal is 136.00 days. The median is 167.00 days. The time from arrest to dismissal is 27.5 days for both the mean and median. However again, this was based on only two cases. In Kandiyohi County the data was available for only five cases. From incident to dismissal the mean is 36.80 days, and the median 57.00 days respectively. From arrest to dismissal the mean and median were the

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6 The mean is the average.

7 The median is the middle value, above and below which lie an equal number of values.

same, 36.00 days and 57.00 days. In Duluth, where 29 instances were determined, the mean elapsed time from arrest to dismissal by the prosecutor is 122.48 days and the median is 96 days.[8]

Cases are dismissed most quickly in St. Paul. The elapsed time data available from Little Falls, Brooklyn Park, Brooklyn Center, and Kandiyohi County was too small to be of significance. For all jurisdictions the mean from incident to dismissal is 70.025 days, the median is 46.00 days. The mean time between arrest and dismissal is 68.9 days the median is 46.00 days. With regard to St. Paul, the rapidity of dismissals should be viewed in conjunction with the dismissal statistics, that is a dismissal rate of 72.5% of the cases. (Thirty-seven (37) initial charges out of 51 cases examined.)

Timing of and Reason for Dismissal

Data was collected on the reasons for dismissal in relation to the timing of the dismissal across all jurisdictions. As noted above it is important to keep in mind the minimal elapsed time data available from Little Falls, Brooklyn Park, Brooklyn Center, and Kandiyohi County. Of those cases dismissed without any indication of the reason, (22 cases) the mean number of days between the incident and the dismissal was 90.182 days; the median was 71.500. A mean of 71.895 and a median of 46.00 days passed from the arrest until the case was dismissed for no indicated reason. Cases dismissed for lack of victim cooperation (44 cases where the data was available) are dismissed at mean of 85.568 days and a median of 65.00 days after the incident, and a mean of 79.200 days and a median of 60.00 days after arrest.

Of the few cases dismissed for "other" reasons with information as to the timing of the dismissal, the mean time period for dismissal was 16.75 days and the median was 2.50 days after the incident. This mean was reduced to 16.25 days after the arrest. The median was also reduced to 2.00 days.

Arrests of Victims

Victims were more likely to be arrested in Duluth and in Brooklyn Center. In Duluth the police arrested the victim in 19 instances out of the 51 files examined. In Brooklyn Center police arrested the victim in 14 of the 48 cases. Duluth charged 8 of the arrested victims. All but 4 of the victims were charged in Brooklyn Center. The remaining jurisdictions had a lower frequency of victim arrest. In St Paul 4 victims or 7.8% were arrested out of the 51 files examined. Of those 4, 2 were charged. In Kandiyohi COunty 3 out of 16 files or 18.8% were arrested but none were charged. Little Falls arrested no victims. In Brooklyn Park in 11 out of 50 files victims were arrested but only 4 were charged.

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8 See graphs attached as Appendices B and C for a visual representation of Lengths of Time to Dismissal. Please note the small number of cases where data was available: Little Falls (2), Brooklyn Park (2), Brooklyn Center (6), and Kandiyohi County (5), Duluth (29), St. Paul (44).

Conclusions

This study examined 225 domestic assault files in the criminal justice system. While there has been speculation based on anecdotal information that a great percentage of cases charged were being dismissed, this study indicates that for at least one jurisdiction, St. Paul, that belief is supported statistically. Further, it is interesting to note the wide variability in rates of dismissal across the six jurisdictions. The reason for the rate of dismissal is less clear. While statistics were minimal in some jurisdictions, it also appears that St. Paul had a comparatively short period of time from the date of the incident to the date of dismissal as well as from the time of arrest to the date of dismissal by the prosecutor.

Similar to the wide range found in the rate of dismissal, the study found great variations in the percentage of guilty pleas obtained from jurisdiction to jurisdiction. St. Paul had the lowest percentage of guilty pleas while Brooklyn Center had the highest percentage.

With regard to the assault itself, 76% of the files noted an injury to the victim. Multiple injuries were not uncommon. Although most victims did not seek medical attention, those few who did were treated on an out patient basis. The vast majority of the defendants and victims were either married or cohabiting. The study also indicated that in the majority of cases there is no other witness present. When there is another witness, it is likely to be a person known to the victim or defendant or related to one of them in some way. In 28% of the cases where there was a witness, the witness was the child of either the defendant or the victim.

With regard to sentencing, it appears that time in jail is rarely served and when served is of minimal duration. Similarly fines and costs are rarely imposed. Some form of probation was the most common outcome. In the 61 instances where we were able to determine specific conditions of probation, the most common condition was chemical abuse counseling (26 instances). Domestic violence counseling was an additional condition in 16 instances.

A surprising finding was the overall number of victims arrested, 22.67%. Of interest also is the finding that Duluth and Brooklyn Center had a higher rate of victim arrest than did the other jurisdictions examined. The occurrence of victim arrest is a phenomenon that requires further exploration and study.

Recommendations

Given the rates of dismissal, the unique characteristics of domestic assault, sentencing patterns and the rate of victim arrest the following actions are recommended:

1. That prosecuting authorities develop a separate unit for the prosecution of domestic assault cases within their offices.

2. That the unit be Staffed by those attorneys, paralegals etc. who have particular interest and training in the area of domestic assault.

3. That such a unit be monitored to determine its effectiveness in reducing dismissal rates as well as the overall prosecution of domestic assault cases.

4. That training and education programs dealing with domestic violence be instituted and/or expanded for prosecutors, judges, law enforcement personnel, and defense attorneys. That some percentage of this training be developed and presented by advocates who work with victims of domestic assault.

5. That judges consider the effectiveness of current sentencing practices .

6. That a uniform method of data collection be instituted by the state for offices of prosecuting attorneys. That relevant data files be maintained in an accessible manner so that future research can occur.

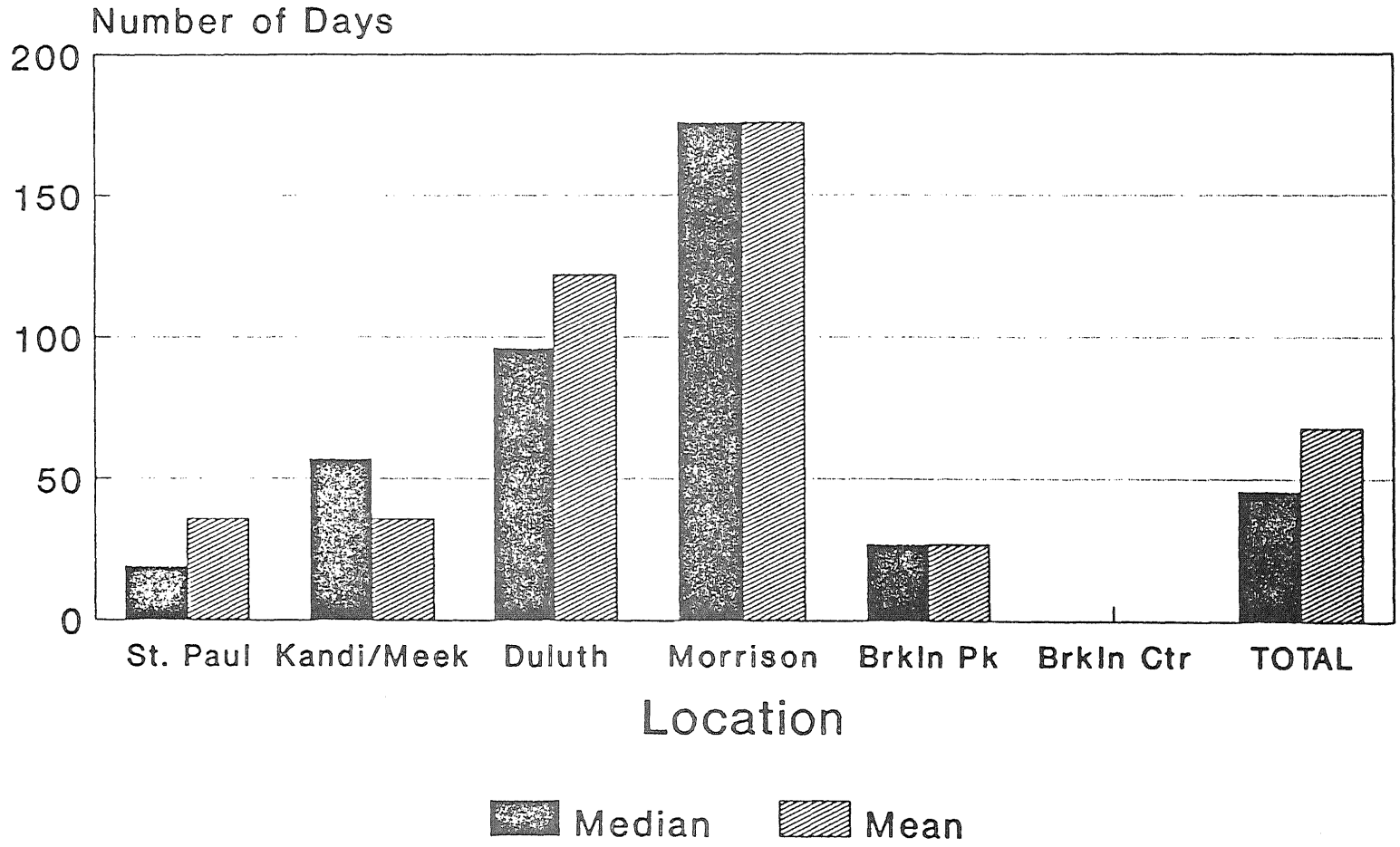
7. That the phenomenon of victim arrest be further examined.

DISPOSITIONS BY LOCATION
Misdemeanor Domestic Assault (609.224, subd. 1)

	Convicted by Court	Guilty Plea	Guilty Plea/ Lesser Crime	Acquitted/ Dismissed by Court	Dismissal by Prosecutor	Case Continued No Finding	Other
Brooklyn Center	-0-	59.6%	4.3%	29.8%	4.3%	2.1%	-0-
Brooklyn Park	-0-	26.0%	4.0%	56.0%	6.0%	4.0%	4.0%
Morrison	-0-	66.7%	33.3%	-0-	-0-	-0-	-0-
Duluth	2.0%	31.4%	9.8%	7.8%	47.1%	2.0%	-0-
Kandiyohi/Meeker	-0-	56.3%	18.8%	-0-	25.0%	-0-	-0-
St. Paul	-0-	23.5%	3.9%	-0-	72.5%	-0-	-0-
All Locations	.4%	37.5%	7.6%	20.5%	31.3%	1.8%	.9%

Note: The category of Acquitted/Dismissed by Court includes continuances for dismissal. There were no convictions by jury in the files examined.

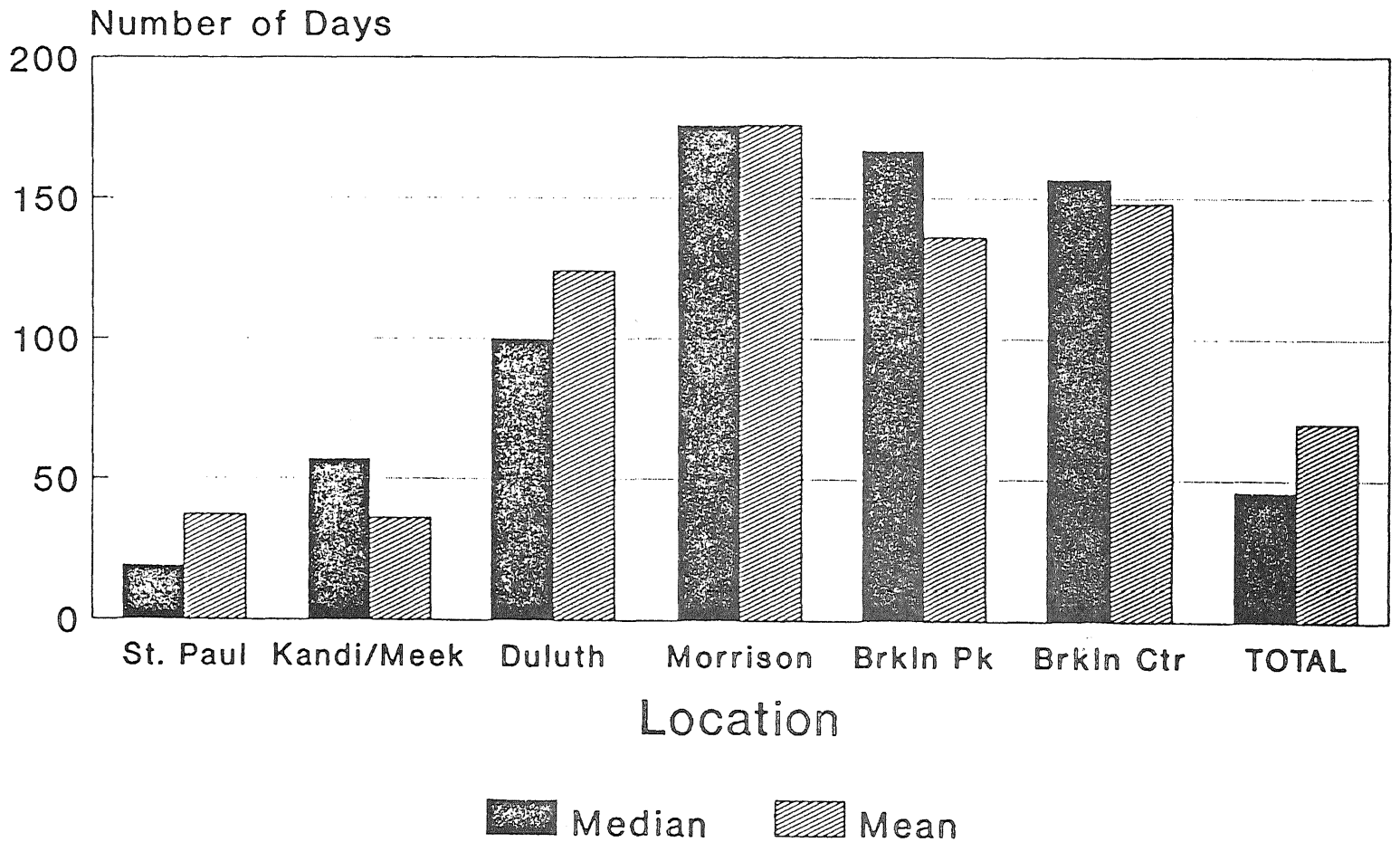
Dismissed by Prosecution
Date of Arrest to Date of Dismissal
Misdemeanor Domestic Assault



Note: Brkln Ctr has no valid cases.

APPENDIX B

Dismissed by Prosecution
Date of Incident to Date of Dismissal
Misdemeanor Domestic Assault



APPENDIX C

GENDER FAIRNESS OF COURT DOCUMENTS

One of the concerns of the Task Force is the gender fairness of communications by the judicial system with the public. The Task Force has attempted to ascertain whether oral communications made by the judicial system contain gender bias through surveys of attorneys, court personnel and judges and through hearings for the general public. The Task Force determined that it was also appropriate to evaluate the gender fairness of the documents through which the judicial system communicates with the public. These documents include forms, statements of rules and procedures and brochures. This evaluation is an important aspect of the Task Force's study. 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 an official statement of the system's perspective. Broadly disseminated documents also provide the judicial system with an opportunity affirmatively to promote gender fairness in the courts.

The Task Force gathered forms and statements of rules issued by the state and the judicial districts and requested that court administrators submit to it any locally produced or distributed materials. The Task Force designed a form for the collection of data regarding court system documents and a set of instructions defining the sorts of language which might be identified as gender biased. It directed evaluators to look for use of the male pronoun regardless of the gender of the person to whom reference is being made, use of language which presumes a person of a particular gender, use of gender-biased stereotypes and opportunities within a document affirmatively to promote gender fairness.

Some people have defended the use of the male pronoun to refer to persons of either gender on the grounds that (1) everyone understands that the masculine includes that feminine; (2) the usage has been historically viewed as grammatically correct; and (3) elimination of such usage would make writing unduly awkward. These arguments are unpersuasive.

The first argument is easily refuted by asking how men would feel if "she" were considered the gender-neutral pronoun and was regularly considered to include men as well as women. Many people today reading material which uses the masculine pronoun in this way conclude that the drafter of the document does not view women as a part of the group being described. A recent American Bar Association policy statement on gender-fair language, for example, reports an incident in which a jury explained to a judge that they had not chosen a woman as jury leader because the court rules instructed them to appoint a "foreman." Exclusive use of male pronouns is particularly harmful when they are used to refer to judges or attorneys or other professionals because they suggest the existence of women in such categories is unusual or irregular. See, for example, Rule 104(a) of the Rules of Evidence which describes the judge's role in determining preliminary questions in the following way: "In making <u>his</u> determination <u>he</u> is not bound by the rules of evidence except those with respect to privileges." See also, the Introductory Statement to the Appendix of Forms of the Rules of Civil Procedure: "Each pleading, motion, and other paper is to be signed in <u>his</u> individual name by at least one attorney of record (Rule 11). The attorney's name is to be followed by <u>his</u> address as indicated in Form 2."

The view that use of the masculine pronoun to include both men and women has historically been considered grammatically correct is no defense to its continued use. Language, including grammar, is not gender neutral, but rather reflects the biases of the society in which it develops. Describing women in language which treats the women as if they were men in order to satisfy a grammatical rule denies the very existence of their gender. An example of that transformation can be seen in CRIMJIG 11.26 from the Minnesota Jury Instruction Guides-Criminal. There, the comment describes the facts of a specific criminal prosecution in which the defendant was a woman and identifies what she contended on appeal. In the following sentence, the comment says, "The Court further held that it was not unreasonable or unconstitutional to impose criminal liability on a defendant in a case in which he would not face civil liability because the decedent's degree of negligence exceeded his own."

The final argument, that avoiding the use of the masculine pronoun will lead to an unnecessarily awkward writing style is easily refuted by examining the successful manner in which many legal documents have been rewritten to become gender neutral. The legislative drafting manual of the Minnesota Revisor of Statutes, for example, lists five different grammatical constructions, in addition to "he or she" or "his or her," which can be used to achieve gender neutrality.

Law student volunteers from the University of Minnesota Law School examined the documents collected in accordance with the Task Force's definitions of gender-biased language. Their evaluations included both overall assessments of a document's gender fairness as well as, in most cases, suggestions for amended language which could improve the document. The study included more than ninety forms and thirty-six statements of rules and procedures, some of them more than a hundred pages long. Ten brochures distributed by local districts were also reviewed. This report provides general findings of the study. 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 55410.

The study found a wide disparity in the attention that has been paid to gender fairness in court documents. Some documents, particularly those which have undergone revisions since 1987, have thoroughly eliminated gender-biased language. The drafters of such documents as the Code of Judicial Conduct and the Minnesota Rules for Admission to the Bar and the Second Judicial District Handbook for Jurors, have managed to achieve gender neutrality without having to sacrifice clarity or style. Other documents, including some which have undergone some recent revisions, are nevertheless filled with gender-biased language. The Rules of Evidence and the Minnesota Rules of Criminal Procedure, for example, exclusively employ the masculine pronoun and make frequent use of other gender-biased language.

It is interesting that in some documents in which obvious attention has been paid to attempt to eliminate masculine pronouns, the masculine pronoun has nevertheless been retained in references to higher ranking officials. For example, in the Court of Appeals Internal Rules, amended in 1987, which are generally free of gender-biased references, Rule 8.4 refers to "the Chief Judge or his designee." The Sixth Judicial District Rules, also adopted in 1987, include a similar retention of a masculine pronoun in the midst of an otherwise gender neutral statement in Rule 9: "The Court Administrator shall assign a

duly appointed deputy clerk from his office who shall be designated as the assignment clerk and he/she shall act under the general instruction of the presiding Judge ..."

In places where documents offer examples, the examples are often unnecessarily gender specific. Illustrative are Comment II.A.04 to the Sentencing Guidelines which gives an example involving father-daughter incest where the reference could instead have been made to parent-child incest or the Comment to II.B.103 of the same document which describes a liquor store robber as "he" where gender is irrelevant to the example. In a statement of policy regarding joinder of parties contained in the Rules of the Second Judicial District, a particular joinder problem is described as typically arising in a personal injury suit brought by "a wife and minor child" where "spouse" could have been used to replace the gender-specific term "wife." In sets of rules which include forms, the litigants and attorneys are universally described by male names and pronouns. See, for example, the forms included in the Rules of Civil Procedure and the forms in the Minnesota Rules of Civil Appellate Procedure.

Many court documents employ nouns which presume that a variety of social roles are filled exclusively by men. Document reviewers found such words as clergyman, bail bondsman, foreman, chairman, venireman and serviceman used in documents issued by the judicial system.

Rules which describe appropriate courtroom attire unnecessarily differentiate between men and women. Rule 17 of the Rules for Uniform Decorum in the District (Trial) Courts of Minnesota states: "Pantsuits or dresses shall be appropriate for women. Coats and ties shall be appropriate for men." This rule might be interpreted as precluding women from wearing business suits. Indeed, some women in the Attorneys Survey reported being criticized by judges for not dressing in a sufficiently "feminine" style. Rule 6.02 of the Fourth Judicial District Rules state: "Either suits, dresses, or other customary business attire are appropriate for women, and coats and ties are appropriate for men." Both rules already note that clothing appropriate for sports or other leisure time activities are inappropriate in the courtroom. It should be sufficient merely to retain that language and provide, without making any gender differentiation, that the proper clothing for all attorneys is "customary business attire."

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. For example, court rules governing the appointment of attorneys to boards could mandate significant representation of both men and women. The Rules of Decorum could be revised to direct that equally respectful forms of address are used for both men and women and that judges are directed to admonish attorneys who fail to meet such a standard. Jury instructions could include directives that juries are to be careful in their deliberations to assure that all jurors have an opportunity to speak and that statements of a juror should not be undervalued simply because a juror speaks quietly or with less assertive language than another.

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 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.

The Task Force concludes that a significant number of court-issued documents require revision. The Supreme Court should direct all groups within the court system which issue documents promptly to undertake revisions to eliminate use of gender-specific nouns, gender-specific pronouns and gender-based stereotypes and to introduce into the documents, where appropriate, language affirmatively promoting gender fairness in the courts.

STATE OF MINNESOTA

IN SUPREME COURT

ORDER ESTABLISHING STANDING COMMITTEE
TO IMPLEMENT RECOMMENDATIONS OF THE MINNESOTA
TASK FORCE ON GENDER FAIRNESS IN THE COURTS

WHEREAS this court, by its order of June 8, 1987, directed the Minnesota Task Force on Gender Fairness in the Courts to document the existence of gender bias where found in the judicial system of Minnesota, to recommend methods for its elimination and to monitor implementation of approved reform measures; and

WHEREAS the Minnesota Task Force on Gender Fairness in the Courts has recommended the appointment at this time of a standing committee to oversee implementation of the recommendations of the Task Force to insure that the monitoring function will be carried out as effectively as possible and to maintain the desired level of continuity;

NOW, THEREFORE, IT IS HEREBY ORDERED that the Committee on Gender Fairness in the Courts be, and hereby is, established to:

1. Implement Task Force recommendations and monitor implementation efforts on an on-going basis;

2. Work with Continuing Legal Education for State Court Personnel, Board of Continuing Legal Education, and the National Judicial Education Program to develop judicial and legal education programs on gender fairness;

3. Work with the Office of the State Court Administrator to establish a statistical data base appropriate for monitoring areas of Task Force concerns and performing studies in furtherance of the committee's charge; and

4. Evaluate the effectiveness of approved reform measures which have been implemented to assure gender fairness in our court processes.

5. Submit a yearly written report to the Chief Justice and the Court regarding the work and recommendations of the Standing Committee.

IT IS FURTHER ORDERED that the following persons be, and hereby are, appointed, effective January 1, 1989, as members of the Committee on Gender Fairness in the Courts for the term of years indicated below:

Hon. Rosalie E. Wahl
Minnesota Supreme Court
230 State Capitol
St. Paul, MN 55155
Term: three years

Hon. Jonathan Lebedoff
District Court Judge
12-C Government Center
Minneapolis, MN 55487
Term: two years

Ember D. Reichgott
Minnesota State Senator
7701 48th Avenue North
New Hope, MN 55428
Term: one year

Sue K. Dosal
State Court Administrator
230 State Capitol
St. Paul, MN 55155
Term: three years

Hon. Jack J. Litman
District Court Judge
St. Louis County Courthouse
Virginia, MN 55792
Term: two years

Hon. George I. Harralson
District Court Judge
Lyon County Courthouse
Marshall, MN 56258
Term: one year

Dr. Nancy Zingale
Public Member/Social Scientist
436 Holly Avenue # 3
St. Paul, MN 55102
Term: three years

Martin J. Costello
Attorney
101 Fifth Street E. # 2100
St. Paul, MN 55101
Term: two years

Hon. Mary Louise Klas
District Court Judge
15 Kellogg Blvd. W. # 1639
St. Paul, MN 55102
Term: one year

IT IS FURTHER ORDERED that members of the Committee on Gender Fairness in the Courts may be reappointed for successive three year terms upon order of this court.

IT IS FURTHER ORDERED that the following be appointed ex officio members of the committee:

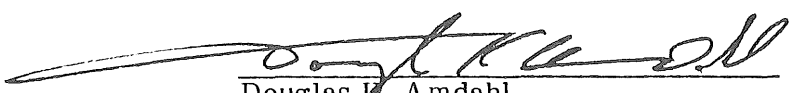
Director of Continuing
Education for State
Court Personnel
1745 University Avenue
St. Paul, MN 55105

Frank V. Harris
MSBA Continuing Legal Education Director
140 N. Milton Street
St. Paul, MN 55104

IT IS FURTHER ORDERED that the Honorable Rosalie E. Wahl be, and hereby is, designated as chairperson.

DATED: Dec 22, 1988

BY THE COURT



Douglas K. Amdahl

OFFICE OF
APPELLATE COURTS

DEC 23 1988

FILED