



# Gender Bias in the Courts

Working Toward Change

By **Hope Viner Samborn**

*W*hen San Francisco lawyer Elizabeth Salveson first started practicing 23 years ago, judges often referred to her as “little lady.” Today, she doesn’t hear judges make such remarks. In California, where she specializes in employment law, the blatant gender bias that once existed is now rare. Reforms to eliminate gender bias in the courts, like judicial education programs that address inequities for both women lawyers and female clients, may be part of the reason for this shift, says Salveson, a director at Howard, Rice, Nemerovski, Canady, Falk & Rabkin.

## Lopsided Nation

A look at court systems across the nation reveals a wide range of re-

sponses to calls for reform. States such as Massachusetts, New Jersey, Minnesota, California, New York, and Washington have initiated significant reforms, but most states have done little to counter women’s second-tier status. Few changes are finding their way into substantive court decisions, especially in the areas of family and employment law—despite the multitude of gender task force recommendations and evidence of nationwide court abuses collected during the past two decades.

The physical structure of some courts has adapted to provide services like childcare for litigants involved in court proceedings in Massachusetts, New York City, Chicago, and elsewhere. Other courts are streamlining

proceedings involving the placement and care of children, especially in critical abuse and custody cases.

States have changed various codes of conduct for judges, attorneys, and court employees in an effort to eliminate gender bias from the courts. And consciousness of gender bias has been raised. But problems still exist, and court decisions based on gender bias still proliferate, says Lynn Schafran, director of the National Judicial Education Program, a project of the NOW Legal Defense and Education Fund. “Black-letter law and rules are fine,” says Schafran. “But everything comes down to the whim and the will of the judge.”

“We all talk the talk now,” says Christine Durham, a Utah Supreme

Court justice and past president of the National Association of Women Judges (NAWJ), but “the degree to which various places in the country are walking the walk is open to discussion.” Adds Schafran, “You could do all of these reforms, and you could still come out with a biased decision. It is important not to be beguiled.”

Schafran cites, for example, a Georgia federal court that recently exhibited blatant gender bias in its reasoning. In *Breda v. Wolf Camera, Inc.* (2001 U.S. Dist. Lexis 9328 (June 25, 2001)), the plaintiff alleged that she was subjected to a hostile work environment; the court said, essentially, “that’s the way the world is.”

Elimination of many forms of blatant gender bias is one of the most visible changes generated by the gender bias task forces. For example, the way in which judges address women attorneys *has* changed as a result of education and amended codes. “That has gotten much better over the years. Cleaning that up and making sure women lawyers are addressed appropriately is not trivial,” says Schafran. That change, however, “is not the whole question.”

The bigger issue—and the one that seems to reflect the fewest inroads—is ensuring equal treatment of litigants in substantive decisions. “The ultimate question is: Are case outcomes equitable? In too many instances, they are not,” says Schafran.

#### Major Success: Rape Shield Laws

“There are pockets of changes,” says Theresa Beiner, a professor at the University of Arkansas William H. Bowen School of Law who specializes in employment discrimination law. On the positive side, Federal Rule of Civil Procedure 412 bars defendants from seeking information concerning a plaintiff’s prior sexual history in a civil matter. Amended in 1994, that rule now extends rape shield laws, which protect victims from inquiries

into their past, to civil cases involving sexual misconduct. “That was huge,” Beiner notes.

Making the process for nominating judges more equitable has yielded significant reforms in some states. In Colorado, the chief justice travels around the state to educate judicial

“Most states with task forces responded with efforts to detoxify the system to make sure that the nominating processes are free of biases in terms of gender.” Before the Massachusetts gender bias task force began its work, women were underrepresented among the Massachusetts judiciary and within

## Catchpole Sets Crucial Precedent

Gender bias task force reports are influencing some court decisions. As of fall 1998, almost 100 state appellate and trial court opinions and a few federal decisions cited gender bias task force reports. Many had a direct effect on substantive law. For example, in *Catchpole v. Brannon* (36 Cal. App. 4th 237, 42 Cal. Rptr. 2d 440 (1995)), a leading California appellate court case involving sexual harassment, the appellate court reversed the lower court, saying that the trial court’s decision was based on gender bias. The judge in the lower court case had repeatedly said he considered sexual harassment cases like the one before him “detrimental to everyone concerned and a misuse of the judicial system.”

*Catchpole* has lasting significance because the appellate court relied on task force reports in reversing the trial court’s decision. Also significant is the court’s finding that gender bias may have affected the outcome.

The appellate court found that the “issue of judicial gender bias obviously involves both public interest and the due administration of justice.” The trial judge in *Catchpole* had “preconceptions about the parties because of their gender” that made a fair trial “impossible.”

The court cited California’s Code of Judicial Conduct, which states that gender bias can be grounds for lack of judicial impartiality and bars judges from words or conduct that manifest bias or prejudice based on gender. In addition, the court found the trial judge’s assessment of the plaintiff’s credibility was based on stereotyped thinking about women; the lower court’s perception was “based on an unrealistic and gender-biased standard of reasonableness.”

*Catchpole* helps clarify “whether a judge’s comment reflects bias or the appearance of bias,” says San Francisco employment lawyer Elizabeth Salveson. It delineates the conduct expected of judges in presiding over trials of any kind, not just employment discrimination, she adds.

nominating committees about gender bias. Committee members learn not only how their own behaviors may show bias but also how to assess whether judicial candidates reveal biases.

The nominating process shows improvements, but work needs to continue, says Schafran. “Women have been interviewed by judicial nominating commissions and asked inappropriate questions about their lives” for many years, says Durham. As a result,

senior management positions in state courts. In addition, jury instructions were written “in a way that assumed that there was only one gender,” says Massachusetts Supreme Court Chief Justice Margaret Marshall. Today, jury instructions are gender neutral and women are no longer underrepresented on the Massachusetts bench.” These changes reflect an important step toward eliminating bias. But nationwide, such efforts are in the early stages, says Schafran.

### Setting an Example

Judges who lead and simply expect others to follow their examples have brought about important shifts in policy within their courts. Marshall's court is very family oriented. "In my chambers, I promote a 'family first' policy," she says. She is flexible with regard to employees' and law clerks' family responsibilities. "People who have parenting responsibilities are not trying to shirk their work. I encourage my people to tell me when they have crises, so we can work that out.

"If a chief justice with my unbelievably demanding schedule can work it out, *you* can work it out," she says. "It takes commitment." The keys are communication and trying to consider imaginative ways to balance work and home life, she adds. "Children cannot be pushed to the sidelines."

In Massachusetts, separate waiting rooms are available for parties involved with domestic violence. The gender-fairness committee found that these accommodations were essential, and the adaptation was easily accomplished without great expense, says Marshall. "There is an awful lot that can be done without an enormous amount of funding."

New York State also has separate, secured waiting rooms for domestic violence litigants. "You don't have to have a situation where complaining witnesses are in the same room together," says Schafran. "Victims of domestic violence are at tremendous risk. Security is needed to protect these people."

Massachusetts also is one of the few states that provide onsite child-care for individuals involved in court proceedings at many courthouses in the state. "It is tremendously important," says Schafran. "Most of the people who are coming to court with children in tow are single-parent mothers." When they come to court with children, they often are distracted, or "judges are upset," she

adds. "It is a bad environment for a child."

California rules now require courts to have supervised waiting rooms for minors. This is being implemented on a court-by-court basis as space is available or courthouses are being renovated. New York and Rhode Island also provide such accommodation; in Rhode Island, foster grandparents staff the facilities.

Even adopted reforms are continually developing. In Massachusetts, court personnel regularly meet with focus groups to determine how the court could better meet the needs of litigants. Based upon feedback from the focus groups, Massachusetts currently is streamlining judicial proceedings involving family matters like custody, child support, and paternity. Marshall says in many cases, domestic violence, child custody, and paternity issues each were handled in a separate proceeding—sometimes in separate buildings. She believes the courts need to coordinate these legal issues because the family is one unit and litigants need court cooperation.

### Kids a Primary Concern

In Minnesota, courts want to fast-track family law cases so that children are placed quickly in permanent homes instead of being bounced from foster home to foster home, says Minnesota Supreme Court Chief Justice Kathleen Blatz. The courts established a pilot program in 12 counties to study the issue and resolve the problem of delays in placing children.

Minnesota reports that nearly eight percent of children removed from their homes are reassigned between five and 21 times to different homes, and 42 percent are placed in at least two different homes. Blatz knows of one child who was placed in 40 different homes. "How can children feel any stability in their life?" asks the judge. She adds that 15,000 children nationally each year leave foster care at age 18 without a permanent home.

Blatz is particularly concerned

about the impact of judicial proceedings on children. "There is a nationally recognized link between childhood maltreatment and delinquency among children." To combat this, Blatz believes that courts need to help prevent maltreatment of children. In 1998, there were 903,000 victims of maltreatment nationwide, she adds.

Improving the processing of children will, Blatz hopes, result in permanent placements in a timely fashion. "As a judicial system, we waste a lot of time. Time in terms of children can be very damaging," she says. Often lawyers request continuances because of their own scheduling. A continuance of a child's court date can mean an entire summer vacation for a child or the difference between whether they go home or stay in custody, says Blatz. She believes that lawyers need to arrange for substitutes rather than ask for continuances in these situations.

### Judicial Education

One of the most sweeping changes instituted by the courts involves education programs for judges, court personnel, and the bar. "There has been a real revolution" in judicial education in the past 20 years, says Durham.

Through education, judges are sensitized to the disparate impacts of employment and family law and the economy on women. "We didn't understand about women's lives," says Durham. "We have made tremendous progress in integrating judicial education with the new perspective."

The National Association of Women Judges provides educational programs for all members of the bench on many topics relating to women, such as battered women syndrome, the use of expert testimony in rape cases, or women in the criminal justice system.

The judges also are going outside the courthouse to educate policymakers about the need for change in areas such as prison conditions. This latest

initiative of the association—undertaken in large part at the behest of judges around the country—educates policymakers about the special needs of women in prison, says Constance Belfiore, executive director of the association. The initiative seeks opportunities for women to have access on a par with male prisoners to educational opportunities or skills training that will allow them to be gainfully employed, says Brenda Murray, director of the association's offender project and association past president.

Among the special needs of women in prison is accommodation for pregnancy. "We've heard stories of women giving birth in shackles," says Belfiore. The initiative also asked that nonviolent offenders imprisoned for a short time be permitted more contact with their children.

Educational programs for judges are leading to substantive changes nationwide, says Durham, who adds that judges are incorporating the skills they learned for overcoming bias into their community, their administrative policies, and their decision making. In Utah, for example, the high court last year permitted members of the bar to earn continuing legal education credit for courses focused on multicultural education, which includes issues such as gender bias.

It is essential that education programs for judges be ongoing because the judiciary members change frequently, says Schafran. When task forces were started 21 years ago, judges took the bench at the end of their legal career and stayed 15 or 20 years, using their knowledge for a long time. "Now," she says, "judges come on the court mid-career and stay on the court a short time."

In the future, gender bias committees will need to investigate these is-

## On the Home Front

One key area targeted by gender bias advocates for change and education is domestic violence. Washington State's bench book is heralded by many observers as a well-done, well-thought-out model for other courts seeking to eliminate gender bias in domestic violence cases. This manual was distributed to all state judges and commissioners. The two-volume book is the text for domestic violence workshops for state and tribal court judges in rural Washington counties. In addition to a brief description of this book, a website provides guidelines for domestic violence orders and resource pages. See: <http://www.courts.wa.gov/commission/genderandjustice/publicat.cfm>.

sues within administrative proceedings, says Judith Resnik, professor at Yale Law School. "Administrative agencies are a tremendously important venue of decision making for many people in the United States. The questions of how gender, race, and ethnicity affect process and outcome ought to be asked not only inside courtrooms of courthouses but also within courtroom-like activities inside many administrative agencies."

One of the problems within administrative agencies is that many administrative law judges are new law graduates who lack experience, says Schafran. "We expect people who are knowledgeable about the issues," adds Schafran, but "many family hearing officers are brand new college graduates, and no one has had any training in this. All of these people are in there making decisions, and they have no substantive expertise."

### Gender-Neutral Codes of Conduct

Significant reform can be seen in changes to judicial codes of conduct, as well as to those directed toward court employees and attorneys. Many codes and rules now include gender-neutral language. Some state codes provide that judges will be sanctioned for failing to discipline attorneys whose actions show gender bias. In a 1999 Maryland case, *Mullaney v. Aude* (1999 Md.Lexis 556 (Sept. 14, 1999)), a judge's sanction of an attorney

whose actions exhibited gender bias in discovery was upheld as proper conduct.

Several state codes and at least one court interpreter association include provisions requiring translations to be accurate and free from bias. The National Association of Judiciary Interpreters and Translators Code of Ethics states that "Court interpreters and translators are to remain impartial and neutral in proceedings where they serve, and must maintain the appearance of impartiality and neutrality, avoiding unnecessary contact with the parties." These changes were adopted to prevent interpreters from trying to influence women not to proceed in some domestic cases, says Schafran.

Essential to continuing reforms are permanent committees or staff persons whose primary role is to evaluate gender bias issues within the courts. Massachusetts is one of the states that has a permanent body, the Gender Equality Committee, to study gender bias and effect changes. A staff person is responsible for ensuring that these objectives are met, says Marshall.

"If you really want to get rid of the deep roots of inequality, you have to keep going back and looking and reexamining," she adds. Schafran agrees, noting that committees cannot implement a few recommendations and disband. "This is something that needs constant attention." ❧

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