

ADOPTED BY ABA HOUSE OF DELEGATES - 2/6/89

AMERICAN BAR ASSOCIATION
SECTION OF TORT AND INSURANCE PRACTICE
AND THE
COMMISSION ON WOMEN IN THE PROFESSION
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED that the American Bar Association and each of its entities should use gender neutral language in all documents establishing policy and procedure.

BE IT FURTHER RESOLVED that the Association calls upon its members and sections to work actively and with due diligence to implement this resolution.

Executive Summary

Summary of the recommendation

The resolution proposes that gender neutral language be used in all ABA documents establishing policy and procedures.

Summary of the supporting report

At the 1988 ABA Annual Meeting, the House of Delegates adopted resolutions calling upon the ABA and all members of the legal profession to eliminate overt and subtle barriers to women's full integration and equal participation in all aspects of the legal profession. Gender biased language is one of those barriers. Utilizing gender neutral language in Association documents represents a concrete step that the ABA can take to eliminate the vestiges of this form of bias from the Association and from the legal and judicial systems.

ABA entities should work actively and with due diligence to incorporate gender neutral language into ABA policy and procedures. Revision of documents with gender neutral language will not require special publication but should occur in the normal course of reprinting and/or updating documents. This will allow for timely revision but will not result in increased cost to ABA entities. In working actively to effectuate revision of policy and procedures, ABA entities may call upon the Commission on Women in the Profession to provide technical assistance in gender neutralizing appropriate documents. The assistance provided by the Commission will enable ABA entities to identify categories of language in need of revision and gender neutral alternatives for documents. (Examples of gender neutral language may be found in Appendix A of report.)

Although individuals within the legal profession may believe that a change in usage is unnecessary, extensive research over the past fifteen years conclusively demonstrates that gender biased language is not harmless and that the misunderstanding and confusion it generates is widespread. Research shows that masculine terminology skews perception about who should seek and hold certain jobs and who may aspire to leadership positions. Within the legal profession itself there is substantial evidence that gender biased language has negative consequences for women.

The growing understanding of the true impact of gender biased language has generated a trend toward formal actions to eliminate it from the legal system. A number of states and court systems have taken action to eliminate gender biased language in their statutes and in the administration of the courts.

Adoption of the proposed resolution would be in keeping with the steps taken by legislatures and courts to employ gender neutral language in the legal system and would create uniformity on this issue within the ABA itself. Adopting the proposed resolution and committing the ABA to use gender neutral language in its documents is an essential step in carrying out Goal IX and realizing the ABA's commitment to eliminate all barriers to women's full and equal participation in the legal profession.

REPORT

Introduction

At the 1988 Annual Meeting the House of Delegates, in keeping with Goal IX, adopted Resolutions calling upon the ABA and all members of the legal profession to eliminate overt and subtle barriers to women's full integration and equal participation in all aspects of the legal profession.¹ Gender biased language is one of those barriers. Utilizing gender neutral language in Association documents is a concrete step the ABA can take to eliminate the vestiges of sexism from our Association and from the legal and judicial systems.²

ABA entities should work actively and with due diligence to incorporate gender neutral language into ABA policy and procedures. Revision of documents with gender neutral language will not require special publication but should occur in the normal course of reprinting and/or updating documents. This will allow for timely revision but will not result in increased cost to ABA entities. In working actively to effectuate revision of policy and procedures, ABA entities may call upon the Commission on Women in the Profession to provide technical assistance in gender neutralizing appropriate documents. The assistance provided by the Commission will enable ABA entities to identify categories of language in need of revision and gender neutral alternatives for documents.

I. Why Gender Biased Language is a Barrier to Women's Full and Equal Participation in the Legal Profession

As attention to the importance of gender neutral language has increased in many segments of society,³ some respected

1. Resolutions Proposed by the Commission on Women in the Profession. Adopted August 10, 1988.

2. The proponents of this Recommendation also encourage the use of gender neutral language in all oral communication, such as speeches and panel presentations, as well.

3. A variety of professional associations, government agencies, educational institutions and publishing houses have adopted regulations or issued guidelines requiring the use of gender neutral language. E.g., American Psychological Association, American Anthropological Association, National Council of Teachers of English, National Education Association, U.S. Commission on Civil Rights, New York State Executive Chamber, Michigan State University, University of Wisconsin, Macmillan Publishing Co., Inc., McGraw-Hill and Random House.

commentators have insisted that a change in usage is unnecessary. Within the legal profession Professor Irving Younger asserted in the ABA Journal that efforts to eliminate gender biased language are "a waste [of] effort" because "[o]nly to the uninformed do fisherman, fireman, and handyman suggest that women may not wield hook, hose or hammer."⁴

Over the past fifteen years, however, extensive research by experts in linguistics and communication has demonstrated conclusively that gender biased language is neither trivial nor harmless and that the misunderstanding and confusion it generates is widespread. Empirical studies have repeatedly found that supposedly generic terms such as "man" and "he" are overwhelmingly perceived by both men and women as referring solely to men. Masculine terminology skews perceptions about who should seek and hold which jobs and who may aspire to leadership. It creates a world model in which men are the paradigm and women feel excluded.⁵

These perceptions have genuine consequences in peoples' lives. The Washington Supreme Court recognized the power of language to shape our mental images and our judgment when it reversed the murder conviction of a woman, in part on the ground that the use of the "reasonable man" standard and masculine pronouns in the jury instruction on self-defense left jurors with the impression that the reasonableness of the respondent's conduct "must be measured against that of a reasonable male individual finding himself in the same circumstances" rather than in the context of a 5'4" woman in a cast facing a 6'2" intoxicated man.⁶

4. Irving Younger, "The English Language is Sex-Neutral", 72 ABA Journal 89 (1986).

5. Fourteen of these studies are reviewed in William R. Todd-Mancillas, "Masculine Generics = Sexist Language: A Review of Literature and Implications for Speech Communications Professionals", 29 Communication Quarterly 107 (1981). Other studies are discussed in Wendy Martyna, "Beyond the He/Man Approach: The Case for Non-Sexist Language", Donald G. MacKay, "Prescriptive Grammar and the Pronoun Problem" and "Sex Similarities and Differences in Language Speech and Nonverbal Communication: An Annotated Bibliography" in Language, Gender and Society, Thorne, Kramarae and Henley, eds., Newbury House Publishers, 1983.

6. State v. Wanrow, 559 P.2d 548 (1977).

Within the legal profession itself there is substantial evidence that gender biased language has negative consequences for women. Several state supreme court task forces on gender bias in the courts have documented the extent and seriousness of gender bias in the legal system. Among their findings are that women attorneys feel that they are not being recognized as members of the legal profession on an equal footing with men attorneys when counsel are addressed as "Gentlemen" in the courtroom and forms and letters sent by judges, court clerks, other attorneys and bar associations begin "Dear Sir" and use only masculine pronouns.⁷ The task forces recommended the use of gender neutral language in all written and oral communication.⁸

The consequences of failing to use gender neutral language in the court system were apparent in an incident reported at a program on gender fairness in the courts at the 1988 Arizona Bar Association annual meeting. A judge reported that in a recent trial he assumed that a particular woman juror would be appointed foreperson. When he asked the jurors why they did not choose her they replied that the court rules instructed them to appoint a "foreman".⁹

Concern about the use of gender biased language by the ABA itself was one of the issues raised at the Commission on Women in the Profession's hearings. Minnesota Supreme Court Justice Rosalie Wahl, Chair of the Section of Legal Education and Admissions to the Bar, noted objections to the Association's using words such as "chairman" rather than "chairperson" or simply "chair".¹⁰ The Commission has found significant inconsistencies of usage within the

7. New Jersey Supreme Court Task Force on Women in the Courts. First Year Report (1984) in 9 Women's Rights Law Reporter 1, 167-68 and 173 (1986).

8. Id. at 173-174; Report of the New York Task Force on Women in the Courts in 15 Fordham Urban Law Journal 1, 146 (1986-87); The Final Report of the Rhode Island Committee on Women in the Courts (Administrative Office of the Courts, 1987) 28 and Exhibit.

9. Arizona Bar Association Annual Meeting, June 10, 1988, Tucson, Arizona. "Sex and Law: The Impact of Gender in the Courtroom" Reported by Lynn Hecht Schafran, program speaker and member of the Commission on Women in the Profession.

10. ABA Commission on Women in the Profession Hearings. Transcript Vol. II, p. 305-306 (1988).

ABA. For example, among the sections, fifteen use "chairman", seven use "chairperson", and three use "chair". The head of the Conference of Section Chairmen is identified as its "chair".¹¹

II. Trends Toward Utilizing Gender Neutral Language in Statutes, Court Systems and the American Bar Association

The growing understanding of the true impact of gender-biased language has generated a trend toward formal actions to eliminate it from the legal system. Until recently the definitions section of every American statute included some version of the rubric that "the Masculine Gender shall be deemed and taken to include Females."¹² Court rules, documents and correspondence employed only masculine pronouns. Beginning in the 1970s many states and court systems recognized the need to eliminate gender biased language in their statutes and in the administration of the courts. For example, the District of Columbia enacted the Anti-Sex Discriminatory Language Laws¹³, Minnesota gender neutralized the language throughout its statutes¹⁴ and the Wisconsin legislature directed that gender neutral language be employed in all revisions and amendments to its statutes.¹⁵ The Maryland Court of Appeals gender neutralized

11. Contrary to many peoples' assumption, "chair" used to refer to the head of a committee or other deliberative body is not a modern neologism. According to the Oxford English Dictionary "chair" was already being used in this context in 1647, seven years prior to the first recorded use of "chairman". This formulation is analogous to the British monarch's being referred to as "the crown".

12. This is the language of an 1850 Act of Parliament, thought necessary in light of the ambiguous meaning of "man". Dennis Baron, Grammar and Gender, Yale University Press, 1986.

13. D.C. Law 1-87, effective October 1, 1976 and D.C. Law 4-111 effective June 4, 1982.

14. Minn. Laws of 1984, Ch. 480 and Minn. Laws of 1986, Ch. 444

15. Wisc. Stat. 13.93(1)(m)(1985-1986). Actions taken by other states are described in "Several States Tackle Gender Neutralization of Statutes", 2 The Legislative Lawyer 1 (1987). The drafting manual of the Uniform Commission of State Laws, the official drafting arm of the ABA, also endorses the use of gender neutral language.

that state's court rules in 1984.¹⁶ In 1987 Congress, at the request of the United States Supreme Court, amended the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure and Bankruptcy Rules to eliminate hundreds of gender-slanted words and phrases.¹⁷

The New Jersey Supreme Court's Task Force on Women in the Courts recommended that court forms, form letters and correspondence utilize gender neutral language. In response the Administrative Director of the New Jersey Courts directed all those under his supervision to follow the task forces's suggestions for revised language.¹⁸ In response to the New York Task Force on Women in the Courts the Office of Court Administration is revising its documents, forms and manuals to make them gender neutral and has requested the major private publishers of unofficial forms used in the New York courts to do likewise.¹⁹

In 1985, the New York County Supreme Court revised its Jurors' Manual when it was brought to the Court's attention that the male-oriented language in the 1984 edition of the manual contradicted the actual participation of men and women in the courts, preconditioned jurors about who would be the judges, lawyers and others they would encounter and made women jurors feel excluded. In 1987 the Rhode Island Jury Commissioner made similar revisions to that state's Jurors' Manual at the request of the Rhode Island Supreme Court Committee on Women in the Courts.

Committees and Sections of the ABA have also begun to follow this trend toward utilizing gender neutral language in their writings. The 1983 revision of the 1969 Code of Professional

16. Md. Reg. Vol. 11, Issue 9, April 27, 1984.

17. 55 U.S. Law Week 4265-4290, 4341-4353, 4417-4455 (1987).

18. Memorandum from Robert D. Lipscher to Assistant Directors, Clerks of the Court, Chiefs, Trial Court Administrators, September 28, 1984.

19. Second Report of the Committee to Implement Recommendations of the New York Task Force on Women in the Courts. Office of Court Administration, 1988, p. 22.

Responsibility eliminated 675 gender slanted words. The Code of Judicial Conduct Subcommittee of the Committee on Ethics and Professional Responsibility has announced that its forthcoming revision of the Code will employ gender neutral language. The Section of Tort and Insurance Practice is among the sections which have independently committed themselves to utilizing gender neutral language in its own printed materials. Adoption of the proposed resolution would be in keeping with the steps taken by legislatures and courts to employ gender neutral language in the legal system and would create uniformity on this issue within the ABA itself.²⁰

Conclusion

Edward Sapir, a pioneer in the study of linguistics, wrote in 1933, "[It] is not too much to say that one of the really important functions of language is to be constantly declaring to society the psychological place held by all of its members."²¹ In the years since this statement was written we have come to understand that whatever the intent, the use of masculine terminology as if it were generic places women in a decidedly secondary "psychological place". The legal profession prides itself on thinking, speaking

20. Because people are so accustomed to writing in a gender slanted style, many assume that conforming to a new style will be awkward and difficult. Becoming comfortable with gender neutral language and realizing how much more accurate and just it is will be facilitated by reference to the several writers' guides published in the last decade. See, e.g. Rosalie Maggio, The Nonsexist Word Finder: A Dictionary of Gender-Free Usage. Oryx Press, 1987; Casey G. Miller and Kate Swift, The Handbook of Nonsexist Writing. Harper and Row, 1980; Bobbye D. Sorrels, The Nonsexist Communicator: Solving the Problems of Gender and Awkwardness in Modern English. Prentice-Hall, 1983.

21. Selected Writings of Edward Sapir in Language, Culture and Personality. David Mandelbaum, ed. Univ. of California Press, 1963.

and writing clearly about complex issues. It is thus our particular obligation to employ language that conveys precisely what we mean.²² Adopting the proposed resolution and committing the ABA to use gender neutral language in its documents is an essential step in carrying out Goal IX and realizing the ABA's commitment to eliminate all barriers to women's full and equal participation in the legal profession.

Respectfully submitted,

Andrew C. Hecker
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22. For examples of gender neutral language see Appendix A.

Appendix A

General Examples of
Gender Neutral Language

1. Avoid the generic use of the term "man" or "men".

Example: The (chairman) chair of the committee...

2. Avoid the use of the masculine or feminine pronouns "he", "she", "his" or "hers".

Example: The President or (his) the President's designee...

If the attorney knows that the witness (he is examining) being examined has testified before...

A lawyer may amend (his) the petition until...

If (an individual) individuals seek(s) nomination to the council, (he) they must submit...

3. Choose a generic noun in place of a gender specific noun.

Example: (wife) spouse

(widower/widow) surviving spouse

4. Add the feminine pronoun in places where only the masculine pronoun appears.

Example: If the President is unable to attend the meeting his or her designee may attend...