OREGON SUPREME COURT

OREGON STATE BAR

Report of the
Oregon Supreme Court/
Oregon State Bar

Task Force on Gender Fairness

May 1998

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Oregon State Bar

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EXECUTIVE SUMMARY

The Oregon Supreme Court/Oregon State Bar Task Force on Gender Fairness studied whether and, if so, how gender affects the experiences of Oregonians in the state court system and in the legal profession. The study took a little more than two years to complete and encompassed an examination of judicial administration; civil litigation; domestic relations cases; criminal law and juvenile justice; interactions between lawyers, clients, staff, and other professionals; lawyers' professional opportunities; employment of staff by lawyers, the Oregon State Bar, and the Professional Liability Fund; bar admission; lawyer discipline; and legal education at Oregon's three law schools. In our gathering and analysis of information, we took into account other personal characteristics, such as race and age, that affect men's and women's experiences with, and perceptions of, the justice system. Methods of study included surveys of 18 different populations, such as judges, lawyers, clients, interpreters, paralegals, legal secretaries, and inmates; public hearings throughout the state; focus groups; interviews; review of extant literature and statistical data; and solicitation of written testimony.

The Task Force came to the following general conclusions:

(1) Substantial gender fairness exists in most aspects of Oregon's justice system and legal profession.

(2) Gender fairness has improved markedly in the past 10 to 25 years.

(3) Significant areas of gender unfairness and perceptions of gender unfairness remain, however. These areas include:

(a) Female lawyers (especially young female lawyers) commonly receive treatment that is less respectful than the treatment accorded to their male peers. For example:

- court staff ask female lawyers whether they are lawyers, while assuming that male lawyers are lawyers;
- in court and at work, male lawyers and even judges sometimes call female lawyers "little lady," "hon," and the like;
- female lawyers are called by their first names when men are not; and
- in court and at work, female lawyers are subjected to sexual comments.

(b) In custody and spousal and child support proceedings, some judges appear to favor men disproportionately, while other judges appear to favor women disproportionately.

(c) In marital dissolutions, women tend to receive spousal support and property divisions that place them at a significant short- and long-term financial disadvantage compared with their ex-husbands. Further, an Oregon case study revealed that only about 30% of the women to whom child support was owed received full payment. (Although most of the men to whom child support was owed likewise did not receive full payment, female obligors were relatively few in number.)

(d) Females housed in adult and youth state correctional facilities do not have access to the same job training, work, and general support programs and services as do male inmates and juvenile detainees.

(e) Almost one-third of legal secretaries surveyed believe that gender-based discrimination is the same or worse now, compared with the past. Areas in which they report bias include lack of opportunity for advancement and lack of having their views taken as seriously as the views of men.

(f) On average, male lawyers earn more than their female counterparts, even considering length of practice. Factors that play a role include that, on average, female lawyers charge less for their time, female lawyers practice in fields that are less highly compensated, and female lawyers work fewer billable hours. However, the disparity in compensation is difficult to explain entirely by objective criteria.

(4) Most gender unfairness works to the detriment of women. In some areas, however, gender unfairness works to the detriment of men. For instance:

(a) About 38% of judges surveyed (both male and female) believe that trial courts are biased against men in child custody matters. More than 72% of male lawyers and 43% of female lawyers expressed the same view. (Interestingly, in contested custody cases, men receive custody of their children about half the time.)

(b) Male victims of domestic violence (who are relatively few in number) face disbelief or ridicule because of gender stereotyping.

(c) A significant proportion of judges, criminal defense lawyers, and male inmates believe that prosecutors and judges treat female defendants more leniently than similarly situated male defendants, perhaps because of different parenting responsibilities.

(5) Negative experiences are, in some cases, based on more than gender alone and may be compounded by race, age, sexual orientation, poverty, or other factors. For example:

(a) About 70% of those in Oregon who live at or below the poverty line are women. Poor women lack adequate access to legal services, most notably in the areas of domestic relations and domestic violence.

(b) Sixty-five percent of female inmates of color surveyed believe that they have received different treatment from male lawyers than they have received from female lawyers. Neither male inmates of color nor white female inmates report this phenomenon in such large numbers.

(6) Most remaining unfairness is neither malicious nor egregious but may, for that reason, be more intractable than earlier, more glaring problems.

(7) Identification and eradication of gender- based unfairness are essential to the achievement of a justice system that is fully responsive to the needs of all Oregonians. That is especially true of the few flagrant instances of bias that are encountered.

Because the remaining areas of gender unfairness largely are subtle, the recommendations of the Task Force emphasize a wide range of educational programs for various participants in the court system and the legal profession. A complete list of our recommendations follows.

RECOMMENDATIONS

■ GENERAL

1. The Chief Justice should:

a. charge the Oregon Judicial Department's Access to Justice for All Committee with overseeing and coordinating implementation of the recommendations outlined in this report. Because that committee already is working to address issues of racial and ethnic fairness in the justice system, it is well positioned to ensure that individuals' multiple perspectives, or intersectionalities, will be incorporated into the work of securing gender fairness;

b. establish within the Oregon Judicial Department at least one permanent full-time staff position, plus appropriate support staff, to coordinate the work of the Access to Justice for All Committee; and

c. include in the Oregon Judicial Department's 1999-2001 biennial budget a request for the funds and position authority necessary for such staff.

2. The Legislative Assembly and the Governor should:

- ensure that the Access to Justice for All Committee is adequately funded.

3. The Oregon Judicial Department and the Oregon State Bar should:

- develop a volunteer panel of trained public hearing and focus group moderators and should sponsor periodic hearings and discussions on issues of fairness. Public hearings, focus groups, and roundtable discussions are excellent opportunities for litigants and other court participants to communicate their concerns and frustrations with the justice system. They also provide a regional perspective on whether and how issues differ from one locale to another. Finally, they provide the Judicial Department and the Bar an opportunity to educate the public. Funds for this purpose should be in the Judicial Department's 1999-2001 budget.

4. The Access to Justice for All Committee should:

- review this report and, where it identifies data that were not available, decide what data should be available and develop a plan for collecting such data.

5. The Chief Justice, the President of the Oregon State Bar, the Oregon Council on Domestic Violence, the Office of the State Court Administrator, and other interested persons should:

- examine the archives of the Task Force in order to identify groups, individuals, agencies, or geographic areas that warrant special attention.

6. The Access to Justice for All Committee, the Oregon State Bar, the Oregon Judicial Department, law firms, and law schools should:

- include consideration of intersectionality issues in future studies and discussions of gender fairness. Likewise, all educational programs recommended in the chapters that follow should include intersectionality issues.

■ JUDICIAL ADMINISTRATION

1. The Oregon Supreme Court should:

- by January 1, 2000, review existing procedures for making complaints of unfairness by, and against, the participants in the judicial system. That review should consider whether existing procedures are adequate to facilitate the prompt and appropriate resolution of such complaints and should recommend any needed changes.

2. Judges, including judges pro tempore, referees, and magistrates, should:

a. monitor behavior in the courtroom and, to the extent appropriate, in pretrial proceedings, and should intervene to correct inappropriate gender-based conduct;

b. participate in periodic refresher courses on the need to be aware of issues affecting gender fairness; and

c. when appropriate, expand on precautionary instruction UCJI No.5.01 to address specific issues of fairness that may arise in a particular case.

3. The Education Division of the Office of the State Court Administrator should:

a. continue to conduct regular educational programs for judges and court staff on the existence and effects of gender-biased behavior in and around the courthouse, and on ways to avoid such behavior; and

b. by January 1, 1999, develop a brochure on gender fairness and begin to distribute it to participants in the judicial process — including jurors, witnesses, litigants, and interpreters. The brochure should emphasize the commitment of the Chief Justice and the President of the Oregon State Bar to achieving gender fairness and should advise lay participants of available complaint processes (both formal and informal) in the event that they experience or observe unfair treatment. (Such information could, instead, be included in a brochure on other issues of fairness.)

4. The Oregon State Bar should:

a. continue to conduct regular educational programs for lawyers on the importance of professionalism, including the avoidance of gender-biased behavior and other forms of biased behavior;

b. in continuing legal education programs for litigators, explore the line between appropriate and inappropriate uses of gender (and other personal characteristics) in litigation strategy; and

c. continue to educate the public about the workings of the legal system, in an effort to raise the general level of public understanding about the legal system and to emphasize its commitment to fairness.

5. The Oregon State Bar's Committee on Uniform Civil Jury Instructions should:

- by January 1, 2000, consider whether to expand the caveat in UCJI No. 5.01, which provides that "you must not be influenced in any degree by personal feelings or sympathy for, or prejudice against, any party to this case." The Committee should consider whether it is advisable to give more explicit guidance on issues of fairness or to refer to other participants beyond the parties (such as a party's lawyer).

6. Law firms, lawyers' organizations, judicial organizations, and other organizations composed of regular participants in the administration of justice (such as interpreters) should:

a. discuss the issues raised in this report; and

b. provide continuing education for their members on methods of achieving fairness.

7. The Access to Justice for All Committee should:

- assist the Office of the State Court Administrator and the Oregon State Bar in improving educational curricula to help judges and lawyers identify and avoid gender bias.

8. The Access to Justice for All Committee, in coordination with trial court administrators, county officials, and other interested persons, should:

- implement the recommendations of the Multnomah Bar Association's CourtCare Advisory Committee

a. to establish child care at courthouses for jurors, witnesses, and parties during proceedings and to form a new committee to oversee that effort; and

b. to begin a statewide feasibility study by January 1, 1999, respecting on-site child care at courthouses.

9. The Access to Justice for All Committee, working together with the Information Systems Division of the Office of the State Court Administrator, trial court administrators, and other appropriate individuals and organizations, should:

- assess the adequacy of the Civil Action Data form to permit analysis of gender fairness and intersectionality issues and recommend appropriate changes.

10. The counties, with the assistance of the Access to Justice for All Committee, should:

- by January 1, 2001, study whether and, if so, how gender affects the treatment of participants in the judicial system by court security personnel and procedures, and recommend any appropriate changes. This research should focus on participants, such as jurors, litigants, lawyers, and witnesses, who are not employees with security passes.

11. The Chief Justice, trial court administrators, and other appropriate individuals should:

- study whether and, if so, to what extent jurors experience or perceive unfairness based on gender during their jury duty and, more specifically, while participating in voir dire and while deciding cases.

12. The Chief Justice and the Oregon State Bar should:

- study whether the gender of participants influences civil litigation, either substantively or procedurally. This research should build on the preliminary work of the Task Force.

13. The Governor should:

- by January 1, 1999, form a group to study whether and, if so, how gender affects the work of administrative agencies in the performance of their adjudicative functions. Many citizens and lawyers participate in hearings before administrative agencies and in appeals of administrative decisions in the contexts of, for example, workers' compensation benefits and unemployment benefits. Administrative matters affect thousands of Oregonians, particularly those of low or moderate income, perhaps resulting in additional intersectionality concerns.

■ DOMESTIC RELATIONS CASES

1. The Chief Justice and the Oregon State Bar should:

a. appoint a Task Force on Spousal Support to consider the feasibility of formulating statewide spousal support guidelines for adoption in the 2001 legislative session; and

b. study the legal and practical issues surrounding the dissolution of gay and lesbian relationships (including child custody and support) and develop recommendations for ensuring that the courts resolve such cases fairly and appropriately.

2. The Legislative Assembly and the Governor should:

- work with the Oregon Family Law Legal Services Commission's recommendations, when issued, to ensure that there is adequate funding in the 1999-2001 state budget for providing legal services to low-income people in family law matters.

3. The Education Division of the Office of the State Court Administrator should:

a. continue to provide regular education for judges regarding the law surrounding marital dissolution cases; and

b. continue to provide regular education for judges and other court personnel concerning domestic violence, including its dynamics, its effect on children, and "best practices" for handling protective orders and dissolution cases involving domestic violence (*e.g.*, see the protocols of the Oregon Council on Domestic Violence).

4. Oregon law schools should:

- by the 2000-01 academic year, ensure that they educate law students about domestic violence.

5. The Oregon State Bar should:

a. further develop *pro bono* lawyer referral programs that specialize in domestic relations and domestic violence matters; and

b. by January 1, 1999, begin to implement a statewide outreach program to inform non-English speakers about what services are available to victims of domestic violence.

6. The Oregon Council on Domestic Violence should:

a. consider recommending to the Legislative Assembly that Oregon statutes on child custody be amended to include a rebuttable presumption that a parent who has engaged in domestic violence toward the other parent or who has battered a child should not be awarded custody of the couple's children; and

b. by January 1, 2000, study whether law enforcement officers are fully and fairly enforcing Oregon's domestic violence laws and, if not, recommend needed changes.

■ CRIMINAL LAW AND JUVENILE JUSTICE

I. PROSECUTORIAL AND JUDICIAL DISCRETION

1. All district attorneys' offices should:

a. by January 1, 1999, review their policies to ensure that gender does not play an inappropriate role in charging practices, plea offers, and sentencing recommendations. Other offices should consider using the Multnomah County District Attorney's policy manual as a model.

b. as soon as possible, begin to keep data that permit analysis of gender fairness in charging practices,

indictments, and plea offers and agreements, and annually evaluate those data.

2. Prosecutors, criminal defense lawyers, and corrections staff should:

- participate in educational programs concerning issues of gender fairness and intersectionality.

3. Criminal defense lawyers should:

- consider whether gender plays a role in who accepts pleas and who rejects pleas and, if so, whether procedural changes are called for.

4. The Oregon Department of Corrections should:

- by January 1, 2001, develop plans for a long-term solution to the increasing problems involving inmates who are primarily responsible for the care of their children.

5. The Education Division of the Office of the State Court Administrator should:

- develop a judicial education program to explore issues pertaining to the sentencing of pregnant substance abusers.

6. The Chief Justice and the Oregon State Bar, working with the Oregon State Police, the Oregon District Attorneys Association, the Oregon State Sheriffs' Association, and the Oregon Association Chiefs of Police, should:

- by January 1, 2002, study whether gender unfairly affects police practices at the pre-indictment and pre-charging stage.

7. The Oregon Judicial Department, working with the Oregon District Attorneys Association, should:

- by January 1, 2003, study court records to determine whether any gender-based patterns exist with respect to prosecutors' sentencing recommendations and judges' final orders.

II. PROGRAMS AND SERVICES FOR ADULT OFFENDERS

1. The Oregon Department of Corrections should:

a. provide adequate space in the new women's prison for educational, vocational, and work programs, as well as for recreation and family visiting;

b. by January 1, 1999, expand work programs and vocational training programs for female inmates to include apprenticeships that realistically prepare them for work opportunities upon release;

c. by January 1, 2000, expand the current dual diagnosis (substance abuse and mental health treatment) programs, which now are available at Columbia River Correctional Institution, to female inmates at other institutions;

d. by January 1, 2000, assess the feasibility of permitting contact between incarcerated mothers and their children (especially newborns) and give special attention to pregnant inmates' needs for services;

e. by January 1, 1999, develop educational materials for corrections officers, program staff, and contract providers on the unique needs of female inmates and make such materials a part of all orientation programs; and

f. ensure that adequate job-training opportunities are available for inmates with sentences of varying lengths. One possible means of ensuring that people who are incarcerated for a relatively short period of time (disproportionately women) complete programs is to permit them to continue training during post-prison supervision.

2. The counties should:

a. begin to address concretely the unique needs of female offenders who are housed in county jails and, by January 1, 1999, develop policies to address those needs; and

b. by January 1, 1999, ensure that female and male offenders are afforded equal access to jail visiting hours and programs.

3. The Oregon State Bar and the Education Division of the Office of the State Court Administrator, working with the Oregon Department of Corrections, including Community Corrections, should:

- by January 1, 1999, create an educational program for lawyers and judges about the availability and nature of the programs and services in Oregon's correctional institutions, county jails, and community corrections facilities.

III. JUVENILE CORRECTIONS

1. The Oregon Youth Authority should:

a. immediately take steps to comply fully with ORS 417.270 and to ensure proportional allocation of funds to girls and boys;

b. provide more programs and services, including drug and alcohol treatment, to serve girls in the juvenile justice system. The OYA should have a plan to implement those programs by January 1, 1999, and should implement the programs by January 1, 2000;

c. ensure that sex-offender treatment programs are available to boys, without waiting;

d. by January 1, 1999, review staffing standards at secure facilities to determine whether the number of staff is sufficient to meet the needs and deliver programs and services, especially to girls;

e. ensure that adequate treatment and vocational services are available for youths who are detained for shorter periods of time (disproportionately girls). One possible means is to permit them to continue in the program or receive services after they leave the secure facility but while they remain in the legal custody of OYA;

f. by January 1, 2000, ensure that girls and boys have access to the same types of job training (*e.g.*, building trades for girls, beauticians' school for boys), based on interests, skills, and the like;

g. by January 1, 1999, hire women to fill maintenance crew, food service, and other training supervisor vacancies so that girls have access to the same job-training opportunities to which boys have access; and

h. by January 1, 1999, provide or arrange for transportation for children of youths who are in close custody, so as to encourage a stronger bond between the youths and their children.

2. The Oregon Youth Authority and the Oregon Department of Corrections should:

- by January 1, 1999, to the extent permitted under the law, jointly develop a policy on programs and services for girls who are sentenced under Measure 11.

3. The Hillcrest Youth Correctional Facility should:

- by January 1, 2000, hire a female doctor to perform obstetric and gynecological services.

4. The Oregon Judicial Department should:

- by January 1, 2001, undertake to study gender and intersectionality issues affecting juveniles who are adjudicated as "status" offenders (disproportionately girls).

■ INTERACTIONS BETWEEN LAWYERS, CLIENTS, STAFF, AND OTHER PROFESSIONALS

1. The Oregon State Bar should:

a. by January 1, 1999, more widely include gender and intersectionality issues in continuing legal education programs for lawyers, with topics such as

(i) the disciplinary rules prohibiting conflicts of interest and sexual relationships with clients;

(ii) clients' perspectives on the lawyer-client relationship; and

(iii) respectful treatment of office staff and court reporters; and

b. by January 1, 1999, develop a public education program designed to inform clients of their right to be free of sexual harassment from their lawyers and of the help available from the OSB to protect that right. This goal could be accomplished, in part, through additional information included in pamphlets already designed for distribution to the public, through separate publications devoted to this issue, and through public service announcements.

2. Every legal workplace should:

a. by January 1, 1999, establish a policy prohibiting sex discrimination and encourage all personnel (*e.g.*, through small-group meetings) to discuss improving workplace relationships, especially with regard to gender issues. All personnel should be protected from retaliation when they describe their experiences and perspectives;

b. by January 1, 1999, establish a policy prohibiting sexual harassment and regularly inform all employees about the policy and how to use its protection. In addition, each workplace should have a clearly identified person to whom sexual harassment complaints are to be directed; and

c. beginning by January 1, 1999, have supervisors communicate at least annually — orally and in writing — their commitment to a bias-free workplace and to enforcement of their non-discrimination and anti-harassment policies. Lawyers, as well as non-lawyer supervisors, must be willing to confront their colleagues when they observe inappropriate behavior.

■ THE EMPLOYMENT OF COURT, OREGON STATE BAR, AND PROFESSIONAL LIABILITY FUND PERSONNEL

I. COURT PERSONNEL

1. The Oregon Judicial Department should:

a. continue to encourage all its employees to help eliminate any form of gender bias from Oregon's court system. An appropriate reminder on this and other forms of discrimination should be delivered to court personnel annually;

b. distribute to all court personnel, biennially, statistics on hiring, promotion, and compensation that permit a comparison to the ratios of men to women within OJD;

c. include information in its regular personnel workshops to address the perceptions that gender limits

opportunities for advancement of both men and women and that members of the opposite sex receive special preferences in supervisory appointments and application of work rules;

d. by January 1, 1999, review its personnel policies and practices to determine whether any changes are needed to achieve gender fairness;

e. by January 1, 1999, assess whether there are inappropriate barriers to promoting and appointing women to actual supervisory positions within OJD in proportion to their availability among all qualified applicants. If so, OJD should take effective steps to remove those barriers;

f. review its policies on job-sharing, flexible work hours, and release time for education to promote greater use where appropriate;

g. by July 1, 1999, and periodically thereafter, review the adequacy of the procedure for court personnel to bring complaints about gender discrimination or harassment and, if appropriate, recommend changes. That review should recognize that some complaints may be directed at trial court administrators, judges, or others in high positions;

h. by January 1, 2002, study the personnel practices applicable to OJD law clerks to ensure gender fairness; and

i. by January 1, 2002, study how issues of intersectionality affect OJD employees.

II. EMPLOYEES OF THE OREGON STATE BAR AND PROFESSIONAL LIABILITY FUND

1. The Oregon State Bar and the Professional Liability Fund should:

a. ensure that continuing education programs for lawyers, managers, administrators, and supervisors at the OSB and the PLF include issues of gender fairness;

b. by January 1, 1999, initiate regular workplace dialogues to foster an understanding of the experiences and perceptions of people of the opposite sex and to promote mutual respect;

c. by July 1, 1998, and periodically thereafter, communicate to employees, in writing and in person, their commitment to gender fairness and to the enforcement of equal opportunity and anti-harassment policies. Additionally, the OSB and the PLF should review those policies periodically; and

d. by January 1, 2000, study whether additional policies (besides flex-time) are feasible to facilitate employees' meeting their family obligations.

■ LEGAL EDUCATION

1. Oregon law schools should:

a. continue to recruit law students and faculty to increase the number of persons from diverse backgrounds, including women and people of color;

b. disseminate existing written policies prohibiting discrimination and harassment on the basis of gender, race, disability, and sexual orientation, and the procedures for filing complaints, at the beginning of each academic year. Those policies should be enforced promptly and consistently when complaints are made;

c. continue to address issues of fair treatment as a part of their orientation of law students and faculty and in publications such as catalogues. By the academic year 2000-01, gender and intersectionality issues should be included in students' training in professionalism;

d. by the academic year 2000-01, conduct orientation programs for faculty members on fair treatment of staff members;

e. by the academic year 2000-01, examine administrative policies and practices, and modify them where needed, to accommodate more fully the family responsibilities of professors;

f. by the academic year 2000-01, create a variety of opportunities for dialogue among all members of the law school community regarding gender-based perceptions of the law school experience, as well as the effects of race, ethnicity, disability, sexual orientation, age, and economic class on students' experiences;

g. by the academic year 1998-99, publicize the pertinent parts of this report to faculty, students, staff, and alumni;

h. by the academic year 1998-99, review the Task Force survey results for their own campuses to determine which issues are most significant to them; and

i. beginning in the current academic year, recognize the importance of faculty members' mentoring and counseling activities outside class, and factor this important work into salary, tenure, and promotion decisions.

2. Oregon law schools' career services offices should:

a. by the academic year 1998-99, solicit interviews by a wider range of prospective employers, particularly small firms and those working in the public's interest and in the public sector; and

b. by the academic year 1998-99, provide more complete preparation of students, especially female students, for interviews with recruiters.

3. Oregon law schools' faculty should:

a. by the academic year 1999-2000, incorporate alternative teaching methods, as well as the Socratic method, in all years of law school to provide for different learning styles and preferences;

b. by the academic year 1999-2000, include gender and intersectionality issues in their class discussions, and as regular parts of the curriculum;

c. beginning in the current academic year, make every effort to create a classroom environment hospitable to different ideas and to different learning styles; and

d. by the academic year 1999-2000, engage in collective self-assessment to determine whether the curriculum, teaching methods, and other law school practices and policies hamper the ability of faculty to be accessible to law students, in particular female students of color.

4. Administrators and faculty at Oregon law schools should:

a. recognize that misperceptions concerning women's competence may adversely affect decisions concerning the promotion and tenure of female faculty; and

b. by the academic year 1998-99, take appropriate steps to ensure that promotion and tenure decisions are not based on such misperceptions.

5. Oregon law schools and the Oregon State Bar should:

a. by January 1, 2001, begin to examine how well Oregon law schools actually prepare men and women for law practice. That examination should address questions such as these:

- Upon graduation, do men and women seek similar forms of employment? Are they hired for the jobs that they want, in the same proportions, within a similar amount of time, and for similar compensation? Are they perceived by employers and potential employers as equally suited and well-prepared for law practice?

The answers to those questions will assist both law schools and the legal profession in assessing gender fairness; and

b. by January 1, 2001, determine whether there are gender-based differences in male and female faculty salaries in Oregon's law schools and, if so, implement the changes necessary to ensure fairness.

■ ADMISSION TO THE PRACTICE OF LAW AND LAWYER DISCIPLINE

I. ADMISSION TO THE PRACTICE OF LAW

1. The Board of Bar Examiners should:

- by the summer 1998 bar examination, formalize its policy addressing gender and racial and ethnic identity in examination questions, because the membership of the Board of Bar Examiners changes over time.

2. The Oregon State Bar should:

- continue to track bar pass rates by gender and by race and ethnicity. This process will enable the Bar and the Oregon Supreme Court to respond to any patterns of disparity that may become evident in the future.

II. LAWYER DISCIPLINE

1. The Oregon State Bar should:

a. recruit equal numbers of men and women (and recruit diverse people) to serve on the committees, boards, and trial panels that conduct disciplinary proceedings; and

b. include participants in the disciplinary process in educational programs concerning gender and intersectionality issues.

2. Bar Disciplinary Counsel should:

a. by January 1, 1999, develop a system to track complaints about lawyer conduct by the gender of the complainant and of the accused; and

b. beginning in 1999, periodically survey complainants and accused lawyers to determine whether there is any perception of gender bias in the disciplinary process.

3. The Oregon State Bar and the Oregon Supreme Court should:

- review disciplinary rules to determine whether there is any gender-based unfairness to lawyers, to clients, or to the interests that those rules are designed to protect. If changes are warranted, the Disciplinary Rules and Procedures Committee should make appropriate recommendations to the Oregon Supreme Court.

III. GENERAL

1. The Access to Justice for All Committee and all those to whom the Task Force addresses recommendations should:

- consider the factors that have led to gender fairness, and the perception of gender fairness, in admission to the practice of law and in lawyer discipline. The Committee should determine whether areas of gender-based unfairness discussed in this report can benefit from those lessons. Such factors may include: extensive, gender-neutral, behavior-based written rules; diversity of persons in the enforcement process; conscious regard for the perceptions of people living at different intersectional points; and multiple layers of review.

■ OPPORTUNITIES IN THE LEGAL PROFESSION

1. The Oregon State Bar should:

a. gather and maintain data about its membership through regular anonymous surveys, conducted at least every three years. The data should contain basic demographic information about lawyers, including gender, race, ethnicity, and self-identified sexual orientation. Specifically, the Bar should maintain, and make easily accessible, the following information:

(i) the number of lawyers in the Oregon State Bar;

(ii) their years of experience;

(iii) their compensation, including benefits;

(iv) their positions with their firm, corporation, governmental unit, or other entity;

(v) their areas of practice;

(vi) their career paths (longitudinal study);

(vii) promotional opportunities offered and taken; and

(viii) status as active or inactive;

b. beginning in 1999, sponsor periodic educational programs about state and federal laws that apply to lawyers in their roles as private and public employers, with an emphasis on appropriate hiring methods and responses to complaints of sexual harassment;

c. continue and expand mentoring programs for young lawyers, especially women and people of color;

d. undertake to consider, by January 1, 2000, the feasibility of establishing a process by which lawyers may complain of adverse treatment without the need to reveal that complaint, at least initially, to persons in the complainant's own firm or community;

e. by January 1, 2000, study whether lawyers who serve in contract lawyer, in-house counsel, and of-counsel positions experience unfairness on the basis of gender or other personal characteristics and, if so, make appropriate recommendations to remedy any such unfairness; and

f. encourage qualified lawyers who are women, people of color, gay men, lesbians, and disabled persons to apply for judicial positions.

2. Private and public legal employers should:

a. by January 1, 1999, implement written hiring policies to ensure that interviewers conduct interviews in accordance with legal requirements;

b. ensure diversity among the persons responsible for hiring decisions, in particular by including women and people of color;

c. by January 1, 1999, implement and distribute policies prohibiting discrimination and sexual harassment;

d. plan social and business events that are open to, and are of interest to, both male and female lawyers and clients;

e. by January 1, 1999, establish promotional policies respecting management positions to ensure fairness in promotions;

f. review case assignment procedures to ensure that women have an equal opportunity to participate in challenging and high-profile cases; and

g. by January 1, 2001, adopt part-time, flex-time, and similar policies that allow lawyers to meet the demands of their personal lives, and ensure that lawyers who take advantage of such policies are not placed at an inappropriate disadvantage for having done so.

3. The Governor should:

- continue to appoint qualified lawyers who are women, people of color, gay men, lesbians, and disabled persons to judicial positions (especially outside major metropolitan areas).

4. The Chief Justice should:

- by January 1, 2000, determine whether case assignments are made fairly to female and male judges and, if not, make appropriate recommendations to remedy any such unfairness.

INTRODUCTION

"Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."[1]

A. HOW DID THE TASK FORCE ORIGINATE?

On October 3, 1994, Oregon Supreme Court Chief Justice Wallace P. Carson, Jr., sent a memorandum to all members of the Oregon Supreme Court, recommending the formation of a Task Force on Gender Fairness. His memorandum explained:

> *"In 1988, the Conference of Chief Justices adopted a resolution exhorting the chief justice of each state supreme court to address the problems of gender bias and racial and ethnic bias. . . . Oregon has acted in support of the resolution by creating and implementing the Task Force on Racial/Ethnic Issues in the Judicial System. Oregon has yet to act, however, to address gender fairness in the state law and courts."*[2]

The Chief Justice described the studies and findings in the many other jurisdictions that already had researched the issue. He stated his commitment to "ensuring that the judicial department treats all members of the public and its employees fairly." The memorandum concluded:

> *"There has not been a systematic gender fairness survey conducted in Oregon that analyzes substantive law, fairness in the courts, legal education, and gender issues within the Bar. . . .*
>
> *"As part of a gendered society, Oregon courts probably face some problems created by gender bias. The majority of other states have undertaken gender bias studies and have found that both the study and the implementation of the task force's recommendations have improved the quality of gender relations in their states. Oregon likely could benefit from that process, as well."*[3]

The Chief Justice proposed that Oregon's study operate as a partnership between the Oregon Supreme Court and the Oregon State Bar ("OSB" or "Bar"). The Court and the Bar agreed, and a joint planning committee was formed. That committee's report served as the foundation of the Oregon Supreme Court-Oregon State Bar Task Force on Gender Fairness ("Task Force"). In December 1995, the Chief Justice and then-President of the Oregon State Bar, Dennis C. Karnopp, appointed the Task Force members.

B. WHO SERVED ON THE TASK FORCE?

The Co-Chairs of the Task Force were Associate Justice Susan P. Graber of the Oregon Supreme Court and Robert H. Fraser, a Eugene lawyer and past president of the Oregon State Bar. Jessica Mindlin served as Task Force Coordinator.

The original membership of the Task Force, composed of 9 men and 11 women, was drawn from all parts of Oregon; all were volunteers. Task Force members brought a range of personal and professional perspectives to the project. The membership included:

- five state court judges;
- one administrative law judge;
- one Tribal Court judge;
- one federal magistrate;
- three lawyers in private practice;
- one Assistant United States Attorney;
- one federal public defender;
- one legal services lawyer;
- the Special Counsel to the Attorney General;
- two state legislators;
- one (district attorney's office) victim advocate;
- one court Interpreter Coordinator; and
- one member of the medical community.

Five Task Force members were people of color (two Latinos, one African-American, one Asian-American, and one Native American), and three were gay or lesbian. Residents of Multnomah, Washington, Lane, Marion, Coos, Malheur, Umatilla, and Jackson Counties served on

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[1] The Rev. Martin Luther King, *Why We Can't Wait,* LETTER FROM BIRMINGHAM JAIL 77, 79 (1964).

[2] Memorandum from Chief Justice Wallace P. Carson, Jr., to the Oregon Supreme Court 17 (October 3, 1994) ("Memorandum"). The Oregon Supreme Court chose to conduct separate studies of (1) racial and ethnic issues in the justice system and (2) gender fairness issues. In 1994, the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System issued its report, REPORT OF THE OREGON SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYSTEM (1994), which was followed in 1996 by the report of the Implementation Committee, A COMMITMENT TO FAIRNESS: PROGRESS REPORT OF THE OREGON SUPREME COURT IMPLEMENTATION COMMITTEE (1996).

[3] Memorandum, *supra* note 2, at 16-17.

the Task Force. The youngest Task Force member was 29, and the oldest was 70.

For personal reasons, such as the demands of health, work, and family, several of the original appointees resigned from the Task Force. An effort was made, however, to maintain the diversity of the original membership as those departing members were replaced. The following individuals served on the Task Force. (An asterisk indicates those members who stepped down before the completion of this report.):

- *Hon. Donald Ashmanskas (United States District Court Magistrate, Portland)
- Ann Bartsch (Oregon State Bar Legal Services Counsel, Lake Oswego)
- *Diana Craine (principal with the law firm of Craine and Love, Lake Oswego)
- Okianer Christian Dark (Assistant United States Attorney, Portland)
- Hon. Julie Frantz (Multnomah County Circuit Court Judge, Portland)[4]
- Robert Fraser (partner with the law firm of Luvaas, Cobb, Richards & Fraser, Eugene)
- *Hon. Sidney Galton (Workers' Compensation Board Administrative Law Judge, Portland)
- *Hon. Michael Gillespie (Coos County District Court Judge, Coos Bay)
- Hon. Susan P. Graber (Associate Justice, Oregon Supreme Court)
- *Hon. Jeanette Hamby (Oregon State Senator, Hillsboro)
- Elizabeth Harchenko (former Special Counsel to the Attorney General; Director, Department of Revenue)
- Hon. Dennis Hubel (United States District Court Magistrate)
- *Hon. William Johnson (Umatilla Tribal Court Judge, Umatilla Reservation, Pendleton)
- Hon. Bryan Johnston (Oregon House of Representatives; Acting President, Willamette University)
- Hon. Darryl Larson (Lane County Circuit Court Judge, Eugene)
- Debra Fee Jing Lee (Director, NonProfit Legal Services, Medford)
- Dr. Joseph Matarazzo (Oregon Health Sciences University, Portland)
- Hon. Jean Kerr Maurer (Multnomah County District Court Judge, Portland)
- *Hon. Joseph Ochoa (Marion County District Court Judge, Salem)
- David Orf (Attorney at Law, Medford)
- Kathey Warnock (Victim Advocate, Malheur County District Attorney's Office, Vale)
- Gloriela Webster (Multnomah County Interpreter Coordinator, Portland)
- Wendy Willis (Assistant Federal Public Defender, Portland)
- Hon. Janice R. Wilson (Multnomah County Circuit Court Judge, Portland)

C. WHAT WERE THE MISSION AND GOALS OF THE TASK FORCE?

The Task Force adopted the following statements of its mission and goals.

Mission Statement

"The mission of the Task Force on Gender Fairness is to study issues of gender fairness in the Oregon judicial system and legal profession[5] and, by September 30, 1997,[6] to prepare a written report to the Chief Justice and the President of the Oregon State Bar, containing findings, conclusions, and recommendations related to those issues."

Goals

"The Oregon Supreme Court and the Oregon State Bar are dedicated to treating all people fairly. As part of doing so, we strive to identify and to eliminate whatever gender unfairness may exist in the judicial system or the legal profession. The goal of the Task Force on Gender Fairness is to study whether and, if so, how the Oregon judicial system and the legal profession treat people unfairly on the basis of gender; to recognize fair treatment where it exists; and to make recommendations for change where it does not. We use the term 'gender' to refer to the biological, cultural, social, and psychological differences associated with being female or male."

We chose the term "fairness" consciously. Early on, we agreed that gender fairness is not necessarily the

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[4] On January 15, 1998, the circuit and district courts of Oregon merged to form a unified state trial court system. At the time of the Task Force study, however, there were two levels of trial courts, and this report refers to the courts, and the judges, accordingly.

[5] The Task Force studied gender fairness only in the Oregon state courts. See the United States Court of Appeals for the Ninth Circuit's study, THE EFFECTS OF GENDER IN THE FEDERAL COURTS: THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE (1993), for further information on gender issues in federal courts, including federal courts in Oregon.

[6] In August 1997, the Task Force requested and received an extension of time to complete the project.

same as gender neutrality. That is, treating women and men "the same" or "equally" sometimes can result in gender *unfairness*. For example, the unwillingness of some law firms to employ lawyers on a part-time basis, or to permit part-time lawyers to continue to advance to partnership, has a disparate effect on mothers of young children.

D. HOW DID THE TASK FORCE OPERATE?

1. Organizing the Task Force

We first met in January 1996. Soon thereafter, we divided into eight "work groups." "Work group" is an accurate label; most of the substantive study was accomplished at the work-group level.

On the basis of the planning committee's and the Task Force members' recommendations, the work groups examined the following areas:

- civil litigation,
- criminal and juvenile law,
- domestic relations,
- interactions among lawyers, clients, and staff,
- judicial administration,
- legal education, bar admission and discipline,
- opportunities in the legal profession and professional life, and
- intersectionality[7] issues.

In addition to operating as an independent work group, the Intersectionality work group assigned its members to serve as liaisons and consultants to each of the other work groups.

Each work group was chaired by a member of the Task Force.[8] An additional 5 to 25 volunteers were recruited to serve on each work group. These additional volunteers brought particular experience and expertise to the substantive area being studied, as well as diversity with respect to age, religion, geography, race, ethnicity, culture, sexual orientation, and profession. Work group members included lawyers, judges, court personnel, psychologists, jurors, social scientists, social service providers, court reporters, interpreters, clients, litigants, law office support staff, university and law school students, faculty, and staff, and other members of the community. Scores of additional volunteers assisted us in countless ways, such as conducting research, arranging public hearings, and editing this report.[9]

2. Preparing for the Study

The first step was to organize the Task Force and to educate ourselves about the journey on which we had embarked. Next, we adopted the mission statement and goals set out above and established operating procedures.[10] Thereafter, we identified research areas and held learning sessions. We read materials on gender fairness and on methods of conducting a study. In March 1996, we hired a Task Force Coordinator. Meeting for one afternoon each month, we brought in consultants to train members on ways to work well together, given our diverse perspectives, and to educate us about our task. For example, research methodologists schooled us on the relative benefits and burdens of qualitative and quantitative research and taught us how to conduct focus groups. We learned about ways to incorporate intersectionality issues into our work. Members of other states' task forces shared the challenges that they had faced and the lessons that they had learned. Jury consultants, public opinion researchers, management and diversity consultants, and other professionals contributed their expertise to the Task Force.

When this step was completed, the work groups began to refine the list of issues to be studied in their respective areas, to narrow the scope of their research, and to formulate plans for gathering information.

3. Fundraising

The Oregon Supreme Court assumed a leadership role and made the initial financial commitment to the Task Force. The Court agreed to contribute the salary, benefits, space, and equipment for Jessica Mindlin, the Task Force Coordinator. Early on, the Oregon State Bar contributed $20,000 and, later, the Bar spurred individual contributions by pledging another $20,000 in matching funds. It was this impetus that enabled us to conduct such a comprehensive study. The Oregon Law Foundation followed, with its commitment of $5,000, and became the depository of other funds raised. Generous

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[7] By "intersectionality," we mean the intersection of gender and other personal characteristics, such as race, disability, sexual orientation, age, and class. For further discussion of this concept, see the Intersectionality chapter.

[8] Work groups were chaired by the following Task Force members: Ann Bartsch (Civil Litigation); David Orf (Criminal and Juvenile Law); Darryl Larson (Domestic Relations); Janice Wilson (Interactions Among Attorneys, Clients, and Staff, and Gender Fairness at the Oregon State Bar); Okianer Christian Dark and Wendy Willis (Intersectionality); Dennis Hubel (Judicial Administration); Elizabeth Harchenko (Legal Education and Bar Admission and Discipline); and Jean Maurer (Opportunities in the Legal Profession). Not every work group generated a separate chapter for this report, and some work groups generated two chapters.

[9] The Acknowledgments section at the end of this report lists work group members and volunteers.

[10] See Appendix for a copy of the Procedures for the Task Force on Gender Fairness.

gifts were received from the Gus Solomon Inn of Court, the Multnomah and Lane County Bars, and the Oregon Circuit Court Judges Association.[11] Eight Oregon State Bar Sections, representing a broad spectrum of the Bar, also made generous contributions. Several dozen law firms contributed as much as $1,000 each, and numerous individuals contributed as much as $250 each. The Task Force is grateful to the organizations, groups, and individuals who supported the project and contributed to it financially.[12]

E. HOW DID THE TASK FORCE COLLECT INFORMATION?

We used both qualitative and quantitative research methods. Quantitative research provided numerical data and permitted us to collect information on a broad range of issues and from diverse groups. Qualitative, or "anecdotal," information provided more detail, insight, and depth and thus more fully and powerfully illuminated the effects of individuals' experiences. Because the most effective and informative study required a combination of research methods, we gathered information from many sources. We held public hearings and focus groups, administered surveys, conducted individual interviews, solicited witness statements and written submissions, and reviewed existing data and literature.

1. Public Hearings

Between September and December 1996, we held nine public hearings in rural and urban communities throughout Oregon: Medford, Ontario, Bend, Portland, Pendleton, Coos Bay, Tillamook, Salem, and Eugene. The hearings were held at schools and community centers and at other accessible sites. To maximize attendance, we set hearings for the afternoon and evening hours. A child "comfort space," with a television and children's videos, was available on-site.[13] The meetings were publicized in print and on radio and through bilingual (Spanish-English) flyers distributed at community events and on community bulletin boards.[14] A tenth hearing was held at the Oregon Women's Correctional Center in Salem.[15] A Spanish-language interpreter attended every hearing. "Realtime" transcription for the hearing impaired was provided at the Portland public hearing. Members of the Oregon Court Reporters Association donated their services and provided the Task Force with written transcripts of all the hearings.

Witnesses, both male and female, testified on a wide range of issues, including: divorce, child custody, spousal and child support, domestic violence, sexual harassment, criminal law, inmate programs and services, interactions with law enforcement, sex discrimination in the legal profession, and judicial appointments and fitness.[16] That testimony helped us to identify and refine the issues that we needed to examine more closely. The public hearings also were an important tool for publicizing our work and for demonstrating the courts' and legal profession's willingness to engage in critical self-examination.

2. Written Comments

Written comment forms in English and Spanish were provided at public hearings, were sent to legal services offices and to prison inmates, and were distributed at various community events throughout 1996 and during the early part of 1997. We received written submissions from nearly 100 individuals and organizations. The length, subject matter, and relevance of the submissions varied, but the Task Force Coordinator reviewed every submission and distributed copies to the relevant work group(s).

3. Surveys

We designed 15 surveys and administered them to 18 different groups. All the surveys were anonymous. With the exception of litigants and witnesses, OSB and Professional Liability Fund ("PLF") staff, and law school faculty, students and staff, all the groups were surveyed through the use of "mail-out/mail-in" surveys. The litigant survey was administered in person at six courthouses throughout the state; the law school, OSB

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[11] No judges were involved in raising funds for the Task Force.

[12] A complete list of financial contributors is included in the Acknowledgments section at the end of this report.

[13] Very few witnesses attended the hearings with their children. We were unsuccessful in our efforts to solicit volunteer child-care services and, at the time of the public hearings, did not have the funds to contract for such services. We do not know whether the lack of child care prevented witnesses from attending.

[14] Despite our efforts to promote diversity at the hearings, most of those who testified at the public hearings were white and English-speaking.

[15] To solicit information from male inmates, focus groups (described below) were conducted at four male correctional institutions. In addition, we solicited written comments from male inmates, many of whom responded.

[16] Some female witnesses, but almost no male witnesses, couched their comments in tentative or apologetic terms. ("I don't want to seem like a complainer, but....") There are several possible explanations for this difference: for example, those witnesses feared retaliation for their criticisms or at least believed that it is unpopular to identify and oppose discrimination against women; the witnesses recognized considerable past gains and were reluctant to see the glass as half empty, rather than as half full; or they were socialized to remain "pleasing" even when criticizing.

and, PLF surveys were distributed and collected on-site.[17]

We developed surveys of lawyers and judges in consultation with Dr. Patricia Gwartney and Kimberlee Langolf of the University of Oregon's Oregon Survey Research Laboratory ("OSRL"), after extensive review of other states' surveys. A letter personally signed by Chief Justice Wallace P. Carson, Jr., accompanied each survey. The lawyer surveys were distributed to 1,800 randomly selected active practitioners in Oregon,[18] 33% (592) of whom returned their surveys. Of those 592 surveys, 575 were usable; the remaining surveys were received after the cutoff date or were returned incomplete.

Respondents to the lawyer surveys are representative of the Bar with respect to gender, race, ethnicity, and age:

		BAR MEMBERSHIP PERCENTAGES	**SURVEY RESPONDENTS PERCENTAGES**
MEN		74	70
WOMEN		26	29
			(1% did not report their gender)
African-American		0.6	0.4
Native American		0.5	0.5
Asian/Pacific Islander		1.6	0.7
Hispanic		1.0	1.2
Ages	21-30	8	4
	31-40	25	25
	41-50	40	39
	51 & over	27	32

Respondents to the survey of judges were similarly representative. The judge surveys were mailed to 157 active district and circuit court judges, 17 active appellate judges, and 87 senior status judges who continue to hear cases.[19] The overall return rate was 36% (95 usable[20] judge surveys were returned), while the return rate for active judges exceeded 50% (88 of the 95 responding judges indicated that they were on active status; the remaining 7 judges did not report their status). Active judges (*i.e.*, judges who are not on senior status) are 79% male and 21% female; among respondents, 77% of the judges were male and 20% were female. Three percent did not report their gender. The age distribution of active judges is as follows: 9% are under the age of 45; 26% are between the ages of 45 and 49; 34% are between the ages of 50 and 54; 15% are between 55 and 59 years of age; and 28% are 60 or older. Among survey respondents: 10.5% were less than 45 years of age; 28% were between the ages of 45 and 49; 31% were between 50 and 54 years old; and 12% were between 55 and 59 years of age. An additional 12% were 60 years of age or older. More than 7% of the respondents did not report their age.

In addition to fielding the lawyer and judge surveys, we surveyed 16 other populations within Oregon's judicial system and legal profession:

- paralegals and legal assistants,
- court reporters,
- legal secretaries,
- Oregon State Bar employees,
- Professional Liability Fund employees,
- law students,
- law faculty,
- law school staff,
- individuals involved in the state bar disciplinary process,
- (private and nonprofit) law firm clients,
- prison inmates,
- district attorneys and deputy district attorneys,
- criminal defense lawyers,
- litigants in the courthouse,
- court interpreters, and
- court personnel.

Survey results can be skewed by self-selection — that is, those who are interested in, or have strong opinions about, the subject matter are more likely to respond to a survey than are disinterested or ambivalent individuals. That being so, the results of some of our surveys must be interpreted with caution. However, the response rate and the demographic representativeness of respondents are among the indicators of the reliability of survey responses. Because we know that the demographics of the membership of the Oregon State Bar closely parallel those of the randomly surveyed respondents, and because of the good response rate, we believe that our survey results reasonably reflect the views of the Oregon bar generally. The same can be said of the judge survey. Certain trends are evident, and there is much to be learned from the data collected.

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[17] The surveys are discussed in greater detail in the relevant chapter(s).

[18] There are approximately 9,700 active members of the Oregon State Bar practicing law in Oregon.

[19] Judges who hear cases are classified either as "active" or "senior." The latter have retired from full-time judicial service. Judges *pro tempore* and referees were not included in the judge survey.

[20] Several judges, presumably those who did not return their surveys, later completed the survey designed for court personnel. However, judges' answers to the court personnel survey could not bbe integrated into the judge survey.

4. Focus Groups

Focus groups were our fourth method of data collection. The focus groups were designed to explore a limited number of issues in more depth than was possible through the use of written surveys.

Consultants to the Task Force specializing in research methodology recommended that most focus groups be composed of same-sex participants, in order to encourage more candid discussion, and be facilitated by trained moderators. Accordingly, nearly all the focus groups were single-sex and were led by trained moderators working with established topic guides. Focus groups were conducted throughout the state with:

- legal investigators,
- court reporters,
- legal secretaries,
- paralegals,
- law firm partners and other lawyers responsible for law firm hiring decisions,
- law students,
- law school classified staff,
- domestic relations clients, and
- prison inmates.

F. WHAT WAS UNIQUE ABOUT THE OREGON STUDY?

Oregon was not the first state to conduct a gender fairness study. At least 32 state and federal courts had studied or were in the process of studying gender fairness when Oregon's Task Force on Gender Fairness was established.[21] We learned from those efforts and from the work of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System, with respect to both process and content. Although our study had much in common with these earlier studies, ours was unique in several respects:

1. Incorporation of Intersectionality

We specifically considered how gender operates in conjunction with the other lenses through which people view their experiences in the profession and in the justice system. We called these "intersectionality" issues. We assigned a work group to study the topic and to ensure that intersectionality issues were incorporated into each work group's inquiries. We also assigned members of the Intersectionality work group to every other work group as liaisons and consultants. To our knowledge, the United States Courts of Appeal for the Second and Third Circuits are the only other jurisdictions that have conducted a gender fairness study specifically examining gender fairness from a multiple identity ("gender *plus*") perspective.

2. Scope of Inquiry

The charge to the Task Force, and therefore the scope of our inquiry, was extremely broad. As a result, this project was far more comprehensive than studies conducted by other states. Few other jurisdictions, for example, have considered gender fairness issues at the law schools within their borders, and fewer still have studied staff in addition to law faculty and students. Oregon also was one of the few states to focus on interactions among lawyers, clients, and legal support staff and to examine bar admissions and lawyer discipline.

Moreover, our study did not inquire only into what lawyers and judges have to say about lawyers and judges. We recognized the important perspectives on the justice system and legal profession that many other groups and individuals had to offer. Therefore, in executing our study, we included, both on the work groups and as the subjects of our inquiry, many non-lawyer individuals and groups whose experiences often are overlooked in studies of this kind. For example, we sought the views of male and female prison inmates; criminal, civil, and domestic relations clients of private law firms and of nonprofit (legal services and public defender) agencies; and youths. Court interpreters, court reporters, legal secretaries, paralegals, and investigators also were included. Many individuals from those constituencies served on Task Force work groups.

In part because of the breadth of our charge, we found new ways to accomplish our work. Through the work groups we found ways to involve scores of people with a broad range of perspectives from all parts of the state. About 100 people served as members of the Task Force and its work groups; an additional 200 volunteers assisted us in other capacities.

G. WHAT CHALLENGES DID THE TASK FORCE FACE?

1. Fundraising

Fundraising efforts, particularly for new projects, often provide a litmus test by which the fundraiser can gauge the perception and general understanding of the cause for which funds are being sought. In our case, the energy required to raise funds within the Bar was

[21] Almost every other state that conducted both gender fairness and racial/ethnic studies conducted the gender fairness study first. Because the Oregon studies were completed in the reverse order, many other states completed their gender fairness studies before Oregon's Task Force on Gender Fairness was formed.

significant, suggesting that gender fairness in the judicial system is not a high priority for most lawyers. Although the fundraising committee eventually raised the necessary funds, because of the delay we could not afford extensive professional surveys and other costly data-gathering techniques.

2. Data Collection

Some people were mistrustful of, or hostile to, the Task Force and refused to participate in the surveys or in focus groups. Some expressed the view that women complain about gender bias where none exists.

We learned of these kinds of opposition from letters to the Task Force and to Chief Justice Carson and from survey comments. One respondent to the lawyer survey asserted, for instance:

> *"I have never seen — nor heard credible reports of — a lawyer or witness being discriminated against or treated unfairly due to gender. . . . Gender bias is dead. Has been for a decade."*

Another lawyer wrote, "This is a waste of time and money. What fuzzyhead developed the need for this?" Other lawyers opined: "Women are frequently looked upon as victims of something, anything, or anyone. Rarely are women told to take responsibility for their own self-inflicted problems, mistakes or evils"[22] and "Women attorneys tend to be anti-male."[23]

Others suggested that the gender bias that exists mostly harms men. Perhaps the angriest, albeit not the most representative, response to our study was that of a male lawyer from Lane County. He wrote to the Chief Justice to say:

> *"I am almost unable to tell you how shocked and offended I am by this survey. . . . If any bias exists in the courthouse and under Oregon law, it is a bias based on race and gender against Caucasian men.*
>
> *"This survey has obviously been drafted by some she-man, man-hating, ball-busting feminist with an agenda towards improving the already fundamentally unfair bias women enjoy in the Oregon courts and legislature."*[24]

By contrast, many survey respondents, witnesses at public hearings, and focus group participants were supportive — even enthusiastic — about the project. Numerous witnesses and respondents spoke or wrote to the Task Force about the importance and value of the study. As one respondent to the lawyer survey observed:

> *"I think this survey is long overdue. Unfortunately, gender bias is still prevalent in the legal profession as it is in society at large. I disagree with those who say that there is nothing the legal profession can do to change the situation. I think there is much that can be done. . . . Until we admit that there is a problem and that there are ways to solve it, we cannot hope to resolve it."*

Other individuals commended the Task Force for conducting the study and shared their law office and courtroom experiences with us. One female lawyer wrote to the Task Force about a judge who, in chambers, referred to her client as a "lardass dyke." She noted that this same judge told her, from the bench, that she was "a fine little lady attorney." Another female lawyer wrote about her recent experience at an Inns of Court dinner where a judge, the guest speaker, opened his remarks by commenting, "It's always so wonderful to see so many lawyers, and their wives, here." As one witness explained at a public hearing, even if rare, such experiences alienate lawyers and litigants from the legal profession.

> *"It doesn't take many whose manifestations of sexual discrimination — even those behaviors as benign as simply thinking that men make better lawyers than women, as opposed [to those] not really ever able to get beyond our anatomy in dealing with us as lawyers — [it doesn't take too many such experiences] to interfere with our opportunity for a rich and satisfying career."*[25]

H. WHAT DID THE TASK FORCE LEARN?

We found that the gender bias that exists today usually is less blatant than that which existed in the past. Although we received complaints of a few egregious, and appalling, instances of gender-based unfair treatment, those occurrences appear to be infrequent. More often, we received testimony, comments, and complaints of more subtle or indirect forms of gender unfairness, such as inappropriate or sexual teasing or comments; disrespectful treatment of female litigants, witnesses, lawyers, and judges; and gender-based stereotyping in family law matters.

A central theme that emerged from our work is that men perceive bias against men, women see bias against women, and each sex reports that the other sex is treated better. Our challenge was to determine whether any or all of those perceptions are accurate, to develop recommendations for change where there is unfairness, and to address perceptions of bias where there is none.

We learned that, because not all women, or all men, experience or perceive gender issues in the same way, intersectionality issues are an important component of any effort to identify and eradicate gender-based unfairness.

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[22] Comment written on a lawyer survey.

[23] Comment written on a lawyer survey.

[24] Letter to the Chief Justice and to the Oregon Survey Research Laboratory.

[25] Testimony of female lawyer at the Eugene public hearing, Dec 13, 1996.

We learned that some of the problems with gender unfairness are limited to specific individuals or geographic areas. Our charge was to examine overall trends and general issues, rather than to ferret out individual problems or resolve individual complaints. The information that we received, however, suggests that not every area of unfairness (where we found unfairness) is equally distributed.

Finally, we learned that some perceptions of gender bias result from litigants' or witnesses' limited understanding of the authority of the courts and that the public hearings provided litigants with an important opportunity to voice their concerns. The hearings also afforded us an opportunity to educate the public about the structure and limitations of the courts.[26]

I. WHAT DID WE CONCLUDE?

The goal of the Task Force was to identify whatever gender unfairness may exist in Oregon's judicial system or legal profession. This report represents an ambitious, yet necessarily limited, inquiry.

We conclude that instances of blatant sex discrimination are much less frequent now than in the past; however, some forms of gender unfairness persist. Although the gender bias that persists is less obvious, and in that regard perhaps less shocking, it is still harmful. It limits the potential and marginalizes the efforts of too many members of our bar and too many participants in the justice system. We commend the efforts of the Oregon Supreme Court and Oregon State Bar and of the many judges, lawyers, other professionals, and entities who seek to promote gender fairness and to combat gender-based unfairness. We hope, and recommend, that the effort to identify and eliminate gender bias, wherever it exists, will continue.

J. RECOMMENDATIONS

1. The Oregon Judicial Department and the Oregon State Bar should:

- develop a volunteer panel of trained public hearing and focus group moderators and should sponsor periodic hearings and discussions on issues of fairness. Public hearings, focus groups, and roundtable discussions are excellent opportunities for litigants and other court participants to communicate their concerns and frustrations with the justice system. They also provide a regional perspective on whether and how issues differ from one locale to another. Finally, they provide the Judicial Department and the Bar an opportunity to educate the public. Funds for this purpose should be in the Judicial Department's 1999-2001 budget.

2. The Access to Justice for All Committee should:

- review this report and, where it identifies data that were not available, decide what data should be available and develop a plan for collecting such data.

3. The Chief Justice, the President of the Oregon State Bar, the Oregon Council on Domestic Violence, the Office of the State Court Administrator, and other interested persons should:

- examine the archives of the Task Force in order to identify groups, individuals, agencies, or geographic areas that warrant special attention. For example, the Chief Justice may find that additional education on certain topics would benefit judges in particular counties.

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[26] For example, a male litigant at the Bend public hearing testified about the anti-male gender bias of the mediator who handled his marital dissolution. As evidence of that perceived bias, he recounted the mediator's refusal to hear testimony detailing the witness' ex-wife's alleged criminal conduct. The witness did not understand that Oregon has no-fault dissolution.

INTERSECTIONALITY

"That man over there say
a woman needs to be helped into carriages
and lifted over ditches
and to have the best place everywhere.
Nobody ever helped me into carriages
or over mud puddles
or gives me a best place . . .

And ain't I a woman?
Look at me
Look at my arm!
I have plowed and planted
and gathered into barns
and no man could head me . . .
And ain't I a woman?
I could work as much
and eat as much as a man —
when I could get to it —
and bear the lash as well
and ain't I a woman?
I have born 13 children
and seen most all sold into slavery
and when I cried out a mother's grief
none but Jesus heard me . . .
and ain't I a woman?
that little man in black there say
a woman can't have as much rights as a man
cause Christ wasn't a woman
Where did your Christ come from?
From God and a woman!
Man had nothing to do with him!
If the first woman God ever made
was strong enough to turn the world
upside down all alone
together women ought to be able to turn it
rightside up again."[1]

A. INTRODUCTION AND OVERVIEW

1. The Nature of Our Study and of This Chapter

We recognized from the outset that gender alone does not define an individual's experiences; each individual has multiple characteristics that affect his or her experiences in society and in the legal system. The intersection of those characteristics provides each person a perspective that influences how that person views and experiences the world. Intersectionality,[2] in this context, challenges our current way of categorizing, ordering, dissecting, and resolving situations that involve people's interactions. Intersectionality requires us to examine how commonly categorized characteristics — for example, gender, race, ethnicity, age, disability, sexual orientation, and class — interrelate, how each may affect the others, and how multiple characteristics result in multiple identities, which sometimes compete.

We therefore created a work group to examine issues of intersectionality. To capture the perspectives of more people, we attempted to identify and to address these issues. We did not intend this added focus on

[1] Sojourner Truth, *"Ain't I a Woman?"* (as adapted to poetry by Erlene Stetson), *in* AIN'T I A WOMAN! A BOOK OF WOMEN'S POETRY FROM AROUND THE WORLD 129, 129-30 (Illona Linthwaite ed., 1993).

[2] Both the Task Force and the Intersectionality work group discussed at length what to call the concept of one individual's having multiple characteristics and perspectives. The group settled on the term "intersectionality" because it seemed, most accurately, to describe the concept that several characteristics can "intersect" to influence a particular person's experiences.

intersectionality to change the gender-based nature of the study, but rather to ensure a more accurate evaluation of gender fairness in the courts and in the legal profession. Once the Task Force committed itself to the recognition that individuals' experiences are influenced by multiple characteristics, the work grew exponentially. Although recognizing and embracing the concept of intersectionality did not make our work any simpler, it made both our study and this report more inclusive and comprehensive.

Oregon is the first state to address intersectionality issues directly. [3] Although academicians have been writing about intersectionality for some years, "fairness" task forces have yet to squarely take on the issues of multiple identities and bias.[4] Oregon chose to accept that challenge.

This chapter is unlike the other chapters in the report — it does not provide a detailed discussion of the information gleaned from surveys, focus groups, public hearings, or other data-gathering sources. Rather, it sets out the theoretical framework for the concept of intersectionality that we employed and presents a substantive discussion of intersectionality apart from any data analysis. The primary purpose of this chapter is to assist the reader in conceptualizing the term "intersectionality" and to outline the challenges presented by incorporating intersectionality issues into our study.

2. Understanding "Privilege"

Our ability to recognize the experiences of individuals who reside at certain intersectional points may be obscured by what often is called "privilege," such as skin color privilege, gender privilege, and class privilege. Professor Kimberle Crenshaw describes how "multiple identities" render the experiences of black women invisible, thereby not addressing their realities within the current legal framework.[5] Another way to describe and understand privilege, especially race privilege, is that "white privilege reinforces the existing racial status quo and overlaps and interacts with other systems of privilege, including those based on gender, sexual orientation, economic wealth, physical ability, and religion. Just as the systems themselves are made invisible by our language, the intersection between the systems is also marked."[6]

The more levels on which privilege exists for a particular individual or group, the more likely it is that the law and society will recognize and meet their needs.[7] By contrast, the more levels on which privilege is denied to a particular individual, the more invisible the individual becomes to the law and society. Privilege does not manifest itself in exactly the same way with regard to each intersectional point.[8] The role of intersectionality in this study is to expose those levels of privilege and to recognize and identify the needs of those who are disadvantaged by the lack of two or more privileges.

It is often asserted by those who understand the phenomenon of privilege that, even if all discriminatory conduct were eliminated, there still would be inequality based on gender, race, class, sexual orientation, and disability. "[T]he flipside of racial discrimination is racial privilege."[9] As another writer put it, "[a]ntidiscrimination advocates focus only on one portion of the power system, the subordinated characteristic, rather than seeing the essential links between domination, subordination, and the resulting privilege."[10]

An understanding of privilege is essential to understanding the experiences of individuals who interact with the judicial system and legal profession every day. As one writer described it:

> *"Domination, subordination, and privilege are like three heads of a hydra. Attacking the most visible heads, domination and subordination, trying bravely to chop them up into little pieces, will not kill the third head, privilege. Like a mythic multi-headed hydra, which will inevitably grow another head if all heads are not slain, discrimination cannot be ended by focusing only on . . . subordination and*

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[3] The District of Columbia conducted a study on gender bias and a study on racial and ethnic bias simultaneously, but that study did not synthesize the materials to explore issues of intersectionality.

[4] To our knowledge, the Second and Third Circuits of the United States Court of Appeals are the only other jurisdictions that have conducted a gender fairness study specifically examining gender fairness from the multiple-identity ("gender *plus*") perspective.

[5] Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U CHI LEG FOR 139 (1989).

[6] Stephanie Wildman, Margalynne Armstrong, Adrienne Davis, and Trina Gullo, *Privilege Revealed: How Invisible Preference Undermines America* xi-xii (1996).

[7] Privilege can reveal itself in a variety of ways. For example, at the public hearings that we held around the state, the most strongly voiced perspective was that of men who had experiences in divorce and custody disputes. The witnesses who expressed the view that men were disadvantaged in the family law arena were mostly white and male and appeared to be organized. As a result, this Task Force heard many of their needs and suggestions for change in the system.

[8] Wildman, *supra* note 6, at 19.

[9] Bill Bradley, *Recognizing Race Privilege*, FOCUS 6-8 (1996) (former United States Senator (D-NJ).

[10] Wildman, *supra* note 6, at 19.

domination."[11]

3. The Intersections that We Examined

We chose to focus on five specific intersections: gender and race/ethnicity,[12] gender and class, gender and age, gender and parental status, and gender and sexual orientation. The model for studying intersectionality issues comes from the recent academic focus on gender and race. During the past decade, in particular, considerable scholarship has been produced concerning how gender and race may intersect to create exponential disadvantage for people who are not members of the socially and economically dominant gender or race.[13] By choosing to examine intersectionality, we recognized that a focus on only race or only gender may cause the experiences of women of color to drop out of the equation.[14]

In 1994, the American Bar Association Commission on Women in the Profession and the Commission on Opportunities for Minorities in the Profession issued a report entitled *The Burdens of Both, The Privileges of Neither* (1994). That report focused on the experiences of women of color in the legal profession. We relied on that report as both an educational tool for grappling with the definition of intersectionality and as a source of information about experiences of women of color. That report made six general findings:

> *1. "The combination of being a lawyer of color and a woman is a double negative in the legal marketplace, regardless of the type of practice or geographic region involved";*
>
> *2. "Multicultural [female[15]] lawyers] perceive that they are 'ghettoized' into certain practice areas and [that] other options are closed or implicitly unavailable [to them]";*
>
> *2. "Multicultural [female lawyers] must repeatedly establish their competence to professors, peers and judges";*
>
> *4. "As evidenced by continuing attitudes and negative stereotypes, multicultural [female lawyers] are invisible to the profession and have more difficulty achieving prominence and rewards within the legal field";*
>
> *5. "To succeed, multicultural [female lawyers] must choose between race and gender"; and*
>
> *6. "Minority [female lawyers] face barriers of gender discrimination in minority bar associations and race discrimination in majority bar associations."*[16]

The intersection of gender with characteristics other than race has been much less widely studied than has the intersection of gender and race; thus we were charting new waters as to the other four intersections. Privilege does not manifest itself in exactly the same way with regard to each intersectional point. For example, according to a well-regarded scholar on sexual orientation and the law, "different advantages accrue from society's privilege of heterosexuality, which generally constitutes gay and lesbian relationships as invisible."[17] There are three societal assumptions about gay men and lesbians: the sex-as-lifestyle assumption, the cross-gender assumption, and the idea that gay issues are inappropriate for public discussion.[18] Given those societal assumptions, heterosexuals can "function in a world where negative assumptions are not made about their sexuality, and their sexuality may be discussed and even advertised in public."[19]

Two specific points deserve mention. First, as to gender and class,[20] we recognize that the disadvantaged have less access to justice than those with resources. The majority of people living in poverty, both in Oregon and in the United States as a whole, are women and

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[11] Adrienne R. Davis, *Identity Later On: Playing in the Light*, 45 AM U L REV 1 (1996).

[12] We recognize that race, ethnicity, and culture are each distinct concepts.

[13] *See, e.g.*, Paulette Caldwell, A Hair Piece: *Perspectives on the Intersection of Race and Gender*, 1991 DUKE LJ 365 (1991); Crenshaw, *supra* note 5; Okianer Christian Dark, *Just My 'Magination*, 10 HARV BLACKLETTER J 21 (1993); Trina Grillo and Stephanie Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other-Isms)*, 1991 DUKE LJ 397 (1991).

[14] A common example is the often-used expression "minorities and women." That expression, by its structure, suggests men of color and white women. Women of color are not included.

[15] That report used the term "multicultural women" to refer to women of color.

[16] "The Burdens of Both, The Privileges of Neither," Report of the American Bar Association Commission on Women in the Profession and the Commission on Opportunities for Minorities in the Profession (1994).

[17] Wildman, *supra* note 6, at 18.

[18] *Ibid.*

[19] *Id.* at 19.

[20] "Class," as a term, is complicated. It can refer simply to economic resources (that is, income and wealth), or to social status, education, prestige, or other opportunities and advantages. Although each dimension is distinct, many are closely related. For the purposes of this study, we treated class principally in terms of economic wealth, while at the same time acknowledging that our definition represented only one aspect of this term.

children.[21] Accordingly, we decided that it was important to investigate issues surrounding gender and class.

Second, the topic of the intersection between gender and sexual orientation became a lightning rod in the lawyer, judge, and court personnel surveys. Each survey's demographic section asked the respondent to identify himself or herself as "bisexual," "gay/lesbian," "heterosexual," or "other." That question drew more vitriolic comments than any other question. Responses to that question raise two issues:

(1) In the judge survey, gay and lesbian judges were concerned with identifying themselves as gay or lesbian on the survey, not because they did not wish to identify their sexual orientation, but because the small number of openly gay and lesbian judges in the state would compromise the anonymity of their survey responses.[22]

(2) Significant numbers of respondents to both the lawyer and court personnel surveys objected to questions about sexual orientation.[23] Some people said that they felt such questions invaded their privacy; others commented that sexual orientation simply was an irrelevant or inappropriate inquiry. For example, one lawyer wrote a letter to the Task Force, stating:

"My sexual orientation is none of your business. I find it so strange that people who are otherwise so concerned about privacy and making sure people are not discriminated against because of their particular type of bedroom activity would find it even necessary to ask this question. Do you have any legitimate justification that overrides my privacy interests?"

The level of emotion generated by the issue of sexual orientation suggests that the intersection between gender and sexual orientation strikes a nerve and that further examination of this intersection may be warranted.

B. METHODS OF STUDY

We purposefully formed a work group that reflected many intersectional points. Work group members included people who are white and of color; heterosexual, gay, and lesbian; non-disabled and disabled; and lawyers and other professionals. The work group included people of various ages (19 to 50s) but was not as geographically diverse as we had hoped. The work group did not have representation from the eastern or far southern parts of the state.

One or two members from the Intersectionality work group worked with each other work group to assist with intersectionality issues. Liaisons' responsibilities were to:

- become familiar with the work of the assigned substantive work group,
- attend its meetings,
- keep in regular contact with its chair,
- develop questions for surveys and focus groups for the area,
- observe or co-facilitate focus groups conducted by the assigned work group,
- review secondary data or recommend other sources to the assigned work group, and
- help to formulate recommendations.

During the writing process, liaisons also reviewed and commented on drafts of portions of the report.

1. Public Hearings

A member of the Intersectionality work group attended at all but two of the 10 hearings.[24] In addition, the work group created a two-person subcommittee to review the records of the hearings and provide additional insights and observations. This process provided additional analysis on intersectionality issues.

2. Survey Design

In focusing on intersectionality, we recognized that the way in which we view the racial, ethnic, gender, socio-economic, and sexual orientation categories to which we assign people is in flux. As a result, we sought significantly more information than many surveys do. For some purposes, gender is a useful category by which to divide people. However, for other purposes the category of "woman" or "man" is insufficient. For example, we may want to find out whether lesbian women would respond the same way as heterosexual women, and African-American men the same way as white men.

3. Focus Groups

The focus groups provided another opportunity to engage in qualitative research and, in particular, to obtain information regarding intersectionality. Work group members facilitated several of those sessions.

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[21] According to the Center for Population Research at Portland State University, the most recent available census data (1990) show that approximately 60% of the Oregon households headed by women with children under age five fall below the poverty line. About 40% of the households headed by women with children under the age of 18 fall below the poverty line. By contrast, only 13.5% of all families (with two parents or headed by men) with children under the age of 18 fall below the poverty line.

[22] Several female judges commented, similarly, that they could be identified by their gender and location.

[23] Surveys were anonymous. That is, respondents were not asked to provide their names and written comments were transcribed and reviewed separately from the completed survey.

[24] Intersectionality work group members did not attend the Medford and Ontario hearings.

4. Data Analysis

The Intersectionality work group analyzed both quantitative and qualitative information in each of the substantive areas studied. Its goal was to identify examples of experiences of people living at intersectional points.

We were confronted with the difficulty of collecting, through quantitative research, statistically reliable information about the intersections that we studied. As each additional characteristic is added, the number of individuals with the combination of characteristics becomes smaller.[25] For example, of the 571 people who completed the lawyers survey, there were four Asian women, no Asian men, three Hispanic men, four Hispanic women, one Native American man, two Native American women, one African-American woman, and one African-American man. By contrast, 375 white men and 154 white women responded to the survey. As a result, it was difficult to draw conclusions that were statistically significant. In fact, the only survey that reflected "statistically significant" numbers of non-white respondents was the inmate survey. Of the 351 male respondents, 32.5% were men of color. Of the 75 female inmates that responded to the survey, more than 25% were women of color.

Focus groups, public hearings, and written comments on the surveys provided us with additional useful information. It is in that narrative form that the we found descriptions of the lives of people living at the intersections.

Accordingly, this section of the report reflects a depth of experience more than it reflects a breadth of experience. In other words, it more completely describes the experiences of particular individuals, although it may not reflect the experiences of a large number of people.

C. FINDINGS AND CONCLUSIONS

Intersectionality challenges the closely held notion that we are all the same and that fair treatment necessarily means the same treatment. The concept of intersectionality requires more work to communicate with one another, and it requires more work to understand the complexities of our own experiences and the experiences of others, but it makes our work more reflective of social reality.

By embracing intersectionality as an integral part of the study, we opened topics that are painful to address, let alone to resolve. The discomfort created by these issues is multi-layered. Members of the Task Force found it painful to confront our own exercise of multiple levels of privilege during the course of envisioning the scope of the project and gathering and evaluating data.

Additionally, our specific findings, contained in the substantive chapters that follow, suggest that people at certain intersectional points are treated unfairly in some respects.

The net result of this foray into intersectionality leaves us with as many questions as answers. Further study and discussion can lead to more effective survey instruments and methods of analyzing qualitative data. That effort will, in turn, help the courts and the legal profession to become more responsive to the needs of all participants in the legal system.

D. RECOMMENDATIONS

1. The Chief Justice should:

a. charge the Oregon Judicial Department's Access to Justice for All Committee with overseeing and coordinating implementation of the recommendations outlined in this report. Because that committee already is working to address issues of racial and ethnic fairness in the justice system, it is well positioned to ensure that individuals' multiple perspectives, or intersectionalities, will be incorporated into the work of securing gender fairness;

b. Establish within the Oregon Judicial Department at least one permanent full-time staff position, plus appropriate support staff, to coordinate the work of the Access to Justice for All Committee; and

c. include in the Oregon Judicial Department's 1999-2001 biennial budget a request for the funds and position authority necessary for such staff.

2. The Legislative Assembly and the Governor should:

- ensure that the Access to Justice for All Committee is adequately funded.

3. The Access to Justice for All Committee, the Oregon State Bar, the Oregon Judicial Department, law firms, and law schools should:

- include consideration of intersectionality issues in future studies and discussions of gender fairness. Likewise, all educational programs recommended in the chapters that follow should include intersectionality issues.

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[25] Based on the 1996 estimates of the Center for Population Research and Census at Portland State University, the racial composition of Oregon residents is: 93.8% white, 1.7% African-American, 3.0% Asian-Pacific Islander, and 1.6% Native American/Eskimo. Among all those racial groups, 5.4% of the population is of Hispanic origin.

JUDICIAL ADMINISTRATION: THE COURTHOUSE AND THE CASE

"Even if discrimination does not affect a single case result, its continuing presence within our judicial system scars a process which must be pure to avoid the perception of unjust resolutions."[1]

A. INTRODUCTION AND OVERVIEW

This chapter incorporates information derived from the efforts of two work groups: Judicial Administration and Civil Litigation. The former considered whether participants in the legal system — such as litigants, witnesses, inmates, interpreters, lawyers, judges, and court staff[2] — are treated fairly on the basis of gender. The Civil Litigation work group examined the effect of gender on case outcomes in civil actions (other than domestic relations cases). Both groups studied whether gender affects litigation strategy and the litigation process.

We learned that, although most participants in the court system believe that it operates fairly in most respects, a significant minority of participants report gender-biased behavior in and around the courthouse and gender-influenced case outcomes. Women are more likely to perceive and to experience gender-biased behavior, and such behavior is usually exhibited by male participants in the court system. However, some men, with less frequency, also perceive and experience such behavior by women. Among those who perceive bias, the bias generally is perceived to operate in favor of persons of the opposite sex.

Much progress has been made in recent decades to eliminate gender bias and to encourage gender fairness in the judicial system. While Oregon's courts should be commended for that progress, there remains room for improvement. Blatantly offensive conduct still exists, although it is becoming much less common. The progress yet to be achieved is primarily on the level of our most ingrained tendencies, responses, and attitudes. Because they are so deeply embedded, their removal will be neither easy nor quick. The theme of the recommendations in this chapter is to foster conscious awareness of gender discrimination and to ensure constant vigilance and continuing education to reduce it.

B. ISSUES STUDIED

We studied the following issues, all of which focus on how the various participants in the legal system are treated inside Oregon's courthouses:

(1) Are female litigants treated differently than male litigants by lawyers or judges? If so, are the differences more or less pronounced when the lawyers are male or female? Are female litigants treated better or worse than male litigants? On balance, does the gender of the client make a difference in the quality of representation that they receive?

(2) Are female inmates treated differently than male inmates by lawyers or judges?

(3) Are female witnesses treated differently than male witnesses by lawyers or judges?

(4) Are female interpreters treated differently than male interpreters by lawyers, judges, court personnel, or litigants?

(5) Are female lawyers treated differently than male lawyers by their clients, opposing counsel, judges, or courthouse personnel?

(6) Are female judges treated differently than male judges by lawyers, litigants, courthouse personnel, or other judges?

(7) Are female court personnel treated differently than male court personnel by lawyers, judges, litigants, or other court personnel?[3]

(8) Does gender affect the results of cases in the civil trial court system (especially personal injury cases)? Do participants in the legal system perceive any gender bias in the civil litigation process or in case outcomes?

C. METHODS OF STUDY

The Judicial Administration work group included trial court administrators, other courthouse personnel,

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[1] Response of lawyer to Task Force survey.

[2] Because of time and budget constraints, we did not survey jurors. However, several members of the Task Force, members of work groups, witnesses, and others who provided information had served as jurors and commented on their experiences and observations related to this study.

[3] For a discussion of whether lawyers treat female court reporters differently than male court reporters, see the chapter on Interactions.

judges, lawyers in public and private practice, an expert witness, and interpreters. The Civil Litigation work group comprised lawyers throughout the state who work as private and public practitioners, as in-house counsel for a financial services corporation, as legal aid lawyers, and as trial and appellate judges and law clerks. The experience level of members of this work group ranged from a recent law school graduate to lawyers in practice for more than 20 years. A man chaired the Judicial Administration work group, while a woman chaired the Civil Litigation work group. These work groups contained seven women and five men and included one Asian-American, one Hispanic, two lesbians, and one gay man.

The work groups on Judicial Administration and Civil Litigation compiled data from responses to various surveys, including surveys of lawyers, judges, interpreters, court personnel, clients, and inmates. In addition, the work groups considered oral testimony from the public hearings, written submissions to the Task Force, and other anecdotal information. Finally, these work groups reviewed existing literature and statistics, such as jury verdict reports.

Members of the Civil Litigation work group also conducted individual interviews with members of the Oregon State Bar's Litigation Section, partners in litigation firms in the Portland metropolitan area, judges who routinely preside over civil cases and settlement conferences, and other experts in civil litigation, such as jury consultants.

With regard to the lawyer survey, 284 of the 571 respondents indicated that they practice in the area of civil litigation. Of those 284 lawyers, 223 (about 79%) were men, 59 (about 21%) were women, and two did not identify their gender. This distribution is very close to the ratio of male and female lawyers who are members of the Litigation Section of the Oregon State Bar, which emphasizes civil practice. In 1997, 1,060 men and 267 women (80% and 20%, respectively) were members of the Litigation Section. Accordingly, the work groups considered the responses to the lawyer survey on issues affecting civil litigation to be reasonably reliable indicators of Oregon lawyers' attitudes about civil litigation.

Apart from the lawyer, judge, client, and inmate surveys that were distributed by the Task Force as a whole or by other work groups, the Judicial Administration work group administered three surveys of its own:

(1) The *litigants survey* included civil plaintiffs, criminal and civil defendants, mediation clients, victims of crime, witnesses, and parties who were landlords and tenants. The survey was pre-tested in Jackson County and then administered at five courthouses in Columbia, Malheur, Marion, Multnomah, and Tillamook Counties. It was administered in person (not by mail) by trained volunteers.[4] There were English and Spanish versions of the survey; however, no Spanish-language surveys were completed.[5] Respondents completed nearly 170 English-version surveys. Of those, approximately 60% were completed by men and 40% by women. The vast majority of completed surveys came from Multnomah and Marion Counties.

(2) The *court interpreter survey* was sent to 98 interpreters in Oregon,[6] with a cover letter and follow-up letter from Supreme Court Justice Graber stressing the importance of participation in the survey. The survey consisted of 70 questions regarding interpreters' perceptions and observations of the judicial system. The issues raised by the questions were similar to the issues raised in the litigant survey. Thirty interpreters, or 30.6%, responded to the survey. Of those, eight (26.7%) were men, 18 (60%) were women, and four (13.3%) did not report their gender.

(3) The *court personnel survey* was distributed to all permanent and temporary, management and nonmanagement employees of the Oregon Judicial Department, except judges, at county courthouses; to all

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[4] Volunteers read a script to each survey respondent. For a copy of that script, see the Appendix.

[5] The reasons why no Spanish-language surveys were completed varied. At most locations, there were no volunteers administering the surveys who were bilingual. In Multnomah County, two volunteers spoke Spanish, but still no Spanish-language surveys were completed.

[6] The interpreters responding to the survey represented a wide range of interpretation experience in the court system. Although some interpreters had only one year of experience, most (78.6%) had nine or more years of experience. Of those interpreters with nine or more years of experience, 42.9% were men and 33.3% were women. Most of the interpretation was performed in criminal cases, with 41.2% of female interpreters and 37.5% of male interpreters spending 90% or more of their time interpreting in criminal cases. On the other hand, 5.6% of female interpreters spend 50-60% of their time interpreting in civil cases, and 12.5% of male interpreters spend 40-50% of their time interpreting in civil cases.

Male and female interpreters reported spending similar amounts of time interpreting in the courtroom. A little more than 10% of the total responding interpreters, 11% of the women and 12% of the men, participate in court daily. Close to half the responding interpreters (46%) interpret in court on at least a weekly basis. Twelve percent of male interpreters spend 50-60% of their time interpreting in court, while 17% of female interpreters spend 80-90% of their time interpreting in court. Responding interpreters also had experience interpreting legal matters outside the courtroom: 25% of male interpreters and 17% of female interpreters interpret one to three times a week in such settings.

Because of the small number of respondents, the survey results should be viewed with caution.

employees of the Office of the State Court Administrator; and to the judicial assistants and staff attorneys for the appellate courts. Of the 1,547 surveys distributed, 1,412 went to employees at county courthouses. The response rate for those employees was 34% (521 responses). The response rate for the 135 administrative and appellate employees was 56% (76), and the overall response rate was 39% (597).

D. FINDINGS

This section first considers how various participants in the legal system are treated in and around the courthouse. Second, this section considers whether gender affects the litigation process, litigation strategy, pretrial proceedings, and the outcome of civil litigation (other than domestic relations cases). Third, this section considers issues of intersectionality.

1. In and Around the Courthouse

a. Overview

Litigants, inmates, interpreters, lawyers, judges, and court personnel all responded to general and specific questions about gender-based treatment of participants in the legal system inside Oregon's courthouses. The general questions asked whether the survey respondents had observed any inappropriate treatment or gender bias and whether they had perceived respectful treatment based on gender. Survey respondents also reported on their observations of specified behaviors that may indicate inappropriate gender bias in the courtroom — such as the use of terms of endearment. None of the specific behaviors was reported in large numbers, but patterns worthy of notation still emerged from the responses. In general, female lawyers reported incidences of the specific behaviors in greater numbers than did male lawyers, and lawyers of both genders reported the specific behaviors in greater numbers than did judges of both genders.

i. Court Personnel

Of all groups surveyed, female court personnel perceived the most gender bias against women. More than 50% of female court personnel under the age of 45, and just under 40% of female court personnel age 45 or older, reported gender bias against female lawyers to some degree.

When court personnel were asked: "Have you observed plaintiffs, defendants or witnesses who are racial minorities receive less courteous treatment than others?," 16% of the court employees who answered the question said "yes." However, different populations answered the question quite differently. Of the women who answered the question, 17% said "yes," representing nearly 90% of all the "yes" responses. On the other hand, of the men who answered the question, 10% said "yes," representing only 10.8% of the total "yes" responses. Thus, the large majority of those who observed discourteous treatment to racial minorities were women rather than men. In addition, 14.1% of white, non-Hispanic respondents answered "yes" to the question, while 45% of respondents of color answered "yes." Some white survey respondents wrote comments suggesting that people of color received "better" treatment than white people in the judicial system.[7]

ii. Interpreters

In general, few interpreters reported inappropriate gender-based treatment. Female interpreters observed inappropriate treatment of both sexes at higher rates than did male interpreters; however, male interpreters were more likely to report observations of inappropriate treatment or bias directed at men by women and other men. Both female and male interpreters reported (within the range of 5.6% and 25%) observing inappropriate and biased behavior of men and women by both female and male lawyers, judges, interpreters, court personnel, and security personnel.

Interpreters' written comments confirmed that, as a group, interpreters believe that inappropriate or biased behavior in the courthouse is the exception to the rule. Several male interpreters praised the system. One wrote that "the entire legal or judicial system is basically free of bias or mistreatment of others." Another commented that "all [his] contacts with members of the legal/judicial system have been professional, courteous, and appropriate." Yet another expressed that, on the whole, judges and lawyers were very professional, although in one domestic relations case, he observed the judge to be more supportive of the male spouse than of the female spouse, who was deaf and required a signer to interpret. With regard to inappropriate behavior by a female lawyer with a male client, an interpreter noted that, somehow, this behavior is not considered as bad as the converse.

iii. Litigants

Overwhelmingly, litigants believe that they have been treated with respect by judges and courthouse staff although, in general, male litigants reported this result with greater frequency than did female litigants. Approximately 90% of male and female litigants reported they were treated respectfully by courthouse staff. Similarly, 92.1% of male litigants and 80.3% of female litigants reported being treated respectfully by the judge. There was less than a 1% variation from those overall results when the gender of the judge was male. The

[7] For example, one respondent opined: "I feel the minority groups get better treatment, not equal." Comment on a court personnel survey.

results regarding respectful treatment by judges improved, however, for female judges: astoundingly, 94.4% of male litigants and 100% of female litigants appearing before female judges felt that they were treated with respect. Approximately three-quarters of all litigants observed no difference between the amount of respect that they were accorded by male versus female judges. Of the remaining litigants, it is not surprising that more men (19.5%) than women (8.3%) felt that they were treated with greater respect by male judges, while more women (11.1%) than men (7.3%) felt that they were treated with greater respect by female judges.

Similarly, over three-quarters of all litigants reported that they believed that their gender did not affect the manner in which they were treated in court. The remainder (22.7% of men and 21.3% of women) did believe that their treatment in court was affected by their gender.

Only 8.1% of men and 16.7% of women reported that male and female judges were treated differently in court. Of those reporting such differences, more female litigants (33.3%) than male litigants (25%) observed female judges being treated better than male judges; conversely, more male litigants (75%) than female litigants (66.7%) observed male judges being treated better. No reliable survey results exist with regard to the gender, occupation, or purpose in court of the persons behaving differently toward judges.

iv. Inmates

Unlike other litigants, many inmates reported that their treatment in court was affected by their gender. Nearly half the male and female inmates (42% and 47%, respectively) responding to the inmates' survey thought that their treatment in court was affected by their gender. When we asked inmates *who* treated them differently in court because of gender, a clear pattern emerged. The vast majority of those inmates who felt that they had been treated differently because of gender said that a man in the court system had treated them differently. Three hundred sixty-five responses identified a male judge, lawyer, court employee, court security person, law clerk, or secretary as the person who had treated them differently — in that order of frequency — as compared to 122 responses identifying a female in one of those positions as the person who treated them differently.

We also asked inmates whether other courtroom participants were treated differently because of gender. The responding male and female inmates observed such treatment at the same rate, 56%. As to whether men or women received better treatment:

- 7.2% of respondents (3 men and 32 women), thought that men were treated better; and
- 39% of respondents (184 men and 5 women) thought that women were treated better.

Those overall percentages were heavily influenced by the high percentage of male respondents: 407 (83.7%) of the respondents were men and 79 (17.3%) of the respondents were women. As in other surveys, each gender reported that the other was treated better.[8]

A related question asked inmates whether male or female judges treated inmates more respectfully. A large majority of the 285 inmates who answered the question, 63.9%, said that there was no difference in treatment based on the gender of the judge. About the same percentage of male and female inmates (23.2% and 22.7%, respectively) reported that female judges treated them more respectfully.

We also asked how other participants in the courtroom treat judges. More than 75% of responding inmates said that they had seen no difference in the treatment of male and female judges. When inmates perceived that judges were treated differently by gender:

- 45.8% of male inmates and 33.3% of female inmates reported that female judges were treated better;
- 25.3% of male inmates and 33.3% of female inmates reported that male judges were treated better; and
- 28.9% of male inmates and 33.3% of female inmates said that, in multiple court appearances, they had seen both male and female judges treated better.

Inmates of both sexes reported that lawyers and police officers are the groups that most frequently treat judges differently based on gender. Moreover, both male and female inmates perceived that male participants are more likely to treat judges of one gender differently from the other.

Last, we asked inmates whether their behavior in court varied with the judge's gender. Like other participants in the court system, inmates do not see themselves as regularly behaving in a gender-biased manner. Only 82 inmates (17% of all respondents) indicated that they treat a judge of a particular sex with more respect. Sixteen (21%) of the 82 male inmates and none of the 8 female inmates who answered the question, "Who do you treat more respectfully?," reported treating female judges more respectfully. Two female inmates (25%) and 8 (10.5%) of the responding male inmates reported treating male judges more respectfully.

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[8] For a discussion of the effect of gender on sentencing, see section I.B.2 of the Criminal Law and Juvenile Justice chapter.

b. Recognition and Opportunity to be Heard

We addressed our first question on specific kinds of potentially gender-biased treatment to the ability of lawyers and litigants to be recognized and heard when appearing in court. We included that question in the surveys of lawyers, litigants, inmates, and court personnel. Respondents told us:

(1) Judges, lawyers, and court staff assume that male lawyers are lawyers, but question whether female lawyers are lawyers.

Some lawyers, judges, and court personnel ask female lawyers whether they are in fact lawyers, yet do not ask this question of male lawyers. More than 25% of the responding female lawyers reported that they had observed judges inquire whether a female lawyer was a lawyer and that the same question was not posed to male lawyers: 12.3% of all responding lawyers had observed this behavior by male judges; only 2.8% had observed this behavior by female judges.

Twice as many lawyers had observed this behavior in other lawyers: 26.6% of all lawyers observed male lawyers asking female lawyers whether they were lawyers, while only 5.9% of all lawyers observed female lawyers asking that question of other female lawyers.

When asked whether court personnel also ask that question of female lawyers but not of male lawyers, respondents reported as follows:

- lawyers 25.5%
- court personnel 14% (48 responses)
- male court personnel (32)
- male judges (31)
- male lawyers (27)

(2) Judges and lawyers cut off female lawyers, more often than male lawyers, when they are speaking.

Both male and female lawyers and judges reported that judges and other lawyers cut off or ignore female lawyers when they are speaking. Lawyers observed this differing treatment more by male judges (13.3%) and male lawyers (22.9%) than by female judges (3.8%) or female lawyers (3.6%). Vastly more female judges (42.1%) than male judges (1.4%) reported that female lawyers are cut off or ignored when speaking in situations in which male lawyers are not. Court personnel did not report observing this behavior in any significant numbers.

(3) Some judges afford female litigants less opportunity to be heard.

Female litigants also expressed some difficulty in being afforded an opportunity to speak and be heard in court. The survey asked litigants whether they had wanted to address the court and, if so, whether they had been given an opportunity to do so. Approximately 50% of male and female litigants expressed a desire to address the court. Of those, slightly more men (90.7%) than women (81.3%) were given the opportunity to do so when both male and female judges are considered.

This statistic holds true even when taking into consideration the gender of the judge. Slightly fewer female litigants (87.5%) than male litigants (92.6%) appearing before male judges and desiring to address the court were given an opportunity to do so. However, far fewer female litigants (50%) than male litigants (91%) appearing before female judges and desiring to address the court were given an opportunity to do so.

(4) Judges deny male criminal defendants an opportunity to be heard more often than they deny female defendants; judges and court staff treat male defendants with disrespect more often than female defendants.

Most inmates (78%) appearing before a judge wanted to address the court. Male inmates wanted to talk to the judge more frequently (79.8%) than did female inmates (69.6%). And, the judge denied more male inmates (40%) than female inmates (29%) who wanted to address the court an opportunity to speak to the judge.

When the court did allow inmates to speak, again, significantly more men (48%) than women (33%) believe that the judge treated them with disrespect. Inmates reported slightly better treatment by court staff than by judges, but still male inmates (32%) believed that they were treated less respectfully more frequently than did female inmates (21%).

c. Credibility

An experienced expert witness commented that, a few decades ago, it was difficult for female expert witnesses to be recognized and accepted by lawyers and the court, but the situation has changed; now the use of an expert depends much more on his or her background, qualifications, and abilities in the forensic field. Judges and juries now readily accept testimony by female expert witnesses.

The data collected from the litigant survey support that observation. Approximately one-half of all litigants (52.1% of men and 46.4% of women) believed that gender does not affect the credibility of witnesses in court. Interestingly, of those litigants who did report that gender affects a witness's credibility, both female and male litigants reported that female witnesses are *more* credible than male witnesses. Slightly more male litigants (15.1%) than female litigants (10.7%) considered female witnesses to be more credible, while fewer, 11% of male litigants and 8.9% of female litigants, considered

male witnesses to be more credible.[9]

By contrast, comments that we received suggest that female lawyers are not accorded the same amount of credibility as male lawyers. Several lawyers expressed their perception that the claims, arguments, and schedules of female lawyers or their clients are not taken as seriously or afforded the same respect as those of male lawyers or their clients. For example, one lawyer wrote:

> *"In several discretionary matters I believe male judges have more readily listened to and accepted the representations of my male opponentsCregardless of how logical or accurate, with their decision ultimately favoring the cause represented by a male opponent."*

Several lawyers observed that juries may find against a client when the client's female lawyer is treated with less respect or credibility. In a few instances, however, lawyers noted that juries reacted to that behavior by responding favorably to a female lawyer's client.

d. Use of First Names or Informal Address

Litigants, judges, and interpreters report some informality or use of first names in court, although not necessarily on the basis of gender and not necessarily with women but not men.

Only 14.3% of male litigants and 9.8% of female litigants responded in the survey that they had been addressed in court or in a law office by their first names. However, a judge reported that, in a recent court appearance, a male lawyer began his argument: "I represent a little lady who believes . . ." In a letter to the Task Force, a female trial judge described a residential real estate case that came before her court in October 1996. Three parties and three lawyers participated in the court proceeding that gave rise to the following anecdote. Of those six people, only one, a party, was a woman; she was also African-American. The judge relayed the following:

> *"Whenever counsel referred to or addressed either of the male clients or other men, they invariably complied with UTCR 3.030[10] prohibiting the use of first names only. However, when reference was made to the female party, all attorneys, including her own, consistently referred to her by her first name. When I corrected counsel, apologies were made and it was explained that all concerned had become familiar enough with the party to be on a first-name basis and that no disrespect was intended. However, the practice continued, as did my all too frequent admonishments. It was only after I advised counsel that all future violations would be treated as summary contempt with escalating monetary fines per violation that counsel complied.*
>
> *"The lawyers seemed surprised that I took issue with this matter and I was surprised that, once it was brought to their attention, there appeared to be little effort to redirect these 'inadvertent' references without the threat of monetary penalties.*

Several witnesses at the public hearings described occasions when female witnesses were asked whether they should be addressed as Miss or Mrs. and when female judges were not referred to as Judge, but rather as Miss or Mrs. In recent cases, a female judge received a letter (from a male witness) in which the witness called her "domineering" and "a self-righteous bitch." And a female judge reported that young lawyers whom she did not know personally, mostly female, called her by her first name at Bar functions, when she did not observe similar familiarity toward male judges.

The judges' survey responses indicated that women are addressed by their first names in court more frequently than are men and that women are more alert to this behavior. Asked whether male judges addressed female (but not male) lawyers by first names, 42.1% of female judges responded "yes," while 11% of male judges answered "yes." Only 5.3% of female judges and 6.8% of male judges reported that female judges addressed female lawyers by their first names. In the same percentages, judges reported that male lawyers address female (but not male) lawyers by their first names. Judges further responded that female (but not male) litigants, witnesses, and jurors were addressed by first names (1) most frequently by male lawyers (31.6% of female judges and 9.6% of male judges reporting); (2) occasionally by male judges (10.5% of female judges and 1.4% of male judges reported "yes"); and (3) almost never by female judges (0% female judges and 1.5% of male judges reported "yes").

Although only a few court personnel reported that lawyers of either sex are addressed by first names in court, female lawyers themselves reported being referred to by first names when male lawyers are not. Both male and female lawyers reported that male lawyers (28%) and male judges (17%) address female lawyers but not male lawyers in a patronizing manner.

On a related issue, we asked interpreters whether, when interpreting in languages that have a formal and informal form of address, they had observed a bilingual lawyer, judge, or other interpreter use the informal form of address.[11] Two male interpreters and eight female interpreters answered "yes." When asked who was

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[9] *But see* the discussion of intersectionality, below.

[10] Uniform Trial Court Rule 3.030 provides:
"During trial, the litigants and litigants' attorneys must not address adult witnesses, jurors or opposing parties by their first names, and, except in voir dire, must not address jurors individually."

[11] Because the numbers of respondents to this survey were so small, we have omitted percentages from this discussion.

addressed in this more familiar, informal manner, one of the male interpreters and four of the female interpreters stated that women were addressed informally. Two male interpreters and seven female interpreters stated that men were addressed informally. One of the written comments reported that bilingual lawyers, as well as some interpreters, "constantly engage in this behavior when addressing witnesses and/or defendants no matter what the sex of the person is." The data indicate that this informal behavior occurs both in and out of court.

We asked whether interpreters had observed male judges addressed by first names or in familiar terms by male lawyers. All male interpreters answered "no," and only one female interpreter answered "yes." One male and one female interpreter had observed female judges addressed by first names or in familiar terms by both male and female lawyers and by male judges.

We asked interpreters whether male lawyers were addressed in court by first names or in familiar terms; four male interpreters and five female interpreters answered "yes." Interpreters reporting this behavior observed that all engage in this behavior with about the same frequency. Both male and female interpreters also had observed female lawyers being addressed by their first names or in familiar terms.

e. Terms of Endearment

Litigants, lawyers, court personnel, and interpreters all reported some incidents of female and male participants in the legal system being addressed by a term of endearment. For example, both male and female lawyers observed female litigants, witnesses, jurors, and lawyers being addressed by terms of endearment by male lawyers (18.7%) and male judges (12.4%) when their male counterparts were not. In similar proportions, female litigants (17.5%) and male litigants (12.8%) reported being addressed in court or in a law office by a term of endearment. Female lawyers reported that they have been referred to as "young lady," "girl," "sweetie," or "fine little lady attorney" by male opposing counsel or judges.

Three female but no male interpreters observed female defendants, victims, or witnesses being called by first names or by classic terms of endearment, such as "dear" or "honey," when it was not appropriate to do so. The same number of female interpreters plus one male interpreter reported that they had observed male defendants, victims, or witnesses also inappropriately called by a first name, "dear," or "honey." Although the male interpreter did not specify the gender or occupation of the person using the terms of endearment, the female interpreters observed this behavior from male and female lawyers, interpreters, judges, and court personnel, most often from male lawyers, judges, and court personnel. When we asked interpreters whether they themselves had ever been referred to by first names, "dear," "sweetie," "honey," or other terms of endearment when people of the opposite sex were not, approximately one-quarter answered "yes."[12]

In the highest numbers, 227 court personnel reported that they, too, were addressed or referred to by first names or by a term of endearment when it was inappropriate: 38% (94% of whom were female) responded affirmatively based on personal experience, while 33% (87% of whom were female) observed other participants being treated this way. Consistently, these addresses were spoken by male lawyers, judges, litigants, defendants, and by other court personnel of both genders.

f. Comments about Personal Appearance

Survey results suggest that some comments are made by almost all the participants in the legal system regarding the personal appearance of other participants. Some male and female lawyers (10.2%) reported that male judges make comments about the personal appearance of female lawyers, litigants, witnesses, and jurors when similar comments are not made about their male counterparts. Many more lawyers (29.8%) reported such comments by male lawyers, and fewer lawyers (7.9%) reported such comments by female lawyers.

Approximately 10% of both male and female litigants had heard inappropriate comments about their personal appearance, either in court or in a law office setting. Similarly, two of the female interpreters had received inappropriate remarks about their appearance or dress; one was spoken in court by a male lawyer. One interpreter believed that, in one county, defense lawyers selected a particular uncertified female interpreter based on her looks, rather than calling available certified interpreters.

Court personnel both received and observed inappropriate comments directed at female employees in higher numbers than did litigants or interpreters. Approximately 25% reported such comments from other court personnel, male lawyers, male judges, and male litigants. One survey respondent complained that female court personnel, lawyers, and judges are allowed to dress more casually than men, who are expected to wear a dress shirt, tie, and jacket.

g. Sexual Advances or Comments.

Lawyers, court personnel, interpreters, and litigants all reported, in numbers ranging between 10% and 25%,

[12] One written comment from an interpreter noted that the questions regarding use of terms of endearment should have been qualified further because, although some expressions could be considered terms of endearment, inflection and context could suggest otherwise.

inappropriate comments or touching of a sexual nature. Most of this behavior is directed at women by men.

Slightly more than 10% of all lawyers responding to the survey (17 men and 48 women) reported that female lawyers are subjected to verbal or physical sexual advances from male lawyers. Fewer, 17 lawyers in all, reported that male lawyers are subjected to sexual advances from female lawyers. More court personnel, 23% (137 court employees), reported receiving unwanted sexual or suggestive comments. Again, most of those receiving such comments are female (86%). In descending order of frequency, the comments were made by

- male lawyers (55),
- male litigants or defendants (41),
- male court personnel (32),
- male judges (30),
- male police officers (25), and
- female court personnel (25).

Nearly identical numbers of court personnel reported seeing other employees receive unwanted sexual or suggestive comments, the majority of which were directed at female employees.

More than 25% of court personnel reported that they had been "subjected to unwanted sexual teasing, demeaning jokes or remarks hostile toward men or women," and 92% reported such behavior directed at others. Approximately 85% of those who had experienced or observed such behavior were female employees. The remarks were made by male lawyers (66), female court personnel (55), male court personnel (49), male judges (45), and male police officers (30).

More than 10% of court personnel (91% of whom were female) also reported that they had received unwanted pressure for social contact from

- male lawyers (27),
- male court personnel (19),
- female court personnel (14),
- male litigants or defendants (13),
- male police officers (10), and
- judges (9).

Another 16% of court personnel (86.3% female and 13.7% male) reported unwanted, deliberate physical touching from male lawyers (33), male court personnel (29), female court personnel (20), male judges (18), and male police officers (10). Complaints were brought by only 14% (84) of court employees who reported having been subjected to unwanted sexual comments or conduct.

Similarly, three of the responding female interpreters had been subjected to sexual or suggestive comments, two of those by male lawyers. Male interpreters did not share this experience. Six female interpreters reported that they had been treated in an inappropriately familiar manner, while no male interpreters reported this treatment. Only one female interpreter had been subjected to unwanted sexual teasing, jokes, comments, or deliberate physical touching (but not in the courthouse); again, no male interpreters made this report. Male lawyers, judges, court personnel, and security personnel were responsible for various incidents of unwanted comments or physical touching, and a lawyer had called this interpreter on the telephone to ask her in very graphic terms to have sex with him.

Interpreters themselves were reported to be responsible for some incidents. Lawyers, support staff, and court personnel told us about male interpreters who had engaged in inappropriate behavior, making unwelcome advances and comments to female court staff. In one case, an interpreter had been called to interpret out of court in proceedings related to a sex offense case. He was aggressively flirtatious with female staff. The respondent perceived this behavior to be not only inappropriate, but also offensive and insensitive, given the nature of the case.

Just under 10% of female litigants experienced inappropriate sexual comments or touching, either in court or in a law office setting. Almost no male litigants reported this experience.

One work group member described an incident that occurred 15 years ago during the preparation of a civil case for trial. A single mother who was an anticipated witness had been so traumatized by the overt sexual advances of one of the lawyers that she refused at first even to speak with any other lawyers. When a non-offending lawyer requested an interview with the witness to discuss her trial testimony, she would consent only after arrangements were made for an unusually large group of people to accompany her to a relatively public setting for her interview.

Written comments on the surveys suggest that blatant instances of overt sexual conduct appear to be waning. One survey respondent described her more recent experiences as being so subtle as to be "unconscious." However, recognizable instances of inappropriate behavior of a sexual nature still occur, most frequently directed at women by men, often male lawyers.

b. Demeaning or Hostile Remarks

Some lawyers reported hearing, in court or in chambers, demeaning or hostile remarks or jokes about women. Approximately 10% of lawyers had observed male judges make those comments, and 15% had observed male lawyers make them. With less frequency, lawyers heard hostile remarks or jokes directed at men

by women in court or in chambers; more male lawyers (7.5%) than female lawyers (2.1%) reported such comments.

Similarly, two female interpreters, but no male interpreters, heard someone making hostile or negative remarks about other women to them. One of those female interpreters reported the hostile or negative comments from both male lawyers and male interpreters. Four female interpreters, and again no male interpreters, were themselves addressed in a rude manner when persons of the opposite sex were addressed politely. Those rude comments came from male lawyers and, to a lesser extent, from female judges. On the other hand, one male interpreter and one female interpreter encountered hostile or negative remarks directed at men by female lawyers and female interpreters outside the courtroom.

Some litigants and court personnel reported being addressed rudely or with demeaning jokes, hostile remarks, or unwanted sexual teasing. Approximately 20% of litigants were addressed rudely in court or in a law office setting, with such conduct being directed at male litigants (23%) slightly more frequently than at female litigants (18%).

Anecdotally, we learned of a recent medical malpractice case in which a female lawyer was subjected to alarmingly hostile treatment by her male opposing counsel. The action was litigated in 1997 in an Idaho state court but involved several Oregon lawyers. After a deposition in which the female defense lawyer was treated unprofessionally by the plaintiffs' male lawyer, the defendant moved for sanctions against the plaintiffs' lawyer for "disruptive, unethical, and unprofessional behavior during depositions and towards [defendant's] counsel." As described in defendant's motion for sanctions, during deposition, plaintiffs' counsel referred to defendant's counsel as "hon," "honey," "sweetheart," and "witch." He also "attempted to physically intimidate counsel, leaning across the table, and at one point, slamming the table with his fist hard enough to disconnect the phone." After repeated, argumentative objections during the deposition, the following interchange occurred between the lawyers:

> *"[Defendant's Counsel:] Please don't interrupt me.*
>
> *"[Plaintiffs' Counsel: No, she'll say what she damn well pleases, Hon. * * **
>
> *"[Defendant's Counsel:] Are you done now? I want to give you a full chance to put whatever you need to on the record.*
>
> *"[Plaintiffs' Counsel:] Honey, you have been needing to park your broom for a long time. Let's go.*
>
> *"[Defendant's Counsel] Let the record reflect that [plaintiffs' counsel] has terminated this deposition.*
>
> *"[Plaintiffs' Counsel:] No, Ma'am, you have been a witch like you have been so many times."*

Plaintiffs' counsel then terminated the deposition, refusing to allow defendant's counsel to ask any further questions. Following the deposition, plaintiffs' counsel continued to attack defendant's counsel personally. "[He] called [her] at home, in an effort to intimidate her. [He] went to considerable lengths to find [her] home number and where she lived, as the phone was not listed in her name and was outside the . . . , Oregon, area." Defendant's counsel was forced to obtain an unlisted phone number to prevent further harassment by plaintiffs' counsel. "In addition, [plaintiffs' counsel] recently faxed drawings to [defendant's] counsel, referring to [her] as "squaw," a derogatory and racist word." In response to defendant's motion for sanctions, plaintiffs' counsel admitted his conduct. However, the Idaho trial court took the matter under advisement and as of the date of this writing still has not ruled on the motion.

i. Child Care

More than half the nearly 600 court employees who responded to the court personnel survey said that they favored a policy allowing on-site child care. Court employees also heavily favored flexible work schedules (75%) and job sharing (63%), as well as release time, to assist with family responsibilities. On-site child care may have been less favored than these options due to the fact that only a fraction of court employees have children under the age of 18 living in their homes. More women than men would be affected by these policies.

Child care also was studied by the Multnomah Bar Association, through its Court Liaison Committee and CourtCare Advisory Committee. The CourtCare Advisory Committee issued The CourtCare Study Report in March 1997. The focus of the study was the child-care needs of jurors, litigants, and witnesses in the Multnomah County courthouse.

The study found that an average of 80 children (age 12 or under) per day enter the Multnomah County courthouse. A survey was done of citizens conducting business at the courthouse counters. One hundred sixty-nine surveys were completed over a one-week period. Forty-five of the respondents had children; 19 respondents had brought a total of 29 children with them. Twenty-five respondents with a total of 39 children had made child-care arrangements before coming to court. Thirty-four respondents (17 who had brought children to court and 17 who had not) said that they would use "safe and convenient" child care at the courthouse if it were available.

The CourtCare study also surveyed jurors and court personnel who decided whether requests for excuses from jury service would be granted. During one four-week period, the court excused 159 people from jury duty because of their need to care for small children. A 1993 study of the representativeness of the jury pool in Multnomah County also showed that those who ignored their jury subpoenas were more likely to be

female heads of households with children at home (or unmarried cohabitors with children at home) than were those who served on jury duty or who sought and obtained an excuse from service. On the other hand, relatively few jurors who did serve said that they would use child care at the courthouse if it were available.

Courthouse staff, judges, and lawyers were also interviewed or surveyed as part of the study. All reported many instances of court proceedings being seriously disrupted by the presence of children and of children being exposed to extremely negative situations, including yelling, accusations of wrongdoing against parents or other family members, verbal abuse, obscenities, and graphic descriptions of violence, especially in domestic relations and criminal cases.

The CourtCare study did not ask survey respondents their gender, nor did it ask courthouse observers to note whether children being brought to court accompanied a man, a woman, or both. Anecdotally, trial judges recounted to the Task Force that most of the children in the courtrooms and hallways are in the company of a women. The CourtCare study obtained similar anecdotes, for example:

> *"In criminal cases the defendants are usually male. So the wives or girlfriends bring the kids. The judge assumes that the reason might be that the kids have a chance to see their dad in the court proceeding and that the defendant tries to gain sympathy with the kid's presence and so hopes to get no, or a less harsh punishment."*

Some other states provide child-care facilities at courthouses for litigants, witnesses, and others.[13] Oregon does not.

2. Gender and Civil Actions

a. The Litigation Process Generally

Some lawyers and judges perceive that the gender of parties or lawyers affects the litigation process, either positively or negatively. Female lawyers and judges are more likely than are male lawyers and judges to report that a party's gender has an effect on the litigation process:

- 33.9% of female lawyers,
- 47.4% of female judges,
- 26.3% of male lawyers, and
- 20.5% of male judges.

Similarly, more women than men reported that a lawyer's gender affects the litigation process:

- 37.5% of female lawyers,
- 21.1% of female judges,
- 16.9% of male lawyers, and
- 4.1% of male judges.

Although the surveys did not explore how or to what extent gender may affect the litigation process, some anecdotal comments did provide insight. For example, a female lawyer wrote about the legal system as being "male":

> *"The traditional legal system is based on a 'male' model of aggressive combative winner take all advocacy. Some women accept it—others take other career paths * * *. We need more ADR [alternative dispute resolution] and other changes to the legal system even more than focusing on the treatment of women. For example, a strong look at male and female definitions of honesty and truth."*

In a letter to the Task Force, a litigant from the Willamette Valley involved in a property case noted what may be an isolated incidence of gender bias by one particular judge: "Our [female] attorney explained to us that she could not get a fair hearing on our claim before this judge. He was well known to dislike women lawyers, so she advised us to seek other [male] counsel."

Most judges, however, reported their belief that male and female lawyers are equally skilled in the courtroom. We asked judges whether, in their experience, they believed that male or female lawyers "tend to be better at" (a) reaching a settlement, (b) representing clients' interests assertively, or (c) arguing complicated questions of law. With regard to "reaching a settlement," 88.4% of judges indicated that the gender of the lawyers made no difference. Of those reporting a gender difference, there is a disparity in the responses: 21.1% of female judges believed that female lawyers are better at reaching a settlement, while only 2.1% of male judges agreed. On both "assertive representation" and "arguing complicated questions of law," more than 90% of the judges, both male and female alike, believed that the gender of the lawyers had no effect whatsoever.

The majority of litigants, both male and female, reported that they behaved no differently when appearing before a male judge than when appearing before a female judge, and most reported that they treated all judges with equal respect. Some litigants, 10.5% of men and 16.7% of women, indicated that they did behave differently before a male judge than before a female judge, but most of those respondents (78.6% of men and 84.6% of women) reported that they still treated

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[13] *See also* JESSICA E. MINDLIN, COURTWATCH: JUDGES RESPOND TO DOMESTIC VIOLENCE, A REPORT FROM THE LEGAL ACCESS PROJECT OF THE OREGON COALITION AGAINST DOMESTIC AND SEXUAL VIOLENCE 16 n 50 (1996); OREGON DOMESTIC VIOLENCE COUNCIL, A COLLABORATIVE APPROACH TO DOMESTIC VIOLENCE: OREGON PROTOCOL HANDBOOK 46 (1997) (recommending that courts offer child care in the courthouse).

male and female judges with equal respect, notwithstanding their different behavior.

b. Litigation Strategy

i. Litigants' Strategy

Most inmates (82% of male inmates and 69% of female inmates) had no gender preference with respect to selecting a defense lawyer.[14] When inmates did have a preference as to the gender of the lawyer, women wanted female lawyers more often than men wanted male lawyers (77% and 52%, respectively). The three most common reasons (in roughly equal degrees of popularity) that male inmates gave for preferring a certain gender for his lawyer were: the lawyer would fight harder, the lawyer would spend more time on the case and, given the nature of the charge, the inmate would have a better chance for success. Female inmates reported the same top three reasons for expressing a gender preference for their lawyers; the most popular reason for female inmates was that the selected gender would fight harder. As discussed in more detail below, inmates' reasons for gender preference correlate to their perceptions as to whether they were treated differently by male and female lawyers when they have been represented by both. More than half the male and female inmates felt that there was no difference in their treatment by male or female lawyers.

ii. Lawyers' Strategy

About one-third of all lawyers reported that they used the gender of a party, witness, lawyer, judge, or other participant in the legal system as part of their civil litigation strategy. Female lawyers (36.9%) were slightly more likely than male lawyers (30.6%) to report the use of gender in their litigation strategy.

The survey did not ask *how* gender affects litigation strategy. Again, however, anecdotes provided further information. In some instances, we heard examples that might be classified as appropriate uses of gender in shaping litigation strategy, as preparation for predicted subconscious responses of decision-makers.

For instance, one female judge reported that, when she was in private practice, she chose a female witness instead of a male witness with the same job title to testify on behalf of a large corporate client following several male witnesses, in order to help "soften" the client's image before the jury. A lawyer reported that, to counteract possible perceptions of racial bias among jurors, she would ask more questions of an African-American female witness than she would ask of a white male to establish that person's qualifications as an expert economist. In addition, certain kinds of cases, such as sex discrimination claims, inherently require that gender be an issue that lawyers consider in preparing for trial, because alleged gender bias is a substantive issue in the case.

On the other hand, the Task Force heard examples of inappropriate uses of gender in litigation strategy. At public hearings, for example, witnesses said that they had heard male lawyers belittle female opposing counsel by using her first name or making remarks about her appearance. Likewise, some male lawyers reported that some female lawyers use their attractive appearance to gain an unfair advantage with jurors and judges. We also note that lawyers may not exercise peremptory challenges to excuse jurors on the basis of sex[15] or race.[16]

After finding that female lawyers often believe that they must take their own gender into account in court, we were not surprised that more female than male lawyers report using gender as part of litigation strategy. Some female litigators reported at public hearings and in focus groups that they assume that they must work harder, be more prepared, or be more competent than their male counterparts to be perceived as equal by jurors, judges, and even their own clients. One lawyer wrote on the survey next to the question about using gender as part of litigation strategy: "Every trial. Women lawyers must work to establish the credibility in jurors' eyes that men enjoy immediately."

iii. Pretrial Proceedings

Pretrial proceedings include discovery, motion practice, arbitration, and mediation. When we asked lawyers about the effect of gender on pretrial proceedings, 27.8% of male respondents observed behavior that they believed indicated a gender bias. Almost twice as many female respondents (50.8%) had observed such behavior. Fewer judges than lawyers observed such behavior. More female judges (15.8%) than male judges (4.1%) had observed gender-biased behavior by lawyers, mediators, or other judges in pretrial proceedings.

The results of the lawyer survey suggest that there is a perception of slightly less gender-biased behavior in pretrial proceedings than in the courtroom. This perception differs from the conclusions reached by task forces in other states. According to an analysis published by the American Judicature Society: "In jurisdiction after jurisdiction, task force reports show that the reported incidence of overtly biased behavior by attorneys is greater outside the presence of a judge than

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[14] For a discussion of civil litigants' gender preferences for lawyers, see the chapter on Interactions Between Lawyers, Clients, Staff, and Other Professionals.

[15] *J.E.B. v. Alabama ex rel. T.B.*, 511 US 127, 114 S Ct 1419, 128 L Ed 2d 89 (1994).

[16] *Batson v. Kentucky*, 476 US 79, 106 S Ct 1712, 90 L Ed 2d 69 (1986).

in settings before a judge."[17] The questions in Oregon's lawyer survey asked about the behavior of participants other than lawyers, as well as of lawyers. Had we limited the question to the behavior of lawyers, the results might have been similar to those in other jurisdictions. We received anecdotal evidence suggesting that in Oregon, as elsewhere, lawyers usually behave better when a judge is present (or when a judge may have an opportunity to observe lawyers' behavior as, for example, when a deposition is videotaped for possible admission into evidence). Judges wield considerable influence over lawyers' behavior.

c. *Outcome of Civil Litigation*

Survey results suggest that most participants in civil litigation (other than domestic relations cases) in Oregon's trial courts do *not* perceive that gender affects the outcome of their cases. The limited data available also suggest that, in most personal injury cases, the plaintiff's gender does not affect the size of the verdict. Yet, a significant minority of lawyers and judges perceive that gender does affect the outcome of some cases. Some litigants also perceive that gender makes a difference in the outcome of their cases and that, when it does, the effect on them is negative. The limited jury verdict data available also suggest that male plaintiffs may receive a disproportionate number of high verdicts in personal injury cases, but it is impossible to tell whether gender bias is a factor.

i. Settlements

The Judicial Administration work group conducted interviews with two settlement judges (one male and one female, from two different counties), who made the observations contained in this section of the chapter: We did not obtain quantitative data on these issues.

Assuming that the facts regarding the parties and their injuries in the case are otherwise equal, successful settlement negotiations before trial judges are affected significantly by what plaintiff's counsel is perceived to be able to achieve in the courtroom. Most trial lawyers, particularly older, more experienced trial lawyers, are male. Most personal injury defense lawyers of all ages also are male. Experienced and respected female personal injury lawyers are few. Although five years ago settlement judges perceived that female lawyers were "leaving money on the table" in settlement negotiations when male lawyers did not, they do not perceive that difference today.

Beyond counsel's ability as a trial lawyer, the next most important factor to successful settlement negotiations is the client's expected performance as a witness. Settlement judges perceive that client control problems are more of an issue for plaintiffs than for defendants and that female lawyers are more likely to ask a settlement judge for assistance with client control problems than are male lawyers. Settlement judges believe that male clients are a bit more prepared to follow the advice of their lawyers or of the settlement judge than are female clients, perhaps because (in the view of the settlement judges interviewed) female clients tend to have more emotional investment in the issues in their cases than do male clients.

The settlement judges interviewed did not recall any instances of inappropriate gender-related jokes or comments in their presence. However, they did note that the physical attractiveness of a party is more likely to be mentioned when the party is a woman and that appearance, positive or negative, is more likely to be an issue for female parties than for male parties. For instance, an attractive female plaintiff who is badly scarred may fare better than a less attractive female plaintiff and is even more likely to fare better than a male plaintiff with the same injury. On the other hand, attractive women with injuries that are *not* visually obvious sometimes are viewed as having less valuable claims, particularly if there are women on the jury.[18]

When a disagreement arises between the plaintiff and the treating physician regarding damages, settlement judges asserted, male plaintiffs are more likely to believe that the doctor's opinion will be accepted over their own. Female plaintiffs are more likely to believe that they can explain away a doctor's disagreement with them.

When asked whether the combination of gender and some other attribute of a party or lawyer affects settlement results, settlement judges observed that Oregon has a disproportionately low population of female and of African-American, Hispanic, and Asian-American trial lawyers. Settlement judges also noted that a party's size and physical attractiveness affect settlement. Indeed, when discussing settlement issues, gender is most likely to arise in *combination* with other issues, such as weight or age.

When ethnic background or race is involved in a case, language issues also may affect the outcome of a settlement conference. Less commonly, some minorities have customs or practices that reduce or eliminate the chance of reaching a successful settlement. For example, some cultures are extremely skeptical or resentful of any private caucus between the lawyers and the judge, and

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[17] Vicki C. Jackson, *What judges can learn from gender bias task force studies*, 81 JUDICATURE 15, 18 (1997). *See also Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race and Ethnic Bias*, 84 GEO LJ 1657 (1996).

[18] These observations are borne out by a recent study suggesting that better-looking people are treated better in court. *See* Richard Morin, *Justice smiles on good-lookers*, OREGONIAN, Dec 15, 1997, at C3 (discussing recent study by Kayson and DeSantis, two New York psychologists).

others object to allowing women any role in the decision-making process.

Overall, settlement judges reported that the results obtained in settlement conferences seem to depend more on a lawyer's experience, trial skills, and comfort level with settlement procedures than on any gender bias or other gender issues.

ii. Verdicts

The Honorable Kristena LaMar, Multnomah County's chief alternative dispute resolution judge, has recorded statistical information derived from Jury Verdicts Northwest in Multnomah County from 1987 through 1997. Jury Verdicts Northwest is a private service that gathers and publishes data on jury verdicts in personal injury cases. From reports by lawyers or other participants in the case, it gathers information including the nature of the case, the types of injuries that the plaintiff is alleged to have suffered, and other pertinent facts. Lawyers and parties use this information as a tool in assessing the dollar value of their cases. The following chart represents the statistical data available from Jury Verdicts Northwest with respect to the gender of parties and the verdicts that they received.

SYNOPSIS MALE PLAINTIFF VERDICTS & FEMALE PLAINTIFF VERDICTS MULTNOMAH COUNTY 1987-1997[19]

VERDICT AMOUNT	# OF MEN	% OF ALL VERDICTS OBTAINED BY MEN	% OF ALL VERDICTS IN THIS RANGE OBTAINED BY MEN	# OF WOMEN	% OF ALL VERDICTS OBTAINED BY WOMEN	%OF ALL VERDICTS IN THIS RANGE OBTAINED BY WOMEN
$00.00	209	41.5%	52.9%	186	40.5%	47.1%
$1 - 10,000	92	18.3	54.4	77	16.8	45.6
$10,001 - 20,000	47	9.4	52.8	42	9.2	47.2
$20,001 - 50,000	48	9.6	43.2	63	13.7	56.8
$50,001 - 100,000	24	4.8	40.7	35	7.6	59.3
$100,001 - 200,000	22	4.4	53.7	19	4.1	46.3
$200,001 - 500,000	28	5.6	59.6	19	4.1	40.4
$500,001 - 1,000,000	17	3.4	65.4	9	2.0	34.6
Over $1,000,000	15	3.0	62.5	9	2.0	37.5

The foregoing chart shows that female plaintiffs are somewhat more likely than male plaintiffs to obtain verdicts in the middle range of $20,000 to $100,000, while male plaintiffs are more likely than female plaintiffs to obtain the lowest and highest verdicts, that is, verdicts of less than $20,000 and those from $200,000 to over $1,000,000. Thus, the highest verdicts were obtained by male plaintiffs.

Because the sample was small and the comparability of the facts of the underlying cases uncertain, we interpret these data with caution. If the gender disparity in very large verdicts is not the result of random chance, it may reflect gender differences in society outside the courts. For example, in a personal injury case in which the plaintiff has been permanently disabled from working, the jury may include in its verdict economic damages to compensate the plaintiff for wages lost in the past and for future lost wages or lost wage-earning capacity. Such damages must be based on evidence of what the plaintiff had earned in the past and would reasonably be expected to earn in the future and may be high if the plaintiff is young and had a long work-life expectancy. In a society in which men's wages generally are higher than women's wages (for whatever reasons), one would expect a higher jury verdict for lost wages and earning capacity for the "average" permanently disabled male plaintiff than for the "average" female plaintiff of the same age and with the same injury.

The Civil Litigation work group did not study the correlation between a *defendant's* gender (when the

[19] The percentages in the third and sixth vertical columns, regarding all verdicts by gender, total 100%, indicating by gender the frequency of verdicts in each amount range. Additionally, the sum of the percentages listed on each horizontal line in the fourth and seventh columns total 100%, indicating how many women versus men obtained verdicts in each amount range.

defendant is an individual) and the verdict obtained. That being so, the possible role of a defendant's gender in influencing case outcomes cannot be evaluated.

iii. Participants' Perceptions

The data collected from the various surveys provide no concrete evidence that gender bias affects the results of civil cases (excluding domestic relations cases). However, some participants perceive that it does.

The survey responses from lawyers practicing in the area of civil litigation followed a pattern that we saw in most of our other research: (1) most respondents (both men and women) saw little or no gender bias; (2) women were more likely than men to perceive gender bias; and (3) of those who did perceive gender bias, women were more likely to see gender bias against women, and men were more likely to see gender bias against men.

A series of questions asked lawyers and judges whether they had observed behavior in the courtroom by judges, lawyers, parties, or witnesses that "indicated" gender bias. If so, they were asked whether this behavior affected the outcome of the case. More female lawyers (48.2%) than male lawyers (31.1%) reported having observed gender bias in the courtroom. A little more than 20% of the female lawyers responding believed such behavior affected the outcome of the case, while only 11.6% of the male respondents did.

Lawyers seemed to recognize that gender may have either a positive or a negative influence on case outcome, depending on the nature of the case. One lawyer wrote: "I have several times felt that because my client was a married woman, opposing counsel (and, on one or two occasions, judges) were biased when it came to offering settlements or making decisions about damages or liability, on the theory that my client had a man at home who could 'bring home the bacon.'" Conversely, other lawyers noted that gender may favorably influence the outcome of a personal injury case tried to a jury, especially when the plaintiff is a young, physically attractive woman.

The judges responded more conclusively. A substantial number of both female judges (63.2%) and male judges (57.5%) responding to the survey said that they had observed gender bias in the courtroom. Interestingly enough, the difference in the observations of female and male judges is not as great as the difference in the observations of female and male lawyers on this question. But a substantially higher percentage of female judges (21.1%) than male judges (9.6%) reported that the gender bias that they had observed affected the outcome of the case.

The vast majority of court personnel who responded to a separate survey reported that they detected no difference in case outcomes or reported that they had no basis to respond.

Clients were less likely than lawyers or judges to perceive any effect of gender on the results of their cases. Of the 239 clients who responded to the survey, 204 (85.4%) did not believe that their own gender or the gender of their lawyer affected the outcome of their case. Female clients (14.2%) were slightly more likely than male clients (9.5%) to believe that gender did affect the outcome.

When clients, male and female, did perceive that either their own or their lawyer's gender affected the outcome of their case, they believed that gender had a negative effect. A female party described her involvement in litigation against a former business partner in a county on the Oregon coast: "[E]verybody knows that women can't win in business cases. The good old boy network is there." Another female client explained: "[M]y case related to my ability not to be a cheerleader, and I think that if I would have been a male playing football, things would have been different." Similarly, male clients perceived a negative influence because of their gender. One said: "Men are held to a higher standard in recognizing inherent dangers in equipment and avoiding injury."

Some legal scholars suggest that the legal system values various physical or emotional damages that may be more salient to one gender or another, depending on the nature of the case.

> *"The law of torts values physical security and property more highly than emotional relationships . . .. The law has often failed to compensate women for recurring harms — serious though they may be in the lives of women — for which there is no precise masculine analogue."*[20]

Thus, the law itself favors men in the values that are attached to "economic" (out-of-pocket) damages as distinguished from "non-economic" damages, such as physical pain and emotional distress.[21] In Oregon, non-economic damages have been "capped" by the legislature, while economic damages have not. ORS 18.560. These factors may affect the size of verdicts awarded to male and female plaintiffs.

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[20] Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH L REV 814, 814 (1990); *see also* Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN L REV 847 (1997).

[21] *See* Lucinda Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L REV 886, 898 (1989).

3. Intersectionality

In and around the courthouse, the intersection of gender and race, ethnicity, sexual orientation, or youth is perceived to result in some unfairness. With respect to case outcome, most Oregon judges and lawyers did not respond that they believed race, ethnicity, age, marital, status, disability, or sexual orientation to have had a negative influence on the outcome on a case. However, from 1% (noting Asian-American female lawyer as a negative factor) to 17.3% (noting lesbian or bisexual female litigant or witness as a negative factor) of lawyers do perceive intersectionality issues as affecting the outcome of cases.

a. Gender and Race/Ethnicity

We asked judges and lawyers whether gender combined with one or more other demographic factors had a negative effect on the outcome of a case. More than 90% of judges responded that the racial or ethnic background of male and female lawyers had no effect on the outcome of a case. Lawyers responded in slightly greater numbers than did judges that the race or ethnicity of a female lawyer negatively influenced case outcome: when the female lawyer is also African-American (7.7%); Hispanic (5.1%); Native American (3%); and Asian/Pacific Islander (1.9%). Lawyers responded similarly with respect to male lawyers who are also: African-American (7.4%); Hispanic (5.0%); Native American (2.5%); and Asian/Pacific Islander (1.4%)

These trends hold with respect to litigants and witnesses, although in greater numbers. Thus, when we asked whether the ethnic or racial background of female litigants or witnesses negatively affected case outcome, we obtained these results:

PERCENTAGES OF JUDGES WHO PERCEIVE A NEGATIVE EFFECT ON CASE OUTCOME WHEN GENDER COMBINES WITH RACE/ETHNICITY

	African-American	Hispanic	Native American	Asian/ Pacific Islander
Male Litigant or witness also is	14.7	15.8	9.5	3.2
Female litigant or witness also is	12.6	12.6	9.5	3.2

PERCENTAGES OF LAWYERS WHO PERCEIVE A NEGATIVE EFFECT ON CASE OUTCOME WHEN GENDER COMBINES WITH RACE/ETHNICITY

	African-American	Hispanic	Native American	Asian/ Pacific Islander
Male Litigant or witness also is	17	15.6	8.1	5.4
Female litigant or witness also is	15.4	13.5	7.5	5.6

More female than male court personnel reported that they had "observed plaintiffs, defendants or witnesses who are racial minorities receive less courteous treatment than others." Seventeen percent of the female respondents, but only 10% of the male respondents, said so. In addition, 45% of the respondents of color, but only 14% of the white respondents, answered "yes" to that question.

In our surveys and focus groups, men and women of color and white women were more likely to report or perceive discourteous treatment to people of color than were white men. We also received written comments from white respondents suggesting that people of color received better treatment than did white people in the judicial system. That perception differs from the those revealed in the lawyer and judge surveys, which suggest that people of color may be disadvantaged in civil litigation on account of race or ethnicity.

b. Gender and Sexual Orientation

About 90% of both judges and lawyers believed that the perceived sexual orientation of a lawyer does not have a negative effect on the outcome of the case. With respect to the sexual orientation of litigants and witnesses, judges and lawyers responding to the surveys reported as follows:

PERCENTAGES OF JUDGES AND LAWYERS WHO PERCEIVE A NEGATIVE EFFECT ON CASE OUTCOME WHEN GENDER COMBINES WITH SEXUAL ORIENTATION

	JUDGES	LAWYERS
Male litigator or witness also is perceived to be gay or bisexual	17.9	16.8
Female litigator or witness also is perceived to be gay or bisexual	16.8	17.3

In the lawyer survey, one lawyer commented that a judge had offensively referred to her client as a "lardass dyke." Another lawyer commented: "Attractive female litigants who are well-spoken fare better than any other litigant. But, if their sexual orientation is known, gay and lesbian litigants are treated poorly by some judges."

c. Gender and Age

About 95% of judges reported that a lawyer's age has no effect on the outcome of a case. Lawyers disagreed. One out of five lawyers reported that being a young, female lawyer adversely influences case outcome. Half as many lawyers, 11.4%, reported that being a young, male lawyer adversely affects case outcome.

During the public hearings, several female lawyers testified about difficulties that they had encountered in being accorded respect by other lawyers and by some judges because of their gender and youth. The judge survey also contained comments suggesting that young female lawyers were more likely to be patronized or demeaned than other lawyers.

Some lawyers also reported that the compounding effects of being single, a parent, and a female lawyer (regardless of age) had similar adverse effects on case outcomes.[22] On the other hand, very few lawyers, less than 5%, reported that being an older lawyer, female or male, adversely affects case outcome.

Responses to the court personnel survey varied by the ages of the respondents. For example, 48% of responding court employees indicated that gender bias against female lawyers does exist in some form. Of the female respondents under the age of 45, 53.6% indicated that gender bias against female lawyers exists at some level. Of the female respondents age 45 and over, only 39.4 % indicated that gender bias exists. This sizeable discrepancy carried through in the comments that we received. Women age 45 and over frequently expressed the opinion that, although some gender bias does exist, it is not as bad as it used to be, and younger women are "looking for excuses." That difference in perception reflects a significant correlation between age and gender in how fairness is perceived in the court system.

d. Gender and Class

Anecdotal evidence suggests that the intersection of gender and class limits women's access to the courts. Access to justice continues to be an enormous problem for low-income people, the overwhelming majority of whom are women. The Director of the Oregon Law Center described the proportions of the crisis:

> *"[I]n my experience as a Legal Services lawyer, what I have seen, with 70 percent of our clients being women, women are, of course disproportionately in the ranks of the poor as are people of color.*
>
> *". . . . .*
>
> *"But when you have 500,000 low-income people in Oregon, 70 percent of them being women, and you have just a handful of Legal Services lawyers, maybe as much as, according to some ABA studies, 80 percent are completely outside the system. So I would hope that the task force would take a look at not just even-playing-field issues but who is even allowed to be on the playing field. Because the vast majority of low-income women just don't have access at all."*

Another legal services lawyer reported that opposing counsel will "routinely malign our clients based on the fact that they receive welfare or they live in subsidized housing." In addition, a lawyer reported that one judge told a mother receiving welfare that, just because she was poor, she did not deserve relief. That lawyer opined that it was doubtful that a similar statement would have been made to a male welfare recipient.

e. Intersectionality and Oregon Judges

There are few judges living in the "intersections" identified by the Task Force. Currently, there are no women of color serving as active judges. According to the statistics kept by the Office of the State Court Administrator, among male active judges, two are Hispanic, two are African-American, one is Native American, and one is Asian-American. Although the Office of the State Court Administrator does not keep statistics about the sexual orientation of judges, by anecdote, there are several openly gay men and lesbians serving as judges. The scarcity of judges living in intersectional points, particularly women of color, affects both the perspective of the judiciary and the perspective of those appearing before members of the judiciary.[23]

E. CONCLUSIONS

1. In and Around the Courthouse

On the whole, the court system operates even-handedly toward both men and women. Nonetheless, a significant minority of judges, lawyers, litigants, inmates, interpreters, and court personnel have observed, in varying degrees, unprofessional gender-related behavior in and around the courthouse. Such behavior includes:

- differential treatment of courtroom participants by judges, and *vice versa*;
- differential uses of first names and terms of endearment;
- differential courtroom recognition of lawyers and clients;
- differential credibility of lawyers and clients;
- differential credibility accorded to lawyers;
- comments on personal appearance;
- sexual comments and advances;
- demeaning or hostile remarks; and
- discourtesy.

Those behaviors have a negative effect on the fair administration of justice. Although gender bias is a two-way street, women are much more likely than men to perceive and to experience gender-biased behavior in and around the courthouse, and men are much more likely than women to exhibit such gender-biased behavior.

To put these conclusions in perspective, we note that much progress has been made to eliminate overt

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[22] The number of observations of this compounding effect were small in the survey.

[23] For further discussion of who serves as judges, see the chapter on Opportunities in the Legal Profession.

gender bias and to encourage gender fairness in the judicial system, especially during the past 25 years. Older participants in the court system confirmed that gender fairness has improved over time. And, although the survey of litigants did not obtain a representative sample, it did obtain the freshest, most current impressions of any of the surveys. It is therefore especially significant that a substantial majority of litigants reported fair, respectful, and even-handed treatment in and around the courthouse.

In combination with gender, age is the other personal characteristic that is perceived to play the greatest negative role. Youth affects both male and female lawyers, but is a particular problem for women in establishing credibility and in achieving favorable results for their clients. In addition, the minority sexual orientation and minority race or ethnicity of lawyers and their clients are perceived to be factors having an adverse effect on those who are, or are associated with, that minority person.

Eliminating the remaining gender-biased behaviors in and around the courthouse — many of them subtle and unconscious — will be neither simple nor swift. Some people believe that men and women are "hard-wired" as hunters and gatherers.[24] Others believe that socialization is responsible for differential behavior and differential treatment of men and women. In either event, change will take time and effort. The time and effort will be well spent to achieve courts that permit all persons fully and fairly to participate in the justice system.

There is a perceived need for on-site child care in courthouses, to respond both to court employees on a long-term basis and to litigants, jurors, and witnesses on a short-term basis. More women than men who use the courthouse are affected by the absence of on-site child care.

2. Gender and Civil Actions

The statistical data available to the Task Force provide no concrete evidence of gender bias affecting the outcome of civil actions, whether by settlements or verdict. Nonetheless, a substantial minority of the survey respondents believe that gender-biased behavior or the gender of a party, lawyer, or judge affects the outcome of cases. Whether the statistics or the perceptions are more reliable is unknown. However, visible efforts to ensure fairness can be expected to improve both perception and reality.

As to the litigation process, we conclude that not all strategic uses of gender are inappropriate. But lawyers and judges must be vigilant to avoid inappropriate strategic uses of gender.

F. COMMENDATIONS

We commend the Oregon Supreme Court for adopting JR 1-101(H), which provides:

> *"A judge shall not hold membership in any organization that the judge knows is a discriminatory organization. For purposes of this rule, 'discriminatory organization' means an organization that, as a policy or practice and contrary to applicable federal or state law, treats persons less favorably in granting membership privileges, allowing participation or providing services on the basis of sex, race, national origin, religion, sexual orientation, marital status, disability or age."*

and JR 2-110, which provides:

> *"(A) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers, court personnel and members of the public.*
>
> *"(B) A judge shall not act in a way that the judge knows, or reasonably should know, would be perceived by a reasonable person as biased or prejudiced toward any of the litigants, jurors, witnesses, lawyers or members of the public.*
>
> *"(C) A judge shall require lawyers and court personnel who are subject to the judge's direction or control to act in accord with the principles embodied in paragraphs (A) and (B) of this rule.*
>
> *"(D) Paragraphs (B) and (C) of this rule do not preclude consideration or advocacy of any issue relevant to the proceeding."*

We commend the Education Division of the Office of the State Court Administrator for regularly including issues of gender fairness in educational programs for judges.

G. RECOMMENDATIONS

1. The Oregon Supreme Court should:

- by January 1, 2000, review existing procedures for making complaints of unfairness by, and against, the participants in the judicial system. That review should consider whether existing procedures are adequate to facilitate the prompt and appropriate resolution of such complaints and should recommend any needed changes.

2. Judges, including judges *pro tempore*, referees, and magistrates, should:

a. monitor behavior in the courtroom and, to the extent appropriate, in pretrial proceedings, and should intervene to correct inappropriate gender-based conduct;

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[24] *See, e.g.*, CARL SAGAN, BILLIONS AND BILLIONS: THOUGHTS ON LIFE AND DEATH AT THE BRINK OF THE MILLENNIUM, 26-28 (1997).

b. participate in periodic refresher courses on the need to be aware of issues affecting gender fairness; and

c. when appropriate, expand on precautionary instruction UCJI No.5.01 to address specific issues of fairness that may arise in a particular case.

3. The Education Division of the Office of the State Court Administrator should:

a. continue to conduct regular educational programs for judges and court staff on the existence and effects of gender-biased behavior in and around the courthouse, and on ways to avoid such behavior; and

b. by January 1, 1999, develop a brochure on gender fairness and begin to distribute it to participants in the judicial process — including jurors, witnesses, litigants, and interpreters. The brochure should emphasize the commitment of the Chief Justice and the President of the Oregon State Bar to achieving gender fairness and should advise lay participants of available complaint processes (both formal and informal) in the event that they experience or observe unfair treatment. (Such information could, instead, be included in a brochure on other issues of fairness.)

4. The Oregon State Bar should:

a. continue to conduct regular educational programs for lawyers on the importance of professionalism, including the avoidance of gender-biased behavior and other forms of biased behavior;

b. in continuing legal education programs for litigators, explore the line between appropriate and inappropriate uses of gender (and other personal characteristics) in litigation strategy; and

c. continue to educate the public about the workings of the legal system, in an effort to raise the general level of public understanding about the legal system and to emphasize its commitment to fairness.

5. The Oregon State Bar's Committee on Uniform Civil Jury Instructions should:

- by January 1, 2000, consider whether to expand the caveat in UCJI No. 5.01, which provides that "you must not be influenced in any degree by personal feelings or sympathy for, or prejudice against, any party to this case." The Committee should consider whether it is advisable to give more explicit guidance on issues of fairness or to refer to other participants beyond the parties (such as a party's lawyer).

6. Law firms, lawyers' organizations, judicial organizations, and other organizations composed of regular participants in the administration of justice (such as interpreters) should:

a. discuss the issues raised in this report; and

b. provide continuing education for their members on methods of achieving fairness.

7. The Access to Justice for All Committee should:

- assist the Office of the State Court Administrator and the Oregon State Bar in improving educational curricula to help judges and lawyers identify and avoid gender bias.

8. The Access to Justice for All Committee, in coordination with trial court administrators, county officials, and other interested persons, should:

- implement the recommendations of the Multnomah Bar Association's CourtCare Advisory Committee

a. to establish child care at courthouses for jurors, witnesses, and parties during proceedings and to form a new committee to oversee that effort; and

b. to begin a statewide feasibility study by January 1, 1999, respecting on-site child care at courthouses.

9. The Access to Justice for All Committee, working together with the Information Systems Division of the Office of the State Court Administrator, trial court administrators, and other appropriate individuals and organizations, should:

- assess the adequacy of the Civil Action Data form to permit analysis of gender fairness and intersectionality issues and recommend appropriate changes.

10. The counties, with the assistance of the Access to Justice for All Committee, should:

- by January 1, 2001, study whether and, if so, how gender affects the treatment of participants in the judicial system by court security personnel and procedures, and recommend any appropriate changes. This research should focus on participants, such as jurors, litigants, lawyers, and witnesses, who are not employees with security passes.

11. The Chief Justice, trial court administrators, and other appropriate individuals should:

- study whether and, if so, to what extent jurors experience or perceive unfairness based on gender during their jury duty and, more specifically, while participating in voir dire and while deciding cases.

12. The Chief Justice and the Oregon State Bar should:

- study whether the gender of participants influences civil litigation, either substantively or procedurally. This research should build on the preliminary work of the Task Force.

13. The Governor should:

- by January 1, 1999, form a group to study whether and, if so, how gender affects the work of administrative agencies in the performance of their adjudicative functions. Many citizens and lawyers participate in hearings before administrative agencies and in appeals of administrative decisions in the contexts of, for example, workers' compensation benefits and unemployment benefits. Administrative matters affect thousands of Oregonians, particularly those of low or moderate income, perhaps resulting in additional intersectionality concerns.

DOMESTIC RELATIONS CASES

"We welcome this group. We need to be examined. We need to grow. We need to increase our gender awareness. We have problems; everybody does in this area.

"And we're lawyers. We're not psychiatrists, we're not psychologists; we're judges and lawyers. And you know that and I know that, but not everybody in the world seems to know that."[1]

A. INTRODUCTION AND OVERVIEW

Most Oregonians have little contact with the court system. When they do, it is most likely to be in matters involving traffic offenses, domestic relations, or domestic violence. Few types of court proceedings engender more heightened emotion or have more lasting effect than marital dissolutions or hearings related to domestic violence, particularly when they involve children. During the public hearings, both men and women testified that they perceived the courts to be gender-biased in matters related to domestic relations and domestic violence.

We conclude that both men and women justifiably perceive some areas of unfairness in Oregon state courts in cases involving domestic relations and domestic violence. Women tend to receive financial dispositions in marital dissolutions that ultimately leave them at a long-term economic disadvantage relative to men. Because so many women are awarded custody of minor children and so many male obligors do not pay some or all of the support ordered, the economic injury to women and their children is compounded. Both men and women of low income are disadvantaged by the lack of available legal services and effective access to the courts in Oregon; this is particularly so for non-English speaking persons. Litigants who are victims of domestic violence, primarily women, confront lawyers, judges, and law enforcement personnel who are not sufficiently trained or experienced concerning domestic violence to deal effectively with the issues presented by these litigants. Finally, male victims of domestic violence are more likely to be disbelieved or denied relief than are female victims.

B. ISSUES STUDIED

We studied (1) whether and, if so, how gender affects the ability to pursue domestic relations litigation and the results thereof; and (2) whether and, if so, how gender affects the treatment accorded parties in domestic violence cases. Specifically, we focused on gender inequities, real or perceived, in matters involving:

- child custody and visitation,
- child support,
- spousal support,
- property division,
- Family Abuse Prevention Act (FAPA)[2] restraining orders, and
- marital dissolution cases.

C. METHODS OF STUDY

Members of the Domestic Relations work group brought a range of expertise to the tasks at hand. Members included domestic relations lawyers, prosecutors, a legal services lawyer, a domestic violence expert, a child support enforcement lawyer, and a support enforcement division staff person. A male state trial court judge chaired the group. A total of two men and six women served on the work group, including two Asian-Americans and one Hispanic. Volunteers from other professional disciplines helped the work group accomplish selected tasks.

We settled on six primary means of acquiring information:

1. Public hearings and written comments.
2. The survey of lawyers. (Nearly 50% of the lawyers who responded either did not answer the questions concerning domestic relations cases or stated, "I don't know.")
3. The survey of judges.
4. Marital dissolution case study. We reviewed a representative sample of dissolution cases terminated by judgment in 1995 and 1996 in 11 Oregon counties.[3] We divided the state into four quadrants for comparison purposes: Northeast (Deschutes County only[4]), Northwest (Multnomah, Yamhill, Marion, Polk, and Lane Counties), Southeast (Harney and Malheur

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[1] Testimony of a male judge at the Medford public hearing, Sept 25, 1996.

[2] ORS 107.700 *et seq.*

Counties), and Southwest (Curry, Coos, and Douglas Counties).

5. Review of other national, state, and local studies and literature.

6. Review of a "courtwatch" study conducted in three Oregon counties.

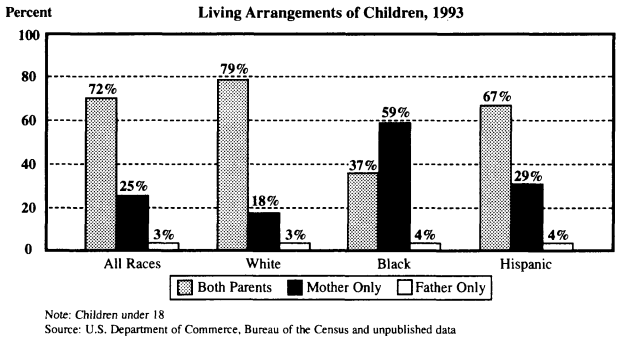
D. FINDINGS

Much of the testimony presented at each of the public hearings related to domestic relations or domestic violence. Testimony was offered in person by 93 people (60 women and 33 men). Of those who testified, 32 persons (21 men and 11 women) offered testimony concerning issues primarily related to domestic relations, and 28 (6 men and 22 women) offered testimony concerning issues primarily related to domestic violence. We also received written materials from many others.

1. Background: Demographic Trends and Systemic Intervention

The United States is experiencing high rates of separation, divorce,[5] and domestic violence,[6] and Oregon is no exception. It is little wonder, then, that so many witnesses at the public hearings had experienced the justice system through a dissolution or domestic violence-related proceeding.

The percentage of children in Oregon who live with one parent nearly doubled from 1970 (14.7%) to 1993



Note: Children under 18
Source: U.S. Department of Commerce, Bureau of the Census and unpublished data

(28%). The distribution of these children among parents is extremely disproportional by both race and gender:

Far more white children live in two-parent households than do either African-American or Hispanic children. Women are vastly over-represented in the ratio of one-parent households, and this is especially true for African-American women. Oregon mirrors these trends.[7] These statistics are, however, only one part of the picture.

In the two decades between 1970 and 1990, wages were stagnant or declining, while family costs were rising.[8] According to an Oregon study, "all racial and ethnic groups have the same overall pattern of household income variation. Married couple families have the highest income, followed by male heads of household with no children at home and female heads of household with no children. Men with children are next, while women with children consistently have the

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[3] The specific findings from this survey, which are noted in later sections of this chapter according to subject matter, are categorized as "very significant" (*i.e.*, very unlikely to have occurred by random chance), "moderately significant," "slightly significant," or "insignificant."

[4] Other counties in the northeast quadrant of the state did not participate in our study.

[5] Approximately 50% of first marriages and 62% of second marriages in Oregon end in divorce. The divorce rate has tripled since 1960. *Testimony, Oregon Legislature*, Nov 18, 1996 (statement of Hugh McIsaac, Secretary of the Oregon Task Force on Family Law). Although both marriage and divorce rates in the United States have dropped in the last few years, in Oregon the divorce rate increased from 4.6 per thousand in 1970 to a high of 6.9 per thousand in the mid-1970s and is now at 4.9 per thousand. In 1995, the rates for divorce in Oregon varied widely, from a low of 3.5 per thousand in Union County to a high of 7.2 per thousand in Baker and Crook Counties. Oregon Health Division, Center for Health Statistics, July 1996.

[6] National surveys in 1975 and 1985 found high levels of domestic violence. A national probability sample of more than 2,000 families allowed researchers to estimate that, in the prior year, over 1.7 million Americans had faced a spouse wielding a knife or gun and that well over 2 million had experienced a severe beating at the hands of a spouse. Murray A. Straus & Richard J. Gelles, *Societal Change and Change in Family Violence from 1975 to 1985 as Revealed by Two National Surveys*, 48 J MARRIAGE & FAM 465 (1986). The Surgeon General of the United States has reported that the leading cause of injury to women between the ages of 15 to 44 is domestic violence. In 95% of all domestic violence assaults, crimes are committed by men against women. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE (1983).

[7] In Oregon, 5.6% of all households are headed by a white female with minor children, 5.7% of all households are headed by an Asian/Pacific Islander female with minor children, 9.5% of all households are headed by a Hispanic female with minor children, 13.8% of all households are headed by a Native American female with minor children, and 17.7% of all households are headed by an African-American female with minor children. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS POPULATION (General Population Characteristics, Table 43); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1980 CENSUS POPULATION (General Characteristics, Oregon Table 21, and Summary File Tape 1, Oregon).

[8] For married couples, the median price of a one-family house increased 23 times as fast, health care four times as fast, and consumption twice as fast as median income. U.S. COMM'N ON CHILD AND FAMILY WELFARE, PARENTING OUR CHILDREN: IN THE BEST INTEREST OF THE NATION 13-14 (1996).

lowest incomes."[9] The percentage of children living with single mothers in Oregon increased from 5% in 1960 to 15% in 1990.[10]

Children in single-parent families are much more likely to be poor than are children in two-parent families.[11] Non-custodial parents' failure to pay support is a significant contributor to the low incomes of single-parent families. In 1991, 60% of the 9.9 million women and about 80% of the 1.6 million men who were custodial parents received no child support. Only about 52% of the men and 43% of the women to whom child support was owed received full payment.[12] The consequences of the failure to receive support are far more severe for women than for men[13] and help to contribute to the well-documented and widely recognized "feminization of poverty."

Children who live with one parent often have limited contact with their other parent. The National Survey of Children found that 49% of the children in its national sample who lived with only one of their parents had not seen their non-residential parent in the preceding year, and only one in six children averaged one or more contacts per week.[14] As the United States Commission on Child & Family Welfare pointed out, "There are. . . complex reasons why men lose contact with their children, from apathy to a belief that the system is biased against them."[15] Regardless of the reasons, the consequences of a non-custodial parent's absence may be detrimental to the child, as children are more likely to suffer both from economic disadvantage and from the emotional and developmental scars of neglect. However, in some cases, judges must weigh the benefits of promoting contact between children and their parents against the safety risks presented when domestic violence is an issue in the family.[16]

2. The Role of the Courts

When married couples with children divorce, the courts oversee and, not infrequently, decide the arrangements for custody, visitation, and support of the children. In 1995, courts decided custody for 12,991 children in Oregon.[17] In the great majority of cases, custody is not contested.[18] Of those cases in which the parents did not contest custody, 65.6% of children were placed in the sole custody of the mother and 11% were placed with their fathers.[19] The remainder were placed in joint custody.

In Oregon, with the important exception of mandatory mediation[20] in child-custody cases, limited services are available to divorcing or separating parents outside the courtroom to help them work out what is best for the children. Few counties in Oregon offer formalized services to educate families before the relationship founders and to help them cope during and after dissolution of the marriage.

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[9] Center For The Study Of Women In Society & The Labor Education And Research Center, University Of Oregon, Women In Oregon: A Profile From The 1990 Census 112 (1993) ("WOMEN IN OREGON").

[10] *Id.* at 30.

[11] Nationwide, 9% of the children in families headed by a married couple, 23% of the children in families headed by a man, and 46% of the children in families headed by a woman are poor. The 1990 U.S. Census reflected that 60.9% of households in Oregon headed by a female with related children under 5 years, and 40% (27,346 single female-headed households) with children under 18 years, fell below the poverty line. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *Income, Poverty and Valuation of Noncash Benefits: 1993*, CURRENT POPULATION REP, at Tables D-6 and D-22 (Series P60-18, 1995). An additional 2,440 Oregon households headed by a single female with no children fell below the poverty line. OREGON HOUSING AND COMMUNITY SERVS DEP'T, OREGON CENSUS ABSTRACT, CENSUS 1990 (1992).

[12] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *Child Support for Custodial Mothers and Fathers: 1991*, CURRENT POPULATION REP 2, 15 (Series P60-187). A computer sample of 99,463 Oregon child support cases, done by the Oregon Child Support Enforcement Division at our request, disclosed that approximately 30% of males and 21% of females ordered to pay child support actually pay the full amount.

[13] Five and nine-tenths million women, but only 1.3 million men do not receive child support. In addition, because women's incomes are generally lower, the economic effect of not receiving support is greater, on average, in their households. U.S. COMM'N ON CHILD AND FAMILY WELFARE, *supra* note 8, at 15. In 1990, in Oregon, 40% of female-headed households with children had incomes below the poverty line. WOMEN IN OREGON, *supra* note 9, at 130-31.

[14] Frank F. Furstenberg, Jr., et al, *The Life Course of Children of Divorce: Marital Disruption and Parental Contact*, 48 AM SOC REV 656 (1983).

[15] U.S. COMM'N ON CHILD AND FAMILY WELFARE, *supra* note 8, at 13.

[16] As violence against women becomes more severe and more frequent in the home, children experience a 300% increase in physical violence by the male batterer. Murray A. Straus & Richard J. Gelles, PHYSICAL VIOLENCE IN AMERICAN FAMILIES (1990).

[17] Oregon Health Division, Center for Health Statistics, July 1996.

[18] NATIONAL CTR OF HEALTH STATISTICS, U.S. DEP'T OF HEALTH AND HUMAN SERVS, MONTHLY VITAL STATISTICS REPORT, Vol 43, No 9 (Supp Mar 22, 1995).

[19] OREGON VITAL STATISTICS, DIVORCE FACT SHEET: OREGON OCCURRENCE.

[20] *See* ORS 107.755 *et seq.*

Unlike most other types of cases, marital dissolutions involve an equal number of men and women, and a victory or defeat in court is easily susceptible to the perception that the result is gender-based. Inevitably, it seems, dissolutions involve issues inextricably related to generally perceived gender roles and responsibilities.

The reasons why litigants may feel that they are not treated fairly in family law cases vary by gender. Men's perceptions may be related to the fact that men do not receive custody of their children as frequently as women.[21] Women's perceptions may be related to the fact that they often receive monetary dispositions that place them at a relative financial disadvantage.

3. Surveys of Lawyers and Judges: General Information

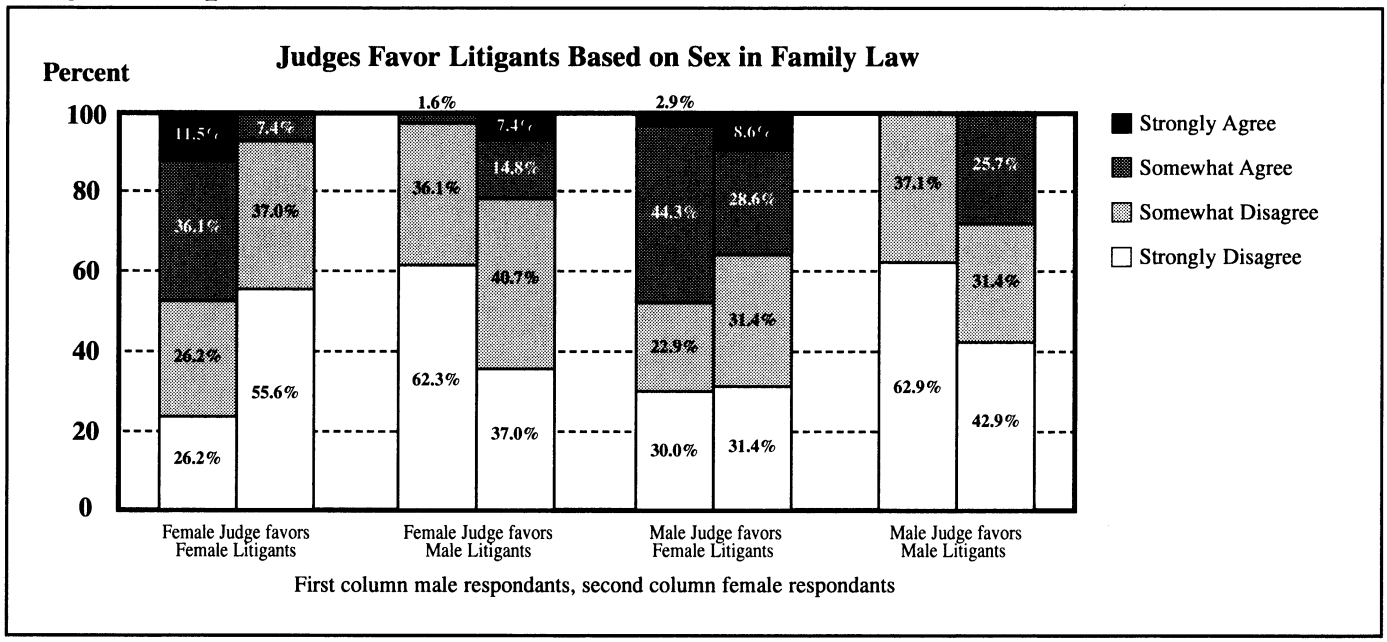
We surveyed both lawyers and judges concerning a wide variety of subjects, including domestic relations and domestic violence. Of those responding lawyers who practice family law, 68.7% were men and 30.5% were women.[22]

More than 60% of both male and female judges said that they had dealt with family law cases in the preceding 12 months. We asked judges whether they perceive that judges favor one sex over the other in family law matters. Generally speaking, most judges do not believe that such bias exists. Interestingly, not one judge, male or female, believed that female judges tend to favor male family law litigants. On the other hand, nearly one-fifth (18%) of all male judges (but only one female judge) stated a belief that male judges tend to favor female family law litigants.

The survey of lawyers elicited somewhat different responses on this issue of gender-based bias in the judiciary. For instance, 47.5% of male, but only 7% of female, lawyers with an opinion indicated that they "somewhat or strongly" agreed that female judges favor women in family law cases. Concerning the converse issue, although no male respondents were of the opinion that male judges favor men in family law cases, 25.7% of female and 23.5% of divorced lawyers with an opinion indicated that they "somewhat" agreed that male judges favor men in family law cases. Female lawyers (22.2%) and divorced lawyers (25%) were much more likely than their non-divorced male counterparts (1.6%) to believe that female judges favor men in family law cases. Of those who expressed an opinion, many more male lawyers (47.1%) than their female (37.1%) or divorced (29.4%) counterparts believed that male judges favor women in family law cases.

The following charts summarize the survey responses of judges and lawyers, concerning perceptions of favoritism by male and female judges toward male and female domestic relations litigants:

Lawyers' Responses



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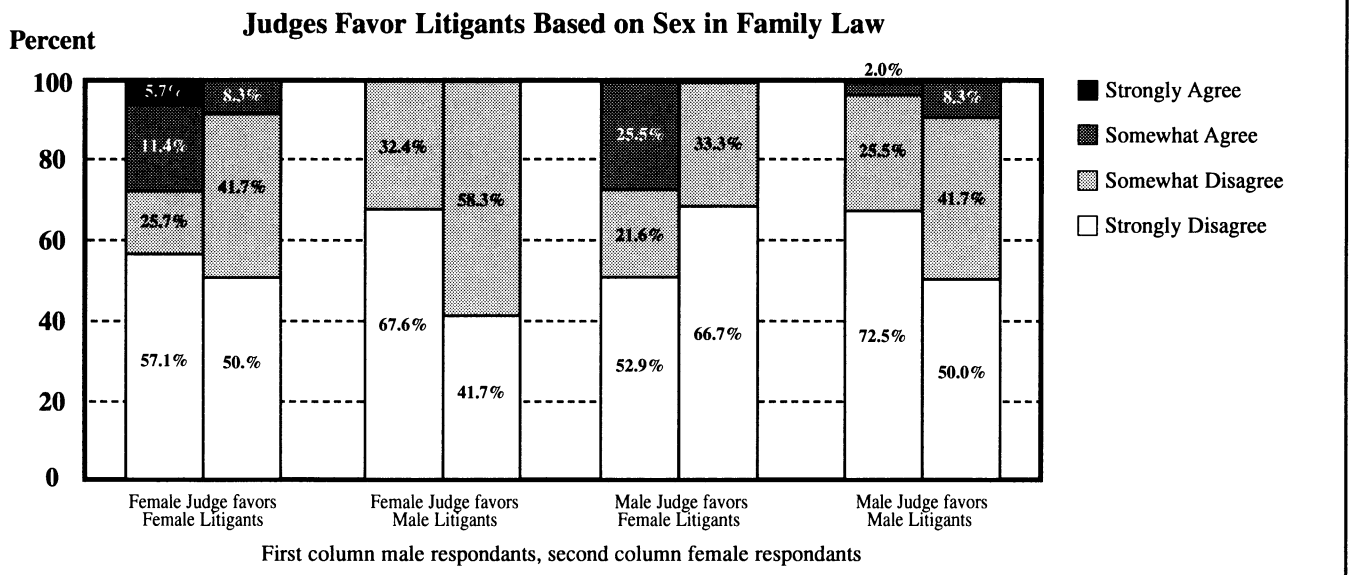
[21] On May 9, 1995, Karen Czapanskiy, Professor of Law at the University of Maryland, testifying before the U.S. Commission on Child and Family Welfare, stated that her analysis of studies of gender bias in the courts conducted in about 60% of the states demonstrated that, for the most part, custody awards in favor of women did not result from judicial bias, but rather from the fact that women, even those who work outside the home, are the primary caregivers of the children before divorce.

[22] These percentages approximately reflect the percentages of men (74%) and women (26%) in the Oregon State Bar and the composition, by gender, of the OSB Family and Juvenile Law Section. That section is 66.2% male and 33.7% female.

Judges' Responses



The judicial survey also included questions concerning domestic violence. Both male and female judges tended to agree "somewhat or strongly" that it is appropriate for the courts to issue restraining orders. Male judges were almost as likely (86%) as female judges (93%) to believe that the legal process does not show too much sympathy for women who allege domestic abuse. Similar percentages of male (87.5%) and female (93%) judges believed that the legal process does not show too much sympathy for men who allege domestic abuse. Four male judges and one female judge agreed with the statement that "judges should not issue restraining orders to victims of domestic violence who repeatedly return to abusive relationships."

By contrast, a large percentage of lawyers with an opinion (40.9%) believed that the legal process shows too much sympathy for women who allege domestic abuse. Responses to this question revealed some important differences based on demographics, particularly gender. Although there was some variation in the data based on urban (35.4%) and rural (45.8%) differences, age and years in practice were even more telling. The longer a lawyer had been admitted to the bar, the more likely that lawyer was to believe that the legal process shows too much sympathy for women who return to abusive situations.[23] The most significant differences in rates of agreement with the "too-much-sympathy" proposition were between male (49.3%) and female (25%) lawyers. Only 20% of male lawyers, but nearly 64% of female lawyers with an opinion, "strongly disagreed" that the legal process shows too much sympathy to women who allege domestic abuse. Nearly 40% of those who "strongly disagreed" were between 40 and 49 years of age. An additional 26% were between 30 and 39 years of age. Approximately 20% of both male and female lawyers agreed that judges should not issue FAPA restraining order to domestic violence victims who repeatedly return to abusive relationships.

In short, women appear to be much more sympathetic to women's claims of domestic abuse in the legal process than are men. With respect to claims by men of domestic abuse, overwhelming majorities of both male (94%) and female (85%) lawyers with an opinion disagreed that the legal process shows too much sympathy.

4. Child Custody and Visitation

Both mothers and fathers voiced concerns at the public hearings about gender bias in court decisions related to child custody. The nature of these concerns was different, albeit fairly consistent, for men and for women. Men perceived that both male and female judges were biased in favor of mothers in custody decisions and that that bias tends to have the effect of largely excluding fathers from their children's lives. For instance, one divorced male witness complained that gender stereotyping was so pervasive that, even when a mother was unfit to have custody of her children, the court would not change custody to an otherwise fit and professionally employed father.[24] Mothers, on the other hand, repeatedly testified to the apparent lack of

[23] Not surprisingly, older lawyers are predominantly male. Among survey respondents, about 90% (154) of the lawyers in practice 20 years or more were male, and about 10% (15) were female.

understanding by their own lawyers and by the court for concerns regarding the safety of their children. There was a widespread belief that this disregard of the safety of the children, as related to domestic violence and abuse, was gender-based.[25]

Nearly identical percentages of male and female judges (38% of each) believed that trial courts are biased against men in child custody matters. Far fewer believed that trial courts are biased against women in such matters. One exception to this perception of lack of bias may arise when the children's last name is at issue. In the January 1998 OSB *Bulletin*, a female lawyer described her recent court experience litigating that issue. She recounted how the male judge hearing the matter insisted that a "man's children need to have his last name. A man has to have a connection with his children."[26] The judge stated that "It's just crazy for a woman's name to be the children's last name." The judge's final argument, "echoed by the opposing counsel, was that the father paid child support and was 'entitled' to insist on the name change."

Regarding possible appellate court bias, 13.7% of male judges and 21.1% of female judges believed that such bias exists against male litigants in child custody matters. As for bias against female litigants, only three male judges and one female judge believed that such bias exists in child custody matters.

We also surveyed judicial perceptions regarding any domestic relations bias reflected in the statutes and regulations regarding child custody. Only insignificant numbers of male judges, and no female judges, were of the opinion that the statutes and regulations reflect bias against men or women regarding child custody.

Of particular interest in the lawyer survey were the substantial responses regarding bias against male litigants in the trial court on child-custody matters. More than 72% of male respondents "strongly" or "somewhat strongly" believed that there is bias against men in the trial courts. Forty-three percent of female respondents felt similarly.

Overwhelming percentages of both male (96%) and female (91%) lawyers with an opinion did not believe that trial courts are biased against women in child-custody proceedings. Similarly, there appears to be very little perception among lawyers of either sex that there is bias against men or women in the appellate courts or in the child-custody statutes or regulations.

5. Child Support

a. Survey Results

Somewhat surprisingly, there was little testimony at the public hearings concerning child support. What testimony there was focused mainly on some men's perceptions that the courts place them in a culturally pre-conceived, non-involved "gender role" regardless of their true place in their children's lives. These men felt that the courts viewed them as "cash cows" whose sole function in post-dissolution families is to provide money without regard to their role as "fathers." A female legal services lawyer testified at the Medford public hearing to a different perspective about gender and child support:

> *"Locally, I have heard a presiding judge in —— County state when he was deciding [a] child support case[, state] to a man, he said quote, 'There's nothing I hate more than having to write a check to my ex-wife for child support.' This remark seemed to me to undermine a whole lot more than the respect for women but certainly for the judicial system and for the obligations to provide for child support for the children."*

Although a significant minority of male and female judges (nearly one-quarter of each) believed that there is trial court bias against men on child support issues, very few judges believed that such bias exists against women. Similarly, approximately 18% of both male and female judges responding were of the opinion that the appellate courts are biased against men regarding child support, yet very few judges believed that appellate courts evince bias against women regarding child-support awards. Statistically insignificant percentages of judges believed that Oregon's statutes and regulations regarding child support are biased against either men or women.

Among lawyers, the perception of judicial bias regarding child support issues was much greater. Of those expressing an opinion, more than one-quarter of female lawyers and nearly one-half of male lawyers believed that there is trial court bias against men. Of

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[24] Testimony of male witness at the Medford public hearing, Sept 25, 1996.

[25] A scathing written comment on this subject was directed at a female judge's decision to give custody of a child to an acknowledged abusive father. The judge is quoted as saying: "Although the father has an anger problem and has sought minimal help, and while his testimony reflects that he is the epitome of an abuser, that still does not answer the ultimate question as to what is in the best interest of the child."

[26] Rose L. Hubbard, *Gender Discrimination — It's Still With Us*, OR ST B BULL, Jan 1998, at 70. The three children who were the subject of the dispute each had a different last name during the parents' marriage: "the first child had the last name of the mother, the second child had a hyphenated last name, and the third child had the last name of the father." *Id.* According to the judge, it is "natural for a man's children to have his last name." *Id.* Opposing counsel reportedly shared the judge's opinion, stating in court that "he would 'kill' his ex-wife before he ever allowed his child to be called by his ex-wife's last name." Her gender notwithstanding, the judge might have permitted the children to keep their current names "if the mother had an 'important' last name or an 'important' or 'monied' family." *Id.*

those lawyers who "strongly agree[d]" that there is such bias, 90% were men. Overwhelming majorities of male and female lawyers with an opinion did not believe that trial courts are biased against women with respect to child support. Of those who did perceive bias, however, female lawyers outnumbered male lawyers three to one.

Lawyers of both sexes overwhelmingly stated that they "did not know" whether there is appellate court bias against male or female litigants regarding child support.[27] Of those who expressed an opinion, it is of some interest to note that more than one-quarter (26.9%) of male lawyers said they "somewhat or strongly" agree that the appellate courts are biased against men regarding child support, whereas only 5% of female lawyers concurred.

b. Administrative Procedures

We included Oregon's administrative child-support procedures and practices in our study. In 1979, the Oregon legislature authorized the use of the Administrative Procedures Act to establish child-support orders when the state was paying public assistance for a child.[28] Largely driven by federal directives aimed at improving child support collection rates, the next two decades produced a comprehensive administrative child support system in Oregon. By the end of the 1995 legislative session, agency processes were available for the establishment of paternity; establishment of child support orders; modification of child support orders; and enforcement of child support orders. Administrative rules supplement other remedies available under Oregon law.[29]

Paternity may be established by administrative or judicial proceedings. Federal law requires that states make paternity and child-support services available to everyone needing them, and Oregon's agencies have adopted an administrative rule clarifying that men who wish to establish paternity for a child may apply for these services. Women also may apply for services, regardless of public assistance status, and seek to establish paternity for their children. Likewise, either mothers or fathers may move for modification to increase or decrease a support award in the judicial or administrative arenas.[30]

Women and men are parties to Oregon's administrative child-support proceedings and have an opportunity to participate fully regardless of public assistance status, geographic location, or representation by legal counsel. Most hearings are conducted telephonically, enabling parents to participate regardless of geographic location. The state provides translation services for both telephonic communications and written documents. In contested proceedings, men and women may retain and be represented by private lawyers.

The amount of the child-support award is determined by a formula, which creates a rebuttable presumption applicable in any judicial or administrative proceeding to establish support. ORS 25.280. Oregon's guidelines are intended to be gender-neutral and seek to establish a support amount that entitles the child to benefit from the income of both parents to the same extent that the child would have benefited had the family unit remained intact or had there been an intact family unit consisting of both parents and the child.[31] This standard reflects a gender-neutral public policy choice favoring the active support of children.

In the area of support enforcement, the overwhelming majority of obligors, and therefore delinquent parents, are males. This fact certainly has a disproportionately negative effect on women and the children in their custody. Some fathers maintain that non-custodial parents do not pay support because of lack of access to parenting time with their children, and they argue that the legal system has not been as zealous in finding ways to require shared parenting time as it has been in child support collection. This disparity in emphasis is fiscally driven: The federal government pays two-thirds of the cost of the states' child support programs in order to reduce welfare costs. The federal government has not demonstrated a commensurate interest in parental access issues, although recent federal welfare reform legislation allocates minimal amounts to states for pilot programs in this area.[32] This failure has, of course, a disproportionately negative effect on males.

For purposes of this study, the Oregon Department of Human Resources' Accounting Unit identified 99,463 Oregon child support cases in which there was a court order for monthly child support in effect. Of those

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[27] Sixty-seven percent of the male and 80% of the female lawyers answered that they "didn't know" whether there was such bias.

[28] ORS 416.400 to 416.470.

[29] *See* ORS chapter 107.

[30] Only the State of Oregon's Title IV-D agencies may seek modification under a "review and adjustment procedure." ORS 25.287. "Title IV-D" refers to the section of the federal Social Security Act that sets that requirement for the child support programs that states must administer as a condition of receiving federal funds for welfare under Title IV-A of the Act (formerly Aid to Dependent Children, now Temporary Assistance to Needy Families). *See* 42 USC § 651 *et seq* (1997).

[31] At two public hearings, men made negative comments about their perception that support was calculated in "earnings potential" instead of true earnings.

[32] *See* 42 USC § 669(B) (1997).

cases, 91% of the non-custodial parents were male, and 9% were female. Approximately 30% of the men and 21% of the women ordered to pay support actually paid the full court-ordered amount each month; another 11% of the men and 6% of the women made at least a partial support payment each month.

6. Spousal Support

Testimony at the public hearings revealed a gender-based difference of perception on spousal support issues. Women, far more than men, believed that judges do not sufficiently value the contribution that homemakers make to the family.[33] Women stated that they receive too little spousal support and that its duration is insufficient to provide them with an opportunity to achieve financial independence.

When asked whether they perceive bias against men in the trial courts on issues of spousal support, 37% of male judges and 42% of female judges who had an opinion answered affirmatively. When we asked lawyers the same question, about two-thirds of male lawyers and slightly more than one-half of female lawyers who responded perceived such bias against men. As for bias against women in the trial courts regarding spousal support, nearly 17% of both male and female judges with an opinion believed that such bias exists. However, among lawyers, significant gender differences became apparent: 53% of female lawyers but only 9% of male lawyers said that they "somewhat or strongly" agreed that such bias exists. In other words, male lawyers believed overwhelmingly that female litigants are treated fairly in spousal support decisions in the trial courts; a minority of female lawyers so believed. One lawyer suggested that neither the trial courts nor the appellate courts are inclined to award spousal support to a man (unless he has a disability) in circumstances in which it would be awarded if the person requesting it were a woman.[34]

We also sought to identify judges' perceptions concerning bias in the appellate courts. More than one-quarter of responding female judges were of the opinion that there is bias against men in the appellate courts on the issue of spousal support; approximately 15% of responding male judges shared this belief. Only 5% of both male and female judges responding expressed a belief that statutes or regulations reflect a bias against women on the issue of spousal support. Among lawyers, 27.3% of female lawyers expressing an opinion indicated that they "somewhat or strongly" agree that the statutes and regulations are biased against women regarding spousal support, yet only 5% of male lawyers with an opinion shared that view. When asked whether Oregon's statutes and regulations reflect bias against men regarding spousal support, almost 10% of male judges but only one female judge answered affirmatively.

Interestingly, an analysis of the survey of dissolution files reveals no statistically significant findings as to awards of permanent spousal support — by region, judge's sex, or litigant's income. Those findings suggest that permanent spousal support awards are unbiased with respect to the variables mentioned. However, with respect to non-permanent spousal support, female judges provide larger awards, on average, than do male judges.[35]

7. Property Division

At the public hearings, several women reported a belief that the property division in their dissolutions were substantially disproportionate in favor of the men involved. Each of those women firmly believed that the judge's gender-role stereotyping about the man as the family's financial manager played a central role in unequal awards of property. Lawyers who testified expressed the opinion that, even when the woman is given the "larger half" of the property, the award is not sufficient to offset the long-term disparity in income or potential for income.

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[33] For example, a female domestic relations lawyer testified to the Task Force that, in her opinion, "women who stay at home are viewed as parasites on society. And, that's particularly true when they get to the courtroom." Testimony at Eugene public hearing, Dec 13, 1996. That at least some people do view women in this way was confirmed in a letter to Chief Justice Carson, in which a male Lane County lawyer opined:

> "In the overwhelming majority of cases . . . the husbands end up losing half of everything they have truly worked for to a wife who has had the luxury of staying home and raising her children while taking classes or going to the country club, or to the fitness center, or [to] whatever social activity they are involved in, or simply staying home while the children are in school. Once she files for divorce, she then claims that she has somehow 'earned' half of her husband's six or seven figure business because she 'endured' the relative luxury of staying at home, working at home with or without the children, something that most dads would love to do."

Letter to Chief Justice Carson and the Oregon Survey Research Laboratory, responding to the lawyer survey.

[34] Testimony at the Portland public hearing, Oct. 21, 1996, from a lawyer who practices primarily in the area of family law, citing a Court of Appeals decision (*Maidel and Maidel*, 108 Or App 702, 816 P2d 1206 (1991)) reversing an award of spousal support to a male.

[35] The probability of such an occurrence's happening by chance was determined to be .0401. Oregon Survey Research Laboratory and Task Force on Gender Fairness *Dissolution File Survey*, 1997. That is, a trial judge's gender is a significant variable in the award of non-permanent spousal support.

Among the 55 male judges and 14 female judges who responded to the survey question, 12 of the men and just one of the women expressed the belief that there is bias in the trial courts against men on property division matters. Among lawyers, fully one-third of the male lawyers with an opinion — but not one female lawyer — believed that such bias exists. In contrast, regarding bias against women in the division of property, more than 40% of female lawyers and fewer than 5% of male lawyers believed that such bias exists.

Regarding appellate court decisions, three male and three female judges believed that a bias exists against female litigants regarding property division matters, and almost no respondents perceived appellate court bias against male litigants on property division issues. Among the lawyers, not one man believed that there was bias against female litigants in the appellate courts regarding property division. Significantly, however, the 10 female lawyers (25%) who expressed an opinion were equally divided on this subject. It would appear that female lawyers are much more convinced than male lawyers that there is bias against women in both the trial and appellate courts regarding property division.

Regarding possible gender bias or property division matters in Oregon's statutes and regulations, only four male judges and no female judges perceived bias against men. On the other hand, fully 22% of the male judges and nearly 36% of the female judges perceived bias against women in the statutes and regulations. Among lawyers, responding female lawyers also were much more likely (21.8%) than their male counterparts (8.6%) to say that they "somewhat or strongly" agreed that the statutes and regulations are biased against women regarding property distribution.

8. Domestic Violence

The public hearings conducted throughout Oregon revealed consistent, pervasive, and wide-ranging concerns about domestic violence. The witnesses' perceptions of unfairness focused principally on the following problems:

- lack of community resources to combat domestic violence;
- police agencies that do not enforce mandatory arrest laws, and police officers who are uninformed about or insensitive to domestic violence;[36]
- judges, lawyers, and staff who are uninformed, misinformed, or insensitive to domestic violence issues and dynamics;
- inadequate or non-existent bilingual court processes for domestic violence proceedings;
- lack of legal representation for victims of domestic violence, particularly after recent cutbacks of federal funds supporting legal services programs.

Considerable testimony at the public hearings suggested that, to the extent that a marital dissolution case involves both children and domestic violence, courts often become an unintentional pawn in the battle by the abuser to continue control and domination of the victim. Testimony also reflected a widespread belief and experience that a substantial lack of understanding exists, in both the domestic relations bar and among judges, about the dynamics of domestic violence as it relates to decision-making in dissolution cases. At the Medford public hearing, a male trial judge commented:

> *"The judges had a meeting...three years, four years [ago], at a judicial conference about the family violence, domestic violence and talking about some of the — and the person that was presenting it felt very strongly about it. And there was reaction among the judiciary that thought this person seemed like such an advocate, maybe they seemed like an advocate because. . .the judiciary were not as aware of gender fairness....*
>
> *"We need more education like that. The judges continually need to be reminded....I think it needs to go to the Bar, too, for the practitioners that are appearing before the court understanding these [battered woman] syndromes and being sensitive to them.*
>
> *"It seems to me that it's very complex and needs a lot of education and we need to keep hearing about it."*[37]

Most FAPA complaints in Oregon are filed by women to protect themselves, or themselves and their children.[38] Witnesses contended that judges, lawyers, and police officers often appear to be unaware or uninformed concerning the practical safety considerations in these situations.[39] Witnesses also voiced concerns that lawyers and litigants, male and female, abuse the FAPA process as a "preemptive strike" in marital dissolutions as a tactic to discredit the other party, especially in custody battles, and that judges are not screening cases adequately.

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[36] The conduct of police and other law enforcement officers was outside the scope of our study. However, witnesses in several of the rural counties expressed concern that local law enforcement officers do not fully and fairly enforce domestic violence laws, including Family Abuse Prevention Act (FAPA) restraining orders. Recent statistics published by the Oregon Department of State Police (March 1997) support those complaints. In Malheur and Umatilla Counties, for example, the rates of domestic disturbance incidents-to-arrests were only 54.15% and 59.24%, respectively. The rates of arrests-to-restraining order violations were 15.6% and 33.3%, respectively. In other counties, such as Lane and Washington, the incidents-to-arrest rates were 98.4% and 92.78%, respectively.

When we asked judges about domestic violence issues, some differences in attitude between male and female judges emerged. For example, 93% of female judges, but only 70% of male, judges, "strongly disagreed" with the proposition that judges should not issue restraining orders to women who repeatedly return to their abusers. Nearly twice as many male judges (49.3%) as female judges (25%) who expressed an opinion believed that the legal process shows too much sympathy for women who allege domestic abuse. When asked whether, in their opinion, "the legal process shows too much sympathy to men who allege domestic abuse," twice as many female judges (15%; 4 of 27) as male judges (6.3%; 4 of 64) responding to the survey agreed with the statement.

Among lawyers, nearly one-half of male lawyers, but only one-quarter of female lawyers with an opinion, said that the legal process shows too much sympathy for women who allege domestic abuse. Even more graphically, only 20.5% of male lawyers, but 63.8% of female lawyers with an opinion, said that they "strongly disagree[d]" with this proposition. Although an overwhelming majority of all lawyers rejected the proposition that the legal process shows too much sympathy for men accused of committing domestic violence, 15% of female lawyers and 6% of male lawyers with an opinion agreed with the proposition.

A fundamental concern, raised by witnesses and experts alike, is the lack of access to legal representation in domestic violence matters.[40] This problem disproportionately (but not exclusively) harms women[41] and is particularly pernicious in cases involving domestic violence. An additional serious need affecting women and children is the lack of adequate shelter space for victims of domestic violence.[42] Although this lack of space is not directly an issue of gender fairness in the courts, it is a factor about which the courts must be cognizant when fashioning appropriate remedies.

As a further part of our study, we reviewed the work of the Oregon Coalition Against Domestic and Sexual Violence Legal Access Project, which conducted a "courtwatch" in three Oregon counties in 1994 and 1995 using trained volunteers.[43] Data accumulated in the project demonstrated that 83% of all FAPA cases observed involved a female petitioner requesting a restraining order against a male respondent.[44] Approximately 90% of all petitioners and respondents were unrepresented by legal counsel.[45]

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[37] Comment by a male trial judge at the Medford public hearing, Sept 25, 1996.

[38] Oregon Judicial Department statistics show that there were approximately 3,350 fewer FAPA filings in 1996 than in 1995 and approximately 2,300 fewer than in 1994. The seven counties in which there was an increase in FAPA filings all were counties that are among the most sparsely populated in Oregon. The reasons for those reductions are unclear, but the extent of domestic violence in Oregon is evident in that the total number of FAPA filings is still very substantial: 16,637 in 1994, 17,679 in 1995, and 14,331 in 1996. A number of Oregon's more populous counties have very active and growing domestic violence councils that may be having some effect, particularly in the light of the growing population.

It recently was reported in a study by the United States Department of Justice's Bureau of Justice Statistics that domestic violence is "seriously under reported." Jube Shiver, Jr., *Domestic abuse vastly underreported, study shows*, OREGONIAN, Aug 25, 1997, at A1. There is new evidence that suggests that current domestic violence figures may underestimate the actual number of domestic violence incidents by at least fourfold. NY TIMES, Aug 24, 1997, at A12 (reporting on Department of Justice report).

[39] *See also* JESSICA E. MINDLIN, COURTWATCH: JUDGES RESPOND TO DOMESTIC VIOLENCE, A REPORT FROM THE LEGAL ACCESS PROJECT OF THE OREGON COALITION AGAINST DOMESTIC AND SEXUAL VIOLENCE 7 (1996). It has been reported that more than 53% of male abusers beat their children, Lenore Walker et al, *Beyond the Juror's Ken: Battered Women*, 7 VT L REV 1 (1982), and that, as violence against women becomes more severe and more frequent in the home, children experience a 300% increase in physical violence by the male batterer, STRAUS & GELLES, *supra* note 16. Women who leave their batterers are at a 75% greater risk of being killed by the batterers than those who stay. Barbara Hart, Pennsylvania Coalition Against Domestic Violence, 1988.

[40] According to Oregon Legal Services, legal services programs must reject 2 out of 3 applicants who seek services; the declination rate for family law clients is greater than in any other area of legal representation. Requests for services for domestic violence victims are escalating.

[41] At the public hearings, some men contended that they are without representation in marital dissolutions or their aftermath and that there are more legal resources available to women, because legal services programs prioritize services to victims of domestic violence. *See, e.g.*, transcript of Eugene public hearing, Dec 13, 1996. Oregon legal services programs provide services based on client need. Programs prioritize service needs; securing the physical safety of clients and their children (through protective orders and landlord-tenant cases, for example) is among legal services programs' highest priorities.

[42] In 1990, there were three times as many animal shelters in the United States as there were shelters for battered women. *U.S. Senate Judiciary Committee hearings*, 1990. According to the Oregon Coalition Against Domestic and Sexual Violence, shelters in Oregon for victims of domestic violence typically turn away 75% or more of those in need of housing, due to lack of shelter space.

[43] The Courtwatch Project provided trained volunteers to monitor judicial practices concerning the issuance and enforcement of restraining and anti-stalking orders in Multnomah, Washington, and Marion Counties. The volunteers completed nearly 1,600 surveys in 20 months.

[44] MINDLIN, *supra* note 39, at 7.

[45] MINDLIN, *supra* note 39.

The Courtwatch Project documented a number of exemplary practices[46] by judges and court staff. However, courtwatchers also noted a number of judicial practices that fairly could be labeled as insensitive at best, and unfair or dangerous at worst. Courtwatchers recorded that, in over 7% of the cases, judges made comments that were discouraging or belittling to the petitioners. In about 4% of the cases, judges ordered the domestic violence victim into mediation with the abuser, in direct violation of Oregon law.[47] In almost 6% of the cases, judges issued restraining orders with mutually binding terms, even though Oregon law does not provide for the issuance of such orders. Men were three times as likely as women to request such a mutual restraining order.

Language is a barrier to access to the courts in matters of domestic violence. The growing number of persons in our state who do not speak English[48] requires the courts to be much more conscious of the need for bilingual staff, interpreters, and explanatory court literature.[49] The Courtwatch Project found that, in almost 50% of the cases in which an interpreter was needed, no interpreter was available. The Courtwatch Project found a disproportionately low percentage, only 5% of the petitioners and respondents,[50] to be non-English speaking. Cultural and language barriers may be discouraging victims of domestic violence from using the legal system.

9. Attorney Fees

The only method that we used to examine attorney fees was the survey of marital dissolution files. No statistically significant differences were found regarding the frequency of the award of attorney fees by region or gender of judge. A moderately significant finding, however, was that female judges were likely to award a higher amount of attorney fees than were male judges.

10. Intersectionality

Four specific findings emerged from our study of intersectionality and domestic relations cases.

(a) Poor women fare worse than non-poor women and men in domestic relations matters. During the public hearings, several lawyers who work primarily with women in the area of domestic relations and domestic violence expressed the opinion that, because men tend to have more resources, they may have more power in domestic disputes. Litigants expressed similar concerns. A witness at one of the public hearings described her experience with her marital dissolution proceeding:

> *"By the time the trial occurred, having been forced to suffer one calamity after another, I was in ill health, poor and untenable since . . . I had no money to employ an attorney. I believe I contacted every divorce attorney from Ashland to Portland including those referred by the Oregon State Bar referral service. Legal aid was not available to me because it had a prerequisite that I had to have children to receive assistance and I had none."*[51]

We also heard testimony about how divorce drove women into poverty. One witness described how she had supported her husband for 20 years before he asked for a divorce. She described how her ex-husband had benefited in the proceedings and then said:

> *"[B]eing poor is very difficult . . .*
>
> *"[I]t just, it just blows me away to think that I worked for 20 years and that a person who has a lot of power,*

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[46] Some of those practices included the following: providing orientation for FAPA petitioners and respondents, providing referrals to community resources, addressing victims in a compassionate and respectful manner, first handling cases where children are present, refusing to accept or tolerate abusive behaviors, acting to revoke concealed weapons permits, establishing comprehensive case-tracking and monitoring procedures, providing clear and concise visitation orders that anticipate the safety concerns of the situation, and providing bilingual forms and procedures. MINDLIN, *supra* note 39, at 13-15.

[47] ORS 107.755(1) provides that the circuit court "may provide mediation . . . for custody and visitation disputes in a domestic relations suit *not including proceedings under [FAPA].*" (Emphasis added.)

[48] According to 1992 data compiled by Portland State University's Population Research and Census Center, there are substantial numbers of persons in Oregon between the ages of 18 and 64 who do not speak English in the home and who report not speaking English "well or at all":

	Percentage of Population Who Do Not Speak English in Home	Percentage of That Population Who Do Not Speak English Well/At All
Multnomah County	10%	20%
Marion County	12%	30%
Washington County	22%	10%

[49] The Office of the State Court Administrator is in the process of translating FAPA documents into Spanish so that they will be available throughout the state. In several counties, including Multnomah, interpreters are provided in any language when a party requests it. ORS 45.275(1) requires courts to appoint interpreters "whenever it is necessary . . . to assist the court in performing the duties and responsibilities of the court."

[50] MINDLIN, *supra* note 39, at 10.

[51] Testimony of a female witness at the Medford public hearing, Sept 25, 1996.

all the control over the money that we earn together in a business which was a partnership, that he and his partner could have so little respect for me and my energy and my 20 years that they would leave me financially devastated for the rest of my life. . . . [I]f I live to be a thousand years old, I will never get over the humiliation of being broke."[52]

(b) Gay men and lesbians expressed concern about the lack of legally enforceable rights, such as child custody, visitation, and property rights, in the breakup of a family unit and the enormous degree of misinformation and bias among judges and other court personnel regarding homosexuality. A gay man and a lesbian recounted separate experiences in which they had faced allegations in custody proceedings that they were unable to relate to their child of the opposite sex because of their sexual orientation. A lesbian parent expressed concern that, in the dissolution of lesbian relationships, the partner with the biological connection to the child or children receives a preference in custody decisions. A lawyer recounted difficulties faced by non-heterosexuals when a marriage between a man and a woman breaks up and one partner becomes involved in a gay or lesbian relationship; that lawyer noted that the gay or lesbian (or bisexual) partner often is treated automatically as a less fit parent than the heterosexual parent.

(c) Anecdotal testimony and a survey of the relevant literature suggest that litigants of color might have very different experiences in the domestic relations arena than do white litigants. For instance, one witness described how language barriers, mistrust of the police, and fears regarding immigration status are impediments to accessing certain legal safeguards. That witness testified:

"[Hispanic] women find it difficult to request services or protection. . . . I think many Hispanic women [in our community] would be surprised to learn that there was such a thing as a restraining order, that you legally could keep a man out of 'his' house."[53]

That observation may well reflect a general pattern in which women of color are reluctant to use the courts or even to consult with a lawyer. During all the public hearings conducted for this study, the only hearing at which a woman of color addressed the topic of domestic violence at all was in the state women's prison, where the witness was serving a sentence for killing her batterer.

An outreach coordinator for an urban domestic violence shelter described how the intersection of race and gender affects a domestic violence victim's experience in the court system. As she put it, women of color "have been very much discriminated against both because of their race and their gender, by the court systems. Whether their partner is a man of color or their partner is a white man, they're more discriminated against."[54]

(d) Finally, an intersection of gender, class, and race surfaced at the public hearings. At nearly every hearing, significant numbers of men testified about their experiences in domestic relations cases. Almost all the testimony about discrimination against men in domestic relations cases was offered by white male witnesses.

E. CONCLUSIONS

1. Child Custody and Visitation

There is a substantial perception among judges, lawyers, and male litigants that child custody proceedings are biased against men. Indeed, women become the primary custodians of their children far more often than men. But, in most cases, fathers do not seek custody. When custody is litigated, fathers are awarded primary parenting custody of their children about half the time.

2. Child Support

The establishment of the amount of child support is gender-neutral. Most obligors do not pay the child support that they have been ordered to pay, and most obligors are men. Women, more than men, suffer serious harm from the failure of obligor parents to comply with child support orders. Federal interest and dollars are expected to continue the enhancement of child-support collection methods.

3. Spousal Support and Property Division

In marital dissolutions, women tend to receive monetary dispositions (spousal support and property division) that place them at a significant short- and long-term financial disadvantage. When women have primary care and custody of their children, these financial disadvantages harm their children, as well.

4. Domestic Violence

Not infrequently, women are discouraged and belittled by judges and court staff who, although usually well-intentioned, are insufficiently educated concerning the dynamics of domestic violence and how best to address the problem.

Women, in particular, suffer from the lack of adequate shelter and safety resources for victims of domestic violence. In turn, judges do not always appear cognizant of the safety issues involved in their decision-making.

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[52] Testimony of a female witness at the Medford public hearing, Sept 25, 1996.

[53] Testimony of a female witness at the Tillamook public hearing, Nov 21, 1996.

Women are placed at risk of further domestic violence when courts allow batterers to have continued visitation with their children.

Although men constitute only a small percentage of the victims of domestic violence, their injuries are real, but they are sometimes disregarded or denied relief due to gender-stereotyping.

5. Intersectionality

a. Gender and Poverty

Approximately 70% of those at or below the poverty level are women, and women constitute about that same percentage of legal aid clients. The Oregon State Bar Civil Legal Services Task Force, in its May 1996 report, concluded that "not more than one-third of the legal needs of Oregon's low-income population were being addressed by legal services programs [even] before the [35% federal] funding cuts." Members of the judiciary and private bar were reported to have perceived that the greatest unmet needs were in the area of domestic relations and domestic violence.

b. Gender and Race, Ethnicity, and Language

Men and women who do not speak English are at a disadvantage in gaining effective and informed access to the courts in most Oregon counties. This problem is especially severe for women and children who also are victims of domestic violence. Litigants of color may not have access to the courts in domestic relations and domestic violence matters as frequently as white litigants.

c. Gender and Sexual Orientation

Gay men and lesbians are adversely affected by their lack of enforceable legal rights with respect to a variety of domestic relations issues.

F. COMMENDATION

We commend the efforts of some trial judges to accommodate the unique needs of litigants who are victims of domestic violence.

G. RECOMMENDATIONS

1. The Chief Justice and the Oregon State Bar should:

a. appoint a Task Force on Spousal Support to consider the feasibility of formulating statewide spousal support guidelines for adoption in the 2001 legislative session; and

b. study the legal and practical issues surrounding the dissolution of gay and lesbian relationships (including child custody and support) and develop recommendations for ensuring that the courts resolve such cases fairly and appropriately.

2. The Legislative Assembly and the Governor should:

- work with the Oregon Family Law Legal Services Commission's recommendations, when issued, to ensure that there is adequate funding in the 1999-2001 state budget for providing legal services to low-income people in family law matters.

3. The Education Division of the Office of the State Court Administrator should:

a. continue to provide regular education for judges regarding the law surrounding marital dissolution cases; and

b. continue to provide regular education for judges and other court personnel concerning domestic violence, including its dynamics, its effect on children, and "best practices" for handling protective orders and dissolution cases involving domestic violence (*e.g.*, see the protocols of the Oregon Council on Domestic Violence).

4. Oregon law schools should:

- by the 2000-01 academic year, ensure that they educate law students about domestic violence.

5. The Oregon State Bar should:

a. further develop *pro bono* lawyer referral programs that specialize in domestic relations and domestic violence matters; and

b. by January 1, 1999, begin to implement a statewide outreach program to inform non-English speakers about what services are available to victims of domestic violence.

6. The Oregon Council on Domestic Violence should:

a. consider recommending to the Legislative Assembly that Oregon statutes on child custody be amended to include a rebuttable presumption that a parent who has engaged in domestic violence toward the other parent or who has battered a child should not be awarded custody of the couple's children; and

b. by January 1, 2000, study whether law enforcement officers are fully and fairly enforcing Oregon's domestic violence laws and, if not, recommend needed changes.

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[54] Testimony at the Portland public hearing, Oct. 21, 1996.

CRIMINAL LAW AND JUVENILE JUSTICE

"[On the same probation violation for the same crime, my husband] got sentenced to 30 days on his fourth violation; I got sentenced to six months [for my first violation]. . . . Now he's out, he's going through treatment."[1]

"If a male and female commit a crime together, it would be highly unlikely that the female would even be charged. If so, lesser charge, lesser sentence."[2]

A. INTRODUCTION AND OVERVIEW

Many Oregonians encounter the justice system in the arenas of adult and juvenile criminal law.[3] We found that gender plays a role in several areas.

A significant number of criminal defense lawyers, judges, and male defendants believe that gender plays a role in charging practices, plea agreements, and sentencing for adults accused of committing criminal offenses; they believe that both prosecutors and judges treat female defendants more leniently than male defendants. That perceived discrepancy may be due to a number of factors, including the types of crimes that men and women generally are accused of committing and the fact that judges and prosecutors may take child-care responsibilities into account when establishing sentences or accepting plea bargains for women accused of committing crimes. Additionally, inmates of color perceive that they are targeted for harsher treatment in both charging and sentencing decisions. That perception is consistent with statistical data.

We also looked at whether state and county incarceration facilities provide comparable services for male and female inmates and equal access to those services. Female inmates in state correctional facilities do not have access to the same diversity, quantity, and quality of treatment, job training, work, and general support programs and services as male inmates. Although resources for both men and women exist on the county level, there, too, women do not have access to the same types of programs as men. Moreover, there are few programs and services available to meet the specific needs of female inmates, including sufficient pre- and post-natal care and targeted mental health counseling.

Finally, we researched whether comparable programs and services are available to male and female youths who are detained at state and county facilities. Female youths are less likely to be admitted to "close custody"[4] facilities than are male youths, and female youths generally are detained for shorter periods of time. The Oregon Youth Authority (OYA) spends proportionately more money and expends proportionately more resources on male youths than on female youths.

B. ISSUES STUDIED

We focused our efforts on three areas:

(1) prosecutorial and judicial discretion (charging practices, indictments, plea bargains, prosecutors' sentencing recommendations, and judges' final orders);

(2) programs and services for adults in the Department of Corrections; and

(3) programs and services for youths at the OYA.

This chapter contains three parts, corresponding to those three topics.[5]

C. METHODS OF STUDY

Individuals who specialize in the areas of criminal and juvenile law served on the Criminal Law and Juvenile Justice work group. Participants included a district attorney, a legal investigator, defense lawyers for accused youths, a domestic violence expert, a criminologist, a district attorney's victim advocate, a circuit court judge, and others involved in law enforcement and criminal justice issues. Most of the work group members were women. An Asian-American and an African-American were among the members of the group.

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1 Testimony of female inmate at Oregon Women's Correctional Center hearing, Dec 5, 1996.

2 Comment of male inmate on survey form.

3 For a discussion of criminal law issues that arise in the context of domestic violence, see the Domestic Relations Cases chapter.

4 "Close custody" refers to detention at Hillcrest Youth Correctional Facility, MacLaren Youth Correctional Facility, and Oregon Youth Authority camps.

5 For a discussion of inmates' perceptions of gender-based treatment on non-sentencing related issues, see the Judicial Administration chapter.

We obtained information through

- public hearings,
- written surveys,
- focus groups,
- interviews,
- surveys from other states' task forces, and
- previous studies and literature in the field.

As discussed in the Introduction to this report, 1,800 randomly selected Oregon lawyers received a survey generated by the Task Force. The survey directed specific questions on criminal law to those lawyers who estimated that 25% or more of their practice was devoted to criminal law.

We sent a separate survey on charging practices to 325 prosecutors and to 518 criminal defense lawyers who have a state contract with the Indigent Defense Services Division of the Office of the State Court Administrator. In addition, we sent a survey containing 22 questions directly related to criminal law and juvenile justice to all circuit and district court judges. Also, we mailed a series of questions to all 36 district attorneys in Oregon, seeking to determine the role, if any, of gender in certain discretionary practices. We asked district attorneys to provide gender-related caseload and case-processing information for the 1995 calendar year. There were additional questions about the use of certain policy guidelines.[6]

Further, we distributed more than 1,300 surveys to a representative sample of inmates in all nine of Oregon's correctional institutions for men — Oregon State Penitentiary (OSP), Powder River Correctional Facility (PRCF), Snake River Correctional Institution (SRCI), Columbia River Correctional Institution (CRCI), Oregon State Correctional Institution (OSCI), Eastern Oregon Correctional Institution (EOCI), Mill Creek Correctional Facility (MCCF), Shutter Creek Correctional Facility (SCCF), Santiam Correctional Institution (SCI) — and to all inmates at the Oregon Women's Correctional Center (OWCC).[7]

The survey response rate for criminal defense lawyers was 13.8% (72), for prosecutors 18.7% (66), for female inmates 22.9% (79), and for male inmates 43.5% (407). The response rate for the separate district attorney survey was 31% (11). Due to low response rates and small numbers in the surveyed populations, the results of all these surveys (except the survey of male inmates) must be interpreted with great caution.

For a different reason, male inmates' responses also must be interpreted with some caution. Based on their written comments, it appears that some inmates did not understand certain questions as we intended them. For example, when asked how men and women were treated differently in court or in law offices, some inmates selected the answer "subjected to comments about their dress or appearance" and noted that their lawyers had instructed them to wear a coat and tie to court. Other survey respondents reported that they had been subjected to (or had observed the inappropriate use of) terms of endearment and then cited demeaning remarks as examples.

We conducted focus groups with male inmates at EOCI, OSCI, and CRCI, with male inmates of color at EOCI, and with female inmates at CRCI. In addition, we held a "public" hearing with inmates at OWCC. We facilitated single-sex focus groups at Hillcrest Youth Correctional Facility, with both male and female youths. Finally, we interviewed and sought information from officials at adult and juvenile correctional institutions.

I. PROSECUTORIAL AND JUDICIAL DISCRETION

A. INTRODUCTION

In this portion of the study, we attempted to discover whether gender plays a role in discretionary decisions involving charging practices, plea agreements, and sentencing recommendations and whether there is a perception that gender unfairly influences such decisions. We also considered whether the intersection of gender with other factors, such as race and sexual orientation, influences those decisions.

Any investigation of judicial discretion must consider Oregon's sentencing guidelines, as well as the nature of the plea-bargaining process. Due to implementation of the sentencing guidelines and enactment of mandatory minimum sentences for certain felony convictions, judges have less opportunity to exercise their discretion in sentencing matters than they had in the past. However,

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[6] This inquiry was prompted by the fact that even the most basic prosecution data, such as the number of felony cases reviewed for prosecution in Oregon, were not available. The fact that there is almost no information about prosecutions in Oregon stands in sharp contrast to what information is known about arrest, sentencing, and incarceration. For example, data show how many men and women were arrested in Oregon each year since the early 1930s. Information also is collected on how many men and women are sentenced each year in Oregon courts, and how many are incarcerated. What is *not* known is how many men and women are prosecuted and with what results.

[7] See Inmate Survey in the Appendix. There were several limitations to the inmate survey. Inmates, both native- and foreign-born, often possess limited reading and comprehension skills in English. The inmate survey was not administered in person. It was printed in English; interpreters were not generally available. Accordingly, the surveys may not have been completed by inmates with limited reading and writing skills in English.

there still is opportunity to exercise some discretion (*e.g.*, in upward and downward departure sentences).

Defendants and defense lawyers overwhelmingly believe that gender plays a role in charging practices, plea agreements, and sentencing and that women are treated more leniently than men, whereas prosecutors and district attorneys believe that these matters generally are handled in a gender-neutral manner. Judges and criminal defense lawyers believe that female defendants are treated more leniently than male defendants in both prosecutors' sentencing recommendations and in judges' final orders. A common reason posited for this difference in treatment is that women have greater direct-parenting responsibilities than men.

B. FINDINGS

1. Charging Decisions, Indictments, and Plea Bargains

Prosecutors charge many different kinds of cases, ranging from relatively minor misdemeanors to homicides. In many cases, prosecutors make charging decisions within 48 hours of the arrest of the defendant, after reviewing the completed investigation file from the police agency responsible for investigating the case. Prosecutors examine the reports to ascertain what, if any, charges to file and whether there are legal impediments that preclude the filing of charges, such as a statute of limitations or search and seizure problem.

The prosecutor may have little personal information about the defendant at the time that a charging decision is made. Generally, the police report includes only a physical description of the defendant and a description of the incident that has led to the arrest. It also may include a description of the victim.

Prosecutors typically have discretion in deciding what charges to file or to take to a grand jury (provided that there is evidence to support the charges). That discretion is limited by the statutes governing the criminal conduct and, occasionally, by internal policies of the district attorneys' offices. For example, the Multnomah County District Attorney's policy manual lists 13 factors for a prosecutor to consider in making a charging decision:

- the nature of the offense,
- the characteristics of the offender,
- the age of the offender,
- the interests of the victim,
- possible improper motives of the victim or witness,
- a history of non-enforcement of the statute,
- likelihood of prosecution by another criminal justice agency,
- possible deterrent value of prosecution,
- undue hardship caused by the accused,
- excessive cost of prosecution in relation to the seriousness of the offense,
- probability of conviction,
- recommendations of the law enforcement agency involved, and
- any mitigating circumstances.[8]

Many other district attorneys' and prosecutors' offices, however, do not have written charging policies and, thus, the factors considered in charging decisions are not so easily identified.

Once a defendant has been charged, the next step is for the defendant to be arraigned. Following arraignment, the prosecutor and the defendant's lawyer typically engage in plea discussions to determine whether the case can be resolved by plea, without a trial.[9] Most often, the defendant agrees to plead guilty to some of the charges in exchange for the dismissal of others.

The prosecutor in charge of the case has broad discretion to determine what plea offer should be made to the defendant. Internal policies of the district attorneys' offices may limit the exercise of that discretion.[10] The policies take into account a number of factors, including:

- the defendant's criminal record,
- the nature of the crime,

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[8] MULTNOMAH COUNTY DISTRICT ATTORNEY'S POLICY MANUAL 14 (June 1995).

[9] Oregon's 1973 Criminal Procedure Code established a statutory framework for plea discussions and agreements. Those statutes codified views expressed by the United States Supreme Court and the Oregon appellate courts approving the use of negotiated pleas, as announced in *Santobello v. New York*, 404 US 257, 92 S Ct 495, 30 L Ed 2d 427 (1971); *Rose v. Gladden*, 248 Or 520, 433 P2d 612 (1968); and *Stewart v. Cupp*, 12 Or App 167, 506 P2d 503 (1973). Plea discussions and plea agreements specifically are recognized under ORS 135.405. When cases are presented to a court pursuant to negotiations, the court often is not advised of many of the issues that have been resolved during negotiations.

[10] Some district attorneys' offices have restrictions on discretion in reducing charges for particular crimes. For example, the Multnomah County District Attorney's Office lists 10 offenses for which prosecutors may not agree to allow a defendant to plead to a lesser offense. MULTNOMAH COUNTY DISTRICT ATTORNEY'S POLICY MANUAL, *supra* note 8, at 33-34. Those offenses are not "Measure 11" offenses (see note 14, below, for a definition of "Measure 11").

- the views of the victim,
- the likelihood of a conviction if the case goes to trial,
- mitigating circumstances,
- the deterrent value of a prosecution, and
- the need for the conviction to reflect the conduct of the defendant.

Some statutory limitations exist. For example, in cases involving driving while under the influence of intoxicants (DUII), the prosecutor has no discretion to negotiate a guilty or no-contest plea to another offense in exchange for a dismissal of the DUII charge. ORS 813.170. Additionally, whenever a violent felony has been charged, the prosecutor handling the case is now required, on request, to consult with the victim about possible plea negotiations. ORS 135.406. We did not study whether prosecutors follow those mandates in a gender-neutral manner. As with the charging decision, however, when discretionary decisions are available, it is difficult to determine whether and how gender influences them.

Because of the paucity of quantitative data, and the small number of written charging or sentencing policies that we received, it is difficult to assess fully how gender may influence charging practices and plea decisions. The data clearly established, however, that there exists a *perception*, particularly among defense lawyers and inmates, that gender influences the exercise of prosecutorial discretion in charging practices and plea offers.

Our data revealed that inmates and criminal defense lawyers generally aligned with one another, in contrast to the views of prosecutors, in perceiving gender as an influence in charging practices. For example, when asked, "To what extent is a prosecutor's willingness to reduce the charges influenced by a defendant's gender?," 65.7% of defense lawyers and 76.6% of inmates — as opposed to 11.4% of prosecutors — answered "somewhat," "often," or "always." Both male *and* female prosecutors overwhelmingly answered that gender and motherhood rarely were factors in charging, reducing charges, or offering plea bargains, with 85% of male prosecutors and 83% of female prosecutors answering that prosecutors' charging decisions are "never" or "hardly ever" influenced by a suspect's gender.

A gender disparity was revealed, however, with regard to answers to two of the survey questions. Whereas just 5.3% of the female prosecutors believed that prosecutors are "somewhat" or "quite a bit" more likely to reduce charges for female defendants, 22% of the male prosecutors so responded, and more than twice the percentage of male prosecutors (22%) as female prosecutors (10.5%) agreed that prosecutors are more likely to offer to reduce charges for women with young children than for women who do not have children.

Approximately half of both female and male defense lawyers believed that gender influences, at least sometimes, prosecutors' charging decisions. Gender differences among defense lawyers emerged in the responses to two questions. Male defense lawyers are more inclined than female defense lawyers to perceive prosecutors as "going easier on" female defendants than on male defendants. When asked "whether prosecutors are more likely to charge female suspects than male suspects," almost 48% of male defense lawyers, but only 14% of female defense lawyers, answered "never." Conversely, nearly twice as many female defense lawyers (41%) as male defense lawyers (22.5%) believed that prosecutors "never" or "hardly ever" are more likely to reduce charges for female defendants than for male defendants.

A comparison of responses from female prosecutors and female criminal defense lawyers revealed dramatic differences. Seventy-one percent of responding defense lawyers, but only 16.7% of responding prosecutors, believed that charging decisions are influenced, at least sometimes, by a suspect's gender. Similarly, 59.1% of the female defense lawyers, but only 5.3% of the female prosecutors, believed that prosecutors are more likely, at least sometimes, to reduce charges for female defendants than they are for male defendants.

Further analysis involved combining the responses from all defense lawyers and prosecutors and separating them by gender. Consistent with the data summarized above, no significant gender differences were revealed. Rather, it appears that *the role of the lawyer in the criminal justice system*, not the lawyer's gender, is the most significant predictor of the lawyer's perception of the effects of gender, if any, on charging decisions.

As noted above, generally speaking, inmates of both sexes concurred with defense lawyers' perceptions that gender does influence charging decisions. On some issues, however, the perceptions of male and female inmates differed. When asked, for instance, whether prosecutors are more likely to reduce the charges for female defendants than for male defendants, 67% of the male inmates, but only 3% of the female inmates, responded "quite a bit" or "completely." When asked whether prosecutors are more likely to charge women with young children than women who do not have children, 37% of the female inmates, but just 11% of the male inmates, answered affirmatively.

Because of the scarcity of responses to the survey that we mailed to the 36 district attorneys, we can draw no meaningful general conclusions from those surveys.[11] Only two counties reported the gender distribution for felony cases that they had reviewed during 1995. Three district attorneys reported the male/female distribution of cases in which "charges were issued" and in which "charges were denied." Only one prosecutor's office provided any gender data for guilty pleas and charge reductions. For other questions, such as how many

felony cases led to convictions on the original charges, we received no information.

The district attorney from only one, albeit the most populous, of Oregon's 36 counties provided answers to nearly all our questions. In Multnomah County, of the felony cases that come to the district attorney for review, 80% involve male defendants. This 20%/80% split remains largely unaltered for cases "issued," guilty pleas, charge reductions, and cases that go to trial.

2. Prosecutors' Sentencing Recommendations and Judges' Final Orders

As noted above, prosecutors and defense lawyers frequently engage in plea negotiations that result in a resolution of the case without a trial. Prosecutors generally have discretion to recommend less than the maximum sentence allowed by law although, as with charging decisions, internal policies of the district attorneys' offices frequently limit the exercise of that discretion.[12]

Once the negotiations are completed, the parties sometimes make a joint sentencing recommendation to the judge. Judges are free to impose any sentence up to the maximum allowed by law. However, in most cases, judges impose the sentence to which the parties have agreed.

In general, judicial discretion in sentencing has been dramatically limited in the last decade. In November 1989, the legislature provided for "sentencing guidelines," which call for the imposition of a "presumptive" sentence for most crimes. Under the guidelines, the defendant's presumptive sentence is specified as a range on a grid formed by crime severity on one axis and the defendant's criminal history on the other axis. Although judges may depart upward or downward from the presumptive sentence, a departure must be based on substantial and compelling reasons, which the judge must identify at the time of sentencing.[13]

More recently, in 1994, Oregon voters passed Measure 11,[14] which requires the imposition of mandatory minimum sentences in certain cases involving violent crimes against persons. There is no judicial discretion to impose less than the mandatory minimum sentence. A defendant can avoid the mandatory sentencing provisions of the ballot measure only if, in an exercise of prosecutorial discretion, the prosecutor files a charge that is not covered by Measure 11. All felony sentences must comply with the state's sentencing guidelines as well as the requirements of Measure 11, if applicable.

Departure rates from the Oregon Felony Sentencing Guidelines are low overall, according to data collected from the first 15 months of implementation of the guidelines.[15] Standard sentences were imposed in 94% of the cases.[16] Although "women were less likely to receive upward departures, more likely to receive downward departures, and more likely to be sentenced to optional probation," judges ordered upward and

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[11] Several district attorneys submitted comments on the survey, either by separate letter or as part of their anonymous responses to the survey. One district attorney labeled the Task Force survey "another witch hunt by the (Oregon State) Bar" and objected to questioning non-prosecutors about charging decisions and case results. We received other comments indicating a belief that at least some of the questions about charging standards were "outside the scope of duties for the Task Force." Other respondents sent us copies of their charging policies.

Some prosecutors disagreed with the proposition that perceptions of gender bias in the criminal justice system merited examination: "Asking for opinions is not an appropriate method to study gender bias and to facilitate changes in the judicial system," commented one deputy district attorney. "The questions do not consider the complexity of factors in charging decisions, plea negotiations and proceeding to trial," he said, and the queries are "so broadly stated it is impossible to realistically answer." In regard to written charging standards, one district attorney commented that "the Task Force is far outside its appropriate duties by promoting written guidelines."

Others offered their advice. One deputy district attorney in the Portland metropolitan area wrote that "legislation does not seem to be the answer to the problem. Education does not work either. Zero tolerance of gender bias in the workplace is the only answer I can see."

[12] *See, e.g.*, MULTNOMAH COUNTY DISTRICT ATTORNEY'S POLICY MANUAL, *supra* note 8, at 130, 148.

[13] ORS 137.671; OAR 213-008-0001.

[14] Measure 11 was an initiative measure approved by the voters at the November 1994 general election; it became effective on April 1, 1995. Or Laws 1995, ch 2. That measure was codified as ORS 137.700.

[15] K. ASHFORD & C. MOSBACK, OREGON CRIMINAL JUSTICE COUNCIL, FIRST YEAR REPORT ON IMPLEMENTATION OF SENTENCING GUIDELINES: NOVEMBER 1989 TO JANUARY 1991, at 31, 37 (1991), *reprinted in* Michael Tonry, U.S. DEP'T OF JUSTICE, INTERMEDIATE SANCTIONS IN SENTENCING GUIDELINES 21 (1997).

[16] ED DEERY, OREGON CRIMINAL JUSTICE COMMISSION, FELONY SENTENCING IN OREGON 1994 (1997).

downward departures in only 3% of the cases.[17]

Departures notwithstanding, on average women receive shorter prison sentences than men. This difference appears to result both from the types and seriousness of crimes committed by women and also from women's lesser criminal histories. According to an Oregon Criminal Justice Committee report on felony sentencing under Oregon's sentencing guidelines, female defendants who were convicted of a felony accounted for fewer than 20% of convictions overall, and they tended to have less serious criminal histories than male defendants.[18] Nearly two-thirds of the crimes for which women were convicted were offenses in the three lowest "crime seriousness" categories on the sentencing matrix; drug offenses accounted for half the offenses for which women were convicted.

Offenders with multiple prior convictions in the more serious criminal history categories are most likely to receive an upward departure. Men have criminal backgrounds that place them in those categories more often than women (about 32% for men and about 13% for women). Accordingly, statistically, men are more likely than women to receive an upward departure sentence. This factor may account for some perceptions of leniency toward women.

Data also suggest that a disproportionate number of women, as compared to men, are convicted of felony assault of an intimate. One study found that, while approximately one in 10 assaultive offenders were female, "almost one in four convicted intimate violence offenders were female."[19]

In the Task Force survey, approximately half the lawyer respondents of both sexes perceived differences in prosecutors' sentencing recommendations based on the defendant's gender. Regarding judges' final orders, nearly two-thirds of lawyers of both sexes who practice in the area of criminal law believed, based on their experience, that gender-based differences exist.[20] The majority of lawyers who perceived different treatment based on gender said that female defendants receive more lenient treatment than male defendants. Most commonly, they attributed the differences exclusively to the defendant's gender, although lawyers also cited greater parenting responsibilities, actual or perceived, as a causal factor. Approximately 70% of lawyers said that, under similar circumstances, judges take women's parenting responsibilities into account "more often" than men's parenting responsibilities.

A substantial minority of judges observed gender-based differences in prosecutors' sentencing recommendations. Fifty percent of the female judges who responded, compared to 37% of the male judges who responded, said that they have observed gender differences in sentencing recommendations. Regarding judges' final orders, approximately one-quarter of responding judges observed gender differences (in other judges, 24.2%; in themselves, 28.4%). More female judges than male judges reported observing differences based on gender in sentencing recommendations and judges' final orders. Of the judges responding to the survey, 48.2% of the women, compared to 29.8% of the men, responded that they have observed that other judges' final orders differ depending on the gender of the defendant. The difference between male and female judges is smallest regarding their own behavior: 37.5% of female judges and 29.9% of male judges said that their own orders have differed depending on the defendant's gender.

Those judges who observed differences based on gender in sentencing recommendations and judges' final orders indicated that female defendants receive more lenient treatment than male defendants. Relatively few judges said that these gender differences are based solely on the defendant's gender or that they are due to structural conditions, such as differences in the availability of facilities or programs for men and women. Rather, parenting responsibilities were most often cited by judges, as they were by lawyers, as the primary reason influencing gender differences in sentencing

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[17] LAURA J. HICKMAN, OREGON DEP'T OF CORRECTIONS, THE IMPACT OF INTIMATE VICTIM-OFFENDER RELATIONSHIPS ON SENTENCING IN FELONY ASSAULT CASES 38 (1995). The study discussed in the Hickman Report compared the severity of sentences received by certain felony offenders convicted of assaulting a person with whom they were in a sexually intimate relationship with the sentences received by defendants convicted of assaulting other persons. The data were drawn from Oregon Department of Corrections records of those offenders, convicted or sentenced in Oregon in 1993, whose most serious conviction was for a completed or attempted Assault I, II, or III.

[18] DEERY, *Supra*, Note 16.

[19] LAURA J. HICKMAN, OREGON DEP'T OF CORRECTIONS, THE IMPACT OF INTIMATE VICTIM-OFFENDER RELATIONSHIPS ON SENTENCING IN FELONY ASSAULT CASES 38 (1995). The study discussed in the Hickman Report compared the severity of sentences received by certain felony offenders convicted of assaulting a person with whom they were in a sexually intimate relationship with the sentences received by defendants convicted of assaulting other persons. The data were drawn from Oregon Department of Corrections records of those offenders, convicted or sentenced in Oregon in 1993, whose most serious conviction was for a completed or attempted Assault I, II, or III.

[20] Some lawyers and judges also perceived differences in prosecutors' sentencing recommendations and judges' final orders for youthful offenders but, because very few lawyers and judges answered the questions concerning youthful offenders, we can draw no meaningful conclusions. In addition, inmates were not part of our survey on prosecutors' sentencing recommendations and judges' final orders.

recommendations and final orders.[21] Fully 50.5% of the judges said that, despite similar circumstances, they take female defendants' parenting responsibilities into account "more often" than they do the parenting responsibilities of male defendants.

Arguably, women's parenting responsibilities are being taken for granted, while men's are not. On the other hand, it is possible that judges observe women's direct-parenting responsibilities with greater frequency, especially among single mothers. Among respondents to the inmate survey, 65% of the female respondents reported having children under the age of 18, while only 46% of the male respondents reported having children under the age of 18.

A number of inmates discussed the role of pregnancy and child-rearing in their experiences with the criminal justice system. A mother in the role of criminal defies conventional stereotypes and seems particularly to disturb the community; as one female inmate put it, "women are not supposed to commit crimes since they are mothers." Two themes emerged:

(1) if a woman was pregnant (and not a substance abuser) or primarily responsible for raising her children, she might obtain sentencing concessions from the judge; and

(2) crimes committed by women differ from those committed by men and are more often a response to economic pressures resulting from substance abuse[22] or domestic violence.

To the extent that female defendants may receive more lenient sentences than male defendants do, that difference may be attributable, in part, to a perception among judges that women with children have few options in corrections and rehabilitation facilities. Several judges noted that the services for pregnant women and women with children are limited. One judge put it succinctly in a comment on the judge survey: "Women have primary responsibility for children — few programs exist to help treat women with child-care responsibilities." Comments to the lawyer survey echoed that perception. Several lawyers noted that female defendants have more difficulty entering rehabilitative programs because of their child-care responsibilities.

A number of judges noted that a female defendant's child-care responsibilities or pregnancy may influence both the prosecutor's sentencing recommendation and the ultimate sentence. In discussing factors that influence prosecutors' sentencing recommendations, one judge said:

> *"If the woman is a custodial parent, her incarceration poses significant problems for her children and social agencies. Efforts are made to avoid incarceration under these circumstances."*

By contrast, several OWCC inmates testified that they believed that they were sentenced more harshly, and were sent to prison, because of their pregnancy and concurrent substance abuse problem. One inmate recounted at the hearing that she and her husband had violated their probation in exactly the same manner (failing to enter in-patient treatment) but that her husband, who had an extensive criminal record, was given a 30-day jail sentence, while she received a six-month prison sentence.

Finally, lawyers and inmates expressed their belief that, if women are perceived as abusing or neglecting children or fetuses, they will receive harsher treatment than men in similar circumstances. One female inmate observed:

> *"[T]he kind of treatment you receive in our judicial system has more to do with if you have money than what gender you are . . . [If] a single mother struggling to raise a child alone gets accused of neglect or abuse falsely, the system is all over them rather than treating them as if they're innocent until proven guilty."*

A judge stated that, in drug-diversion programs, a pregnant defendant's release automatically will be revoked if she uses drugs. One lawyer called this the "public health theory" of sentencing. Some judges freely acknowledged that they sentence pregnant substance abusers to incarceration, even when they would not incarcerate similarly situated men or non-pregnant women.

Another issue to consider is that not all potential sentences, if applied evenly, necessarily would have the same effect on female defendants as on male defendants. For example, in a letter to the Task Force, one woman wrote that inmates who participate in "boot camps" can gain a significant reduction in their sentences. However, she asserted that studies show that a "boot camp" environment can be detrimental to women who have a history of being abused. She wrote:

> *"Since a significant number of female offenders have histories of physical/sexual abuse, these female offenders do not have the opportunity for sentence reduction that male offenders do."*

We could not determine from the data gathered for this report the extent to which the dynamics between male lawyers and female defendants affect female defendants' willingness to resist a plea agreement and contest the charges. However, anecdotal evidence

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[21] One exception to this generalization may be judges' sentencing orders in cases involving defendants who are pregnant substance abusers.

[22] Fifty percent of female inmates are in prison on a drug conviction, and 27% are incarcerated on a property conviction. In comparison, 37% of male inmates are in prison on a drug conviction, and 28% are incarcerated on a property conviction. DEERY, *supra* note 18, at 55.

suggests that women may be more likely than men to accept plea bargains and not contest the charges against them. At the OWCC hearing, a 19-year prison employee explained the differences that he saw between male and female defendants:

> *"[T]he difference between the two is that the women often, often do what their [lawyer] tells them, whatever it may be. . . . The majority of women here, I think, have not had the opportunity for legal redress that the men have had. The women often take the first suggestion that their attorneys [propose]. The attorneys are over-burdened, the defense funds are overburdened and they often plead out and take the first remedy."*[23]

Several OWCC inmates who testified echoed that sentiment.

3. Intersectionality Issues

We examined how factors other than gender, such as race or sexual orientation, may coincide with gender to influence prosecutors' and judges' discretionary choices.

There is a distinct difference between the racial profile of inmates and the racial profile of the state in general:

	Oregon[24] Population (percentages)	**Inmate[25] Population (percentages)**
White	93.8	73.2
African-American	1.7	12.5
Asian/Pacific Islander	3	1.2
Hispanic	5.4[26]	10.9
Native American	1.6	2.2

Those numbers reflect, to some extent, a perception articulated both in comments appended to the inmate survey and in comments made in male inmates' focus groups that men of color, particularly African-American and Hispanic men, are targeted for harsher treatment (both in charging and in sentencing) than are either white women or women of color. One African-American inmate said that he "already has a loaded count being a black man given the history and the predominance of the [Oregon] judicial system."

Approximately 4% of male inmates and 21% of female inmates reported that they are bisexual. About 2% of male inmates reported that they are gay, and almost 3% of female inmates reported that they are lesbian. In the comments on the inmate survey, gay men voiced a concern that they are treated as predatory in their interactions with other men and with children. Some gay men believed that police officers and, perhaps, district attorneys may associate being gay and male with pedophilia. Lesbian women did not report similar concerns.

On the other hand, lesbian inmates expressed their belief that the charging decisions, findings of guilt, and sentencing decisions in their cases were affected by their sexual orientation. They believed that, if they did not fit a "feminine" stereotype, the prosecutor, judge, and jurors saw them as more dangerous. As one lesbian inmate testified at the OWCC hearing:

> *"I've always been a lesbian and I feel that I was, because of this, and the fact that I don't know anybody in the State of Oregon to verify what kind of a person that I am, I feel like I was being prejudiced against. . . . The D.A. decided that I was a psychotic lesbian."*

A number of heterosexual female inmates echoed similar concerns about the importance of personal appearance and compliance with gender roles in how they were perceived and treated. For example, many female inmates stated that it was extremely important that they be provided access to make-up and hair-care products before court appearances, so that they would conform to the court's and the jury's expectations about how women should look.

One female African-American inmate expressed her belief that it was particularly important for her to appear feminine, because she was exceptionally tall; otherwise, she thought, the jury would be afraid of her. Another inmate commented that, when she dressed well and wore make-up, she looked "well off" and was treated better. Another woman said that she was treated badly because she was a "very large woman" and "looked mean."[27]

The issue of class appeared repeatedly. During inmate focus groups, inmates emphasized their concerns about court-appointed counsel. Many of the women felt powerless and unable to alter the relationship between themselves and court-appointed counsel. Several female inmates reported that they felt patronized by counsel and the court, because they were women and because they

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[23] The witness also noted the disparity between the legal resources available to female inmates and those available to male inmates. Testimony at OWCC hearing, Dec 5, 1996.

[24] Data as of July 1996.

[25] Data as of Dec 1, 1997.

[26] Because the Hispanic population of Oregon is divided among several racial groups, the total population percentages listed exceed 100%.

[27] *See also* Richard Morin, *Justice smiles on good-lookers*, OREGONIAN, Dec 15, 1997, at C3.

were poor.[28] One woman told us that she had tried to scrape together money to hire a lawyer to represent her on a drug charge. After her initial meeting with the lawyer, he told her that she would not have to pay him if she would have sex with him. She felt trapped by the charges, and the lawyer continued to represent her. Ultimately, the lawyer stole the money that she put in a trust fund to pay her restitution.[29]

C. CONCLUSIONS

A significant proportion of criminal defense lawyers and inmates believe that the gender of the defendant influences charging decisions, indictments, and plea bargains. Not surprisingly, prosecutors of both sexes overwhelmingly deny that gender plays any part in their decision-making. A significant proportion of judges and criminal defense lawyers concur that female defendants are treated more leniently than male defendants in both prosecutors' sentencing recommendations and judges' final orders. Whether there is any factual basis for either viewpoint is difficult to determine from the data received. A primary reason given for this reported difference in treatment is the perception that women have greater direct-parenting responsibilities than men. Approximately 65% of female inmates, compared to only 46% of male inmates, reported having children under the age of 18.

A significant proportion of male inmates, but not female inmates, believe that female defendants receive more lenient treatment from prosecutors. Again, our data could not confirm or refute the accuracy of this perception. Despite the fact that it is difficult to determine from the data received the degree to which perceptions reflect reality, these impressions are important, because perceptions of gender unfairness can undermine faith in the criminal justice system.

D. RECOMMENDATIONS

1. All district attorneys' offices should:

a. by January 1, 1999, review their policies to ensure that gender does not play an inappropriate role in charging practices, plea offers, and sentencing recommendations. Other offices should consider using the Multnomah County District Attorney's policy manual as a model.

b. as soon as possible, begin to keep data that permit analysis of gender fairness in charging practices, indictments, and plea offers and agreements, and annually evaluate those data.

2. Prosecutors, criminal defense lawyers, and corrections staff should:

- participate in educational programs concerning issues of gender fairness and intersectionality.

3. Criminal defense lawyers should:

- consider whether gender plays a role in who accepts pleas and who rejects pleas and, if so, whether procedural changes are called for.

4. The Oregon Department of Corrections should:

- by January 1, 2001, develop plans for a long-term solution to the increasing problems involving inmates who are primarily responsible for the care of their children.

5. The Education Division of the Office of the State Court Administrator should:

- develop a judicial education program to explore issues pertaining to the sentencing of pregnant substance abusers.

6. The Chief Justice and the Oregon State Bar, working with the Oregon State Police, the Oregon District Attorneys Association, the Oregon State Sheriffs' Association, and the Oregon Association Chiefs of Police, should:

- by January 1, 2002, study whether gender unfairly affects police practices at the pre-indictment and pre-charging stage.

7. The Oregon Judicial Department, working with the Oregon District Attorneys Association, should:

- by January 1, 2003, study court records to determine whether any gender-based patterns exist with respect to prosecutors' sentencing recommendations and judges' final orders.

II. PROGRAMS AND SERVICES FOR ADULT OFFENDERS

A. INTRODUCTION

In this portion of the study, we examined

(a) the comparability of facilities, programs, and services that are available to female and male offenders in state correctional institutions, county jails, and community corrections programs; and

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[28] Interestingly, in comments on the inmate survey, some of the male inmates reported similar observations regarding the treatment of female inmates. Several male inmates felt that women were treated in a "paternal" way by the court and legal counsel, while poor and, particularly, African-American men were not treated kindly and were perceived as dangerous.

[29] Although the speaker did not identify the lawyer, we believe that this speaker was referring to a lawyer who ultimately was disbarred for his conduct.

(b) the extent of training provided to corrections and personnel relating to the specific needs of women.

To help focus this effort, we formulated six questions:

(1) Do female inmates in state correctional facilities have access to the same treatment, education, health, job training, work, and general support programs and services as male inmates?

(2) Are the same types of community corrections programs and county jail programs available to women as to men?

(3) Are there programs and services available to meet the specific needs of women, *e.g.*, pre- and post-natal care and targeted mental health counseling?

(4) Do inmates perceive gender-based differences in the programs and services available to them in the state correctional institutions?

(5) Do staff who work with offenders or who establish policies and programs for inmates receive training or have experience in understanding gender-specific issues?

(6) What are the beliefs, attitudes, and practices of judges, lawyers, and inmates about the availability and effectiveness of services and programs for male and female inmates?

The Oregon Department of Corrections (ODOC) operates 12 correctional institutions, three of which house women. As of July 1, 1997, 41% of the female inmates were housed at OWCC, 38% at CRCI, and 2.5% at Shutter Creek; the remaining 18.4% were residing at contracted space in Arizona.[30]

In the judge and lawyer surveys, we included questions designed to determine lawyers' and judges' attitudes about programs and services for male and female offenders. In the inmate survey, we asked inmates to assess the services and programs available to them in correctional institutions. We analyzed responses by gender, racial or ethnic background, sexual orientation, age, and other demographic factors.

We also conducted telephone interviews with seven institutional program services managers and with five central ODOC program administrators about the programs in each institution, and we interviewed two lawyers who have represented the state in corrections matters. Additionally, we culled information from comments made in hearings by inmates, parole and probation officers, and other parties about the programs and services in the state institutions. Finally, we asked county jail managers for information about services and programs available to female inmates in county jails, but we received few responses.

The judge and lawyer surveys contained several questions, specifically directed at lawyers whose practice was 25% or more in criminal law, on their perceptions of the availability and adequacy of rehabilitation programs and services (job training, education, and health care) to male and female inmates in community corrections, prisons, and jails. Most criminal defense lawyers did not know about the availability of programs and services for inmates. Only 20% of the 571 lawyers surveyed answered some or all of the questions on criminal law. Of the lawyers who did respond to those questions, approximately 30% did not answer or indicated that they "don't know" in reply to most of the questions.

Throughout the process, the group reviewed existing studies and literature in the field.

B. FINDINGS

On the whole, the services and programs available to women at state and county facilities are less comprehensive than those provided to men. This disparity is most apparent in the areas of job training and work opportunities, in mental health and alcohol and drug treatment, and in programs and services provided in county facilities. Further, there is a shortage of programs that address specific needs of female inmates.

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[30] The inmate population of each Oregon correctional institution on July 1, 1997, was as follows:

Oregon State Penitentiary (OSP) - 2,057 men
Oregon State Correctional Institution (OSCI) - 951 men
Eastern Oregon Correctional Institution (EOCI) - 1,430 men
Powder River Correctional Facility (PRCF) - 162 men
Shutter Creek Correctional Institution (SCCF) - 244 men and 11 women
Snake River Correctional Institution (SRCI) - 807 men
Santiam Correctional Institution (SCI) - 404 men
Mill Creek Correctional Facility (MCCF) - 267 men
Oregon Correctional Intake Center (OCIC) - 155 men
South Fork Forest Camp (SFFC) - 145 men
Columbia River Correctional Institution (CRCI) - 235 men and 162 women
Oregon Women's Correctional Center (OWCC) - 174 women

The total number of men in custody in Oregon prisons on July 1, 1997, was 6,857, with another 396 in custody in Arizona. The total number of women in custody in Oregon prisons was 347, with another 78 women housed in Arizona.

Building a new women's prison is one of the top priorities of the Oregon Department of Corrections, because there is space for only 190 inmates at OWCC.

Finally, judges and lawyers are poorly informed about what is available.

1. Programs and Services - State Institutions

a. Education

The Department of Corrections tests all inmates for their literacy level, writing skills, and math abilities upon incarceration. In the last six to seven years, the results have been consistent: There has been no difference in literacy rates between male and female inmates. Between 22% and 24% were functionally illiterate in reading, and between 75% and 80% were functionally illiterate in math skills. The average writing skill level for inmates was somewhere between second- and third-grade level. Seventy percent of all inmates had dropped out of school, although 40% had obtained some sort of high school degree, either a basic diploma or General Education Diploma (GED). Eight percent had some higher degree, such as an associate's certificate or bachelor's degree.[31]

Several educational and vocational programs are available to male and female inmates at the various institutions. Adult Basic Education (ABE), GED, and English as a Second Language (ESL) programs are available in all state institutions and generally are offered through contract with local community colleges. All inmates are eligible for these programs, and there appears to be no gender difference in accessibility to the programs.[32] A number of institutions also have interactive computer courses in study methods and basic skills for math, reading, and writing. Some institutions use ED-Net for college and community college classes, although fewer inmates are enrolled in these classes than in years past, because Basic Educational Opportunity Grants are no longer available to them.[33] Although there often are waiting lists for classes, men and women alike may enroll.

For high school and post-high school training there was little difference in the percentages of male and female inmates' perception of availability, of use, and of helpfulness, although slightly more women used post-high school training and said that it was helpful. More female inmates of color than white female inmates said that they took advantage of educational opportunities and that they found the educational opportunities useful.

Most lawyers who responded to the question (about 60% of both male and female lawyers) believed that education through high school is equally available to inmates of both sexes.

b. Work Opportunities and Job Training

With respect to *work* opportunities, all institutions use some inmate labor in the day-to-day operation of the prison. Additionally, CRCI places female inmates in sex-segregated outside work crews in a variety of jobs. Male institutions place work crews with the Forest Service, Bureau of Land Management, Oregon Department of Fish and Wildlife, Oregon Department of Transportation, and local city and school maintenance operations. Garment and furniture manufacture and laundry work are performed within the institutions for outside customers. At Shutter Creek, work crew opportunities available to male inmates also are available to female inmates.

Also, all Oregon correctional institutions now make some *job training* available to inmates, to satisfy the requirements of Measure 17.[34] As a result, some inmates are learning a trade as they work in a particular production area. Job training varies by institution, based on the nature of the population and the length of stay of inmates. Those with shorter sentences have less opportunity to take advantage of job training. That fact has a greater effect on female inmates than on male inmates, because female inmates tend to have shorter sentences, on average, than male inmates. Some kinds of training, such as books on tape, computer graphic arts, meat-cutting, and auto mechanics, currently are available only to male inmates. Corrections officials assert that none of these job training opportunities is available to female inmates because of space and supervision limitations.

In attempting to compare what is available to male and female inmates, we examined the work and training opportunities that are:

- available to women at OWCC,

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[31] Information provided by Oregon Department of Corrections, Education/Vocational Training Department.

[32] One female inmate testified at the OWCC hearing:
"[I]n 1985 I came to prison. When I came to OWCC, the programs available for women were a GED, you could become a secretary, or you could do some repair in the mills. In other words, basically the information I have got was society preferred that women stay barefoot and pregnant, and if you couldn't do that, we'll teach you to be good secretaries and good beauticians."

[33] Recently, Congress passed legislation that prohibited "any individual who is incarcerated in any Federal or State penal institution" from receiving these federal grants, which pay tuition costs for post-secondary education for low-income persons. *See* 20 § 1070a(b)(8) (1996). Many of the post-secondary programs in the prisons have been discontinued, because most prisoners cannot pay for them.

[34] Measure 17, passed by Oregon voters in November 1994, added Article I, section 41, to the Oregon Constitution; it requires inmates to work, to be enrolled in educational programs, or to be in full-time treatment. Reportedly, none of the institutions is in full compliance but, on average, the compliance rate at OWCC is the same as, or greater than, the overall compliance rate. Telephone conversation between Beth Allen, Task Force volunteer, and Randy Iverson, Oregon Department of Corrections.

- available to women at OSCI or OSP,[35]
- not available to women,
- available to men, and
- not available to men.

We were not able to compare definitively the opportunities for men and women. (For example, we did not compare the number of training slots in a particular trade or educational program, divided by gender, to the number of male and female inmates who are interested in filling those slots.)[36] However, in general, male inmates have more diverse opportunities than do female inmates, and male inmates have more opportunities to become *certified* as capable of performing specified kinds of work. There are a total of 24 training programs and production jobs that are available to men but not available to women; 2 of those 24 programs soon will be available to women. There are 6 programs available to women that are not available to men; 1 of those 6 soon will be available to men. There are 2 certification programs available to female inmates and 8 certification or licensure programs available to male inmates. The only certification program that is available to women but not to men is "Clerical Basics." Attachment A to this chapter summarizes what we learned.

We also examined perceptions of the available programs. For example, CRCI provides an eight-week program to help female inmates develop job skills, improve self-esteem, change lifestyles, and become self-sufficient.[37] A study of this program found that, of 187 inmates who responded who had graduated from the program, 83% found employment after their release, and 59% said that they had similar or greater incomes than before they were imprisoned.[38] The classes in the program specifically are designed around issues that are relevant to women, such as responding to domestic violence and raising children. Although the state provides funding for the program, it depends heavily on volunteers.

With respect to job-training opportunities, the responses of male inmates and female inmates were approximately the same, but a slightly higher percentage of men (73%) than women (66%) said that opportunities are available, and a higher percentage of women (50%) than men (40%) have used the services and also said that they are helpful. (Sixty-nine percent of the male inmates and 89% of the female inmates who responded to the question said that the services are helpful.)

Female lawyers were much more likely than male lawyers (59% to 27%) to believe that prison and jail programs are more available to men than to women. Only 6% of the female lawyers and 22% of the male lawyers believed that jail and prison rehabilitation programs are adequate for women. On the other hand, about 28% of the male lawyers, and between 25% and 35% of the female lawyers, thought that these programs are adequate for men.[39] About half the lawyers who responded said that they believed that availability of job training is limited for both men and women.

More than two-thirds of male and female judges believed that job-training programs are limited in scope for both men and women. Overall, 53% of the female judges, but only 18% of male judges, believed that there are gender inequities in the availability and nature of rehabilitation programs and facilities for male and female adult offenders.

c. *Health Services*

Health-care services for inmates are funded through ODOC, and the Oregon Health Plan priority list[40] is considered when determining the level of care that is provided.[41] All institutions have accredited health-care programs[42] but, because all except OSP lack 24-hour

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[35] OWCC, OSCI, and OSP are located in Salem, Oregon. The Oregon Department of Corrections transports OWCC inmates to OSP and to OSCI to participate in some programs.

[36] These issues have been the subject of protracted litigation between the state and a class of female inmates incarcerated at OWCC. In the second appeal in that litigation, the United States Court of Appeals for the Ninth Circuit held that "prison education programs subject to Title IX must be 'equally' available to male and female imates." *Jeldness v. Pearce*, 30 F3d 1220, 1228 (9th Cir 1994). In 1996, after the Ninth Circuit's second remand to the district court, the parties in Jeldness signed a settlement agreement. As part of that agreement, several OSP apprenticeship programs were terminated (thereby eliminating the obligation to make such programs "equally" available to female inmates at OWCC). Telephone conversation between Task Force Coordinator Jessica Mindlin and Oregon Department of Justice lawyer Jan Londahl, Oct 15, 1997.

[37] *See* ANNETTE JOLIN ET AL, AN EVALUATION OF THE WICS-LIFESKILLS PROGRAM FOR WOMEN AT THE COLUMBIA RIVER CORRECTIONAL INSTITUTION, PRELIMINARY RESULTS (1997) ("Jolin Study"). *See also* Tomoko Hosaka, *I'm just like a gladiator*, OREGONIAN, Nov 22, 1997, at B1.

[38] *See* Jolin Study, *supra* note 37.

[39] Among female lawyers, 34% believed that programs and services in the jails are adequate to meet the needs of male offenders; 25% believed that prison programs and services are adequate for male inmates.

[40] *See* OAR 410-141-0520.

[41] Treatment is provided to all inmates who are HIV-positive, and specific resources are targeted for counseling and education about HIV, regardless of gender.

[42] The accrediting agency is the National Association of Corrections Health Care.

infirmary beds, the prisons must use OSP and local hospitals when needed. All institutions have a nurse on duty or on call 24 hours a day. Both OWCC and CRCI have a women's health-care nurse practitioner on staff.

The annual health-care cost for each female inmate in Oregon has been estimated at $3,433. This figure is somewhat more than the health-care costs for male inmates, although an exact figure was not available.[43] Prison officials explained that larger institutions, which house men, have lower costs per day because of economies of scale. Another factor is that women entering prison generally have more health problems than men, problems that require more tests and laboratory services,[44] and also have more need for emergency and health services while in prison.[45] Pregnancy and complications of pregnancy also may increase the costs of providing health services to female inmates.

Additionally, in Oregon, following the national trend, the average cost of providing health care to female inmates continues to rise at a rate faster than that for male inmates. Oregon's annual spending for health-care costs for incarcerated women recently increased by 172%, from less than $500,000 in 1994 to more than $1.2 million in 1995.[46] Under Senate Bill 1145 (1995),[47] which requires that offenders sentenced to 12 months or less be incarcerated at the county level, some of the responsibility for providing obstetric and gynecological services will shift to the counties. It is uncertain how this shift will affect health services.

Obstetric and gynecological services at the institutions housing women are on contract with outside or on-call physicians. Pregnant inmates at OWCC receive pre-natal and childbirth services. In Oregon, female inmates who give birth while incarcerated are not permitted to care for their newborns in the institution, so new-baby care is not provided.[48] Inmates who had delivered children while incarcerated expressed concern that they had no contact with their children once they were born. One inmate, who had recently had a baby who was being cared for by a relative, expressed concern (at the OWCC hearing) that she was not able to bond with her child. Another female inmate lamented, "I have not seen my child since the day she was born. I have no pictures."

About 96% of both male and female inmates believed that health care is available, but a slightly higher percentage of women reported that they had used the services. One-third of both male and female inmates said that the health care was helpful. Regarding gynecological services, about three-quarters of the women said that they had used the service, and about two-thirds said that it was useful.

However, at the hearing at OWCC, female inmates expressed concern that the waiting list to see a doctor is too long. One female inmate at OWCC (where private physicians provide services on a contract basis) testified that

> *"it took about two months for me to start my [pre-natal] care, because they were so backed up . . . there were so many people coming in and out. . . . I only had about three or four visits with the doctor."*

Additional comments from female inmates were few, but generally indicated dissatisfaction with the availability of health services, counseling, and mental health treatment. According to one female inmate, "You have to fight to be seen when you need it [health services] and, when you are seen, they don't always help you." Male inmates in focus groups did not raise this issue of access to doctors, even though all institutions but one, OSP, rely on private physicians who work under contract.

To an even greater degree than female inmates themselves, lawyers and judges believed that health services for female inmates are inadequate. Among respondents to the lawyer survey, 44% of the female lawyers and 34% of the male lawyers who practice in the area of criminal law believed that the health care available to female inmates is too limited in scope. Approximately 40% of both male and female judges thought that health care for female inmates is available but limited.

d. Mental Health, Alcohol, and Drug Treatment

According to ODOC, the institutions focus on prioritizing inmate needs and then servicing high-need populations. Mental health case managers in each institution screen and evaluate cases and then contract with local providers for mental health treatment groups. Some institutions have on-site counselors. The institutions attempt to identify inmates with persistent and clear mental health problems and those with a high

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[43] Greg Wees, *Inmate Health Care Part II*, CORRECTIONS COMPENDIUM, Vol 21, No 11, Nov 1996, at 15. A 1995 survey conducted by *Corrections Compendium* asked respondents to indicate whether health-care costs for female inmates "were higher, the same, or lower than those for men." *Id.* at 11. Oregon reported that its costs for women were higher. *Id.* at 15.

[44] Barbara A. Nadel, *Designing for Women: Doing Time Differently*, CORRECTIONS COMPENDIUM, Vol 21, No 11, Nov 1996, at 1.

[45] *Id.*

[46] *Id.* at 10.

[47] Codified as ORS 137.124. Or Laws 1995, ch 423, § 12a.

[48] Only four states — Massachusetts, Nebraska, New York, and South Dakota — report that they permit newborns to stay with their incarcerated mothers. Wees, *supra* note 43, at 14-15.

suicide risk. On-site personnel staff a special management unit for acute-care psychiatric crises and day treatment for those who need more than a group setting.

Studies of inmates by ODOC reveal that a higher percentage of female inmates than male inmates have a mental illness; depression is the primary diagnosis. Despite that fact, acute care and day treatment are not available for women. The Oregon Department of Corrections anticipates that, when the new women's prison is complete, there will be 18 beds to accommodate female inmates with these needs.

As previously noted, according to Oregon Criminal Justice Council data, 50% of all female inmates in Oregon are in prison for a drug conviction. A 1995 report for ODOC concluded similarly that drug dependency is a leading cause of criminal activities by women and that sexual, emotional, or physical abuse often is a factor leading to substance abuse by women.[49] The report viewed long-term treatment as essential to address female offenders' chemical dependency problems effectively. The report concluded that, because most female offenders are mothers, supporting them in effective parenting is critical not only for the inmates' success, but also for the physical and emotional health of their children. Female inmates and probation and parole officers concurred that the presence of one supportive, caring individual who expects the best from a female offender often makes a pivotal difference in ensuring her long-term success. Because social networking is a valuable part of female inmates' rehabilitation, CRCI has developed a mentoring program that pairs women in the community with female inmates.[50]

In the area of counseling and treatment services, about the same percentage (88%) of male and female inmates said that counseling is available, although a higher percentage of women (71%) than men had used the service. However, all inmates believed that access to counseling services is limited. Almost all respondents (over 90%) found alcohol and drug treatment available. Alcohol and drug treatment programs serve women at six times the rate that they serve men. Of those who had used that service, a higher percentage of women (82%) than men (65%) found it useful.

A residential therapy unit at CRCI now has a "dual diagnosis" unit to treat alcohol or drug issues and mental illness. The Oregon Department of Corrections has a short-term drug treatment program for male inmates only (Cornerstone) that serves inmates who are in custody for six months or less. There is no comparable program for female inmates.

Some women who responded to the survey felt that counseling and treatment services are inadequate, stating (for example) that "there is no mental health treatment for women and six new programs for men" and that "counseling is not available for me and this is wrong."[51] During hearings at OWCC, inmates sounded a similar theme. Some expressed concern that there often are too many prerequisites to entering the limited number of mental health and alcohol and drug treatment programs. At the Salem public hearing, a former OWCC inmate testified that, if an inmate was not incarcerated for a drug offense, it was difficult to get drug treatment.

Sex-offender treatment programs are available for male inmates at SRCI, which is where men convicted of sex offenses are sent. OWCC provides a small sex-offender treatment group (OWCC houses very few female sex offenders). No female sex offenders are incarcerated at the other two institutions that house female inmates. At OWCC, there also are special groups for victims of sexual abuse and domestic violence. This group is run by volunteers; OWCC does not provide financial support.

e. Intersectionality Issues

Female inmates of color tended to articulate a strong feeling of isolation both from white women "in the system" and from male inmates of color. Particularly in the one coeducational institution, CRCI, female inmates of color and white female inmates reported that female inmates of color find it difficult to create a sense of community, either with white female inmates or with male inmates of color in the institution.

At the male penal institutions, several "cultural clubs" support inmates with particular racial or ethnic identities.[52] Female inmates of color have not developed similar support systems.

2. Programs and Services - County Jails

a. Introduction

As noted above, as a result of SB 1145 (1995), persons sentenced to less than 12 months of incarceration must be placed in county detention facilities. To examine the effect of SB 1145 (1995) on services and programs in county facilities, we asked jail managers to provide information about services and

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[49] INTERMEDIATE SANCTIONS FOR WOMEN OFFENDERS POLICY GROUP, OREGON DEP'T OF CORRECTIONS, INTERMEDIATE SANCTIONS FOR WOMEN OFFENDERS 8 (1995).

[50] *See* Jolin Study, *supra* note 37, at 16.

[51] Comments on inmate surveys.

[52] For example, at OSCI, inmates may belong to a Native American cultural club (Inipi-O-Yate-Ki), a Chicano club (La Raza Unida), an African-American club (Weusi Umoja), or an Asian club that does not have a name. These clubs are authorized to promote a positive understanding of the cultures and to further the cultures' values.

programs that currently exist for female and male offenders. We also asked them whether any additional programs are planned in the light of SB 1145 (1995).

Fourteen counties responded to the survey.[53] Larger counties reported more programs, although all responding counties provided most programs. No county said that it offered programs only to male inmates. However, generally speaking, counties with fewer jail beds provide a narrower range of services or, at best, contract with an outside agency when certain services are needed. Although many counties have specialized supervision caseloads for female offenders, few programs exist that are designed to address the unique needs of women. Also, some counties reportedly have more limited visiting hours for female inmates than for male inmates.

b. Programs and Services Provided

The programs in education, work, health service, alcohol and drug treatment, and mental health treatment provided to men and women who are incarcerated in county jails vary depending on the size of the jail population and the availability of resources. Adult Basic Education and GED programs, work programs, and health-care programs exist in every county that responded to the survey. Marion, Lane, and Jackson Counties provide work release programs in established or to-be-established work release centers.

County jail managers expressed concerns about housing mentally ill persons. Mental health programs, as well as alcohol and drug treatment programs, generally are provided by religious or other private groups or by contract with county mental health departments. More populous counties, such as Lane and Marion Counties, often are able to offer in-house programs in these areas and do their own screening and placement in treatment programs.

In a letter to the Task Force, one person noted that, when Lane County operated a Forest Work Camp, men were placed in a rural work camp setting and were given opportunities to learn skills such as woodworking and carpentry, but that women were housed at the local Community Corrections Center, where their job was to wash police cars twice a week. The women spent the rest of their time watching television or "hanging out in the common day room area." The entire program has been terminated due to funding decreases, but it may be reinstated with funding provided pursuant to SB 1145 (1995).

Pregnant women housed at county jails usually are referred to local physicians. Private service providers expressed concern about the lack of services for pregnant offenders in some counties and noted that these women, despite having been sentenced to jail, have been sent to state prison so that they can receive pregnancy-related services there. Such diversion from county jails may no longer be possible under the limits of SB 1145 (1995), and counties will have to explore ways to meet this need.

3. Education and Training of Corrections Staff

We interviewed staff members who are responsible for the education and training of personnel in corrections, as well as directors of criminal justice programs in post-secondary educational institutions, about the content of course work dealing with gender-related issues. They reported that ODOC uniformed staff are trained through the Board of Public Safety and Standards Training and receive additional, periodic in-service education. They reported no specific effort to address gender issues, although the training addresses outside pressures on inmates, including family and child concerns. The Oregon State Police offer a program on services for victims of domestic violence, through ED-Net, that is available to community corrections departments. In addition, each institution has its own in-house educational program adapted to its inmate population.

C. CONCLUSIONS

Female inmates in state correctional institutions do not have access to all the same job training, work programs, and services as male inmates. Space is the most pressing problem. The Oregon Department of Corrections expects to rectify that deficiency in the next several years with the construction of a new women's prison.

In the state and county facilities, there are few programs and services available to meet some of the specific needs of women, such as pre- and post-natal care and targeted mental health counseling. Men's programs, including sports competition and music activities, generally are regarded as more comprehensive; yet, as one female inmate stated, "women still have just as many if not more needs than men." Several female inmates concluded that the disparity in services simply was discriminatory.

Of the prison inmates responding to the survey, most do not perceive gender-based differences in the overall programs and services available to them in state correctional institutions. However, a number of anecdotal responses indicate a perception of discrimination against female inmates in programs and services provided.

Judges and lawyers who responded to the pertinent survey questions perceive a greater gender-based difference in the availability and effectiveness of services

[53] The following counties responded to our survey: Baker, Benton, Deschutes, Harney, Jackson, Josephine, Lane, Malheur, Marion, Umatilla, Union, Wallowa, Washington, and Yamhill.

and programs than do the inmates themselves. There is a clear demarcation between male and female lawyers and judges as to their perceptions, with more women in both categories stating that they believe that women have fewer resources available.

Finally, staff who work with inmates or who establish policies and programs for inmates generally do not receive specific training in understanding gender issues.

D. RECOMMENDATIONS

1. The Oregon Department of Corrections should:

a. provide adequate space in the new women's prison for educational, vocational, and work programs, as well as for recreation and family visiting;

b. by January 1, 1999, expand work programs and vocational training programs for female inmates to include apprenticeships that realistically prepare them for work opportunities upon release;

c. by January 1, 2000, expand the current dual diagnosis (substance abuse and mental health treatment) programs, which now are available at Columbia River Correctional Institution, to female inmates at other institutions;

d. by January 1, 2000, assess the feasibility of permitting contact between incarcerated mothers and their children (especially newborns) and give special attention to pregnant inmates' needs for services;

e. by January 1, 1999, develop educational materials for corrections officers, program staff, and contract providers on the unique needs of female inmates and make such materials a part of all orientation programs; and

f. ensure that adequate job-training opportunities are available for inmates with sentences of varying lengths. One possible means of ensuring that people who are incarcerated for a relatively short period of time (disproportionately women) complete programs is to permit them to continue training during post-prison supervision.

2. The counties should:

a. begin to address concretely the unique needs of female offenders who are housed in county jails and, by January 1, 1999, develop policies to address those needs; and

b. by January 1, 1999, ensure that female and male offenders are afforded equal access to jail visiting hours and programs.

3. The Oregon State Bar and the Education Division of the Office of the State Court Administrator, working with the Oregon Department of Corrections, including Community Corrections, should:

- by January 1, 1999, create an educational program for lawyers and judges about the availability and nature of the programs and services in Oregon's correctional institutions, county jails, and community corrections facilities.

III. JUVENILE CORRECTIONS

A. INTRODUCTION

In this part of the study, we considered whether comparable programs and services are available to males and females at the Hillcrest and MacLaren[54] youth correctional facilities and at county detention facilities. We focused on three issues:

(a) whether male and female youths[55] who have been committed to secure custody in the juvenile justice system have access to the same treatment, education, and health programs and services;

(b) whether there are programs and services to meet the specific needs of adolescent girls and young women in custody; and

(c) whether the range of county detention programs and services available to female youths in custody is as extensive as that available to male youths in custody.

We surveyed the 11 county juvenile departments that operate juvenile detention facilities, concerning their programs and services. We held two single-sex focus groups at Hillcrest to hear the opinions of male and female youths separately.[56] In addition, we interviewed the Hillcrest superintendent in person concerning programs and services at Hillcrest, and the MacLaren administration self-reported on programs and services available to boys committed to MacLaren. We solicited

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[54] MacLaren houses only male youths. Hillcrest houses both male and female youths.

[55] Throughout this chapter, the terms "juveniles," "youths," "boys," and "girls" refer to individuals under 18 years of age. Oregon statutes refer both to "youth offenders" (*see* ORS 419A.004(29)) and to "juveniles" (*see* ORS 169.730 *et seq*). *See also* note 63, *infra*.

[56] We conducted the juvenile department surveys and the Hillcrest focus groups in collaboration with the Oregon Commission on Children and Families, which also is studying the treatment of female youths in the juvenile justice system. *See* JUVENILE JUSTICE ADVISORY COMM, 1997 REPORT TO THE GOVERNOR AND OREGON LEGISLATURE (1997) ("JJAC Study").

the opinions of Oregon judges and lawyers through the Task Force surveys. Finally, we reviewed national and state studies and data.

We found that a disproportionate percentage of youth offenders in custody are boys. Moreover, a disproportionate share of funds is used for boys committed to "close custody" facilities, despite statutory requirements that girls receive a proportionate share of youth corrections funding and services. Because fewer dollars and other resources are dedicated to providing services and training to female youth offenders, they often do not receive the services and training that they need to prepare them to enter and remain in the general community. In particular, girls are receiving inadequate job-training opportunities and insufficient mental health treatment opportunities.

B. FINDINGS

1. Demographic Trends

The United States Department of Justice reports a disturbing national trend:

> *"Although male juvenile offenders still account for most delinquent acts, the relative growth in juvenile arrests involving females was more than double the growth for males between 1989 and 1993. While juvenile arrests for violent crimes increased 33 percent for males during that period, they increased 55 percent for females. In fact, the ratio of male juvenile arrests to female juvenile arrests declined from [8:1] in 1989 to [6:1] in 1993."*[57]

In Oregon, too, the increase in the number of girls arrested for delinquent acts has outpaced the increase for boys. Between 1990 and 1995, arrests of youth offenders increased 38%; the rate of increase for girls was 49.7%.[58] Arrests of girls increased in all categories of criminal offenses; disturbingly, the greatest increase (100%) was in crimes against persons.[59] In recent years, there has been an increase in girls' gang membership and affiliation, as well.[60]

Although girls account for 24% of crimes against persons by youths, girls constitute only 11% of commitments to close custody.[61] Between 1988 and 1992, Oregon admitted almost 8,000 youths to detention, of whom 17% were female, and admitted almost 2,000 youths to secure facilities, of whom 9% were female.

2. Oregon's Juvenile Justice System[62]

Under Oregon's statutes, persons under 18[63] who have committed an act that would be a crime if committed by an adult,[64] youth who have committed "status offenses" (such as being a minor in possession of alcohol, committing a curfew violation, or running away),[65] and children who have been abused or neglected, may be subject to juvenile court jurisdiction upon the filing of a petition and its adjudication.[66] The courts have wide discretion in fashioning a disposition for each of these circumstances, although only youths adjudicated as delinquents (as distinct from those adjudicated as "dependents") may be committed to secure facilities. Secure facilities are offered at both the state and county levels. Youths can be held before trial, or for a limited time after adjudication, in county-operated detention facilities. Following adjudication, if they are found to be within the jurisdiction of the court, youths who are to be committed to secure facilities are placed in one of the state youth correctional facilities.

a. County Secure Custody

Eleven counties have detention facilities operated by their county juvenile departments: Coos, Deschutes, Jackson, Klamath, Lane, Lincoln, Marion, Multnomah, Umatilla, Wasco, and Yamhill.[67] Juvenile Department Directors in those 11 counties were surveyed, and nine

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[57] *See* EILEEN POE-YAMAGATA & JEFFREY A. BUTTS, U.S. DEP'T OF JUSTICE, FEMALE OFFENDERS IN THE JUVENILE JUSTICE SYSTEM, STATISTICS SUMMARY at iii (1996).

[58] OREGON COMM'N ON CHILDREN AND FAMILIES, OREGON'S YOUTH: DEMOGRAPHIC PROFILES AND CRIME ANALYSIS 18 (Draft report, 1997) (cited with permission).

[59] This 100% increase reflects a change from 1.4 per 1,000 youths arrested to 2.8. JJAC Study, *supra* note 56, at 32.

[60] OREGON COMM'N ON CHILDREN AND FAMILIES, *supra* note 58, at 233, 235.

[61] *See* OREGON YOUTH AUTH, EQUAL ACCESS TO SERVICES FOR FEMALE AND MALE YOUTH (Report on HB 3576 (ORS 417.270)) (Appendix to the Governor's Budget, 1997), at Budget p 234.

[62] This chapter does not address the treatment of girls or boys as victims of abuse or neglect, nor does it address the treatment of young mothers or fathers accused of abusing or neglecting their children.

[63] Until recently, Oregon statutes referred to a person under the age of 18 as a "child." During the 1995 session, the Oregon legislature revised the statutes. Now, a person under the age of 18 who is alleged to have committed an act that, if done by an adult, would be a violation or a crime is referred to as a "youth." ORS 419A.004(27).

[64] ORS 419C.005.

[65] This report does not address the treatment of status offenders, the majority of whom are girls.

[66] ORS 419B.100.

[67] No surveys were sent to youths in county facilities and, accordingly, there are no data on their perceptions of the services and programs provided in those facilities.

responded.[68] All those county facilities are available to house both boys and girls. To varying degrees, as noted below, the facilities offer educational, recreational, health, treatment, and parenting services to detained youths.

All the county detention facilities offer school programs with certified instructors for boys and girls. The counties all provide a variety of skill-building classes, including anger management, refusal skills, stress management, and empathy enhancement. Lane County also offers a girls' support group. Lincoln, Deschutes, Marion, and Multnomah Counties offer opportunities to complete a GED. All nine detention facilities offer coeducational recreational activities.[69]

Regarding health and treatment services, all the counties indicated that, if they find that a particular issue exists, both boys and girls are provided care for that issue. For example, eight counties provide support groups for substance abusers, either sex-segregated or coeducational.

Coos, Jackson, and Marion Counties provide individual counseling services for boys and girls who are survivors of sexual abuse. Marion County also provides coeducational groups. Two counties, Coos and Lane, provide sex-offender treatment for boys and girls; Multnomah County provides such treatment for boys only.

Multnomah is the only county that routinely tests every girl for pregnancy; other counties test only if there is reason to believe that a girl is pregnant.[70] All nine counties responding to the survey provide obstetric and gynecological care for pregnant girls. Two counties, Jackson and Marion, provide counseling concerning post-birth placement options. Other services for pregnant girls include nutritional information,[71] dietary supplements,[72] and pregnancy-prevention information.[73] Two counties, Marion and Multnomah, provide parent-training classes. In responding counties, detainees who are parents may visit with their children, either during regularly scheduled visiting hours or by special arrangements made through probation counselors.

b. Commitment to State Custody

The Oregon Youth Authority (OYA) is the agency that is responsible for youths found to be within the jurisdiction of the court for committing an act that, if done by an adult, would constitute a crime. Currently, youths committed to secure custody reside at either MacLaren (317 beds for boys) or Hillcrest (181 beds for both boys and girls).[74] In addition, OYA soon will open regional youth correctional facilities for boys and girls in Albany, Grants Pass, Prineville, and Warrenton. A new facility in Burns will serve boys only. OYA also operates all-male boot camps.[75] There are no boot camps for girls.

ORS 417.270 requires state agencies (including OYA) that provide services to youths to specify in their budgets what funds are expended for boys and for girls. That statute also requires those state agencies to identify spending disparities and to ensure equal access to appropriate services and treatment. OYA estimates that, during the 1995-97 biennium, it spent proportionately fewer dollars for females than for males in the areas of foster care,[76] gang-transition services,[77] and residential

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[68] The survey was developed jointly by the Task Force on Gender Fairness, Linda Wagner, and the Oregon Commission on Children and Families. Results are based on nine responses; Klamath and Umatilla Counties did not respond to the survey.

[69] Multnomah County reported that it also offers sex-segregated activities for boys and for girls; it did not identify those activities.

[70] The counties that responded to the survey estimated that there were a total of 71 pregnant detainees; about half of them were reported by Multnomah County.

[71] Multnomah, Yamhill, Coos, Jackson, Lane, and Marion Counties.

[72] Multnomah, Yamhill, Coos, Jackson, Lane, and Marion Counties.

[73] Multnomah, Yamhill, Jackson, and Marion Counties.

[74] Hillcrest originally was intended to house only girls. Now the majority of residents are boys. Eight cottages are for boys only, two cottages are for girls only, and one cottage is coeducational (by wing).

[75] Hillcrest's former superintendent, Mary Ellen Eiler, reports that, because the data on all-male boot camps in other states suggest that they are less than effective, Oregon has incorporated more intensive treatment in its boot camps. Oregon is experimenting with boot camps for a trial period and, if they prove effective, they may be offered to girls as well. We note that assessing the efficacy of boot camps for boys presumes that, if something is ineffective for boys it will be ineffective for girls and that what is effective for boys also will be effective for girls. That presumption may or may not be correct.

[76] Girls comprised almost 20% of all youths placed in foster care but received 15.6% of the expenditures. OREGON YOUTH AUTH, *supra* note 61, at Budget p 232.

[77] Seventy-eight percent of the youths served through residential treatment programs were male and 22% were female; 79% of the expenditures in this category were for males and 21% were for females. *Id.*

treatment.[78] It spent proportionately fewer dollars for boys than for girls in the areas of sex-offender aftercare (.72% of the youths who received sex-offender aftercare were girls, but 1.56% of expenditures for such services were for girls.)[79]

ESTIMATED 1995-97 EXPENDITURES BY OREGON YOUTH AUTHORITY

Category of Service	% Girls Served	% Expenditures for Girls
Foster care	20	15.6
Gang transition	22	21
Residential treatment	4.5	1.1
Sex-offender aftercare	.72	1.56

In its 1997-99 Recommended Budget to the legislature, OYA noted that, historically, male offenders have dominated Oregon's juvenile justice system to the detriment of female offenders:

> *"Because of the different types of crimes young men and young women committed, young men have received the bulk of juvenile services and funds. In addition, OYA acknowledges that, with limited bed space, young women were often released from secure facilities and, thus, were unable to complete treatment programs available prior to release. In turn, the recidivism [rate] for women is high."*[80]

Several girls echoed this concern in a focus group at Hillcrest. They complained that, after they had acclimated to the institution but before they could benefit fully from the programs and services available to them, they were released. The girls believed that boys housed at Hillcrest were not returned to the community as quickly as girls were.

Having recognized the disparities in services and programs for boys and girls and the equal access requirements of ORS 417.270, OYA is developing a Gender Equity Advisory Board to advise it on the adequacy and quality of services to male and female youths in the juvenile justice system. In addition, OYA Parole and Probation is developing a Task Force on Girls to identify needs and resources and to ensure that girls receive quality services from the Oregon juvenile justice system. The following sections discuss the types of services and programs available to boys and girls at MacLaren and Hillcrest.

c. Services and Programs Provided at State Facilities

i. Education

The types of educational programs that are available to boys and girls are similar. Boys who are committed to MacLaren and who have not graduated from high school or obtained a GED attend the Lord School on campus. The school is certified by the Oregon Department of Education and has programs that lead to either a high school diploma or a GED. Some of the cottages or programs have self-contained educational programs. Approximately 60% of the boys at MacLaren have special education needs and are on an Individual Educational Program (IEP). Access to community college is now provided through the Internet. According to an official at MacLaren, boys and girls have equal access to Internet facilities.

Girls committed to Hillcrest have access to the Robert S. Farrell High School on campus. Since July 1994, the school has been administered by the Oregon Department of Education and offers mid-high, high school, Chapter 1,[81] and vocational education programs. All students who have received a diploma or GED may take community college and college classes by correspondence. Information about what percentage of girls have special education needs and are on an IEP was not available.

ii. Job Training

The availability of and access to job training, as well as the types of job training available, are greater for boys than for girls. Indeed, the primary job training available to girls seems to be based on stereotypical perceptions of "appropriate" careers for girls, and accessibility to job training in non-traditional positions is quite limited. For example, beauticians' school is available to girls over 16 who have demonstrated trustworthiness with scissors, razors, and other tools. No such program is offered at MacLaren.

MacLaren offers vocational training to boys in horticulture, business services, building trades, and hospitality. In addition, boys at MacLaren are involved in a structured work program in the following areas: institutional laundry, food services, building maintenance, grounds upkeep, garbage and recycling collection, and janitorial and canteen services. There also is a lattice factory where the boys assemble decorative

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[78] Four and one-half percent of the youths who received gang-transition services were girls, but girls received only 1.1% of the funds expended on those services. *Id.*

[79] *Id.* at 232. Disproportionately more dollars may have been spent for services to girls due to the paucity of female sex offenders. Their limited numbers often result in their receiving individual, rather than group, treatment. OYA also spent proportionately fewer dollars during the 1995-97 biennium for Individualized Flexible Services (IFS) to boys. IFS are services provided to youths who are leaving close custody or being diverted from close custody. *Id.* Until part way through the 1995-97 biennium, the IFS program served only girls, to compensate for gender inequities in the residential treatment program. *Id.* at 235.

[80] *See id.* at Budget p 233.

[81] "Chapter 1" refers to Individual Educational Programs and other federally mandated educational services.

cedar lattice used in wood fencing. Due to space shortages, not all boys who request opportunities in job training have access to the programs, however.

Boys at Hillcrest have better access than girls to vocational educational programs through Farrell High School, such as maintenance crew and food service training. Staff shortages sometimes deprive girls of opportunities. For example, maintenance crew training is available to girls only if more than one girl is interested, because training supervisors are men; girls are not allowed to work in food service, because all the staff members are men. Also, girls and boys at Hillcrest are not allowed to serve on the same work crew or training program team. A minimum number of participants must be interested in a work crew or a training program before Hillcrest staff is assigned to supervise the group. Because boys greatly outnumber girls at Hillcrest, this policy has a disparate effect on girls.[82]

iii. Health Services

Girls have less access to health care than do boys. For example, MacLaren operates a 24-hour-a-day, 7-day-per-week health clinic accredited by the National Commission on Corrections Health Care. That clinic employs a full-time physician, a half-time dentist, and several nurses. MacLaren also contracts for psychiatric and psychological services and for additional dental services.[83]

On the other hand, Hillcrest has a health clinic for both boys and girls that is staffed by six registered nurses. A physician is available at predetermined times, and a dentist comes to the clinic as needed. Pregnant girls have access to pre-natal care, a local obstetrician-gynecologist, outside birth coaches, and post-birth baby placement counseling. Access to childbirth classes may vary.[84]

Several girls in the focus group expressed dissatisfaction with the health services at Hillcrest. Although most participants spoke highly of the nurses, they stated that additional medical staff was needed, because staff response time often was slow. One girl recounted that, when she was pregnant, she contacted medical staff because she thought that she was in labor. She reported that she was not examined but, instead, was told that she was not in labor and was directed to return to her room. When she finally was seen by a nurse, she was dilated five centimeters and was taken to the hospital for delivery. In a related matter, girls who give birth at Hillcrest generally are allowed to stay in the hospital for one night following the birth. Several young mothers felt that this was not enough time to bond with their newborns. Additionally, several girls who had been victims of sexual abuse reported discomfort, fear, and extreme anxiety when a male doctor performed a physical examination, including a pap smear. (Every girl receives a complete physical examination upon admittance to Hillcrest.)

iv. Mental Health Treatment

The types of mental health treatment provided for detained boys and girls are similar.[85] However, the manner in which treatment is provided and the amount of time within which to take advantage of mental health treatment programs are not the same.

The focus group with girls revealed considerable concern about treatment services for female sex offenders and survivors of sexual abuse. Several girls reported that sex-abuse survivor issues are not fully assessed upon admission and that the girls themselves might not disclose a history of sexual abuse upon admission, even if asked. In addition, girls were angry and concerned that female sex offenders and victims had been placed in the same therapy group. Some girls also expressed concern that female sex offenders do not have their own rooms, as do male sex offenders but, instead, are bunked with non-offenders, many of whom are survivors of sexual abuse.

With regard to mental health treatment generally, one girl reported:

> *"There are only two and a half cottages for girls, and the rest are for boys, and ours are overfilling. We are getting quantity treatment instead of quality treatment because of the number of girls who need to come in all the time. We constantly have to cap girls out so they aren't even finished with their treatment before they get to leave."*

v. Opportunities for Visits with Family Members

Family visits are scheduled on a designated day each week at Hillcrest and MacLaren although, with advance notice, visits may be scheduled at other times, depending on staff availability. Boys are permitted and encouraged to visit with their families, including their own children. Although the boys at MacLaren generally are prohibited from visiting with non-related girls under 18, this prohibition is waived when the mother of a male resident's child accompanies their child on the visit. At MacLaren's and Hillcrest's parenting classes, the youths' children and the other parent of those children are invited to participate.

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[82] In a focus group at Hillcrest, some girls said that they were frustrated that girls are denied access to certain training programs for these reasons.

[83] Personal communication with Robin Cole, Program Director at MacLaren.

[84] In a focus group at Hillcrest, one girl reported being given only a pamphlet on childbirth.

[85] See Appendix for a complete list of services at MacLaren and Hillcrest.

Several girls reported that they do not see their children during weekly visiting hours because there is no one to transport the children. They suggested that volunteers be recruited to provide needed transportation.

d. Special Concerns for Female Youths Committed for Measure 11 Crimes

Female youths who have been sentenced under Measure 11 are placed in the legal custody of the Oregon Department of Corrections. As part of the intake process, ODOC (in consultation with OYA) decides whether to place a girl at Hillcrest or at OWCC. Girls who are 15 years old are sent directly to Hillcrest; girls who are 16 or 17 years old proceed through the OWCC intake process but then may be transferred to Hillcrest.[86] Some girls initially are placed at Hillcrest and later are transferred (or returned) to OWCC. Hillcrest administrators said that there is little coordination between Hillcrest and OWCC regarding girls sentenced under Measure 11 and that there are no policies in place to require uniform treatment at the two facilities.

e. Staff Training Regarding Gender Issues

The Juvenile Corrections Training Academy provides a two-week educational program for Hillcrest and MacLaren staff. The program includes security and safety issues, crisis intervention, and identifying the different needs of youths on the basis of gender with regard to treatment needs and safety from sexual harassment. Once they have completed the Academy program, staff members at Hillcrest commence two weeks of on-the-job training.

Both boys and girls reported that staff members are generally caring. Nonetheless, girls reported that two staff members told them that they were "too needy" and that the staff members preferred to work with boys. Girls reported concerns about under-staffing, commenting that staff members are spread too thin and do not have time to talk with them, "address our issues," or escort them to recreational activities on the Hillcrest campus.[87]

C. CONCLUSIONS

The number of girls entering the juvenile justice system is on the rise, with the increase in the number of girls arrested for delinquent acts outpacing the increase for boys. However, girls still are less likely to be admitted to close custody facilities. When girls are committed to secure facilities, they stay for shorter periods of time than do boys, although girls are being committed for longer periods of time than in the past. A shorter stay in a secure facility may not be beneficial in all respects, because it deprives some girls of the opportunity to complete training or treatment that may help keep them from re-offending.

In county detention facilities, boys and girls have access to similar educational opportunities and recreational activities. Eight of the 11 counties with juvenile detention facilities reported that they provide treatment for substance abuse. Three counties provide counseling to victims of sexual abuse for both boys and girls, and three counties provide treatment for sex offenders, with two offering treatment to boys and girls and one (Multnomah County) offering treatment only to boys. All nine counties that responded to our survey provide pregnancy-related health care. Counseling regarding birth-control options, pre-natal information and care, and post-birth baby placement is provided in about half the counties.

OYA estimates that it spends proportionately more money for services directed at boys and that the limited funds and limited space for girls have resulted in incomplete treatment for girls. OYA is taking steps to address those disparities.

Many girls in close custody are not satisfied with the health-care services that they receive. Their primary concerns are inadequate staffing and the lack of a female doctor to treat girls. Girls with children are concerned about visitation rules and about the lack of transportation resources that limit their ability to visit with their children.

D. COMMENDATION

We commend the Legislative Assembly for enacting ORS 417.270, which:

- "acknowledges that females under 18 years of age often lack equal access, both individually, and as a group, when compared with males under 18 years of age, to the facilities, services and treatment available through human services and juvenile corrections programs provided by or funded by the State of Oregon" (ORS 417.270(1));
- requires any state agency that regularly provides services to minors to specify in its annual budget the percentages of moneys allocated to, and expended for, minor males and minor females in Oregon (ORS 417.270(3)(a));
- requires all state agencies providing human services and juvenile corrections programs to "identify existing disparities in the allocations of moneys and services to, and expended for, . . . males under 18 years of age and females under 18 years of age" and to document such disparities, if any (ORS 417.270(3)(b)); and

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[86] *See* ORS 137.124(5).

[87] Depending on the girls' privileges, Hillcrest offers basketball, pool, table tennis, cards, television, and music on campus.

- requires the state agencies to develop a plan to implement equal access to appropriate services and treatment for minor males and females and monitor the implementation of that plan (ORS 417.270(3)(c)).

E. RECOMMENDATIONS

1. The Oregon Youth Authority should:

a. immediately take steps to comply fully with ORS 417.270 and to ensure proportional allocation of funds to girls and boys;

b. provide more programs and services, including drug and alcohol treatment, to serve girls in the juvenile justice system. The OYA should have a plan to implement those programs by January 1, 1999, and should implement the programs by January 1, 2000;

c. ensure that sex-offender treatment programs are available to boys, without waiting;

d. by January 1, 1999, review staffing standards at secure facilities to determine whether the number of staff is sufficient to meet the needs and deliver programs and services, especially to girls;

e. ensure that adequate treatment and vocational services are available for youths who are detained for shorter periods of time (disproportionately girls). One possible means is to permit them to continue in the program or receive services after they leave the secure facility but while they remain in the legal custody of OYA;

f. by January 1, 2000, ensure that girls and boys have access to the same types of job training (*e.g.*, building trades for girls, beauticians' school for boys), based on interests, skills, and the like;

g. by January 1, 1999, hire women to fill maintenance crew, food service, and other training supervisor vacancies so that girls have access to the same job-training opportunities to which boys have access; and

h. by January 1, 1999, provide or arrange for transportation for children of youths who are in close custody, so as to encourage a stronger bond between the youths and their children.

2. The Oregon Youth Authority and the Oregon Department of Corrections should:

- by January 1, 1999, to the extent permitted under the law, jointly develop a policy on programs and services for girls who are sentenced under Measure 11.

3. The Hillcrest Youth Correctional Facility should:

- by January 1, 2000, hire a female doctor to perform obstetric and gynecological services.

4. The Oregon Judicial Department should:

by January 1, 2001, undertake to study gender and intersectionality issues affecting juveniles who are adjudicated as "status" offenders (disproportionately girls).

ATTACHMENT A
Professional, Technical, and Production Programs Available to Female and to Male Inmates in Oregon[88]

	Available to female inmates at OWCC	Available to female inmates at OSCI or OSP	Not available to female inmates	Available to male inmates	Not available to male inmates	May Result in Certification or Licensure[89]
PROFESSIONAL/TECHNICAL TRAINING PROGRAMS (includes classroom instruction, lab, and on-the-job training)						
Building Maintenance (OSP, OSCI, OWCC, SCI, MCCF)	X			X		Cleaning Management Institute Certification (Levels I & II)
Organic Gardening (OWCC[90])	X				X	NO
Clerical Basics (OWCC)	X				X	Chemeketa Community College Certificate
Auto Mechanics (OSP)			X	X		Automotive Servicing Excellence (ASE) Certification
Hair Design (OSP)			X	X		State Licensure
Cabinet Making (OSP, OSCI)		X		X		NO
Furniture Refinishing (OSCI)		X		X		NO
Intarsia[91] (OSCI)		X		X		NO
Computer Literacy (OSP)			X	X		NO
Building Technology (SRCI)			X	X		Treasure Valley Community College Certificate
CAD/CAM[92] (certification program) (SRCI)			X	X		Treasure Valley Community College Certificate
Culinary Arts (OSCI)		(will soon be available to female inmates)	X	X		Chemeketa Community College Certificate
Books on Tape (EOCI)			X	X		NO
Audio Tape Player Refurbishing (EOCI)			X	X		NO
Computer Refurbishing/Recycling (OSCI)		(will soon be available to female inmates)	X	X		NO
Meat Cutting (MCCF)			X	X		NO
Computer Graphic (Desktop Publishing) (EOCI)			X	X		Blue Mountain Community College Certificate

88 Information provided by Oregon Department of Justice lawyer Jefry J. VanValkenburgh.

89 Oregon Department of Corrections issues certificates to all inmates who successfully complete a course or educational program. Those certificates are not to be confused with a certification (or licensure) awarded by a college or professional or trade organizaqtion.

90 No male inmates are transported to OWCC for training, education, or production purposes.

91 Intarsia is a craft that involves gluing small peices of wood into a hollow wooden support (popular in 15th century Italy).

92 CAD/CAM is Computer Aided Drafting/Computer Aided Manufacturing.

	Available to female inmates at OWCC	Available to female inmates at OSCI or OSP	Not available to female inmates	Available to male inmates	Not available to male inmates	May Result in Certification or Licensure[89]
PRISON INDUSTRIES/INMATE WORK PROGRAMS (Production Only)						
Phone Answering (DMV) (OWCC)	X				X	n/a
Phone Answering (Secretary of State) (OSCI)			X	X		n/a
Phone Answering (Oregon Health Plan) (OSCI)			X	X		n/a
Mail Room Operations (OSCI)			X	X		n/a
Printing Shop (OSCI)			X	X		n/a
Uniform Repair/Embroidery (OWCC)	X				X	n/a
Card Folding (OWCC)	X				X	n/a
Furniture Manufacturing (OSP)			X	X		n/a
Upholstery (OSP)			X	X		n/a
Bar Code Scanning Equipment Assembly (OSP)		X		(will soon be available to male inmates)	X	n/a
Metal Fabrication (OSP)		X		X		n/a
Laundry (OSP, EOCI)			X	X		n/a
Construction (SRCI and SRCI Expansion)			X	X		n/a
Metal / Wood Fabrication (PRCF)			X	X		n/a
CAD/CAM (work program)(OSCI)		X		X		n/a
Garment Manufacturing (Prison Blues) (EOCI)			X	X		n/a
Milk Packaging Operation (MCCF)			X	X		n/a
Meat Cutting(MCCF)			X	X		n/a
Wood Pallet Manufacturing (SCI)			X	X		n/a

INTERACTIONS BETWEEN LAWYERS, CLIENTS, STAFF, AND OTHER PROFESSIONALS

"I personally know of a legal secretary who is harassed on a regular basis by one of the attorneys she works for. He doesn't request sexual things from her, but subjects her to his sexual exploits by writing them on his calendar, telling her about them and talking about them on his dictation tapes. She is a single mother in her fifties and is scared to mention them because she needs the job so bad and is afraid she won't get hired elsewhere because of her age and doesn't want to be known as a troublemaker."[1]

A. INTRODUCTION AND OVERVIEW

We studied whether and, if so, how gender affects the interactions between lawyers and clients, lawyers and professionals, lawyers and legal secretaries,[2] lawyers and paralegals,[3] lawyers and court reporters, and among employees of the Oregon State Bar (OSB) and the Professional Liability Fund (PLF).[4] In general, gender unfairness in the workplace has diminished during the past several years, but it still persists to a sufficient extent to cause concern.

Among the groups studied, commonalties emerged. First, for those employed with or by lawyers, people of both sexes generally agree that there is less gender unfairness now than there was in the past. In fact, most believe either that gender bias does not exist at all or that it is limited to a few areas. Still, differences in perceptions and experiences remain. For example, 30% of legal secretaries believe that gender bias has stayed the same over time or has gotten worse. More women than men perceive that bias against women continues to exist to some degree; a few people — more men than women — perceive bias against men. Women often believe that men have advantages, while men predominantly believe that opportunities are equal. Significantly, respondents indicate that, although rare, incidents of unwanted touching, inappropriate sexual comments, requests for sexual favors, and other forms of sexual harassment still occur.

For the most part, it appears that clients do not choose their lawyers on the basis of gender, nor does the lawyer's gender affect client satisfaction. Nevertheless, some gender-based selection exists. Where gender is a factor in the selection of a lawyer, the client more often wants to be represented by a man; and where level of satisfaction is influenced by gender, more female than male clients report an effect. Some clients believe that male and female lawyers treat them differently; clients perceive that female lawyers, as opposed to male lawyers, have better communication skills, are more empathetic, and work harder than male lawyers. Some clients also perceive that male lawyers, as opposed to female lawyers, are more aggressive and less likely to be discriminated against to the detriment of their clients. Complaints against lawyers filed with the bar, and disputes concerning client trust funds and fees, suggest that clients are more often dissatisfied with male lawyers than with female lawyers even when the larger number of male lawyers within the bar is factored in. Although clients rarely experience sexual harassment or exploitation by their lawyers, such conduct does occur, as documented in disciplinary cases.

We conclude that, over time, legal professionals have succeeded, for the most part, in significantly reducing gender bias in the workplace. Nevertheless, some bias and unfairness remain.

B. ISSUES STUDIED

We sought, first and most importantly, to determine how, if at all, gender affects the interactions between lawyers and clients. Once under way, we discovered that it was difficult logistically to obtain information from clients. Because we had the cooperation of court reporters, paralegals, legal secretaries, and the Oregon State Bar, we expanded our focus, giving equal attention

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1 Comment by a female court reporter.

2 This term includes legal professionals referred to as "assistants" who perform primarily secretarial functions.

3 This term denotes both "paralegals" and "legal assistants."

4 For a discussion of gender issues in the employment of court, Oregon State Bar, and Professional Liability Fund employees, see the chapter on The Employment of Court, Oregon State Bar, and Professional Liability Fund Personnel. For a discussion of gender issues in the courtroom, see the chapter on Judicial Administration.

to interactions between lawyers and other legal professionals. In the end, we did obtain more data concerning the interactions between lawyers and clients than for other groups, and our findings reflect this emphasis.

As pertinent to this chapter, we addressed the following specific questions:[5]

(1) Lawyers and Clients

(a) Does gender affect a client's selection of a lawyer?

(b) Does gender affect the working relationship between lawyer and client, including the client's satisfaction with the lawyer?

(c) Do lawyers sexually harass clients?

(2) Lawyers and Other Legal Professionals

(a) Are employment opportunities for legal secretaries or paralegals affected by gender?

(b) Are advancement opportunities for legal secretaries or paralegals affected by gender?

(c) Do lawyers subject their employees to sexual harassment?

(d) Do lawyers, as employers, have and enforce policies against sexual harassment?

(3) Lawyers and Court Reporters

(a) Are lawyers' decisions to hire court reporters affected by gender?

(b) Are court reporters' fees affected by gender?

(c) Is the relationship between lawyers and court reporters affected by gender?

(d) Do court reporters experience sexual harassment by lawyers with whom they work?

(4) Legal Staff and Clients

Do clients experience sexual harassment by legal staff?

C. METHODS OF STUDY

The Interactions work group comprised eight women and four men and was assisted by a male liaison from the Intersectionality work group. Two work group members were African-American. A trial judge chaired the group; other members were two health science practitioners and academics, one mental health professional, a business person, a legal secretary, a certified court reporter, a paralegal, an administrator with the Oregon State Bar, two lawyers from private practice, one lawyer from Legal Services, and one lawyer from a public defender's office.

The work group developed surveys directed to six separate groups: clients, court reporters, legal secretaries, paralegals, employees of the OSB, and employees of the PLF.[6] To identify client respondents, we selected 33 firms and legal organizations by practice area and location in order to obtain specialty and geographic diversity. Each firm then was asked to send the survey forms to the clients in their last 50 closed cases. Twenty-two firms participated.[7] In addition, we sent surveys to:

- the 330 members of the Oregon Court Reporters Association (OCRA) and to all Oregon certified shorthand reporters who are not members of OCRA;
- all 280 members of the Oregon Paralegal Association;
- all members of the Oregon Association of Legal Secretaries; and
- all employees of the OSB and the PLF.

In addition to fielding these surveys, we sent letters of inquiry to all indigent defense contractors in Multnomah County and other statewide contractors identified by the Office of the State Court Administrator as having both male and female lawyers. Those letters asked the directors whether gender mattered in the assignment of cases. Finally, we developed questions to be included in the Task Force's general survey of lawyers and in surveys of inmates[8] and litigants developed by the Criminal Law and Judicial

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[5] This list reflects a narrowing of issues for practical reasons. See the Appendix for a complete list of all questions discussed.

[6] To develop the surveys, we reviewed other surveys from similar groups in other states, then formulated a series of questions related to our charge and tested the survey on selected individuals who provided feedback. Patricia Gwartney, Ph.D., Director of the Oregon Survey Research Laboratory at the University of Oregon, then reviewed the survey, and we incorporated her suggestions. Although some questions were changed to make them relevant to different groups, by standardizing the surveys we ensured that the findings could be compared easily. Copies of the surveys are included in the Appendix.

[7] A copy of the letter sent to firms is in the Appendix. It should be noted that, with respect to the client group, we encountered "identification fear" despite assurances of anonymity; also, some firms simply did not have available resources, time, or money to honor the request.

[8] We recognize that inmates also are clients. However, to make references simple, we chose to refer to this group of the client population as "inmates" to distinguish them from other groups of clients surveyed.

Administration work groups.[9]

The work group conducted five focus group meetings involving court reporters, legal secretaries, paralegals, members of the Oregon Legal Management Association (OLMA), and legal investigators for indigent defense contractors. We designed the focus groups to create an informal dialogue about issues of gender fairness and to obtain exclusively qualitative information.[10]

The work group obtained additional data from the Oregon State Bar regarding the gender of lawyers: (1) against whom ethics complaints are filed; (2) against whom Client Security Fund[11] claims are filed; and (3) who are involved in Bar-sponsored fee arbitrations.[12] We also collected information from OSB's Lawyer Referral Service[13] concerning gender-based requests for lawyers. In addition, we reviewed the cases in which the Oregon Supreme Court has disciplined lawyers for sexual exploitation of clients. We also obtained gender-specific information on salaries of lawyers statewide from the Oregon State Bar. Further, because information from the Lawyer Referral Service suggested that clients sometimes hire a female lawyer because they believe that she will charge less, we examined the "Oregon State Bar 1994 Economic Survey" — the most recent information available about the billing rates of Oregon lawyers, analyzed by gender. We also reviewed the transcript of the Oregon State Bar's Annual Meeting at which the members adopted a resolution for a disciplinary rule prohibiting sex with clients, a law review article on lawyers' sexual exploitation of clients, and two articles in the June 1997 Oregon State Bar *Bulletin* concerning lawyers' treatment of legal secretaries. Finally, we also reviewed both oral and written testimony from the statewide public hearings sponsored by the Task Force.

As noted, the work group fielded six surveys. Two of the surveys are discussed in the chapter on The Employment of Court, Oregon State Bar, and Professional Liability Fund Personnel. The other surveys were these:[14]

(1) Clients

Of the 1,100 client surveys distributed, approximately 240 (22%) were returned, roughly half from men and half from women. Most respondents had received legal representation on more than two occasions, with nearly half using a lawyer on at least four matters. The ages of respondents were similar among men and women, the majority being between their mid-30s and early-60s. In this as in the other groups surveyed, the majority of respondents were white, English-speaking, heterosexual, married homeowners who had children and had reached educational levels ranging from some college to post-graduate work.[15] The respondents were represented on a variety of legal matters, including personal injury, business litigation, business transactions, civil rights (including employment discrimination), domestic relations, estate planning/probate, administrative, and criminal law.

(2) Court Reporters

Of the 212 surveys distributed to court reporters, 56 (26%) were returned. Of those, 16 were from men. The men tended to be older than the women – most men

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[9] Copies of these surveys are in the Appendix.

[10] Focus groups for court reporters, legal secretaries, and paralegals were conducted at the statewide conferences for each profession. The OLMA session took place in Portland at a monthly meeting of the organization. We conducted the criminal defense investigators' session through an informal invitation and lunch-meeting process.

[11] This Fund protects clients from misappropriation of funds by lawyers and is supported by mandatory contributions by lawyers in active practice. Claims are reviewed by a Board consisting of lawyers and non-lawyers.

[12] The OSB provides a program in which a client and lawyer can resolve a dispute over the lawyer's fee by arbitration. Because only lawyers in private practice are subject to fee disputes, we also asked for an analysis by gender of Oregon lawyers' practice areas.

[13] This is a service designed to match clients needing lawyers with lawyers who have agreed to participate and charge a low initial consultation fee. The service does not make referrals based on gender. We asked the Lawyer Referral Service to record requests for lawyers by gender for one month, from August 15 through September 16, 1996, and to summarize the reasons given by people seeking referrals for specifically requesting a male or female lawyer, when a reason was given.

[14] For purposes of survey analysis, we generally distinguished between "yes" and "no" responses by grouping the answers. For those questions that had answer options such as "always," "sometimes," "rarely" and "never," the answer "rarely" was grouped with "never" in the "no" grouping. However, if the question or group of questions seemed unusually important, then the "rarely" answer was noted. Generally, a response was noted only if the difference between men and women in frequency of response to the "yes" and "no" answer categories was 10% to 15% or more, unless significant trends were noted.

[15] Three men self-identified as African-American, one as Asian-American, two as Hispanic, and four as Native American; two women self-identified as Asian-American, two as Hispanic, five as Native American, and one as Asian/Pacific Islander. Twenty-six men and 29 women reported having physical disabilities.

were over 50,[16] while more women were in their 40s. Twenty-four respondents were OJD court reporters, and 20 owned their own firms.

(3) Legal Secretaries

Of the 338 surveys distributed to legal secretaries, 128 (38%) were returned – all but two from women.[17] Most respondents were between the ages of 32 and 50.[18] Most respondents had worked in their current positions for between three and eight years, with slightly fewer than half holding supervisory positions.

(4) Paralegals

Of the 280 surveys distributed to paralegals, 104 (37%) were returned. Ninety percent were from women. Most respondents were between the ages of 33 and 50. Most respondents were employed by law firms and had been at their current jobs for three to eight years. About half the respondents had supervisory responsibilities.

D. FINDINGS

1. Clients

a. Overview

In most cases, clients did not select their lawyers based on gender. In the few cases in which gender-based selection did occur, the client more often wanted to hire a man than a woman. When clients expressed a preference, they based it on socially ingrained views regarding male aggressiveness and female empathy. Additionally, although most clients reported that the lawyer-client relationship was not affected by the gender of either, of those who noted a difference in how they were treated by lawyers, twice as many female as male clients reported a difference. In marked contrast, a majority of female lawyers (61.3%) reported that they were treated differently by clients because of their gender, while only a small portion of male lawyers (19.2%) reported a difference. Further, clients rarely experienced sexual harassment by their lawyers, although such harassment does occur, as documented in the survey responses, in lawyer discipline cases, and in correspondence to the Task Force. Finally, the majority of clients were satisfied with the quality of their representation and did not report that their satisfaction level was influenced by the gender of their lawyers. Despite this fact, in 1996 Bar Disciplinary Counsel received a significantly higher proportion of ethics complaints against male lawyers, even when factoring in the higher percentage of men in the bar.

b. Lawyer Selection

Every tool that we used to study whether clients choose their lawyers based on the lawyer's gender yielded the same result: For the vast majority of clients, the gender of the lawyer is not a factor. When gender is a factor, it tends to be based on perceptions that men are more aggressive and that women are better communicators and are more understanding or empathetic.

For example, the Lawyer Referral Service data collection from August 15 through September 16, 1996, reflected that, of the 3,325 requests handled, only 45 clients requested a lawyer of a specified sex. Forty-one people requested a woman, and four requested a man. Most requests for female lawyers occurred at the outset of the call, while requests for male lawyers were made after referral to a woman. Callers were not asked why they wanted a man or a woman, but explanatory comments were noted when they were given. These included that women are "nicer," "more sympathetic," "easier to work with," "will look good to the jury or judge," "understand what it's like to be the underdog," and "probably charge less."[19] Two questions on the client survey inquired about the role of gender in selection of a lawyer. Approximately 85% of the respondents stated they had not sought a lawyer of a specific gender in the case most recently concluded and, for nearly 90%, gender had never been a factor in selecting a lawyer.

In surveys conducted by other work groups, the results were similar. For example, in the inmate survey, we asked: "In the case for which you are now serving a sentence, did you want a lawyer of a specific sex?" More than 80% (82% of the men and 69% of the women) said "no." There was a notable exception for women of

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[16] Two men and two women self-identified as Hispanic, and the rest self-identified as white non-Hispanic. One respondent reported having a mental disability, and eight (14.3%) reported having physical disabilities, of whom five (8.9%) reported having visible disabilities.

[17] There are five male members of the Oregon Legal Secretaries Association.

[18] Twenty-three (18%) of the women said that they have physical disabilities.

[19] We sought to determine whether the perception that female lawyers tended to charge less than their male counterparts had a basis in fact. The most recent information available on lawyer billing rates in Oregon is in the Oregon State Bar's 1994 Economic Survey. The survey indicated that, in 1993, on average, female lawyers billed at a rate approximately 30% less than the rates charged by their male counterparts. See the chapter on Opportunities in the Legal Profession for a discussion of gender fairness implications of that finding.

color[20] — almost 60% wanted a lawyer of a particular gender.[21] At the focus group conducted with male inmates of color, only two participants said that they had a preference regarding the gender of their lawyer; both wanted a female lawyer. In the litigant survey, participants were asked, "Does the sex of your lawyer make any difference to you?" and "Have you ever requested or tried to hire a lawyer of a specific sex?"[22] Again, about 85% of those surveyed said that the gender of the lawyer made no difference to them. Nearly 70% of the smaller group who were asked the follow-up question said that they had not requested, or tried to hire, a lawyer of a specific sex.

Generally, men and women responded similarly to questions about whether gender influenced their selection of a lawyer. Some differences do appear, however, among those who prefer a lawyer of a particular gender. In all the surveys, the number of people seeking legal representation who engaged in gender-based lawyer selection was very small, making reliable analysis difficult. Nevertheless, differing patterns across the surveys are noteworthy. In the client survey, although both male and female clients preferred male lawyers when they had a gender preference, women were much more likely to want a female lawyer than were men. Of the ten male clients who had hired (or tried to obtain) a lawyer of a specific gender, eight wanted a male lawyer and two wanted a female lawyer. Of the 15 female clients who had a gender preference, nine wanted a male lawyer and six wanted a female lawyer. In other words, 75% of the clients who preferred a female lawyer were women.[23] The pattern in the litigant survey was slightly different. Male litigants preferred male lawyers, and female litigants preferred female lawyers, both in absolute and in relative terms. Male inmates expressed an extremely slight preference for male lawyers (51.9%), while 77.8% of the female inmates who had a preference wanted a female lawyer.

We gleaned reasons why clients prefer a lawyer of one gender from the responses to the multiple-choice survey questions and from the written comments.[24] In all the surveys, the most common reasons checked for seeking a lawyer of a particular gender were that the lawyer would fight harder for the client (or would spend more time on the case), and that the client had had a positive experience with a lawyer of that gender, or a bad experience with a lawyer of the other gender, in the past.

A large number of both male and female inmates who had a gender preference believed that they would have a better chance with a lawyer of a particular gender because of the nature of the charges.[25] Seventy percent of the male inmates and more than 60% of the female inmates who preferred a lawyer of a particular gender held that view. That also is consistent with anecdotal evidence provided by a female criminal defense lawyer, who reported that male clients charged with sex offenses had told her that they hired a woman because they believed that it would enhance their credibility before the judge or jury. The theme of lower cost appeared as a reason for gender-based selection of a lawyer in the inmate survey. Seven men felt that cost was a factor in choosing a lawyer of a particular gender.

The written comments on the client and inmate surveys followed similar themes. Female lawyers were perceived to have experienced discrimination in the legal profession. To some respondents, this made female lawyers more understanding of the client's problems and willing to work harder. Others expressed concern that the client's interests would suffer because of discrimination against a female lawyer. For example, one client wrote: "I felt a male lawyer would get a better result. I felt I was discriminated against because I was a female." Another said: "[I w]anted to have less anxiety about whether my case would be fairly heard based on gender of attorney." We also heard this concern in testimony at public hearings. One couple expressed their belief that their female lawyer had been excellent but, because of the gender-based adverse treatment that

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[20] The inmate survey was the only one conducted that had a substantial number of non-white respondents. For an examination of racial and ethnic issues in the criminal justice system, see the REPORT OF THE OREGON SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYSTEM (Oregon, 1994) and A COMMITMENT TO FAIRNESS: PROGRESS REPORT OF THE OREGON SUPREME COURT IMPLEMENTATION COMMITTEE (Oregon, 1996).

[21] Of that 60%, 42% (8 female inmates of color) said that they preferred to be represented by a female lawyer, and 16% (3 female inmates of color) preferred to be represented by a male lawyer. Although the remaining 42% said that they preferred a lawyer of a specific sex, they did not tell us whether they preferred to be represented by a female lawyer or a male lawyer.

[22] The survey, which was administered orally to people at courthouses in five Oregon counties, was structured so that, if a respondent answered "no" to the question whether the sex of the lawyer made a difference, he or she was not asked the second question about gender-based lawyer selection. Nevertheless, some surveyors did not follow this instruction, as the number of responses to the follow-up question is greater than the number of people answering "yes" to the lead-in question.

[23] Although the number of clients of color responding to the survey was quite small, it is striking to note that only white respondents said that they preferred a male lawyer or that gender had ever played a role in their selection of a lawyer.

[24] Analysis was somewhat difficult, because the data were not broken down by gender of lawyer requested.

[25] Four of the female litigants gave "because of the nature of the charges against me" as a reason for preferring a lawyer of a particular gender; no male litigants did.

she had received from the judge, they would not hire a woman to represent them again in their county.[26]

Empathy, listening skills, "communication style," and comfort were often mentioned as reasons why clients and inmates preferred to be represented by female lawyers. In their comments, clients more often mentioned the type of case when it was a domestic relations matter. It appeared that these respondents were most often women expressing a preference for hiring a female lawyer. Inmates tended to comment that female lawyers fought harder on their cases, while litigant and client survey respondents seemed more often to list this as a reason for wanting to hire a male lawyer. Two respondents to the client survey who were involved in insurance defense stated that they prefer to use a female lawyer when the plaintiff is a woman. Another client said that it is an advantage to be represented by a female lawyer in sex discrimination cases. One (apparently corporate) client reported: "My company gave 'bonus points' on our evaluations for each female or minority outside counsel we retained."[27]

When law firms providing indigent defense services (court-appointed criminal defense counsel) were asked about the role of gender in case assignment, 25 of the 36 firms said that gender never played a role. All the firms with more than one lawyer handling cases in a particular county reported using a rotation system to assign lawyers to cases. Three firms said that they took gender into account in assigning counsel when a client has engaged in aggressive or sexual conduct toward a lawyer. Four firms said that they would honor a gender-specific request by a client or juvenile court counselor.[28] Five firms reported that they sometimes took gender into account in assigning lawyers to cases because of the sensitive subject matter or facts underlying the case, usually assigning a female lawyer to work with a female client. Consideration was given to gender in lawyer assignment more often in juvenile than in adult cases, and more often for female than for male clients. Six firms handling juvenile cases make gender-based exceptions to a strict rotation of lawyer assignment in juvenile cases, but five of those do so only for female clients. Five firms consider gender in the assignment of a lawyer in adult cases, but three of those do so only for female clients.[29]

c. Satisfaction with Professional Relationship

We sought to investigate whether lawyers treat male and female clients differently, for example, by giving male clients a greater role in decision-making. We also sought to determine whether male lawyers treat their clients differently than female lawyers do, and whether clients treat their lawyers differently based on the gender of the lawyer. Both questions proved difficult to study using the methods available. The surveys that we conducted, for instance, provided no means to compare the responses of male and female clients of the same lawyer. In addition, although we tried to distinguish between professional and personal interactions between lawyers and clients, the phrasing of survey questions did not always permit us to discern this distinction.

We asked client and inmate survey respondents whether they had used both male and female lawyers in the past and, if so, whether they had experienced a difference in the way male and female lawyers treated them. Respondents who reported a difference in treatment were asked to describe it. We asked litigants and inmates whether they had observed men and women being treated differently in a law office or other legal environment. If so, we asked whether men or women were treated better, by whom, and in what way the treatment was different.[30]

In the client survey, female clients were twice as likely as male clients to report a difference in treatment (26% of women versus 13% of men). Among inmates, both men and women reported being treated differently by male and female lawyers about 45% of the time. When the answers are analyzed by race together with gender, however, strikingly different experiences emerge, especially among women. Only one-third of white female inmates believed that male and female lawyers had treated them differently (the lowest percentage of any inmate group), but almost 65% of female inmates of color believed that they had received different treatment depending on the gender of their lawyers. This was the only group in which a majority of respondents reported a difference in treatment. Unfortunately, the data were not analyzed to determine which gender of lawyer was perceived as treating which gender of client better. Seven of the thirteen male inmates of color participating in a special focus group at Eastern Oregon Correctional Institution (EOCI) also reported differences in the way that they were treated by male and female lawyers. The comments suggested that

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[26] Testimony at Salem public hearing, Dec. 5, 1996.

[27] Comment on client survey.

[28] These requests were characterized by two firms as "rare" and by a third as not having occurred yet.

[29] See the Opportunities in the Legal Profession chapter for a discussion of lawyers' perceptions of gender bias in case assignments.

[30] See Appendix for specific survey questions.

some were treated better by women and some by men.[31]

A majority of litigants and inmates observed no difference in the treatment of men and women in a law office environment. Although inmates were more likely than litigants to observe a difference (27% of inmates versus 16% of litigants), the gender of the respondent did not affect the answer in either group. Among both male and female inmates, people of color were more likely than whites to perceive different treatment based on gender. Both men and women, among both inmates and litigants, perceived that the *opposite* gender receives better treatment when any difference is perceived. Among the male inmates who observed men and women being treated differently in a law office or other legal environment, about 85% thought that women were treated better than men. Of the female inmates who had observed different treatment, about 70% thought that men were treated better. Among male litigants who had observed differences in treatment, 73% thought that women were treated better. Only ten female litigants reported seeing differences in treatment. Of these, three thought that women were treated better, and five thought that men were.[32]

Litigants and inmates alike perceived that men were more likely than women to treat people differently based on gender in a law office environment. Lawyers were identified most often as the person who engaged in differential treatment.

Many written comments on the inmate survey reflected a belief that female lawyers worked harder and were more caring and respectful than male lawyers. For example, one respondent noted that female lawyers were more "compassionate" and "conscientious." Another wrote that female lawyers "are willing to go the extra mile."

When lawyers were asked whether clients treated them differently based on gender, 20% of men and 65% of women said "yes." We tried to examine the role of gender in the client's satisfaction with the lawyer-client relationship in several additional ways. First, the client survey asked specifically what was the client's level of satisfaction with the lawyer and whether the lawyer's gender influenced that level of satisfaction. We also asked clients whether they believed that their own gender had affected the outcome of the case. Inmates were asked whether they would want the lawyer on their most recent case to represent them again and how much total time the lawyer spent with the client talking about the case, explaining options, and trying the case or reviewing the plea petition.

More than 80% of both male and female clients reported being "very satisfied" or "satisfied" with their lawyers. The vast majority of both groups believed that their lawyer's gender did not influence their level of satisfaction, although women were slightly more likely to believe that it did. Similarly large percentages of men and women did not believe that their own gender had affected the outcome of their cases, but again women were slightly more likely to perceive that it had.[33]

Not surprisingly, considering that the survey respondents had been convicted and were incarcerated, the majority of both male and female inmates would not want the same lawyer representing them again. Nevertheless, it is noteworthy that substantially more male than female respondents felt this way. About 75% of the men would not want the same lawyer again, compared to about 60% of the women.

Female inmates reported that their lawyers spent more time with them than male inmates reported concerning their lawyers, although more than 65% of male inmates and 56% of female inmates said that their lawyers had spent three hours or less with them. Further, only 10% of male inmates said that their lawyers had spent 10 or more hours with them, whereas almost 25% of female inmates said that their lawyers had spent that much time. As noted above, we conducted a focus group of 13 male inmates of color at EOCI. Six of the participants said that their lawyers had spent 30 minutes or less with them before going into court.

We also examined OSB records regarding lawyer misconduct, fee arbitrations, and Client Security Fund claims as other indicators of client satisfaction.[34] The Bar reported that, in 1996, there were about 9,300 lawyers in active practice, of whom 26% were women. Of the more than 1,700 complaints filed against Oregon lawyers, about 15% were against women. Further, in 1996, 58 lawyers were disciplined as a result of complaints filed in 1996 or earlier. Of those, seven (12%) were women.

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[31] Inmates of color commented, "Females just seem to treat my case with more genuine care," "more concern," and "Female attorneys are more conscientious." Others in the group stated, "Female attorneys I've had are more weak-willed and reluctant to stand up and fight for the individual * * *. Male attorneys * * * tried to go by the rule that I was innocent until proven guilty, more than the female attorneys did."

[32] The form of the question, which asked for observations "in a law office or other legal work environment," may have caused some confusion. When this question was discussed by the male inmates of color in their focus group, one inmate discussed different treatment of male and female officers within the police force.

[33] For a discussion of gender and case outcome in civil cases, see the chapter on Judicial Administration.

[34] It is important to note that bar complaints may be made by another lawyer, a judge, or the opposing party, as well as by the lawyer's own client, and that the data do not reveal whether one lawyer was the subject of multiple complaints.

The Oregon State Bar Fee Arbitration Program involves only lawyers in private practice. In 1996, about 6,000 of Oregon's active bar members were in private practice and, of those, approximately 20% were women. In 1995 and 1996, there were about 200 fee arbitrations; slightly more than 10% involved female lawyers. In 1996, clients filed almost 360 claims with the Client Security Fund alleging misappropriation of their money by lawyers. Only about 6% involved female lawyers.

Thus, it appears that proportionately fewer ethics complaints are made against women and that even fewer result in discipline, that clients have fewer fee disputes with women, and that women are less likely than men to have claims involving the Client Security Fund.

d. Personal Treatment, including Sexual Harassment

We studied the personal interactions between lawyers and clients by asking questions in the client survey about whether the client's lawyer or anyone in the lawyer's office had called the client by a first name or addressed the client by terms of endearment that the client felt were not appropriate, had touched the client in a way that made the client uncomfortable, or had requested sexual favors of the client. We asked respondents to the inmate survey about the use of terms of endearment, touching, and requests for sexual favors. We asked litigants whether they had been called by a term of endearment, called by a first name when someone of the opposite sex was called by a last name, addressed in a rude manner when persons of the opposite sex were addressed politely, subjected to comments about dress or appearance based on sex, been subjected to comments of a sexual nature, or touched in a way that the respondent felt was inappropriate.

The vast majority of both male and female clients who responded to the client survey reported no experience of being called by their first names when others were not, but a higher percentage of women (13%) than men (4%) had this experience. Male lawyers and female secretaries were the most commonly named offenders. Lawyers or members of legal staffs very rarely used terms of endearment with clients — fewer than 3% of male clients and 6% of female clients reported this experience.[35] Male lawyers are far more likely to call clients of color by their first names than they are to do this with white clients; female lawyers are far less likely than male lawyers to call any client by his or her first name.

One male and two female clients reported unwanted touching, each by a lawyer of the opposite sex. Likewise, two female clients reported being asked for sexual favors, both by a male lawyer. Both clients were white, heterosexual, and married. One client, a defendant in a criminal case, elaborated in her written comments: "Approximately six years ago I had a court-appointed lawyer who used his 'power' to get me to do things that I feel were inappropriate — but at the time I was scared of possibly going to jail or losing my son so I did what he wanted me to do." The other client reporting requests for sexual favors was involved in an estate-planning matter. From the survey, it is not possible to tell when the incident occurred.[36]

We received a letter from one woman, a lawyer, discussing particularly egregious behavior by a lawyer whom she was considering hiring. The male lawyer told the female lawyer to meet him at a downtown Portland bar. She wrote:

> *"Mr. . . . proceeded to tell me about how he had engaged in sexual conduct with a prior client who later brought disciplinary charges against him. He discussed in detail how she engaged in oral sex but not intercourse. He also discussed his sexual relationship (and lack thereof) with his wife. He then began flirting with me and even putting his hands on my legs above my knee and caressing them. He attempted to kiss me. He told me it would be better if he wasn't my lawyer so that he wouldn't have the disciplinary problem he had with his prior client.*
>
> ". . . . .
>
> *"I never did file a formal report (although I did tell close friends) because [he] is a well-known and powerful attorney in town. A male attorney in my office referred to him as a 'classy guy.'"*[37]

The proportions of male and female inmates who reported being inappropriately called by a term of endearment were the reverse of those found in the client survey: 13% of male inmates, but only 7% of female

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[35] Four of the seven women named a male lawyer as the one who inappropriately used terms of endearment. One female client marked "no" to the questions about first names and terms of endearment, but wrote in the comments that she was offended that her lawyer insisted on calling her "Mrs." when she had repeatedly requested that the title "Ms." be used.

[36] In the legal secretaries' focus group, one secretary from a firm that does domestic relations work said that it is her firm's policy that a male lawyer and a female client are not to be in an office alone together. Another woman from the firm must be present.

[37] Letter to Jessica E. Mindlin, Coordinator, Task Force on Gender Fairness, Oct 13, 1997. The letter also described how "vulnerable" the client was at the time of the incident.

inmates, reported this experience.[38] The rates at which men and women in various positions within a law office were reported to have used terms of endearment are roughly proportional to the rates at which men and women occupy those positions.

There were similar responses from inmates to questions about inappropriate touching. This occurred rarely, but was reported by more than 4% of the men versus only 2.5% of the women. Male inmates reported a variety of law office personnel as offenders (including both male and female lawyers), while the female inmates named male lawyers and a male investigator. Finally, one female and ten male inmates (5%) reported requests for sexual favors. The female inmate reported that the request was made by her male lawyer. The male inmates named people, both male and female, holding various jobs, including eight male lawyers and three female lawyers.[39] None of the male inmates of color in the focus group reported inappropriate touching or requests for sexual favors.

Most litigants denied being called by a term of endearment by anyone in a law office. Female litigants (17.5%) reported this experience slightly more often than did male litigants (12.8%). All the female litigants identified men as the offenders. Two-thirds of the male litigants reported women as the offenders. Relatively few male or female litigants reported being called by their first names when someone of the opposite sex was called by his or her last name, although slightly more men (14.3%) than women (9.8%) said that this had happened. Likewise, the number of litigants who reported being addressed in a rude manner when people of the opposite sex were addressed politely was small, with men (22.8%) who had this experience slightly outnumbering women (18%).

Of the few litigants who said that they had been subjected to comments about their dress or appearance, slightly more were men than women.[40] All the female litigants who noted such comments said that men had made them; 60% of the male litigants reported similarly. On the other hand, only one male litigant reported being subjected to comments of a sexual nature or being touched in a way that was inappropriate, while six women (almost 10%) said that they had been – always by a man.

e. Sex Between Lawyers and Clients

Lawyers' sexual exploitation of their clients has been a difficult subject for the Bar. When Professor Caroline Forell published her article, *"Lawyers, Clients and Sex: Breaking the Silence on the Ethical and Liability Issues,"* 22 Golden Gate U L Rev 611 (1992), no American jurisdiction had an ethical rule expressly forbidding lawyers from having a sexual relationship with a client. Lawyers at the annual meeting of the Oregon State Bar in 1991 rejected such a rule by a vote of 107 to 139.[41] Most of the argument in opposition was that existing ethical rules — prohibiting a lawyer from representing a client when his or her personal interests reasonably could impair the lawyer's judgment — were sufficient. Some opponents also believed that the rule would lead to invasion of lawyers' privacy. Others said that there was not a big enough problem to warrant a new rule.[42]

In 1992, Oregon became the first state in which lawyers voluntarily adopted a disciplinary rule, DR 5-110, prohibiting sex with a current client with whom the lawyer did not have a pre-existing sexual relationship.[43] Although there again were arguments in opposition, some people who had voted against the new disciplinary rule in the previous year explained that they had changed their minds. One lawyer gave testimony, through a letter, describing his experience on his local professional responsibility committee in Douglas County in the year between the 1991 and 1992 annual meetings of the Bar. Two of the three cases handled by that committee had involved lawyers having sexual relationships with clients. In neither case was there evidence that the lawyer's professional judgment had been compromised in violation of the *existing* disciplinary rules. The lawyer concluded that a new rule was necessary. Other lawyers recognized that the small number of complaints from clients that their lawyers had had inappropriate sexual relationships with them was more likely a reflection of the clients' feelings of vulnerability and embarrassment than proof of the absence of a problem.

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[38] Male inmates generally reported many more negative experiences and made more negative comments than did female inmates.

[39] For a caution regarding the reliability of these statistics, see the Introduction section to the chapter on Criminal Law and Juvenile Justice.

[40] This was in contrast to the other surveys, in which more women than men said they had been subjected to such comments.

[41] *See* Resolution No. 7, Official Transcript of 1991 Oregon State Bar Annual Meeting. The Disciplinary Rules governing the ethical conduct of lawyers are proposed by the Bar's Board of Governors and must be approved by a vote of the members of the Bar (now the House of Delegates); ultimately, however, all rule changes must be approved by the Oregon Supreme Court.

[42] *See* Official Transcript of 1991 Oregon State Bar Annual Meeting.

[43] *See* Official Transcript of 1992 Oregon State Bar Annual Meeting, at 191-92. The transcript of the debate is in the Task Force archives.

At the conclusion of the debate at the 1992 meeting, the presenter of the proposed rule summed up for the proponents. He said, in part:

> *"The choice required of the lawyer who is sexually attracted to a client may be inconvenient, but it's not an onerous choice. He simply or she simply decides, do you take the fee and forego the sex, or do you become sexually involved and allow your partner or someone else to be the lawyer in the case?*
>
> *"The detriment to the members of the bar is minimal, but the benefit to the multitude of vulnerable, easily exploited clients both today and in the future is enormous."*[44]

In the year between the two annual meetings, the Oregon Supreme Court had suspended a lawyer from the practice of law for engaging in a sexual relationship with a client who was a minor. *In re Wolf*, 312 Or 655, 826 P2d 628 (1992). The Oregon Supreme Court concluded that the lawyer's criminal acts (contributing to the sexual delinquency of a minor, sexual abuse in the third degree, and furnishing alcohol to a minor) reflected adversely on his fitness to practice law. The court also found that the lawyer's professional judgment on his client's behalf might reasonably have been affected by his personal interest in her. The court suspended the lawyer for 18 months.

In 1997, another lawyer was disbarred for sexually exploiting several clients whom he had represented in probation violation cases, child dependency proceedings, and proceedings to terminate parental rights. *In re Hassenstab*, 325 Or 166, 934 P2d 166 (1997). The lawyer also had engaged in a sexual relationship with a deputy district attorney during a time when he represented clients in criminal cases being prosecuted by her office. The evidence presented to a trial panel of the Disciplinary Board showed that the lawyer had engaged in some form of sexual contact with 15 of his present or former clients over a four-year period.[45] The Court concluded that the lawyer had a personal interest that might have affected his professional judgment. The court also found that the lawyer had violated the rule prohibiting commission of a criminal act that adversely reflects on the lawyer's honesty, trustworthiness, or fitness to practice law. Finally, the court found that the lawyer had violated a disciplinary rule involving conflicts of interest when he engaged in a sexual relationship with a deputy district attorney who was prosecuting the lawyer's clients.

In the only case that we found involving discipline for violating the rule prohibiting a sexual relationship with a client, the lawyer submitted a "Form B resignation" in 1997 after a trial panel of the Disciplinary Board found that the lawyer had violated that rule as well as the older conflict-of-interest rule. *In re Boothe*, Oregon Supreme Court Disciplinary Case No. 95-63.[46] The client, who was seeking a divorce, told the lawyer that her husband had subjected her to mental and sexual abuse and that she was in desperate emotional and financial circumstances. The lawyer made comments of an explicitly sexual nature, twice touched her under her jacket, rubbing his hands up and down her back, attempted to kiss her on the lips, and attempted to engage her in a full-body embrace. However, as noted above, not all clients report lawyers who have initiated, or attempted to initiate, a sexual relationship with a client.

2. Lawyers and Professional Staff

a. Overview

Most legal secretaries and paralegals perceive the existence of some gender bias in their workplaces. All respondents to the paralegals' survey, and most respondents to the legal secretaries' survey, agree that there is less bias now than in the past. A significant minority of female legal secretaries (30%), however, believe that gender bias has either stayed the same or become worse. The majority of respondents to both surveys perceive bias directed mostly against women, with a larger proportion of women than men holding this view. Some paralegal respondents — a larger proportion of men than women — noted a bias against men as well. The perception of bias against women reflected in both surveys relates to a feeling among female respondents that their views are not taken as seriously as those of men and that men have greater opportunities for advancement. Among paralegals, the perception of bias against men relates to some male respondents' feeling that women were given a hiring preference in support positions. Male legal secretaries, on the other hand, feel that the profession offers equal opportunity. Legal secretaries and paralegals rarely experience sexual harassment from lawyers in their

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[44] *See* Official Transcript of 1992 Oregon State Bar Annual Meeting, at 189.

[45] The disciplinary rule governing sex with clients had not been adopted at the time of most of the lawyer's conduct. The court's analysis focused on whether the lawyer's conduct violated the disciplinary rule prohibiting legal representation if the lawyer's professional judgment might be affected by the lawyer's personal interests. For the most part, the lawyer did not dispute the occurrence of the sexual contacts; he contended that he did not violate any disciplinary rules by "grooming" clients for sexual relationships after their cases were concluded.

[46] Disciplinary procedures permit a lawyer who is accused of misconduct to resign from the practice of law while disciplinary proceedings are pending. The lawyer does not further contest the pending complaints and is prohibited from applying for reinstatement. This process is called a "Form B resignation."

workplaces; however, between 20% and 25% of female respondents to both surveys indicated that they had been told offensive jokes or had heard offensive comments. Finally, although most respondents say that their employers have a policy against sexual harassment, more men than women believe that it is enforced.

b. Paralegals

i. Opportunities

Most paralegals (approximately 70% of both men and women) responding to the survey agreed that gender was not a serious factor affecting job advancement. However, roughly 20% more women than men felt that their gender often limited advancement opportunities. Related to this perception, a larger proportion of women than men stated that their opinions are not taken as seriously as those of men (35% of women vs. 11% of men).[47] During a focus group meeting, a female paralegal recounted a situation that exemplified this feeling. She described having called a lawyer from another firm to reschedule a hearing. The lawyer grew angry and ultimately hung up, stating: "I don't talk to paralegals." After consultation with lawyers from her firm, she sent a letter to the lawyer, asking him to try to work with her in a calmer fashion. The lawyer wrote back: "My daddy always taught me that you send a man to do a man's job."

Approximately 10% more female than male survey respondents (approximately 30% of female paralegals and 20% of male paralegals) stated that men are given preference for promotion due to their gender. Participants in the focus group shared this view. For example, a female paralegal commented that "there's still an . . . old boys network," and another noted that a more recently hired man was "afforded many opportunities for traveling that a female [would not be given]."[48]

Regarding the delegation of duties, most respondents agree that gender does not play a role (approximately 70% of both men and women). By contrast, although most survey respondents agreed, with respect to support positions, that males were not given a preference, almost half the men and women felt that women received preference in appointments to these positions.[49] Similarly, roughly one-third of respondents of both sexes believed that men and women in similar positions were treated differently regarding family-care issues.[50]

Finally, when asked whether they had a preference regarding working for a man or woman, most paralegals replied "no." However, one man reported that he would prefer working for a woman, and 17% of the women reported that they would prefer working for a man.

ii. Personal Treatment

Most respondents had not witnessed female or male lawyers or staff persons being addressed by their first names or by terms of endearment when those of the opposite sex were not (approximately 85% of both men and women). Respondents of both sexes reported witnessing more female than male lawyers and staff persons being addressed by their first names or by terms of endearment. Of those reporting that they had personally experienced being so addressed, about 25% of the women objected to being addressed by their first names, while nearly all men and women objected to terms of endearment. Finally, respondents of both sexes noted many more comments about the physical appearance of women than of men. Nearly 50% of the respondents reported comments about women; only 7% reported comments about men.

Regarding sexual harassment, no male respondents had experienced or witnessed requests for sexual favors of any nature, nor had they been touched offensively. On the other hand, although the vast majority of female respondents likewise had not experienced such requests or offensive touching, a small percentage personally had experienced some form of unwanted advance, and between 5% and 12% had witnessed it happen to others. The results were roughly similar for offensive touching. The percentages increased slightly when respondents were asked about previous employment. Most respondents had not been the recipients of inappropriate jokes or comments. Of those who had, the highest percentage was among female respondents (approximately 23%) to whom a lawyer or co-worker had made a joke or comment. Regarding sexually explicit material, the vast majority of respondents (90%)

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[47] Significantly, the perceptions and experiences of gender bias were more pronounced among paralegals of color, as shown in the survey responses, and among paralegals who worked outside the Portland metropolitan area, as reflected by comments received from focus group participants.

[48] In addition, paralegals of color were more likely to say that there is more gender bias now than in the past, when compared with white paralegals.

[49] This perception may relate to gender bias, or it may derive from the fact, as described by the focus group participants, that most female paralegals are stereotyped as support staff because many of them began their professional careers as legal secretaries and worked their way up. By contrast, male paralegals generally enter law firms initially as paralegals.

[50] Although the survey questions themselves do not permit further analysis of what distinctions respondents believe are drawn, written comments on the survey and discussion in the focus group suggest that men are treated better when they have family-care problems.

had not been subjected to or witnessed such material.[51]

The majority of respondents said that their employers have policies against sexual harassment (approximately 80% of both men and women) and that the policies are enforced. However, although all the male respondents were aware of such policies, and all but one of the male respondents believed that they are enforced, only about three-quarters of the women knew of the policies, and only about two-thirds thought that they are enforced.

c. Legal Secretaries

i. Opportunities.

The majority of female legal secretaries responding to the survey stated that bias against women from lawyers exists in their profession. One of the two males responding to the survey agreed, but said that the bias exists "only in a few areas." Also, although all male and most female respondents perceived that gender bias has lessened over time, roughly 30% of the women stated that gender bias is the same or worse now than it was in the past.[52] Men generally perceived their profession as offering equal opportunity across all positions and duties. By contrast, roughly 35% of the women perceived that men are given preference in all positions and that women are asked to perform duties not asked of men. Notably, a female participant in the focus group "doubted that a male applicant for a secretarial job would be hired." At the focus group meeting, one woman stated that she had heard that the "boss hires on looks." Further, 43% of the female respondents believed that their opinions are given less weight than men's; neither of the men agreed.

The view that women are given less respect than men underlies most of the concerns expressed by female legal secretaries. In the June, 1997, Oregon State Bar Bulletin, two articles — *"The Good, the Bad, and the Ugly"*[53] and *"Secretaries Speak Out"*[54] — discussed this perception. Those articles concluded that legal secretaries want, and deserve, more respect. Similarly, a female participant in the focus group offered a recommendation to lawyers for improving the work environment: "'Support Staff 101' — Education in manners, how to treat people with respect."[55]

Additionally, although most respondents did not report discrimination based on age, more than 20% of the women responding (proportionately more who were over 50 and under 35) believed that they had experienced such discrimination, while none of the men did. Similarly, more than 40% of the women noted a difference in how they were treated regarding family-care issues, but neither of the men did. Participants in the focus groups also expressed this perception. One woman noted that, during the interview process, she was "kind of asked" whether she planned to have children. Another noted that employers "don't like it if you take time off for sick kids." Two female respondents took action as a result of alleged discrimination.[56]

Finally, although no men indicated a preference for working for a man or a woman, 30% of the women noted their preference for working for a man. Several female participants in the focus group provided an explanation, noting that "some of the best and some of the worst" bosses with whom they had worked were women. Another woman had an even stronger response: "Last job I worked for three women — a nightmare."

ii. Personal Treatment

Few respondents reported being addressed by their first names, or by terms of endearment, when members of the opposite sex are not. Women are far more likely to report such treatment. Twenty percent of the women responding reported hearing female staff members addressed by their first names when male staff members were not, while no men reported observing such conduct. Similarly, more than 40% of the women said that they personally had been addressed in terms of endearment, yet no men reported such treatment. Most respondents did not object to being called by their first names, or in terms of endearment, although more women objected than did men. Further, more women

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[51] Paralegals of color reported experiencing sexual harassment more often than did white paralegals, and paralegals working outside the Portland metropolitan area also reported more such experiences than did paralegals in the Portland metropolitan area.

[52] White female secretaries are more likely to perceive gender bias than are female secretaries of color. However, female secretaries of color are more likely to take the position that there is more gender bias now than there used to be than are white female secretaries.

[53] Miriam A. Green, *The Good, the Bad and the Ugly*, OR ST B BULL, June 1997, at 15.

[54] Julie A. Hankin, *Secretaries Speak Out*, OR ST B BULL, June 1997, at 17.

[55] Age and gender affect how legal secretaries perceive gender bias. Older women often observed in these surveys that discrimination based on gender is more subtle than in years past. Legal secretaries who were over 50 years of age were more likely to indicate that gender bias is widespread but subtle, compared to women aged 36-50 and under 25. Legal secretaries who were aged 36-50 were more likely to view women's opportunities for advancement as limited, compared to women aged 35 and under. Legal secretaries who were over age 36 were more likely to say that their opinions on work matters are given less weight.

[56] Significantly, the perceptions of bias noted here were concentrated among the older respondents. In other words, it appears that older workers perceive gender bias to be a problem more often than do younger workers.

objected to being addressed in terms of endearment than by their first names. More than 60% of respondents reported more comments about the appearance of women; 8% reported more such comments about men — a substantial disparity.

The vast majority of respondents had not experienced acts of unwanted touching or requests for sexual favors. However, of those who had, a larger proportion was women, and the conduct was attributed to a co-worker more often than to a supervisor or lawyer. Such acts happened more frequently at former jobs than at the respondents' current employment. By contrast, one of the two male respondents and 26% of the female respondents reported having heard an offensive joke or comment at their current job. Exposure to sexually explicit materials, again, occurs infrequently but, when it does occur, more women than men experience it, and it comes mostly from co-workers as opposed to supervisors. Finally, although most legal secretaries reported that their employers had a policy against sexual harassment, all the men, but only half the women, thought that it was enforced vigorously.[57]

In the lawyers' survey, we asked: "Has anyone come to you complaining of sexual harassment in *your* workplace?" (Emphasis in original.) If the answer was "yes," we asked the respondent to give the gender and position within the office of both the complainant and the alleged perpetrator. Seventeen percent of the survey respondents (14% of the men and 26% of the women) had received such complaints. Ninety-five percent of the complaints came from women; more than 80% of the alleged perpetrators were male. The vast majority of complainants were paralegals, secretaries, and other support staff. Conversely, almost 60% of the alleged perpetrators were lawyers, and another 12% were characterized as "management," "supervisor," "manager," "boss," or "superior."

3. Lawyers and Court Reporters

a. Overview

About half the respondents to the court reporters' survey perceived gender bias against women in their profession. A larger proportion of women than men stated that their opportunities for advancement are more limited than men's. Notably, when we rephrased the question to ask whether opportunities for men were limited based on their gender, a larger proportion of men than women responded affirmatively. However, despite these general observations, more than 90% of all respondents indicated that, personally, they had *not* been discriminated against in their current places of employment. Also, most respondents felt that there is less bias now than in the past. Some respondents said that the recent increase in the number of women in the field has had a negative effect on pay rates. A small number of female court reporters stated that lawyers made unwanted requests for sexual favors or touched them offensively. Both male and female respondents indicated that they had heard offensive jokes and comments. Finally, fewer than half the respondents said that their workplaces had a policy prohibiting sexual harassment, and even fewer noted that it was enforced.

b. Opportunities

Fifty percent of the responding court reporters — 45% of the women and more than 60% of the men — checked a box indicating that "[t]here is no gender bias against women" in their workplaces at the present time. Almost 65% of all respondents perceived no gender bias against men. Four individuals, all male, reported that they had been discriminated against based on gender in their current places of employment but did not identify lawyers as the source of discrimination. A larger percentage (almost 20%) reported that they were discriminated against, based on gender, at a previous place of employment in the legal field. Almost 60% of all respondents thought that there is less gender bias now than in the past. However, half of the responding men thought that there is the same amount of, or more, gender bias now than in the past.[58]

Finally, several court reporters expressed their perception that lawyers want court reporters to lower their fees and receive less income because they are women.[59] This phenomenon is sometimes referred to as the "pinking" of the profession.

c. Personal Treatment

The survey results indicate that some lawyers made requests to female court reporters for sexual favors in

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[57] These perceptions on enforcement were more pronounced among white female respondents over 50 years of age.

[58] Fifty-two whites and four Hispanics (two male and two female) responded to the court reporters' survey. We received no responses from any other court reporters of color. Hispanic court reporters were more likely than white court reporters to indicate that there is more gender bias now than in the past, but were less likely to believe that they had been subjected to gender-based harassment or denial of promotion.

[59] Some court reporters work for the courts. The question pertaining to court reporters' fees were relevant to those reporters who are not public employees.

exchange for employment opportunities or security,[60] made requests for unwelcome sexual activity, or caused unwelcome physical touching of a sexual nature. No male respondents reported experiencing such behavior. Respondents of both sexes said that they had heard unwelcome sexual jokes or comments or had been shown unwelcome objects, pictures, or calendars of a sexually explicit nature by a lawyer.

E. CONCLUSIONS

Most of the time, gender is not a factor in the interactions between lawyers and their clients, professional staff , or court reporters. People in all areas of the legal profession believe that there is less gender bias now than there was in the past. Nevertheless, some gender-based distinctions, and some problems, remain.[61]

Clients' perceptions of the different treatment that they experience from male and female lawyers tend to follow gender-stereotyped lines: women are better listeners; men are more aggressive. Although some clients believe that female lawyers will fight harder and other clients believe that male lawyers will, clients with both views obviously believe that there is a difference based on gender. We cannot answer the question whether male and female lawyers *actually* approach clients, cases, and their work differently. It is troubling that clients sometimes believe that the bias of *others* against female lawyers might affect the client's case and thus might affect the client's selection of a lawyer.

Gender-based selection of a lawyer may sometimes be acceptable, and other times not. For example, few people would object when a female lawyer is assigned to represent a female youth who has been sexually abused and expresses a high level of anxiety about being in the presence of male adults. At other times, gender-based selection of a lawyer should not be tolerated, such as when a client simply views women (or men) as innately inferior. There is a division of opinion in society, and on the Task Force, as to whether it is appropriate to select a lawyer of one gender or the other for the express purpose of anticipating the possible responses of the judge or jury, such as hiring a woman to defend a man accused of rape or to defend a company being sued for sexual harassment.

Although both men and women perceive that they sometimes are treated differently in the same environment based on their gender, women see the differences more often than men do. This should not be attributed to any "paranoia" on the part of women, nor to willful blindness on the part of men. People who enjoy privileges are less likely to be aware of the advantages that they enjoy. This phenomenon is also illustrated by the fact that legal secretaries report the persistence of gender bias more than do paralegals.

Women continue to be noticed as physical objects more often than men are; both men and women report that women's clothing and appearance are much more likely than men's to be commented upon. Women are more likely than men to believe that men have advantages based on gender. Men tend to believe that opportunities are equal, although they sometimes perceive that women are more likely to be selected for support (as opposed to supervisory) positions. Although rare, sexual harassment persists.

The step of eliminating the persistent residual bias will be, in many ways, more difficult than eliminating the overt bias that once was widespread. This next step involves a change in behavior at more subtle levels, which in turn requires an increased understanding of what others are experiencing. Accordingly, our recommendations focus on education and dialogue.

F. COMMENDATION

We commend the Oregon Supreme Court and the Oregon State Bar for

- making Oregon the first state to adopt a disciplinary rule prohibiting sex with a current client with whom the lawyer did not have a pre-existing relationship:

"(A) A lawyer shall not have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them before the lawyer/client relationship commenced.

"(B) A lawyer shall not have sexual relations with a representative of a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client in the representation.

"(C) For purposes of DR 5-110 'sexual relations' means:

"(1) Sexual intercourse; or

"(2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual

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[60] Three court reporters said that lawyers had asked them or another court reporter for sexual favors in exchange for employment security or opportunity. One female court reporter noted that she had experienced this personally at her current job. One court reporter stated that this had happened to her at a previous job. One court reporter said that this had happened to another person at a previous job.

[61] Although the vast majority of respondents to the surveys reported that they believe that there is less gender bias in the workplace now than there once was, paralegals, legal secretaries, and court reporters of color all were somewhat more likely than their white counterparts to believe that gender bias is worse now than it once was. The reason for that difference in perception is not immediately clear.

or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.

"(D) For purposes of DR 5-110 'lawyer' means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance." DR 5-110.

G. RECOMMENDATIONS

1. The Oregon State Bar should:

a. by January 1, 1999, more widely include gender and intersectionality issues in continuing legal education programs for lawyers, with topics such as

(i) the disciplinary rules prohibiting conflicts of interest and sexual relationships with clients;

(ii) clients' perspectives on the lawyer-client relationship; and

(iii) respectful treatment of office staff and court reporters; and

b. by January 1, 1999, develop a public education program designed to inform clients of their right to be free of sexual harassment from their lawyers and of the help available from the OSB to protect that right. This goal could be accomplished, in part, through additional information included in pamphlets already designed for distribution to the public, through separate publications devoted to this issue, and through public service announcements.

2. Every legal workplace should:

a. by January 1, 1999, establish a policy prohibiting sex discrimination and encourage all personnel (*e.g.*, through small-group meetings) to discuss improving workplace relationships, especially with regard to gender issues. All personnel should be protected from retaliation when they describe their experiences and perspectives;

b. by January 1, 1999, establish a policy prohibiting sexual harassment and regularly inform all employees about the policy and how to use its protection. In addition, each workplace should have a clearly identified person to whom sexual harassment complaints are to be directed;[62] and

c. beginning by January 1, 1999, have supervisors communicate at least annually — orally and in writing — their commitment to a bias-free workplace and to enforcement of their non-discrimination and anti-harassment policies. Lawyers, as well as non-lawyer supervisors, must be willing to confront their colleagues when they observe inappropriate behavior.

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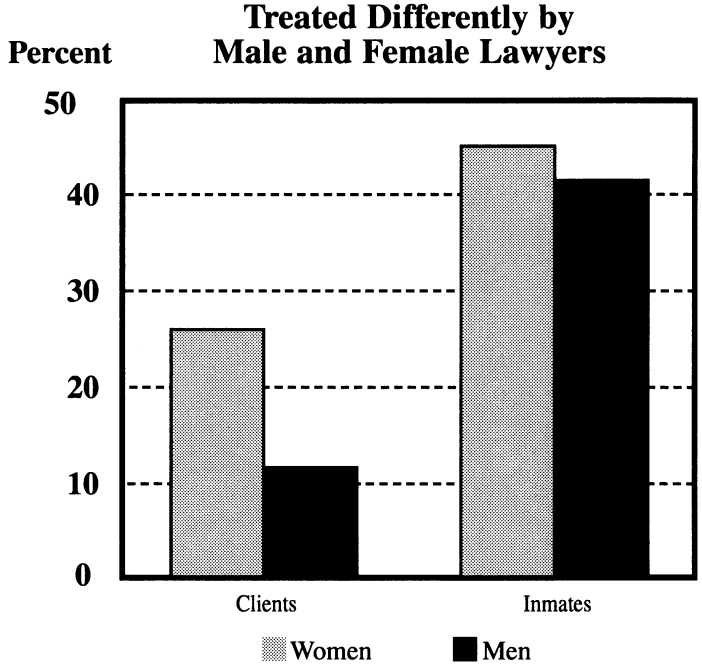
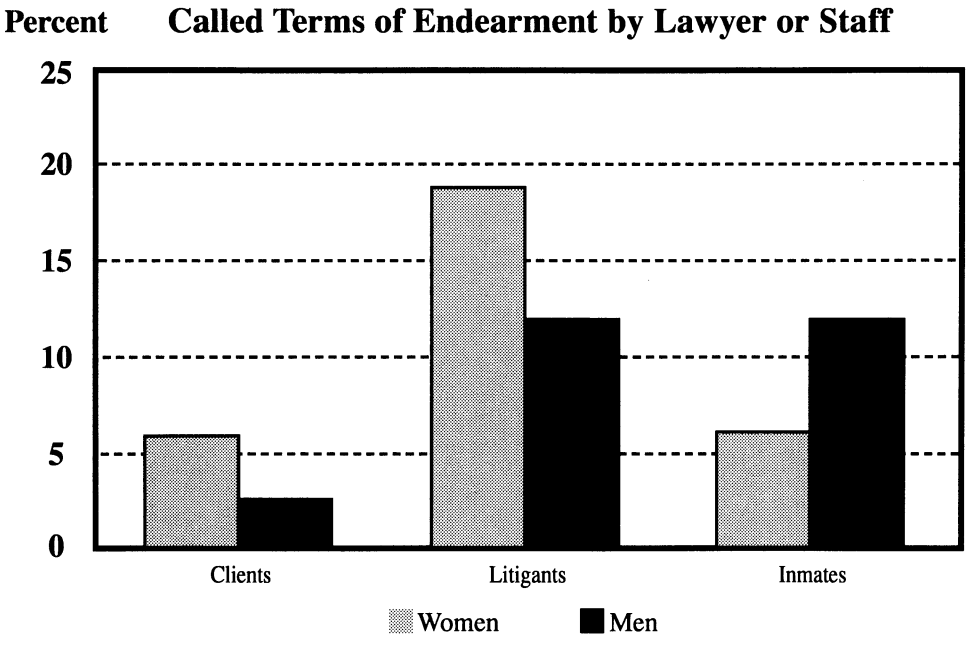
[62] A sample sexual harassment policy is included in the Appendix.

ATTACHMENTS



Clients:
Female - 26.3%
Male - 12.9%

Inmates:
Female - 45%
Male - 42%



Clients:
Female - 5.8%
Male - 2.6%

Litigants:
Female - 17.5%
Male - 12.8%

Inmates:
Female - 6.7%
Male - 12.8%

THE EMPLOYMENT OF COURT, OREGON STATE BAR, AND PROFESSIONAL LIABILITY FUND PERSONNEL

"I feel as if I know my role. Because I am older, I am accepting of a lot of things that I think younger women aren't. I think that a lot of the problems have nothing to do with gender. . . . It's more that they pay the people at the top as much as they can and the people at the bottom as little as they can. . . . More women are now moving into those top positions, but you still don't see men doing our work."[1]

This chapter combines information gathered by two separate work groups: Judicial Administration and Interactions Between Lawyers, Clients, Staff, and Other Professionals. This chapter addresses gender fairness in employment by the courts, the Oregon State Bar, and the Professional Liability Fund.[2]

I. COURT PERSONNEL

A. INTRODUCTION AND OVERVIEW

Overall, the majority of court personnel within Oregon's court system do not perceive gender bias with respect to the conditions or benefits of their employment. However, a noticeable minority, generally about 10% to 25% of survey respondents, report observing some differences on the basis of gender. Women are more likely to report negative effects on female court personnel, and men are more likely to report negative effects on male court personnel.

Most significantly, both male and female court personnel perceive gender to influence female employees' opportunities for advancement, including appointments to supervisory positions, and the application of work rules. Those perceptions parallel statistical data suggesting that men hold proportionately more supervisory positions than do women. Additionally, many court employees are not aware of existing complaint procedures.

B. ISSUES STUDIED

With respect to courthouse personnel, we studied whether the Oregon Judicial Department ("OJD") treats court personnel differently on the basis of gender with respect to:

- hiring,
- promotion,
- compensation, or
- other aspects of employment. [3]

C. METHODS OF STUDY

We compiled data from answers to survey questions, testimony at public hearings, written submissions to the Task Force, and other anecdotal information. We relied heavily on the court personnel survey, which focused its questions on hiring, promotion, and compensation issues for court personnel. We did not analyze extensively the employee policy manuals and other OJD policy guidelines.

We distributed the court personnel survey to all Oregon court personnel, including the following groups: (a) all permanent and temporary, management and non-management OJD employees at trial court locations (with the exception of judges); (b) employees of the Office of the State Court Administrator ("OSCA"); and (c) judicial assistants and staff attorneys to the 17 state appellate judges ("Appellate").[4] Oregon Supreme Court Justice Graber sent a letter explaining the purpose of the survey to each Presiding Judge in Oregon's 26 court districts and requested each court's cooperation. At the same time, Justice Graber wrote to all Trial Court Administrators asking that they distribute the surveys to their staff. We asked that staff be allowed to complete the survey during work hours.

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[1] Statement by female Oregon Judicial Department court employee.

[2] The Professional Liability Fund is a captive malpractice insurance carrier for members of the OSB. No lawyer may engage in the private practice of law in Oregon without paying a premium to the Fund; government, legal aid, and court-appointed criminal defense lawyers are exempt from this requirement.

[3] For a discussion of the perceptions of court personnel about the treatment of participants in the legal system, see the chapter on Judicial Administration. This chapter addresses only how gender affects the employment of court personnel.

[4] Law clerks were excluded from the survey.

We designed the court personnel survey for trial court employees. Accordingly, it instructed OSCA and Appellate employees not to complete several sections that did not apply to them. We sent the survey to a total of 1,547 court personnel: 1,412 to trial court locations and 135 to OSCA and Appellate. A total of 597 employees returned the survey, for an overall return rate of about 39%. More specifically, trial court employees returned 34%, or 521 surveys, while OSCA and Appellate employees returned 56%, or 76, of their surveys. Surveys were completed by 463 women and 98 men; 36 respondents did not tell us their gender. Of all respondents who told us their gender, 82.5% were women and 17.5% were men. As noted, the Oregon courts, through OJD, employ a total of 1,547 employees in various non-judicial positions, making it one of Oregon's larger employers. Of those employees, 79.4% are women and 20.6% are men, closely matching the proportions of women and men responding to the court personnel survey. The high rate of return and the proportional responses suggest that confidence in the results of the survey is appropriate.[5]

D. FINDINGS

Oregon's state courts are structured by geographic area. The 36 counties are grouped into 26 judicial districts. Each judicial district has a presiding judge, and all are administered by OJD. Most courts have their own trial court administrators, but smaller courts have a court operations supervisor instead.

1. Hiring Process

In response to the question, "How did you hear about your current job?," court personnel offered the following in descending order of frequency: "another employee," "job posting," "newspaper," "other," and from a "supervisor."[6] For the most part, male and female court personnel identified the sources from which they heard about their jobs in similar ratios. However, slightly more men than women had heard about their jobs from a job posting, and slightly more women than men had heard about their jobs from another employee. Written comments revealed that some court personnel perceive incidents of "nepotism" in OJD's hiring practices. For example, respondents commented that "the judge's kid," the "judicial assistant's daughter-in-law," and "the supervisor's friend" were hired.

Male and female court personnel reported no differences in their experiences with OJD's use of interviews or with the explanation of promotional opportunities during the hiring process.

2. Opportunities for Advancement

Both male and female court personnel viewed their opportunities for advancement as somewhat limited because of gender. In general, 22.5% of respondents felt that opportunities for advancement of women are limited because of gender, but only half as many, 11.4%, felt that opportunities for advancement of men are limited because of gender. Relatively more men believed that opportunities for advancement of men are limited due to gender, while more female court personnel believed that opportunities for advancement of women are limited because of gender.

Moreover, proportionately more women (23%) than men (15%) reported that they have been turned down for a promotion within the last five years. Five men (38%) and 28 women (27%) who had been turned down for a promotion were not told why. However, of those who were told (92 women and 12 men), more women (32%) than men (25%) were told that someone more qualified was hired, one man (8%) and four women (4%) were told that someone with more seniority was hired, and only women (3) were told that they did not have enough education for the position.

A little more than 10% of court personnel responding to the survey, all of whom were women, believed that taking parental or adoption leave hurts a woman's chances for advancement. Only 1.8% of respondents believed that taking parental or adoption leave hurts a man's chances for advancement. Of the remaining court personnel, roughly half reported no effect on promotional opportunities as a result of parental or adoption leave, and the other half did not know whether there was any effect.

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[5] There are limits to the utility of some of the survey data. In questions pertaining to working conditions, survey questions did not ask the respondent to specify the time frame within which an event or perception occurred. In other questions, a five-year time period was specified. Although we asked whether such an incident had been personally observed or experienced "in Oregon courts," we cannot conclude from the survey the extent to which answers indicating problem areas are occurring today or whether they are historical events still in the memory of respondents. We did not analyze the data to determine whether problem areas are localized geographically or occur throughout OJD.

Similarly, comments regarding the distribution of men and women in certain jobs reflect a snapshot of the population holding those jobs as of a certain date. That snapshot reflects historical hiring and promotion decisions, which may be different from the hiring and promotion practices today. We did not obtain data to indicate whether *current* hiring and promotion decisions still reflect biases that may have existed in past years.

[6] Of the 597 employees who responded to the survey, 171 employees heard about the job from another employee, 153 learned of it from a job posting, 102 learned of it from a newspaper, 42 learned of it from a supervisor, and 101 learned of it through "other" means.

In response to the question, "Have you been asked to perform duties that are not asked of the opposite sex?", approximately 20% of court personnel said "yes." Of those respondents, proportionately more men than women said "yes." More specifically, although only 17% of survey respondents were men, over 40% of the male respondents believed they had been asked to perform extra duties not requested of women. Examples given included lifting cases or boxes, fixing broken equipment, and moving furniture. On the other hand, although fewer than 5% of court personnel reported that they are not allowed to perform certain duties because of their gender, almost all of those respondents were women.

Approximately 12% (70 court personnel) responded that they have "trained" a newly hired employee who was later promoted above them.[7] Of those newly hired employees receiving promotions, court personnel identified 14 as men and 68 as women.

Approximately 20% of court personnel believed that men are given preference over women in appointments to supervisory positions. However, of those respondents, 97% were women; accordingly, almost no male court personnel reported that men received preference in supervisory appointments. By contrast, 13.2% of all court personnel believed that women are given preference over men in supervisory appointments, but 37% of those respondents were men.

Thus, women and men perceive preferences in appointments very differently: women believe that men are given preference over women, while many men believe that women are given preference. For example, on the court personnel survey, one employee wrote:

> *"Gender fairness does not exist in our office. Prejudice towards men abounds here. Hiring of male[s] is almost non-existent (3 men versus 11 women hires in 7 1/2 years). Supervisors have discriminated against males when they complained against sexual harassment."*

By contrast, another employee opined:

> *"I have applied for 2 supervisor positions in the past 4 years. Both times the positions were given to younger men with less court supervisory experience than I have. In this respect, I believe I was the subject of age and gender bias."*

Overall, the percentages of female (78%) and male (22%) court personnel who *actually received* promotions closely matches the ratio of women (79%) and men (21%) within OJD. That statistic suggests that gender does not have a disparate effect on promotion decisions.

There are 201 employees classified as "management staff," 72.6% of whom are women. Thus, women in management represent only slightly less than the percentage of female court personnel employed by OJD.

However, of the 201 management staff in OJD, 34 are management assistants to trial court administrators and judicial assistants to presiding judges, all of whom receive management benefits but have no actual supervisory duties. All those positions are held by women. When those positions are subtracted from the total number of management positions, the ratio of women to men with actual supervisory responsibilities changes to 67% women and 33% men:

	Percentage in OJD	**Percentage who supervise**
MEN	21	33
WOMEN	79	67

In other words, for their numbers, men are more likely than women to hold actual supervisory positions within OJD. Those results parallel the perceptions of court personnel generally, and especially the perceptions of female court personnel.

3. Compensation

The classification scheme and personnel rules of OJD do not permit men and women to be classified differently for performing the same work. OJD rules and policies also require additional compensation to be paid to employees who perform the duties of a higher position. Nonetheless, 21% of court personnel (23% of the women and 12% of the men) with an opinion stated that they do not believe that men and women doing the same work are classified the same.

4. Other Conditions or Benefits of Employment

The majority of court personnel, both men and women alike, favor job-sharing (87%), flexible work hours (74%), release time for education (67%), and on-site child care (60%).

Although 74% of court personnel responding to the survey felt no extra pressure to prove themselves on the job because of their gender, race, disability, age, or sexual orientation, a significant minority did feel such pressure. Sixty court personnel identified "gender" or "age" as factors to overcome on the job, with men and women responding in proportions equal to their overall representation among survey respondents. Additionally, 16 respondents identified "race," five identified "sexual orientation," and three identified "disability" as factors to overcome. Respondents were permitted to identify more than one pressure-inducing factor in the survey, and 26 marked more than one category, but only a handful marked more than two categories. These responses suggest that some OJD employees feel that they are under extra pressure to prove themselves on the job because of age or gender, and some because of race, sexual orientation, or disability.

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[7] The survey did not define the term "trained."

In addition, 18% of the respondents — all of whom were female — reported that, based on their observations and experiences, taking parental leave following the birth or adoption of a child was detrimental to a female employee's advancement and promotion opportunities. Only 4% of respondents (6 women and 3 men) believed that such leave was detrimental to a male employee's advancement and promotion opportunities.

5. Complaints about Gender Discrimination

Approximately one-quarter of court personnel, men and women alike, reported that they have been, or know someone who has been, the subject of gender discrimination. Because there is no way to know from the responses to our survey question the *number of instances* of gender discrimination or *when* they may have occurred, we view this result cautiously.[8] In any event, "older" female court personnel (age 45 and over) commented that gender discrimination still occurs, but not as frequently as in the past. One court employee explained:

> *"As the 'old guard' goes into retirement the 'old boy' attitude will retire with them. Some things that offend younger women may offend but not outrage some of the older staff because of the way things 'were.'"*[9]

Another observed:

> *"Mainly because of my age I have watched quite a change in this matter. What was normal, although unwelcome and sometimes uncomfortable, behavior was easily dealt with by females. We could always just say 'no.' [It] has become a legal problem that is costing the state an enormous amount of money both in prevention and in methods of dealing with the problem."*[10]

"Younger" female court personnel (under age 45) seem to possess one of two different perspectives: Half believe that gender bias does exist, and the other half believe that they are treated fairly and with respect.

More than half of court personnel who responded to the survey did not know whether there is a person in administration who receives complaints relating to gender discrimination. Only 3% (15) of the female court personnel and 2% (2) of the male court personnel reported that they had made a complaint "to a person in Court Administration /OSCA relating to gender based discrimination." However, 73 people (59 women, 11 men, and 3 people who did not tell us their gender) reported that they "wanted to make a complaint but [had] not done so." In written comments, court personnel urged the identification of a person to receive such complaints, especially for instances in which the conduct is exhibited by a trial court administrator or judge. One employee wrote:

> *"OJD has such a flat organizational structure, that it is difficult to make the decision to proceed with a complaint or report on inappropriate behavior by judges, managers, or administrators. It is often believed to be better to endure a hostile working environment than to confront or report a manager or judge. There is a definite need to develop a complaint process that is fair to both parties."*[11]

Another employee echoed that sentiment, noting: "It appears people are afraid of judges and allow them to do as they wish"[12]

Recent testimony before the Commission on Judicial Fitness and Disability, which suggested that the problem of gender discrimination exists at the highest levels of the state court system, underscores the significance of those comments.

6. Discipline

In representative proportions, most male and female court personnel (70%) reported that disciplinary practices are equally fair for women and men. Similarly, 81% believed that work rules are applied equally to men and women. Of the court personnel who do not believe that work rules are applied equally, men were slightly more likely than women to hold this belief. Two-thirds of those men believed that the rules are applied to benefit women. On the other hand, of the women who did not believe that the rules are applied equally, 77% believed that the rules are applied to benefit men and fewer than 1% believed that the rules are applied to benefit women. Accordingly, men and women view the unequal application of work rules very differently, with each perceiving a benefit to the opposite sex.

E. CONCLUSIONS

A substantial majority of court personnel surveyed report no gender unfairness with respect to the conditions of their employment with OJD. Nonetheless, there is room for improvement.

In general, without respect to the gender of survey respondents, court personnel perceive that women's opportunities for advancement within OJD are more limited than are the opportunities for men. Women

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[8] For example, if one well-known person in a large court was the subject of gender discrimination, then many court personnel could report *knowing* someone who was subjected to such discrimination.

[9] Comment on court personnel survey.

[10] Comment on court personnel survey.

[11] Comment on court personnel survey.

[12] Comment on court personnel survey.

perceive that they are more likely to be turned down for a promotion and that men are more likely to be promoted over the person who trained them. They report that their chances for a promotion are hurt when they take parental or adoption leave. Women also believe that, when work rules are not applied equally, that inequality benefits men. Although women hold a proportionate share of management positions in OJD, men hold proportionately more of the positions with actual supervisory responsibility than do women in OJD.

Conversely, men believe that their opportunities for advancement are limited due to their gender, although historically the overall statistics do not bear out that perception. More than one-third of men believe that women are preferred in supervisory appointments although, again, the overall statistics do not support this belief. Men report that they are asked to perform certain extra work duties not requested of women. Men also believe that, when work rules are not applied equally, that inequality benefits women.

It is difficult to reconcile the conflicting perceptions of male and female court personnel, all working within the same work environment. Whether or not data support employees' concerns, OJD should recognize and acknowledge men's and women's differing perspectives before further progress toward a more gender-neutral work environment can commence.

F. COMMENDATION

We commend the Oregon Judicial Department for:

- adopting written policies prohibiting discrimination and harassment;
- providing job-share and flex-time opportunities for employees;
- using gender-neutral job descriptions and a gender-neutral interviewing process;
- monitoring fairness in employment opportunities; and
- establishing a gender-neutral compensation system.

G. RECOMMENDATIONS

1. The Oregon Judicial Department should:

a. continue to encourage all its employees to help eliminate any form of gender bias from Oregon's court system. An appropriate reminder on this and other forms of discrimination should be delivered to court personnel annually;

b. distribute to all court personnel, biennially, statistics on hiring, promotion, and compensation that permit a comparison to the ratios of men to women within OJD;

c. include information in its regular personnel workshops to address the perceptions that gender limits opportunities for advancement of both men and women and that members of the opposite sex receive special preferences in supervisory appointments and application of work rules;

d. by January 1, 1999, review its personnel policies and practices to determine whether any changes are needed to achieve gender fairness;

e. by January 1, 1999, assess whether there are inappropriate barriers to promoting and appointing women to actual supervisory positions within OJD in proportion to their availability among all qualified applicants. If so, OJD should take effective steps to remove those barriers;

f. review its policies on job-sharing, flexible work hours, and release time for education to promote greater use where appropriate;

g. by July 1, 1999, and periodically thereafter, review the adequacy of the procedure for court personnel to bring complaints about gender discrimination or harassment and, if appropriate, recommend changes. That review should recognize that some complaints may be directed at trial court administrators, judges, or others in high positions;

h. by January 1, 2002, study the personnel practices applicable to OJD law clerks to ensure gender fairness; and

i. by January 1, 2002, study how issues of intersectionality affect OJD employees.

II. EMPLOYEES OF THE OREGON STATE BAR AND THE PROFESSIONAL LIABILITY FUND

A. INTRODUCTION AND OVERVIEW

For those employed by the Oregon State Bar (OSB) and the Professional Liability Fund (PLF), the sexes generally agree that there is less bias now than there was in the past. In fact, most believe either that gender bias does not exist or that it is limited to a few areas. More women than men perceive that bias against women continues to exist to some degree; a few people — more men than women — perceive bias against men.

B. ISSUES STUDIED

We sought to determine how, if at all, gender affects employment opportunities at the OSB and the PLF, specifically:

(1) Are employment opportunities in these organizations affected by gender? If "yes," does it matter whether the position is "professional" or "clerical"?

(2) Are advancement opportunities in these organizations affected by gender? If "yes," does it matter whether the position is "professional" or "clerical"?

(3) Do employees in these organizations experience job-related sexual harassment?

(4) Do these organizations have policies against sexual harassment? If "yes," are they publicized and enforced?

C. METHODS OF STUDY

Our main method of answering the questions posed was to survey employees of each entity. We sent surveys to all employees. Because of the small size of each workforce, we did not believe that a statistical analysis of their present composition (*e.g.*, recent promotions) would yield significant results.

1. Employees of the OSB

We distributed 80 surveys, of which 75% (60) were returned. About three-quarters (43) of the returned surveys were from women, and about one-quarter (13) were from men, which is consistent with the gender composition of the OSB staff. (Four respondents did not tell us their gender.) Respondents were between the ages of 24 and 61. Most respondents had worked in their current positions for three to eight years. Four (30%) of the men and seven (16%) of the women were lawyers. One of the men and 33% (14) of the women held administrative support positions, 30% (four) of the men and 19% (eight) of the women were managers, and no men but 14% (six) of the women held professional or technical support positions.

2. Employees of the PLF

Of the 35 surveys distributed, 80% (28) were returned. About 60% (16) of the returned surveys were from women, and about 40% (10) were from men, which is consistent with the gender composition of the PLF staff. (Two respondents did not tell us their gender.) Respondents were between the ages of 32 and 64. Most had worked in their current positions for three to eight years. Most of the men were lawyers (70%), while the women held a variety of positions. Only women checked the box indicating that they held administrative support positions.

D. FINDINGS

1. General Perceptions

Generally, fewer than half the respondents perceived gender bias at the OSB and the PLF. Overall, both male and female respondents (61% and 64%, respectively) noted that there is less gender bias now than in the past. However, although 72% of female OSB employees believed that there is less gender bias now than in the past, only 44% of female PLF employees concurred. Female PLF employees (31%) also were more likely than female OSB employees (12%) to believe that there is *as much* gender bias now as in the past.

In addition, a larger proportion of women than of men reported having a general perception of unfairness. This perception is strongest among employees in support positions and weakest among supervisory and management employees,[13] and is borne out in the response showing that women felt that their opinions are given less weight than men's (16% of female OSB employees and 44% of female PLF employees reported that their opinions on work matters are "often" or "sometimes" given less weight than those of a person of the opposite sex). No men reported that their opinions were given less weight than women's. Although most employees did not perceive different treatment based on gender, a larger proportion of women (23%) than of men (17%) reported that they were asked to perform duties not asked of men.

At the OSB, a larger proportion of women (23%) than of men (15%) felt that women were treated differently than men with respect to family-care issues. Similarly, more women (21%) than men (8%) at the OSB felt that women were disadvantaged on account of their age. We did not obtain similar results from the PLF survey.

2. Opportunities for Advancement

Most male and female employees of the OSB (93% of men and 76% of women) and the PLF (95% of men, 68% of women) agreed that gender does not limit advancement opportunities. However, a significant minority of female employees believed that women's opportunities for job advancement at the OSB and the PLF are limited by gender. Of those female employees who expressed an opinion, 36% of female OSB employees believed that women's opportunities at the OSB are "often" or "sometimes" limited because of gender; nearly 30% (3 of the 11 female PLF employees with an opinion) believed that such opportunities are "always" or "often" limited for women.

Approximately 50% of the female OSB and PLF employees who expressed an opinion believed that men are given preference in appointments to management

[13] For example, 56% of OSB and PLF supervisory and management employees believed that there is no gender bias against women at the OSB and at the PLF, compared to 41% of OSB and PLF support staff who held that view.

and to supervisory positions.[14] More female than male employees at the OSB (53% of women versus 15% of men) felt that women are "always," "often," or "sometimes" given preference in support positions. Men generally saw equal opportunity across all positions.

3. Personal Treatment

At both the OSB and the PLF, men noted almost no instances in which female lawyers and staff, or male lawyers and staff, were addressed by their first names or in terms of endearment when those of the opposite sex are not. By contrast, albeit in low numbers, women reported that female lawyers and staff are addressed by their first names or in terms of endearment, with more occurring at the OSB than at the PLF.[15]

At the PLF and the OSB, unwanted requests for sexual activity and acts of offensive touching were extremely rare. More prevalent were offensive comments and jokes. At each organization, no men and a small proportion of women had heard "unwelcome verbal jokes or comments of a sexual nature." Four female OSB and four female PLF employees reported they had "personally experienced" "unwelcome verbal jokes or comments of a sexual nature."

Once again, support staff were more likely to perceive gender-based behaviors than were those in more supervisory or managerial positions.

Finally, all men, and nearly all women, at each organization knew that a policy against sexual harassment exists. All of the male and most of the female OSB and PLF employees believed that it is enforced.

E. CONCLUSIONS

Most employees of the OSB and the PLF believe that gender does not affect their employment, their opportunities for advancement, or the way in which they are treated. They also believe that there is less gender bias now than there was in the past. Nevertheless, some problem areas remain. A significant minority of female employees believe that women's opportunities for job advancement at the OSB and at the PLF are limited by gender, and that women (especially support staff) are at a disadvantage because of their family responsibilities and their age. Female employees sometimes are subjected to jokes or comments of a sexual nature and are addressed by terms of endearment.

F. COMMENDATION

We commend the Oregon State Bar and the Professional Liability Fund for:

- adopting written policies prohibiting discrimination and harassment and making employees aware of those policies; and
- providing a flex-time option for employees.

G. RECOMMENDATIONS

1. The Oregon State Bar and the Professional Liability Fund should:

a. ensure that continuing education programs for lawyers, managers, administrators, and supervisors at the OSB and the PLF include issues of gender fairness;

b. by January 1, 1999, initiate regular workplace dialogues to foster an understanding of the experiences and perceptions of people of the opposite sex and to promote mutual respect;

c. by July 1, 1998, and periodically thereafter, communicate to employees, in writing and in person, their commitment to gender fairness and to the enforcement of equal opportunity and anti-harassment policies. Additionally, the OSB and the PLF should review those policies periodically; and

d. by January 1, 2000, study whether additional policies (besides flex-time) are feasible to facilitate employees' meeting their family obligations.

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[14] Thirteen of the 26 female OSB respondents with an opinion, and 5 of the 11 female PLF respondents with an opinion, reported that men are "often" or "sometimes" given preference in appointments to management and to supervisory positions. By contrast, approximately 10% of male OSB and PLF employees reported that men are "often" or "sometimes" preferred.

[15] Female OSB employees reported the following: Seven employees (22% of those with an opinion) reported that female lawyers are "always" or "often" addressed by their first names when male lawyers are not, four employees (11% of those with an opinion) reported that female lawyers are "always" or "often" addressed by "terms of endearment (*e.g.*, honey, dear, sweetie, babe, girl)" when male lawyers are not, one employee reported that female staff are "always" or "often" addressed by their first names when male staff are not, and 10 employees (25% of those with an opinion) reported that female staff are "always" or "often" addressed by "terms of endearment (*e.g.*, honey, dear, sweetie, babe, girl)" when male staff are not.

Fewer female PLF employees reported similar experiences. Only one female PLF employee reported that female lawyers are "always" or "often" addressed by "terms of endearment (*e.g.*, honey, dear, sweetie, babe, girl)" when male lawyers are not, and three female employees (20% of those with an opinion) reported that female staff are "always" or "often" addressed by "terms of endearment" when male staff are not. No female PLF employees reported that female lawyers or female staff are "often" or "sometimes" addressed by their first names when male lawyers or male staff are not, although a few reported that such references occur "rarely."

LEGAL EDUCATION

"Personally I've found the way the law thinks: the cases; the issue spotting stuff; 'don't look at the context', just 'look at this,' 'get the blinders ever narrower.' I kept having these male professors — my whole first year was male professors — saying, 'No, no think like a lawyer, think like a lawyer.' I finally figured out at the end of my second year — 'Think like a guy, think like a guy.' And that is so counter to the way that I normally think."[1]

A. INTRODUCTION AND OVERVIEW

The work group on Legal Education examined gender issues in legal education in Oregon. The group studied how gender bias, if any, and gender affect law students, law faculty, staff, and the law school environment. We found that, in many areas, the three Oregon law schools (Northwestern School of Law at Lewis and Clark College, in Portland; University of Oregon School of Law, in Eugene; and Willamette University College of Law, in Salem) achieve gender fairness. These areas include the existence of formal non-discrimination policies, students' academic performance and participation in extracurricular activities, assistance from career services offices, classroom participation, and interactions between co-workers at the law schools. However, the information that we obtained through our surveys and focus groups suggests that the law schools need to take action in four specific areas: (1) teaching styles; (2) sexual harassment of women; (3) professional recognition of female faculty; and (4) treatment of gay and lesbian students, students with disabilities, and students of color.

The current structure of the study of law, as well as of the traditional practice of law, rewards behaviors and thought patterns that men, more often than women, use comfortably. In surveys and focus groups, many female students reported that they were not comfortable with teaching styles that rely heavily on the Socratic method of questioning students to elicit legal principles. This response was especially strong for first-year female students. They reported that their own styles of problem-solving and communication did not seem to fit into the law school environment. Although their classroom experiences do not appear to affect women's success in law school, we recommend that law faculties incorporate a mixture of styles into their teaching so that students of both sexes can participate more fully in class discussions.

Our survey of faculty members revealed similar views of the classroom and the law school environment. Female faculty members observed differences in the behavior of female students in class. They reported that female students participate less often in class discussions than do male students. They also reported that their gender encourages female students to participate in class (both male and female students concurred).

We also found that a substantial number of female students had experienced adverse treatment because of their sex or, more seriously, sexual harassment in law school. In both instances, the source of the adverse treatment was predominantly other students. A few faculty members, administrators, and job recruiters also treated women negatively because of their sex, although sexual harassment complaints involved other students almost exclusively. Such behavior should be discouraged actively, and condemned swiftly when it occurs.

We found that lingering gender stereotypes affect female faculty members. Over half the female faculty members who responded to our survey reported being treated less respectfully by male students than by female students. Female faculty also reported that family planning is an issue in their professional advancement.

The findings of greatest concern were those related to the treatment of students of color, students with disabilities, and gay and lesbian students. Although the number of Oregon law students in those groups is very small (reflecting the population of Oregon generally), those students' experiences in law school suggest that adverse treatment based on race, ethnicity, disability, or sexual orientation is not being addressed fully in all Oregon law schools. As with the reports of gender bias and sexual harassment, incidents of racial and ethnic bias and bias based on a student's disability or sexual orientation were largely attributable to other students. Law schools are the gateway to the legal profession. They must take steps to eliminate these unacceptable behaviors.

B. ISSUES STUDIED

We addressed the following questions:

(1) Does a student's gender affect his or her expectations, experiences, or treatment in Oregon law schools? If so, how?

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[1] Female law student describing her law school experience in a focus group.

(2) Are female and male law students treated differently in Oregon law school career services offices or in the law career recruitment process? If so, how?

(3) Does gender affect the way in which staff[2] in the Oregon law schools are treated by others in the law school community? If so, how?

(4) Does gender affect the experiences of Oregon law school faculty members? If so, how?

(5) What influence, if any, do other personal characteristics, such as race, ethnicity, sexual orientation, or disability, in combination with gender, have on the experiences or treatment of members of the law school community?

C. METHODS OF STUDY

The work group consisted of law professors, law school administrators, law students, and recent law school graduates. A professor of sociology and members of the Intersectionality work group also assisted us. Eighteen members of the work group were women, and four were men. Two members of the work group were Hispanic; one was Asian-American. One member was disabled.

We studied gender issues in legal education at all three Oregon law schools. In order to ensure the full cooperation of the three schools, we consolidated the results of our research and chose not to report separately on each institution. Although the three schools are different in many ways, similar issues of concern arose at all three schools to varying degrees.

To explore students' expectations and experiences in the law school environment and in career services offices, we prepared and administered an extensive multiple-choice survey. The survey was administered in selected classes during class time in April 1997,[3] to a total of 570 male and female law students. First-, second-, and third-year students participated. Our survey respondents represented 36.5% of the total student population at all three schools.[4] Students also had an opportunity to provide written narratives as part of the survey. We received 94 narrative responses. We also obtained qualitative information concerning students' expectations, experiences, and treatment in law school and in career services programs from six focus groups, which were conducted by students in the Social Research Design class at Willamette University. One focus group of men and one of women was conducted at each of the three law schools. Students were invited to participate through a random selection process.

To examine the treatment of staff in the law schools, the Social Research Design class students prepared and administered a written survey to all 72 staff at the three Oregon law schools. Forty-two (60%) of the staff responded. All were white women.

To capture the experiences of law school faculty, we prepared and administered a written survey to faculty members at the three Oregon law schools. The survey examined faculty members' personal experiences and their perceptions of the law school environment. The survey was distributed to all full-time and permanent part-time (at least half-time) faculty members (a total of 116).[5] Thirty-eight (33%) of the surveys were returned. Seventeen of 40 female faculty (42.5 %) responded. Twenty-one of 76 male faculty (27.6%) responded. We received responses from approximately equal numbers of faculty members from each of the three law schools. No respondents identified themselves as belonging to a specific minority group, although two respondents indicated that they were of mixed race or ethnicity.

To understand the effects of other personal characteristics on the experiences of women in Oregon's law schools, we included specific questions in the student and faculty surveys, and the Intersectionality work group conducted focus groups of students of color and gay and lesbian students (a total of 12 participants) from the three Oregon law schools.

D. FINDINGS

1. Law Students

a. Demographics

Of the students responding to our survey, 54% were women. In the 1996-97 academic year, 47% of all Oregon law students were female.

Although we did not ask survey respondents where they were from, the law schools report that most law students in Oregon come from Western states; on average, 70% come from Oregon, Washington, and California.

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[2] In this chapter, the term "staff" refers to employees of the law school who are not students, faculty, or administrators.

[3] The survey was modeled in part after surveys developed by Professor Lani Guinier at the University of Pennsylvania Law School in 1990 and by the Law School Admission Council in 1991-92. *See* Lani Guinier, et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U PA L REV 1 (1994); LINDA F. WIGHTMAN, LAW SCH ADMISSION COUNCIL, WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCES OF WOMEN AND MEN (1996).

[4] The three Oregon law schools had the following enrollments at the time the survey was administered: Total men - 831 (white men - 705; men of color - 126); total women - 731 (white women - 607; women of color - 124).

[5] Adjunct instructors were not included in the survey.

Eighty-three percent of those surveyed were between 20 and 30 years of age, 82% were white, 8% were Asian or Asian-American, 3% were African-American, and 8% were of mixed race or ethnicity or of another minority. Those numbers reflect the demographics of the law student population at the three Oregon law schools.

Ninety-five percent of those surveyed identified themselves as heterosexual. Five percent identified themselves as gay, lesbian, bisexual, or other. Of the students surveyed, 4.6% identified themselves as having a disability. Fewer than a third of those students said that their disability was visible to others.

In the survey, we asked students to report their class standing. There were no significant gender-specific patterns associated with those self-reports. Nor did the students' reports of class standing vary significantly with year in school, age, or disability. However, fewer ethnic minority students reported being in the top 10% to 25% of their class than their numbers in the student population. A disproportionate percentage of ethnic minorities reported being in the bottom 25% of their class than their numbers in the student population. Second- and third-year students' participation on law review boards or in moot court societies also did not appear to be affected by gender.

Almost two-thirds of the students surveyed were single. Fifty-five percent of the single respondents were women. Of the students who were married or partnered, men and women were equally represented. Eight percent of the surveyed students had minor children living at home; 24 of those students said that they were the primary caretaker of their children. Of those primary caretakers, 75% were women.

Men and women had similar educational debt loads. Sixty-five percent of those students surveyed expect to owe at least $50,000 upon graduation.

b. Overview

The survey, narrative comments, and focus group analyses all indicated that most law students, male and female, do not perceive gender bias at Oregon law schools. In fact, two female law students wrote that their experiences with gender fairness were far better at the Oregon law schools they attended than at the law schools in other states from which they had transferred. The majority of men and women surveyed reported that neither a student's nor a professor's gender affects the level or nature of student class participation, that male and female students are equally tolerant of comments by other students in class, and that male and female professors elicit similar levels of classroom participation. Furthermore, as self-reported, academic performance of male and female law students is comparable, and male and female students are represented similarly on law review and on moot court teams.

Although these findings are very gratifying, all is not entirely well at Oregon law schools. The survey results and focus groups revealed that women are significantly less confident about their academic and public speaking abilities than are male students. Female students participate less in class and are much less comfortable with the Socratic method. In addition, women reported significant gender bias and sexual harassment.

c. Self-perceptions

We asked students to rate themselves on five personal traits: academic ability, cooperativeness, competitiveness, public speaking, and self-confidence.[6] Students could rate themselves as "above average," "average," or "below average" with respect to each. We then examined these ratings for gender disparities.

Men and women viewed themselves differently with respect to each personal trait. Except for cooperativeness, males rated themselves more generously than did females. The students' self-ratings on cooperativeness and competitiveness reflect generally held views of differences between men and women: men (61% of those who rated themselves "above average") reported being more competitive, and women (57% of those who rated themselves "above average") reported being more cooperative. These self-views appear to bear some relationship to students' comfort with classroom participation and the Socratic method (see discussion below).

Focus group reactions also reflected this perceived gender difference regarding competitiveness and cooperativeness. Both men and women saw law school as inherently competitive. One male student commented, "After first year grades, you'll find an intellectual caste system immediately imposed." Another, referring to the grading system, commented that "the system creates that ultra-competitive environment." Most respondents viewed competitiveness as necessary in order to prepare them adequately for law practice. Men generally viewed competition positively, while women had mixed views. Some women gained confidence and felt more prepared for different situations through competition; for other women, however, competition created self-doubt about their ability to succeed and lowered their self-confidence. One student commented, "It's mental anorexia ... it's like the old physical anorexia where you can never be too skinny. This is you can never be too smart."

Among the 40% of students who rated themselves "above average" in self- confidence, 57% were men.

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[6] These traits typically are associated with success in law school and in law practice.

Conversely, of the 13% of students who rated themselves "below average," 67% were women. Half the male students rated themselves "above average" with respect to self-confidence, while less than one-third of women rated themselves "above average." Of particular interest was the contrast between the confidence levels of women and men in the first and in the third years of law school. In the first- and second-year classes, women had less self-confidence than men; in the third-year class, however, the gender difference disappeared. Indeed, self-confidence ratings were higher for third-year women than for third-year men.[7]

The focus groups painted a somewhat different picture. The majority of men expressed self-confidence upon entering law school, while women were more apprehensive and prepared more than men before entering law school. Once in law school, students' feelings changed. Men described an initial jolt to their self-confidence after first semester grades; after that initial jolt, the men said that they experienced a steady increase in confidence. By contrast, women reported that their self-confidence either fluctuated or diminished during law school.

Men and women also differed significantly in their views of their public speaking skills. Forty-seven percent of the men rated their public speaking ability above average, in contrast to only 32% of the women. Only 11% of the men rated their public speaking skills as below average, compared to 21% of the women. Women's more negative self-perception of their speaking ability may correlate to lower levels of self-confidence, as well as of class participation.

Based on our survey, we found that male and female law students in Oregon perform similarly academically, regardless of differences in their perception of their skills and differences in their confidence in their abilities when they enter law school.

d. Participation in Law and Non-law Activities

Male and female students reported substantial differences in how they spent their time. The only activity to which men and women devoted equal time was studying. Women spent significantly more hours than men attending class and participating in law-related extracurricular activities. By the third year, 40% of the men, in contrast to just 18% of the women, reported spending no time on law-related extracurricular activities. Also, third-year men, unlike women, dramatically increased the time spent each week working for pay. One-third of third-year men reported working for pay between 13 and 20 hours per week. Half the third-year women and most first-year students reported that they spent no time working for pay. Thus, the data suggest that, in their third year, men — but not women — shift their time away from law-related extracurricular activities and toward outside employment.

The survey revealed modest gender differences in preferences for certain teaching styles. Most students liked mixtures of the Socratic method and lecture (63% of all students; 61% of women; 65% of men) and lecture and question (63% of all students; 71% of women; 53% of men), as compared to pure Socratic method (11% of women; 19% of men) or straight lecture (20% of women; 15% of men). When asked to identify their preferred teaching style, 56% of men and 49% of women identified mixed Socratic/lecture, and 34% of men and 45% of women identified mixed lecture/question. Although we cannot draw significant conclusions about the attractiveness of any particular style from our survey, it is interesting that twice as many women preferred the straight lecture method to the pure Socratic method.

In the focus groups, however, gender differences *vis-a-vis* the Socratic method were more pronounced. The majority of men were indifferent or viewed this method as a positive teaching style. They described the Socratic method as a game and were more comfortable just telling the teacher, "I can't answer that question." By contrast, fear and apprehension were the prevalent feelings that women expressed about the Socratic method. They did not think that it was a good learning style for them, but did believe that it was good preparation for becoming lawyers. The women in the focus group reported that they tend to take the experience more personally than do the men; the women reported internalizing the fear and apprehension that they associated with the Socratic method, which resulted in diminished self-esteem.

At all class levels, women were less likely than men to ask questions or to volunteer in class. Fifty-four percent of the students reported that they "never" or "rarely" ask questions in class (58% of women and 47% of men). Among the 77 students who never ask questions in class, 68% were women. By contrast, among the 63 students who frequently ask questions in class, 59% were men. The results were similar for volunteering comments in class. Fifty-two percent of students (54% of women and 50% of men) reported "never" or "rarely" volunteering to speak in class. The data indicate, however, that women over 30 participated actively in class. One student commented that "the most aggressive personalities seem to be the females who are over 30 years old; [they] dominate class discussions." Another student noted that "women students who are smart and aggressive are more likely to be disliked and similar men are just seen as annoying."

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[7] The survey was administered to all three law classes simultaneously. The work group did not perform any longitudinal studies to determine whether there is a *change* in self-confidence levels as students move from their first year to their last.

Women in the 20- to 25-year-old age group participated the least of any group.

Significant differences also emerged for students of different ages and ethnic backgrounds, regardless of gender. Compared to white students, African-American students were three times more likely, and Asian students twice as likely, never to volunteer in class. Younger students were less likely than older students to ask questions or volunteer.

Despite significant differences in actual class participation, men and women were equally comfortable with their level of participation in the classroom. Fifty-three percent of women and 57 % of men were "comfortable" or "very comfortable" with their level of participation. The percentage of women who were "very uncomfortable" with their participation decreased significantly from the first to the third year, despite women's reported decreasing level of participation during law school.

The focus groups highlighted one area in particular in which both men and women felt uncomfortable and silenced, but for different reasons: gender-related issues. Men felt silenced on issues such as rape and sexual harassment, because they feared being misinterpreted and criticized by female students and female professors. Women were less inclined to discuss the same issues for fear of being labeled "radical" or "feminist."

e. Students' Perceptions of the Effect of Gender in the Classroom

Male and female students had significantly different perceptions of the effect of a student's gender on classroom participation. One-quarter (26%) of the men and nearly half (47%) the women believed that a student's gender correlates to rates of student participation. Of those students who said that gender does matter, both men and women overwhelmingly reported that male students participate more in class than do female students. Those views support the self-perceptions of men and women as to their individual participation; that is, more men than women reported that they participate actively in class. In the focus groups, women stated that men dominate the classroom. Women thought that men are more comfortable jumping to an answer and working out their thoughts as they speak, whereas women said that they tend to think about the answer before volunteering and, thus, are called on less often. A number of written comments similarly suggested that men participate more in class.

We also probed tolerance of male and female class participation. More than 79% of students said that male and female students' comments are tolerated equally by male and female students. Among those who did perceive a difference in the reactions of male and female students to classroom comments, men and women held different views. Eighty-six students (16% of the survey respondents) said that female students are more tolerant of classroom comments made by one gender or the other. Male respondents (72% of those who perceived different reactions based on gender) predominantly thought that women are more tolerant of women's comments, whereas female students (80% of those who perceived different reactions based on gender) thought that women are more tolerant of men's comments. Similarly, of the 114 students (26% of the survey respondents) who thought that male students reacted differently to student comments based on the gender of the speaker, most of the men (78% of those who perceived difference based on gender) thought that men are more tolerant of women's comments, whereas most women (73% of respondents who perceived difference based on gender) thought that men are more tolerant of men's comments.

Most students (79%) believed that the gender of the professor does not affect overall classroom participation. However, among those who said that the professor's gender does matter, 67% were women. Of those who believed that the professor's gender makes a difference, both men (71%) and women (73%) believed that female professors are more effective than male professors at promoting classroom participation. A positive view of female professors' ability to encourage classroom participation also was reflected in four narrative comments. For example, one student noted that "female teachers tend to ... encourage class participation by asking questions. Female students seem more comfortable volunteering information in this environment."

Female students of color who participated in the focus group described difficulty developing relationships with faculty members. Although they acknowledged that a few faculty members tried to interact with them in a positive way, most faculty were difficult for them to approach. In general, focus group participants agreed that they were not likely to approach a professor unless it was absolutely necessary.

f. Students' Experiences of Bias or Adverse Treatment

A series of questions addressed whether professors treat male and female students differently. Approximately 80% of the respondents said that neither male nor female professors treat students differently because of their sex. However, of those who said that professors treated students of one sex preferentially, most women said that professors treat men preferentially, while most men said that professors treat women preferentially. Whether the professor was male or female did not affect those responses. Women who said that there was a difference in treatment of male students saw that behavior in both male and female professors. Male students who said that there was a difference in the treatment of female students saw that behavior in both male and female professors.

Nearly one-quarter of the students (31% of the women, 17% of the men) reported that they had experienced gender-related bias or adverse treatment.[8] Fewer than 7% of those surveyed (10% of the women, 2% of the men) reported sexual harassment. It is noteworthy that, of the seven disabled women surveyed, four (57%) reported gender-bias. In addition, the narrative reports indicated that some men have felt victimized by gender bias: six men complained of favoritism toward women, five complained of discrimination against men, and seven expressed the view that our survey was either biased or a waste of time, or both.

Among women, the primary source of both gender-related bias and sexual harassment was other students. Two female students at different law schools provided narrative reports about male students viewing pornography on the Internet in the law school computer rooms. In addition, written and focus group comments by women described incidents of gender bias or sexual harassment by male professors: for instance, telling sexist jokes in class, ogling female students' bodies, and calling women "feminist" or "radical" during class. Among men, the primary source of sexual harassment was other students, but the primary source of gender-related bias was faculty.

Students reported substantially greater degrees of discrimination on the basis of characteristics other than their gender. High percentages of Asian-American students (61%) and African-American students (64%) reported that they had experienced racial bias or adverse treatment, predominantly from other students. A female African-American law student recounted how, in a trial practice course, a juror had told her "that she should take English language classes." The focus group moderator noted that "[t]his student speaks flawless English. English is her first and native language. . . ."[9] Another female African-American student described how her professor called on her in class only when they were discussing civil rights, discrimination, or similar topics.[10] In one focus group of women of color, *every* participant reported some instance of sexual harassment by either male students or male faculty members, such as unwanted touching.

In addition, 55% of gay and lesbian students reported discrimination based on their sexual orientation. In a focus group, one gay male student described the reluctance of his law school dean to deal with homophobic cartoons that were posted on a law school bulletin board. Another gay male student in the same focus group noted that "seeing 'fag' didn't really phase me. . . [but] postings on campus began to make me feel threatened."

Overall, the data indicate that women, students of color, gays and lesbians, the disabled, and those over 30 are most likely to experience bias or adverse treatment during law school and that adverse treatment is most likely to come from other students. Significantly, focus group participants reported that the law school administration's attitude of tolerance or intolerance of harassment and discrimination set the tone for the students. According to focus group participants, students reported few problems at those schools where the administration had a zero-tolerance policy and made that policy well-known through actions.

g. Career Interests and Career Services

Nearly half of all students reported that they came to law school because it was the best career option. Twenty-nine percent of the students reported they came to law school to help others; 39% of those students were women, and 21% were men. The focus group discussions revealed that female students were more interested in small firms and public sector jobs than were male students.

Students found that career services offices do not distinguish between male and female students in giving access to services, sponsoring activities, or counseling on career choices. Although male and female law students reported no significant differences in the behavior of career services staff toward students, women responded differently to some experiences. For example, women expressed concern that career services offices cater to large law firms and to the top students in the class and encourage students to fit into the "mold" that would appeal to those employers — such as in their manner of dress. Some female students also expressed the belief that large firms consider men to be more serious candidates for employment and that career services offices reflect that attitude. As noted, more female students than male students were interested in small firms or public sector jobs; those female students expressed a desire to see career services offices place more emphasis on those employment options.

Students observed that career services offices generally treat male and female students similarly in the interview preparation process. However, in the interview process itself, female students sometimes found it hard to make connections with interviewers, particularly if the interviewer was an older male lawyer.

All three law schools' non-discrimination policies bar on-campus recruitment by employers who discriminate

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[8] For more information, see Attachment A to this chapter.

[9] Comment at focus group with law students of color, Apr 13, 1997.

[10] Comment to a Task Force member at focus group with law students of color, Apr 13, 1997.

on the basis of sex, race, ethnicity, or sexual orientation. In part, those non-discrimination policies conflict with current military policy toward gay men and lesbians in the armed forces. A federal law (commonly known as the "Solomon amendment") requires educational institutions to give the United States military access to on-campus recruitment of students and withholds federal funds from any institution that does not comply.[11] The three Oregon law schools' responses to the possible withholding of federal funds have varied.

2. Faculty

The goal of the faculty survey was to determine whether there are differences between male and female professors' perceptions of their experiences in the law school environment. The survey included four sections: (1) classroom environment, (2) job satisfaction, (3) professional relationships, and (4) fairness issues. We mailed the survey to 116 full- and part-time faculty members (76 men; 40 women).

Of the survey respondents (21 men and 17 women), men tended to be older, longer-tenured, and more highly paid than women. Fifty-seven percent of the men were at least 51 years of age. The largest group of female faculty members (64.7%) fell into the 41-50 age bracket. Eighty-one percent of the men were tenured; 11 of the men had been tenured for at least 16 years. By contrast, 59% of the women were tenured, all but one for 15 years or less. More than half the males in the sample reported base salaries in excess of $80,000 per year, whereas fewer than 30% of the females reported such income. In addition, four men and one woman also received supplemental compensation for endowed faculty chair positions.

a. Classroom Environment

The responses obtained from questions concerning the classroom environment revealed differences between men's and women's perceptions of the effect of gender on the character and quality of classroom interaction. When asked whether "the nature or content of classroom interactions between you and the students [is] affected by the gender of the student," 35% of the women reported that gender is a factor, but only one man responded affirmatively. Forty-one percent of the female professors, compared to just 30% of the male professors, believed that male students volunteer in the classroom more often than female students. Those responses are similar to responses from the student survey, where 49% of female students and 26% of male students believed that one gender (men) dominates in classroom participation. Fifty-one percent of the female faculty, but only 35% of their male colleagues, perceived male students as taking up more class time than female students.

Eighty percent of the female faculty believed that female instructors elicit greater classroom participation from female students than do male instructors. By contrast, most male faculty (61.5%) did not believe that their gender has an effect on classroom participation by either male or female students. By contrast, only 26% of female students and 15% of male students believed that the professor's gender makes a difference in classroom participation. Of those who did, 76% said that female professors encourage more participation.

Nearly two-thirds of the female professors stated that male students treat them with less respect than do female students. In sharp contrast, not one male professor said that he is accorded less respect, from female or male students, because of his gender. Those findings are consistent with findings of other studies in the field[12] and suggest that female faculty bear a heavier burden than their male counterparts in proving their competence to students.

With regard to mentoring of students, female professors reported both higher numbers of students whom they "mentor" and more time spent on mentoring activities than their male counterparts reported. Women, in particular, commented on the importance of mentoring, its time-consuming nature, and the need for compensation or other recognition for mentoring students.

Although both male and female faculty said that gender-neutral language is important, female professors (76%) believed it to be more important than did their male colleagues (60%). Fifty-five percent of faculty reported using gender-neutral classroom materials (70% of female faculty, 45% of male faculty).

b. Balance Between Professional and Personal Life

Our study revealed that female professors have a much higher involvement in child care and household responsibilities than do male professors. Female professors with families spent more than twice as much time providing child care and 50% more time on other "household" affairs than did male professors with families. Conversely, male faculty reported spending 50% more time on academic research (a key component for securing professional advancement, recognized by faculty at all three law schools) than did female faculty

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[11] The amendment is codified at Omnibus Consolidated Appropriations Act of 1997, Pub L No 104-208, § 514(b), 1996 USCCAN (110 Stat) 3009-270 to -271.

[12] *See generally* ANNE STATHAM ET AL, GENDER AND UNIVERSITY TEACHING: A NEGOTIATED DIFFERENCE (1991); Kathleen S. Bean, *The Gender Gap in the Law School Classroom—Beyond Survival*, 14 VT L REV 23 (1989).

(15.5 hours per week for men versus 10.6 hours per week for women).

Family responsibilities, as they relate to one's professional life, are perceived by female faculty to be a factor of much greater consequence than they are to male faculty. Nearly half the female respondents reported that family planning had had a significant effect on their career advancement. No men indicated that this was a matter of importance. In a related question, "Are the needs of faculty with families adequately addressed by your law school (and the parent institution)?," 88% of male respondents answered "yes," while a sizeable minority of female respondents (41%) believed that such family responsibilities are not adequately acknowledged by their institutions. Comments critical to administrative policies or practices focused on a lack of flexibility in work schedules, a lack of day care services, and an absence of part-time options.

c. Professional Environment

Forty-seven percent of the female faculty who responded to our survey believed that male faculty hold leadership positions in numbers disproportionate to their actual population. Only 10% of male respondents held that view. Although both male and female faculty were supportive of official policy goals in place to promote gender fairness in the law-school setting, female faculty were less convinced of the actual commitment of administrators to carry out such policies than were their male colleagues. That divergence of viewpoint is illustrated in responses to the question: "How hard do you think that the administration of your school has worked to develop an atmosphere of gender equality?" Sixty-two percent of the male respondents believed that administrators work "very hard" to promote gender equality, as compared to just 12% of female respondents. Indeed, more than one-third of the female faculty members believed that law school administrators work "not very hard" or "not hard at all" toward such ends, while fewer than 10% of the male respondents concurred with that view.

d. Fairness

Eighty-two percent of all faculty respondents reported that they had not been the objects of discriminatory treatment by administrators with regard to pay or career advancement. However, 23.5% of the women surveyed answered "yes" in response to the question: "Do you believe that you receive (have received) a lower salary than other faculty members because of your gender?"[13] The faculty survey showed that women outnumber men in salary ranges below $70,000 and that men outnumber women in salary ranges above that level.[14] Most faculty members (85%) reported that they believe that it is equally difficult for men and women to gain tenure at their institutions.

A significant minority of female respondents reported having been treated inappropriately by administrators and students because of their gender. Thirty-five percent of the responding female faculty stated — in response to the question: "Have administrators at your law school, in any context, treated you inappropriately based on your gender?" — that they believed that they had been subject to inappropriate treatment. Only 14.2% of male respondents answered the same question affirmatively. In addition, two women said that they had observed such inappropriate treatment directed at others. Similarly, nearly half the female professors believed that they had been treated inappropriately by students because of their gender; only 14.2% of their male colleagues answered likewise.

Another indication that female faculty observe gender discrimination to be a greater problem in Oregon's law schools than do their male colleagues is reflected in responses to the question, "Have you ever helped a student (counseled, aided in other ways) deal with a gender discrimination issue that occurred at your school?" Thirty-three percent of the male respondents reported that they had aided a student with a gender discrimination problem; 80% percent of the female respondents answered that they had done so.

3. Staff

In a separate survey, we asked staff at the three law schools about their experiences in their jobs and about their observations of interactions between other groups in the law school environment. All the respondents to our survey were female. Half the respondents added written comments at the end of the surveys. In those comments, many respondents stated that the combination of their job status and their gender adversely affects their ability to contribute to decision-making in their law schools. Many also reported that they were expected to perform menial tasks that were not part of their jobs, and some reported that they had been treated inappropriately because of their gender by faculty members or administrators. Examples given included: inappropriate comments about a staff member's children, rude or demeaning behavior toward staff, ignoring staff, and verbal abuse.

Between 51% and 71% of respondents indicated that they are treated the same by male and female faculty

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[13] This figure does not include the responses of two female faculty members who expressed dissatisfaction with their salary levels, but who could not definitely ascribe their perceived low salaries to gender discrimination.

[14] As noted elsewhere, male faculty who responded to our survey tended to be older and longer-tenured than female respondents.

members. When staff members reported a difference in behavior by others, they noted that male faculty and students are less considerate of staff members than are female faculty and students. In response to the statement, "I deserve more consideration from," 11% of the respondents replied "male students" but none replied "female students." In response to statements about working relationships with male and female faculty, 23% of respondents said that they work best with female faculty members; 13% said male faculty members.

Staff observed that, for the most part, faculty members treated each other with respect and work well together regardless of gender. In those cases in which staff observed gender-based differences, they see male faculty members as having more respect for and working better with other male faculty, and female faculty members as having more respect for and working better with female faculty. Staff reported that some male faculty are sensitive to the needs of female colleagues and some are not. The same observations were made concerning the relationships between faculty and students, and between students and other students.

E. CONCLUSIONS

1. Students

The student survey, written comments, and focus group results all indicate that, objectively, women are doing quite well in Oregon law schools. Women match men in self-reports of academic performance and participation on law review and moot court. Women are as satisfied as men that law school is preparing them for a legal career, even when they do not feel comfortable with some aspects of the preparation, such as the Socratic method, public speaking requirements, and the competitive environment.

In focus groups and narrative comments, several men and women discussed their perceptions that law, law school, and the legal profession are "male" in character. As one woman noted:

> *"Personally I've found the way the law thinks: the cases; the issue spotting stuff; 'don't look at the context,' just 'look at this,' 'get the blinders ever narrower.' I kept having these male professors, my whole first year was male professors, saying, 'No, no think like a lawyer, think like a lawyer.' I finally figured out at the end of my second year — 'Think like a guy, think like a guy.' And that is so counter to the way that I normally think."*[15]

Even though law school and law practice are viewed as "male," female law students are coping fairly well. Female respondents to the survey did not report that the "culture" of Oregon law schools has produced extensive negative effects on either their psyches or their academic standing. Although women participate in class less frequently than men, they are comfortable with their level of class participation.

However, this level of comfort should not be interpreted to mean that there is no cause for concern. Class participation is a way of gaining the professor's attention and learning to think on one's feet. The fact that fewer women participate in class and that men are perceived as dominant in the classroom is of concern. Law schools should look for ways to encourage more class participation by women. Cooperative learning should be incorporated as a teaching method, and efforts should be made to make the classroom less intimidating. Professors need to be aware of the differences in class participation between their male and female students and, when they notice significant differences, look for ways to incorporate women's voices. One way to do this is to use classroom materials in which the gender of the "characters" (authors, judges, lawyers, parties, experts, etc.) is balanced. Until recently, there were not many textbooks that reflected the true makeup of the American population, but that situation is changing and law school teachers in Oregon should continue to take advantage of those changes.

A promising finding is that, even though first-year female students reported lower self-confidence than first-year male students, they still reported performing at the same levels academically as men, and second- and third-year women (who presumably have adjusted to the law school environment and the law itself) reported self-confidence levels comparable to those of men in the same class years. This difference in women's self-confidence suggests that women feel more competent to practice law by their final year of law school.

Women continue to be involved in law school life in their third year, while men tend to separate themselves from law school life by that time. It is unclear whether these different behaviors have any significant effect on students' preparation for law practice. Law schools should reflect on the different strategies that men and women follow by the time they are third-year students. The schools should determine whether women are benefiting sufficiently from their continued involvement with law school and whether men are being affected detrimentally by their lack of involvement with law school.

As to gender fairness, Oregon law schools in general, and their faculties in particular, appear to be doing an adequate job. Most male and female students have not experienced gender bias and do not perceive faculty to be gender biased in their treatment of students. In fact, most students concur with the observation that

[15] Comment at focus group of female law students.

their law school "goes out of its way to provide a relatively gender-neutral environment for its students." Nonetheless, nearly one-third of the women surveyed reported that they had experienced gender bias while attending law school, and 10% of women and 3% of men reported that they had been sexually harassed. With this in mind, accusations of gender bias and sexual harassment against students, faculty members, or administration need to be taken seriously.

Regarding student perceptions of career services offices, the focus group results indicate that, although career services offices in the three Oregon law schools treat male and female students equally, three underlying differences exist. First, there is a substantial emphasis on large-firm hiring. Female students want more variety in the type of employers who interview on campus. As a group they are less interested than male students in working for large firms. Second, the advice from career services staff concerning women's dress stresses uniformity. Many female students perceive this as sacrificing their individuality to fit a "mold." Finally, in the interview process itself, female students do not believe that they are adequately prepared for on-campus interviews with large firms. More emphasis is needed concerning appropriate and inappropriate interview questions, "ice breaking," and the like.

Of grave concern are reports of bias, based on their intersectional characteristics, from people of color (especially women), gays and lesbians, and disabled students. More than half the respondents of color reported racial bias. This is a significantly greater percentage than the overall percentage of women who reported gender bias. One explanation for this phenomenon is that the numbers of people of color, gays and lesbians, and disabled students in the law school population are much smaller. They are, therefore, likely to be more vulnerable.

Ironically, law schools' attempts to be sensitive to gender occasionally may be viewed as going too far, resulting in resentment and perceived unfairness by men. The number of narrative comments complaining of reverse discrimination — as well as of bias within the survey — are indicative of this resentment. A few women also observed that a number of men refused to complete the survey, and other men intentionally were not completing the survey seriously. Care must be taken not to give in to backlash and unjustified resentment while, at the same time, care must be taken not to replace unfairness to women with unfairness to men.

Overall, the law schools appear to be making progress on gender fairness. However, they should be alert to the remaining problems and should create opportunities to educate students and faculty about gender fairness.

2. Faculty

The aggregate results of the faculty survey assign relatively high marks to both administrators and professors for establishing and maintaining an environment within Oregon's law schools that promotes gender fairness and equality principles for faculty, support staff, and students alike. This general assessment is shaped, however, by observable differences in the makeup and responses of the survey population drawn along gender lines. By and large, survey responses by male professors tend to support the view that gender equality concerns are a major priority in their respective institutions and that policies already in place to deal with issues of gender fairness are adequate and effective. In short, to male faculty members, gender discrimination is not a significant problem in Oregon's law schools, yet a sizeable portion of female professors report gender-based differences in their experiences in the law school administrative and classroom environments.

Female faculty members believe that, as compared to their male colleagues, they:

- receive less respect from students;
- are forced to make more choices between career and family; and
- have less access to leadership positions.

Drawing conclusions on intersectional issues for law faculty is difficult because of the very small sample of minority faculty members who responded to the surveys. However, two narrative comments may be worth consideration: "Sexual orientation makes more of a difference than gender," and "Women and minorities get extra work piled on for the same pay as white males."

3. Staff

Generally, staff members are treated fairly by others in the law school community. Staff also observe that interactions among faculty colleagues and between students and faculty do not appear to be affected by gender bias.

However, some staff reported adverse treatment. The law schools are the first place where students experience a "law office" environment. Poor treatment of staff members by faculty and administrators, even if not frequent and even if not motivated by gender, sets a bad example. Because most staff are female, poor treatment by those of higher rank may communicate to students that such behavior toward women is acceptable in the work environment.

We could draw no conclusions concerning intersectional issues among staff, because all respondents were white women, none of whom identified themselves as having other characteristics that were the subject of our research.

F. RECOMMENDATIONS

1. Oregon law schools should:

a. continue to recruit law students and faculty to increase the number of persons from diverse backgrounds, including women and people of color;

b. disseminate existing written policies prohibiting discrimination and harassment on the basis of gender, race, disability, and sexual orientation, and the procedures for filing complaints, at the beginning of each academic year. Those policies should be enforced promptly and consistently when complaints are made;

c. continue to address issues of fair treatment as a part of their orientation of law students and faculty and in publications such as catalogues. By the academic year 2000-01, gender and intersectionality issues should be included in students' training in professionalism;

d. by the academic year 2000-01, conduct orientation programs for faculty members on fair treatment of staff members;

e. by the academic year 2000-01, examine administrative policies and practices, and modify them where needed, to accommodate more fully the family responsibilities of professors;

f. by the academic year 2000-01, create a variety of opportunities for dialogue among all members of the law school community regarding gender-based perceptions of the law school experience, as well as the effects of race, ethnicity, disability, sexual orientation, age, and economic class on students' experiences;

g. by the academic year 1998-99, publicize the pertinent parts of this report to faculty, students, staff, and alumni;

h. by the academic year 1998-99, review the Task Force survey results for their own campuses to determine which issues are most significant to them; and

i. beginning in the current academic year, recognize the importance of faculty members' mentoring and counseling activities outside class, and factor this important work into salary, tenure, and promotion decisions.

2. Oregon law schools' career services offices should:

a. by the academic year 1998-99, solicit interviews by a wider range of prospective employers, particularly small firms and those working in the public's interest and in the public sector; and

b. by the academic year 1998-99, provide more complete preparation of students, especially female students, for interviews with recruiters.

3. Oregon law schools' faculty should:

a. by the academic year 1999-2000, incorporate alternative teaching methods, as well as the Socratic method, in all years of law school to provide for different learning styles and preferences;

b. by the academic year 1999-2000, include gender and intersectionality issues in their class discussions, and as regular parts of the curriculum;

c. beginning in the current academic year, make every effort to create a classroom environment hospitable to different ideas and to different learning styles; and

d. by the academic year 1999-2000, engage in collective self-assessment to determine whether the curriculum, teaching methods, and other law school practices and policies hamper the ability of faculty to be accessible to law students, in particular female students of color.

4. Administrators and faculty at Oregon law schools should:

a. recognize that misperceptions concerning women's competence may adversely affect decisions concerning the promotion and tenure of female faculty; and

b. by the academic year 1998-99, take appropriate steps to ensure that promotion and tenure decisions are not based on such misperceptions.

5. Oregon law schools and the Oregon State Bar should:

a. by January 1, 2001, begin to examine how well Oregon law schools actually prepare men and women for law practice. That examination should address questions such as these:

- Upon graduation, do men and women seek similar forms of employment? Are they hired for the jobs that they want, in the same proportions, within a similar amount of time, and for similar compensation? Are they perceived by employers and potential employers as equally suited and well-prepared for law practice?

The answers to those questions will assist both law schools and the legal profession in assessing gender fairness; and

b. by January 1, 2001, determine whether there are gender-based differences in male and female faculty salaries in Oregon's law schools and, if so, implement the changes necessary to ensure fairness.

ATTACHMENT A
Gender Bias Experiences of Different Groups of Students

	White		People of Color		Disabled		Gay/Lesbian		Bisexual	
Sex	M	F	M	F	M	F	M	F	M	F
Number in Sample	211	241	48	54	4	7	4	5	0	8
Number/% Experiencing Gender Bias	35 17%	74 31%	7 14%	16 30%	1 25%	4 57%	0	2 40%	—	3 38%
a. By Other Students	13 37%	52 70%	4 57%	12 75%	1 100%	2 50%	0	2 100%	—	3 100%
b. By Faculty	15 43%	40 54%	4 57%	9 56%	0	3 75%	0	1 50%	—	1 33%
c. By Administrators	7 20%	13 17%	4 57%	1 6%	0	1 25%	0	0	—	0
d. By Recruiters	12 34%	26 35%	4 57%	5 31%	0	2 50%	0	1 50%	—	0
e. In Class Materials and Curriculum	4 11%	16 21%	1 14%	4 25%	0	1 25%	0	0	—	1 33%
Number/% Experiencing Sexual Harassment	4 2%	25 10%	3 6%	4 7%	1 25%	0	0	0	—	1 13%
a. By Other Students	2 50%	19 76%	3 100%	3 75%	0	0	0	0	—	1 100%
b. By Faculty	0	11 44%	1 33%	0	0	0	0	0	—	0
c. By Administrators	1 25%	1 4%	1 33%	0	0	0	0	0	—	0
d. By Recruiters	0	0	1 33%	1 25%	0	0	0	0	—	0
e. In Class Materials and Curriculum	1 25%	2 8%	0	0	0	0	0	0	—	0

ADMISSION TO THE PRACTICE OF LAW AND LAWYER DISCIPLINE

"In short, although the impact of gender and cultural inequity is hard to measure, eliminating such inequity is, simply, the right thing to do."[1]

A. INTRODUCTION AND OVERVIEW

We examined the processes for admission to the practice of law and for disciplining lawyers. Generally speaking, we found both the admission and discipline processes to be gender-neutral. The preparation and administration of the Oregon State Bar examination are objective, and the Board of Bar Examiners (colloquially known as the "BBX"), which is responsible for the bar examination, has policies and practices in place that ensure gender neutrality of the admission process. The disciplinary process generally is perceived to be unaffected by the gender of the participants, by both those who administer it and those whose conduct is under review.

B. ISSUES STUDIED

We sought answers to the following questions:

1. Does gender affect the admission of lawyers to practice? If so, how?

2. Does gender affect the lawyer disciplinary process? If so, how?

C. METHODS OF STUDY

The work group on Admission and Bar Discipline divided its work into two parts. The sub-group on admission included three members, two white women and one white man, all of whom are lawyers who had served on the BBX. The sub-group on discipline included a white, female law professor and a white, female assistant disciplinary counsel for the Bar. That sub-group also had available to it the assistance of the Willamette University Social Research Design class for the fall of 1996.

With respect to the question whether gender affects the admission of lawyers to the practice of law, the sub-group on the admission process approached its task by examining

- the composition of the BBX,
- the process by which the BBX creates the bar examination,
- the grading process, and
- the bar results.[2]

We looked at national and statewide statistics regarding pass rates of men and women and at the use of gender in both multiple choice and essay questions on the Oregon bar examination during the last 10 years.

With respect to the question whether gender affects the discipline of lawyers, the sub-group worked with students from the Willamette University Social Research Design class. The students developed a survey that they sent to all people who were involved in the disciplinary process between January 1, 1994, and January 1, 1996. The surveyed group included

- accused lawyers,
- accused lawyers' defense counsel,
- defense counsel,
- Bar counsel,
- members of local professional responsibility committees,
- members of the State Professional Responsibility Board, and
- members of trial panels.[3]

The students sent surveys to 306 lawyers, of whom 96 (31.4%) responded.

D. FINDINGS

1. Admission to the Practice of Law

a. Admission Process

The Oregon Supreme Court (the "Court") is responsible for admitting new lawyers to practice in this state. In order to fulfill that responsibility, it has created the Board of Bar Examiners ("BBX"). Currently, there

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1 Lynda Leidiger & Mary M. Sandifer, *Names, Gender, and Ethnicity in the MBE*, BAR EXAMINER, Aug 1996, at 21, 22.

2 We did not survey bar applicants.

3 We did not survey complainants.

are 14 BBX members, 12 of whom are lawyers and 2 of whom are "public members" appointed by the Court. Each member serves a three-year term.

The Court has charged the BBX with determining semi-annually which applicants should be recommended for admission to practice in Oregon. To this end, the BBX performs character and fitness investigations of each applicant and administers a bar examination. If the applicant passes the investigation and the examination, the BBX recommends to the Court that the applicant be admitted.

We focused on the examination process rather than on the character and fitness investigation, for two reasons. First, very few applicants are denied admission on the grounds of character and fitness; thus, any results of such a study would be statistically insignificant. Second, there is no way to measure unfairness based on the information available to us. The investigations are confidential, including the identity of the persons being investigated. The only public information is the Court's opinion, which would be rendered only after the BBX has recommended denial and the applicant has sought review.

b. Composition of the BBX

The composition of the BBX was, from its inception in 1954 until 1981, exclusively male. One woman was appointed as a public member in 1980 for a two-year term. The first female lawyer was appointed in 1981, and a second in 1983. The BBX voted in its first female vice-chair in 1985, and its first female chair in 1989.

Since 1993, approximately equal numbers of men and women have served on the BBX. Women are actually over-represented on the BBX when compared to the composition of the bar as a whole. Between 1994-95 and today, the average annual female representation on the BBX was 44%, whereas the average female representation in the Oregon State Bar was 25.8% during that period.

c. Bar Examination

The examination itself is divided into three parts: professional responsibility ("MPRE"), multiple choice ("MBE"), and essay questions.[4] The MPRE and MBE are drafted by the National Conference of Bar Examiners ("NCBE"), which reviews all tests for potential bias. The NCBE appoints a group of law professors and practitioners, both men and women, to serve on each drafting committee. Persons with varied racial and ethnic backgrounds assist in the preparation and review of items at multiple levels. In response to concerns about bias in the development of MBE questions, the NCBE has adopted guidelines for preparation of test forms that ensure balance in the use of roles, names, and gender in the MBE.[5]

The third area of testing is the essay examination. The BBX adopted policies in 1989 and 1990 that govern the drafting of essay questions for the Oregon bar examination. Those policies do not expressly address issues of gender identity in examination questions but, as a matter of practice, the BBX attempts to ensure that its questions do not reflect or incorporate gender bias. In appointing members of the BBX, the Court is sensitive to matters such as gender, ethnicity, region, and type of practice. In the past decade, the BBX's composition has reflected its commitment to gender diversity.[6]

The BBX's diversity produces a spectrum of perspectives and sensitivities that is brought to bear on the development and final character of each question. Each question is drafted by a member of the BBX and then is subjected to an extensive series of reviews and revisions, first by a small group of BBX members and then by the entire BBX. The months of drafting and the repeated review to which each question is subjected ensure that attention is paid not only to issues of substantive law, but also to drafting concerns such as gender neutrality.

Particular concerns that the BBX addresses in the drafting process include the following, and questions are drafted and revised to take account of these concerns:

- The roles that characters play in the questions. Both women and men run businesses and stop signs, as the case may be. There is a deliberate attempt to ensure that lawyers and judges, bad actors and innocents, are given both male and female identities or identities that do not specify gender.
- The fact patterns themselves. The questions attempt to describe events that are not, by their nature, necessarily more familiar to or more offensive to examinees of one gender or the other. Particular care is taken, for example, in the

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[4] In 1998, a fourth component, performance testing ("MPT"), will be added.

[5] For a description of the guidelines, see Leidiger & Sandifer, *supra* note 1.

[6]

	Women on BBX	Men on BBX	%Women on BBX	% Female Lawyers In Oregon
1994-95	6	7	46.1	25.0
1995-96	5	8	38.5	26.0
1996-97	5	9	35.7	26.0
1997-98	8	6	57.1	26.2

drafting of questions that deal with issues of discrimination.

- Avoidance of words or phrases or contexts that are likely to be more readily understood by one gender than another. Thus, one would not likely see a bar exam question that uses a sports term, such as one party's making an "end run" around the letter of a contractual provision.

In addition to the foregoing specifics, the BBX also tries to ensure that the mix of examination questions as a whole reflects the range of legal practice for which applicants seek licensure, without undue emphasis being given to any particular area of practice. Thus, in selecting and approving essay topics, the BBX looks for a balance among general practice (*e.g.*, real property, family law, legal ethics, wills and trusts); commercial law (*e.g.*, UCC, contracts, corporations, partnerships); litigation (*e.g.*, evidence, civil procedure); and basic substantive law (*e.g.*, constitutional law, criminal law, tax law).

Finally, the examination is graded anonymously; that is, the grader does not know the identity of any applicant. There is no way of knowing, other than by guessing, whether a man or a woman answered a question. Applicants are given the choice whether to type or handwrite their examination. Although some handwriting styles may be associated with a man or a woman, the grading process is conducted in a way that does not allow the individual bias of a particular grader to have an effect on the outcome.

Before grading occurs, a member of the BBX develops a model answer to each essay question. From that model answer, a standard written grading outline is developed. The outline breaks the answer down into issues that an applicant is expected to identify in the answer. Each issue is broken down into sub-issues that, if identified by the test-taker, will result in points. For example, a real property question may involve the issue of adverse possession. On the grading outline, identifying adverse possession is worth five points. Identifying the element of hostility as part of the answer is worth two points. If the applicant goes on to identify that the concept of tacking of interests also was an issue, an additional three points would be awarded under the outline. In this way, each grader is awarding points in an essentially objective manner, with little room for awarding points on anything as subjective as a guess as to the gender of the applicant. Separate individuals grade separate questions on the examination, and more than one individual may grade a specific question.[7]

Additionally, a regrading process is available to applicants who do not pass the bar exam on the initial grading but whose scores are close to the cutoff point. Usually some additional applicants pass after the regrading.

During the period under review (1987-1996), there was no statistical pattern in the pass rates on the bar exam that would indicate gender bias in the examination itself: overall, 74% of the female applicants and 73% of the male applicants passed the exam. Neither men nor women consistently passed at a higher percentage rate than the other group. For example, in 1989, the passage rate for men was 75% and for women 67%, whereas in 1993 the rate for men remained at 75% while women's passage rate rose to 89%. In the last 10 years, men passed in higher percentages half the time, while women passed in higher percentages the other half.[8]

The work group also reviewed bar examination pass rates for people of color. Race and ethnicity are the only intersectional characteristics, other than gender, for which data were available. Bar pass rates for applicants of color consistently have been lower than overall pass rates. However, there does not appear to be any gender-based disparity within the pool of test-takers of color. Between 1987 and 1996, women of color constituted 3.7% of all bar applicants. Their 52.1% pass rate was 22% lower than the pass rate for all women. Men of color constituted 4.9% of bar applicants for the same period. Their 47.5% pass rate was 25% lower than that for all men. For six of the ten years, a greater percentage of women of color than men of color passed the bar examination.[9]

2. Disciplinary Processes

In our survey of people involved in the disciplinary process, 72% of the respondents were male, and 90% were white. Included in this group were accused lawyers, their defense counsel, Bar counsel, members of local professional responsibility committees, members of the State Professional Responsibility Committee, and members of trial panels. We did not survey complainants. Almost all returned surveys came from lawyers who are currently in practice. Sixty-five percent worked in small firms or as solo practitioners. One-third of the respondents had been accused of a disciplinary

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[7] Even assuming that a gender-biased grader could or would skew an essay score, the relative weight of that one essay exam is unlikely to affect the overall passing score for the applicant. Each essay question constitutes one twenty-fourth of the applicant's overall bar exam score, with fully half being determined by the multiple choice ("MBE") portion, which is not subject to an individual grader's prejudices, if any.

[8] For complete figures, 1987-1996, see Attachment A to this chapter.

[9] *See* Attachment A to this chapter.

violation. Eighty percent of those were men.[10] Two-thirds of the respondents had served at one time or another as Bar counsel or as a disciplinary trial panel member. Accused lawyers who responded had experiences at all levels of the disciplinary process. Complaints against survey respondents typically involved neglect, dishonesty, and conflicts of interest in areas of practice such as litigation, domestic relations, civil practice, and probate law. Two-thirds of the complaints against the responding lawyers had been filed by men.

The disciplinary process begins with a complaint letter. Bar Disciplinary Counsel reviews the letter to determine whether the conduct of the accused lawyer appears to violate a disciplinary rule. If it does, the complaint is referred to the State Professional Responsibility Board (SPRB), which decides whether to prosecute. The SPRB may refer the matter to a local professional responsibility committee for further investigation. If the accused lawyer does not agree that a violation of the disciplinary rules has occurred, the matter goes to a trial panel for a hearing and decision. Appeals from decisions of the trial panel go directly to the Oregon Supreme Court, which decides each matter *de novo* on the record.

We asked respondents to indicate their level of agreement or disagreement with a number of statements about aspects of the disciplinary process, such as

- conduct of disciplinary proceedings,
- trial panel decisions,
- sanctions, and
- behavior of participants during disciplinary proceedings.

We asked for respondents' perceptions about the influence of gender on those aspects of the disciplinary process. The survey responses showed that, regardless of their roles in the process, respondents did not perceive gender bias in any aspect of the disciplinary process.

E. CONCLUSIONS

1. Admission to the Practice of Law

Gender appears to play almost no role in the decision whether to admit an applicant to the Oregon State Bar. At the national level, the NCBE has taken effective steps to eliminate gender bias in its tests. In Oregon, the BBX has worked hard, especially during the past decade, to be conscious of any kind of bias that might find its way into the admission process. It has been vigilant in recruiting as board members lawyers who reflect diversity in gender, firm size, areas of practice, and location. The process by which the examination is administered is designed to make test-taking and grading anonymous. No single grader or question can distort the outcome of the examination. Additionally, in the essay examination, the mix of questions does not appear to favor any individual or group of individuals based on their background, experience, or likely area of legal practice.

Although applicants of color do not pass the bar in the same proportion as applicants do overall, there does not appear to be a gender-based difference in their performance over time. No data are currently available concerning other intersectional characteristics such as age, class, sexual orientation, or disability, and we are not aware of any concerns about discrimination in the admission of persons in those groups.

2. Lawyer Discipline

Because of the small number of respondents, the findings from our survey cannot establish conclusively the absence of gender bias in the disciplinary process. However, those who responded to the survey perceived no gender bias. We recognize that accused lawyers who come into contact with the disciplinary system only once or twice have little basis for making an observation about the fairness of the system overall. Nevertheless, the absence of reported perceptions of gender bias by accused lawyers reveals, at the least, that they did not perceive gender bias to be present in their own proceedings. The views of Bar counsel and members of disciplinary trial panels, who have more experience participating in the disciplinary system, tend to support those observations.

F. COMMENDATIONS

1. Admission to the Practice of Law

We commend the Oregon Supreme Court and the Oregon State Bar for ensuring gender balance on the Board of Bar Examiners.

We commend the Board of Bar Examiners for its continuing commitment to producing bar examination questions that are free of gender bias.

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[10] As reported in the Interactions Between Lawyers, Clients, Staff, and Other Professionals chapter of this report, 85% of all bar complaints are filed against male lawyers, and male lawyers are subject to discipline in a proportion even greater than the proportion of complaints against them. Even so, we did *not* discover a perception that those disparities resulted from gender unfairness. We did not study what other factors might explain the disparities, such as a disproportionate number of complaints against lawyers in particular age groups or practice areas.

2. Lawyer Discipline

We commend Bar Disciplinary Counsel and others who perform disciplinary functions for conducting processes in which participants generally do not perceive gender bias.

G. RECOMMENDATIONS

I. ADMISSION TO THE PRACTICE OF LAW

1. The Board of Bar Examiners should:

- by the summer 1998 bar examination, formalize its policy addressing gender and racial and ethnic identity in examination questions, because the membership of the Board of Bar Examiners changes over time.

2. The Oregon State Bar should:

- continue to track bar pass rates by gender and by race and ethnicity. This process will enable the Bar and the Oregon Supreme Court to respond to any patterns of disparity that may become evident in the future.

II. LAWYER DISCIPLINE

1. The Oregon State Bar should:

a. recruit equal numbers of men and women (and recruit diverse people) to serve on the committees, boards, and trial panels that conduct disciplinary proceedings; and

b. include participants in the disciplinary process in educational programs concerning gender and intersectionality issues.

2. Bar Disciplinary Counsel should:

a. by January 1, 1999, develop a system to track complaints about lawyer conduct by the gender of the complainant and of the accused; and

b. beginning in 1999, periodically survey complainants and accused lawyers to determine whether there is any perception of gender bias in the disciplinary process.

3. The Oregon State Bar and the Oregon Supreme Court should:

- review disciplinary rules to determine whether there is any gender-based unfairness to lawyers, to clients, or to the interests that those rules are designed to protect. If changes are warranted, the Disciplinary Rules and Procedures Committee should make appropriate recommendations to the Oregon Supreme Court.

III. GENERAL

1. The Access to Justice for All Committee and all those to whom the Task Force addresses recommendations should:

- consider the factors that have led to gender fairness, and the perception of gender fairness, in admission to the practice of law and in lawyer discipline. The Committee should determine whether areas of gender-based unfairness discussed in this report can benefit from those lessons. Such factors may include: extensive, gender-neutral, behavior-based written rules; diversity of persons in the enforcement process; conscious regard for the perceptions of people living at different intersectional points; and multiple layers of review.

ATTACHMENT A
BAR APPLICANTS

YEAR		TOTAL APPLICANTS[11]	% APPLICANTS	% PASSED
1987	All Women	219	40.4	69.0
	(Women of Color)	(19)	(3.5)	(57.9)
	All Men	323	59.6	75.0
	(Men of Color)	(23)	(4.2)	(65.2)
1988	All Women	247	40.5	61.5
	(Women of Color)	(13)	(2.1)	(69.2)
	All Men	363	59.5	60.0
	(Men of Color)	(15)	(2.5)	(33.3)
1989	All Women	103	37.7	59.0
(Feb)	(Women of Color)	(7)	(2.6)	(57.1)
	All Men	170	62.3	75.0
	(Men of Color)	(11)	(4.0)	(45.5)
1990	All Women	276	40.3	75.0
	(Women of Color)	(15)	(2.2)	(46.6)
	All Men	409	59.7	64.0
	(Men of Color)	(36)	(5.3)	(44.4)
1991	All Women	275	42.2	76.0
	(Women of Color)	(22)	(2.9)	(54.5)
	All Men	477	57.8	72.0
	(Men of Color)	(27)	(3.6)	(40.7)
1992	All Women	287	35.5	83.0
	(Women of Color)	(25)	(3.1)	(48.0)
	All Men	521	64.5	78.0
	(Men of Color)	(34)	(4.2)	(38.2)
1993	All Women	226	31.0	89.0
	(Women of Color)	(33)	(4.5)	(54.5)
	All Men	502	69.0	75.0
	(Men of Color)	(50)	(6.9)	(48.0)
1994	All Women	193	41.2	74.0
(July)	(Women of Color)	(21)	(4.5)	(52.4)
	All Men	275	58.8	77.0
	(Men of Color)	(34)	(7.3)	(61.8)
1995	All Women	274	39.2	75.0
	(Women of Color)	(38)	(5.4)	(44.7)
	All Men	425	60.8	76.0
	(Men of Color)	(42)	(6.0)	(69.0)
1996	All Women	312	40.0	69.0
	(Women of Color)	(45)	(5.8)	(51.1)
	All Men	467	60.0	77.0
	(Men of Color)	(39)	(5.0)	(53.8)
TOTAL	All Women	2412	38.1	74.0
	(Women of Color)	(238)	(3.7)	(52.1)
	All Men	3911	61.9	73.0
	(Men of Color)	(311)	(4.9)	(47.5)

[11] Women and men of color are included within the total numbers and percentages of all women and all men applicants.

OPPORTUNITIES IN THE LEGAL PROFESSION

"I have seen really enormous progress made....But I have, over the course of my experience, seen a lot of . . . dismissal of women lawyers' arguments. And to my mind, it's on the level almost of unconscious discrimination."[1]

A. INTRODUCTION AND OVERVIEW

We heard the above-quoted testimony at a public hearing. The opening sentence, respecting the progress that the profession has made on issues of gender fairness, captures the sentiment of many of the lawyers and judges who responded to our surveys or participated in public hearings and focus groups. Not surprisingly, we also heard concerns about the continued existence of more subtle and sometimes "unconscious discrimination."[2] More women than men voiced those concerns, although there were exceptions: some women reported never having experienced discrimination during their careers; and some men believe that women enjoy a "fundamentally unfair bias [in their favor] in the Oregon courts and legislature."[3]

The experiences of men and women in the legal profession have differed markedly, the differences inuring most often to the benefit of men and to the disadvantage of women. As recently as 1983, even in law school, the concept of women as lawyers was still met with open hostility. A female lawyer related this experience:

> *"The prominent male trial attorney sitting as the judge [and who is still in practice today] remarked that women 'should devote themselves to their families and not plan to be lawyers.'"*[4]

More recently, a female summer associate at a large urban law firm was not invited to join the male lawyers and summer associates in a round of golf, because the men were playing at an all-male club.[5] Although such blatant expressions of bias are infrequent today, the fact that they were not uncommon in the recent past continues to have a detrimental effect on the lawyers now in practice.

The depth and intensity of comments received by the Task Force reveal that men and women continue to have very different perceptions as to whether and, if so, to what extent gender affects opportunities in the legal profession. Female judges and lawyers in Oregon report more perceptions of unfairness than do their male counterparts. This could, of course, be due to a variety of factors: men not seeing bias against women, men not wanting to see bias against women, women wanting to see bias against women, men being less sensitive to the issue, or women being hypersensitive and eager to attribute different treatment to gender.

Objective data relating to patterns of hiring, promotion, retention, compensation, case responsibility, practice specialty, and positions of leadership support the perception of gender unfairness in some areas. With respect to the hiring process, most lawyers do not report inappropriate inquiries during interviews but, of those who do, female lawyers report being asked personal questions more frequently than do male lawyers. Judges, on the other hand, regardless of gender, have not experienced this type of inquiry as part of the judicial interview process.

Gender-based patterns also are apparent with respect to the area of specialty that lawyers choose to pursue. Female lawyers view the public sector, and solo private practice, as more desirable places to practice law than large law firms. Possible reasons include lack of part-time positions and long hours, which are incompatible with family responsibilities, in large-firm private practice.

Gender does appear to play some role in the geographical area in which women and men choose to practice. The experiences of lawyers in rural areas differ from those in urban areas in ways that appear related to gender, for example, with respect to compensation and acceptance within the legal community.

As to advancement opportunities, female lawyers continue to lag behind their male counterparts in compensation and in attaining positions of power. This phenomenon appears to be changing, however, as more women enter the profession.

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1 Testimony by male lawyer at Portland public hearing, Oct 21, 1996.

2 For example, in a recent letter to the *OSB Bulletin*, a male lawyer used the following words to describe his view of the perfect judge:

"He was the physical embodiment of what a jurist should be . . . tall, spare frame, slightly bent with age, an ample shock of unruly gray hair . . .." OR ST B BULL, Oct 1997, at 5.

3 Letter to Chief Justice Wallace P. Carson, Jr., from a white male lawyer in Lane County.

4 Excerpt from letter to Task Force by female lawyer describing her experience in her law school trial practice class in 1983.

5 Witness statement submitted to the Task Force by a female lawyer.

Finally, women, more than men, feel great pressure to meet the demands of family, particularly with respect to responsibility for child care.

B. ISSUES STUDIED

We studied whether, and to what degree, gender has an effect on hiring or advancement opportunities in the practice of law, specifically:

- whether male and female lawyers are treated similarly in the hiring process, case assignment,[6] and advancement;
- whether men and women practice in different specialties;
- whether male and female lawyers are equally compensated and whether they are in positions of power proportionate to their years in practice;
- whether geography plays a role in the experiences of male and female lawyers;
- whether there are differences in the experiences of male and female lawyers in the public and private sectors;
- whether family obligations or other outside pursuits affect male and female lawyers' ability to realize their professional goals; and
- whether retention rates for male and female lawyers differ.

C. METHODS OF STUDY

The work group studying Opportunities in the Legal Professional initially included male and female practicing lawyers in the private and public sectors, one retired lawyer, one state judge, one Tribal Court judge, a law professor, and a social scientist.[7] The work group represented diverse geographical areas (both urban and rural), areas of practice, and types of professional employment. The group also included individuals of diverse racial and ethnic backgrounds and included two Asian-Americans and one Native American. One work group member was a lesbian, and one was a gay man.

We used several methods to study opportunities in the legal profession. We developed survey questions for inclusion in the surveys sent to lawyers, judges, litigants, and court personnel.

We collected statistical and anecdotal data from survey respondents on their legal employment-related experiences and their perceptions of gender fairness. We analyzed whether the respondents' gender, age, geographical location, and type of practice affected their perceptions. We also analyzed data maintained by the Oregon State Bar, the Oregon District Attorneys Association, the Oregon Attorney General, the offices of county counsel, the Office of the State Court Administrator, the Oregon Judicial Department's Indigent Defense Services Division, and the National Association of Law Placement.

We attended public hearings, conducted focus groups, and reviewed written comments in letters, surveys, and Task Force comment forms. We conducted a total of eight focus groups in five counties — Multnomah, Jackson, Josephine, Marion, and Baker. Four focus groups were composed of women, three of men, and one of members of both sexes. Lawyers from various practice settings and areas of practice participated.[8]

Finally, we reviewed and summarized existing literature and surveys, including articles published in the media and gender fairness reports from other jurisdictions.

D. FINDINGS

1. Work Environment

We studied the opportunities available to male and female lawyers within the legal profession by examining: (1) hiring and promotion experiences within the private and public sectors; (2) the effect of geographical location on those experiences; and (3) the compensation of lawyers, the areas of practice in which lawyers specialize, and the retention rates of lawyers.

a. Hiring Practices

Most male and female lawyers and judges perceive no significant disparity in hiring for men and women in the legal profession. However, some female lawyers and judges reported gender bias during the hiring process.[9] We explored this issue from two perspectives:

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[6] For a discussion of case assignment practices at law firms providing indigent defense services (court-appointed counsel) in criminal cases, see the Interactions Between Lawyers, Clients, Staff, and Other Professionals chapter.

[7] Personal reasons necessitated the departure of some members of the initial work group.

[8] One focus group was composed of male partners in large urban law firms, another of men practicing in the public sector, and a third of male lawyers in the public and private sectors from mixed rural/urban settings whose practices ranged from solo practice to large-firm practice. Similarly, the four focus groups with female lawyers included women from diverse areas of specialty, geographical region, and type of practice. An eighth focus group sought comments from lesbian and gay lawyers with various kinds of law practices in a large urban area. Each group was conducted by one or two moderators.

[9] In letters to the *OSB Bulletin* in May and July 1996, female lawyers provided examples of the "overt illegal sexism that is a part of every woman attorney's interviewing experience." OR ST B BULL, May 1996, at 6.

(1) lawyers as prospective employees; and (2) lawyers as prospective employers.

The surveys of lawyers and judges asked whether, during the hiring interview, questions inquired into, discussed, or took into account an applicant's: (1) personal relationships; (2) family obligations; (3) personal commitments; or (4) sexual orientation.

i. As an Applicant

Male and female lawyers reported different experiences when being interviewed for legal positions. Female respondents were three to five times more likely than male respondents to report that interviewers inquire about, discuss, or take into account personal relationships, family obligations, or personal commitments. For example, in response to the question whether the applicant was asked about personal relationships, one-third of the female lawyers responded that these questions were "often" or "sometimes" asked. By contrast, only 17% of male lawyers reported that these questions were asked with such frequency.

The disparity between the responses of male and female lawyers is striking with respect to other hiring questions as well. Nineteen percent of female respondents indicated that personal relationships are "often" discussed during an interview, whereas only 4% of male respondents said that this occurred. Women reported being asked questions about their family obligations twice as often as men.

Female judges reported similar experiences. When they interviewed for non-judicial positions earlier in their careers, female judges were asked about their personal relationships, family obligations, and personal commitments more often than their male judge counterparts. When judges were interviewed for judicial positions, however, such questions were rare.[10]

Female lawyers opined that such questions are unnecessarily intrusive and demeaning; they feared that the answers would be used against them in hiring decisions.[11] For example, a female lawyer reported that, when she applied for a federal clerkship position in 1987, the male judge asked whether her husband supported her taking the position and whether he would help her with child care. She reported a comparable experience during an interview with a large Portland law firm. In that (more recent) interview, a male partner asked the applicant whether she had children, cautioned her that "the law is a jealous mistress," and then asked whether her husband wanted her to be a lawyer. Another female lawyer, admitted to the bar in 1993, reported that her male former employer had not only asked numerous personal questions during the hiring interview, but later had subjected her to derision when she became pregnant:

> *"He complained...about [my] pregnancy and its effect on [the] firm; he complained to one of my clients; he... complained to other attorneys in the office, and he said...'I would like to fire her, but I don't want to get sued.'"*[12]

On the other hand, male lawyers did not report being questioned about whether their wives support their employment as lawyers. Nor did they report being questioned about their plans to have a family.

In a recent article reprinted in the Oregon State Bar *Bulletin*, a woman wrote anonymously about her hiring experiences in Seattle, Washington.[13] She described numerous interviews in which she was asked about her marital status and her husband's employment. Her article drew immediate responses from female lawyers who described similar hiring experiences in Oregon.[14] One woman wrote:

> *"I have been asked what my husband does for a living. When I tell them he's a truck driver, all communication stops. I don't know which is worse, the lawyers that ask about my husband or the ones who simply don't respond to my job applications because I am female."*[15]

Another female lawyer recounted:

> *"Curiously, I have not been grilled about my husband. . . .* I have, *however, been asked many, many times what my child-bearing plans are in the same way you [the Washington lawyer] have been asked about your husband. Many of those questions have been phrased in crude terms, and many have, like your experience, been prefaced with 'I know it's illegal to ask, but....' . . . I have winced at the time, answered the questions and raged later."*[16] *(Emphasis in original.)*

A third female lawyer wrote:

> *"I have found that otherwise incredibly kind men can say the dumbest things in job interviews. Recently, while interviewing for a deputy D.A. position in Central Oregon, the D.A. said: 'God, the last time I*

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[10] Data gathered from the judge survey may be less relevant to this study than data gathered from lawyers, because the responses most likely reflect interviewing practices common in the past. Nonetheless, judges' responses are consistent with lawyers' responses to this same question.

[11] We do not know the full *effect* of the interview inquiries, however. That is, we do not know whether the inquiries generated information that inured to the applicant's advantage or detriment.

[12] Excerpt of testimony from a female lawyer at Portland public hearing, Oct 21, 1996.

[13] *The Job Search*, OR ST B BULL, Apr 1996, at 37, *reprinted from* KING COUNTY [WASH] B BULL, Jan 1996.

[14] *See* Letters to the Editor, OR ST B BULL, May 1996, at 6, and July 1996, at 5.

[15] Letter to the Editor, OR ST B BULL, May 1996, at 6.

[16] Letter to the Editor, OR ST B BULL, May 1996, at 6.

hired a female lawyer was such a disaster!' Then he stuck his foot deeper in his mouth when he inquired what the career plans were of another (male) lawyer in my office. Not surprisingly, I did not get that job. My sister who is in one of the most male-oriented professions (cattle ranching) gets more respect from her peers than I do from this supposedly 'enlightened' group."[17]

Some women reported demeaning interviews. For example, when one woman expressed concern about the firm's monthly practice of publicly discussing each lawyer's billable hours, she was told to "consider it the way you do your annual pap exam; it's good for your health."[18]

Participants in the focus group with gay and lesbian lawyers also revealed that personal issues, including sexual orientation, arose in interviews occasionally, although far less frequently than did other inquiries into personal aspects of their lives.

In general, the majority of men and women report no negative hiring experiences. Survey data and anecdotes suggest that, when personal questions are asked in a hiring interview, particularly when those questions probe into child-bearing plans, women are concerned about answering the questions honestly, fearing that their job prospects will suffer. Male lawyers generally do not face such questions, nor do they share those concerns.

ii. As an Interviewer

We next inquired about lawyers' experiences as interviewers. More male than female lawyers "often" or "sometimes" ask questions about family obligations and personal commitments. However, female lawyers inquire slightly more often into "personal relationships." Because the survey did not define the distinctions among "family obligations," "personal commitments," and "personal relationships," we do not know why female interviewers reported asking more questions about "personal relationships."

In anecdotes, however, some further information emerged. Several female lawyers expressed a need to ask certain questions about the applicant's personal relationships to determine whether the applicant would "fit" in the firm. Female lawyers frequently were of two minds on the subject. All agreed that personal questions usually were inappropriate, but all also recognized that finding out whether an applicant would be likely to stay is of primary importance to an employer. One female lawyer who hires associates was particularly candid:

"I have found it very difficult to have the other lawyer in my office be a single parent, because there were problems with illness or problems with this and that. And that lawyer simply wasn't in the office at the time when I needed that person...Most people who are single parents are women, but I would have the same difficulty with a single man with children...I would never not hire somebody because of that. But it is something in the back of my mind. [I would think] Oh God, here we go again."[19]

In summary, we found that all lawyers conducting the hiring interview, regardless of gender, find themselves seeking some personal information about the prospective employee to make a determination about the likelihood that the applicant will work well with others in the firm, will want to stay in the area, and will be able to do the work required. Both male and female interviewers tend to ask female applicants more personal questions than they ask of male applicants because of the interviewers' belief that child-bearing or other family obligations may interfere with the female lawyer's long-term ability to work.

b. Case Assignment

i. Generally

In the legal profession, a lawyer's status depends, in part, on the kind and complexity of cases to which the lawyer is assigned. In private law firms and in the public sector, cases typically are assigned by a senior person in the office. That person can influence a junior lawyer's rank in the office by ignoring or selecting the lawyer for "big" case assignments.

The survey asked respondents whether they had lost a case assignment in the previous five years for reasons that they believed were associated with gender. The overwhelming majority of lawyers responding to the survey did *not* believe that they had lost a case assignment for gender-related reasons.[20] Of those who did, the average total number of cases believed to have been lost for such reasons was between one and three in the previous five years. Of those few lawyers who observed an assignment lost by a female to a male lawyer for a gender-related reasons, three times as many females (12.5%) as males (4.5%) had seen this occur.

The following table contains the choices available to survey respondents as reasons for assigning a case to a male lawyer and charts the frequency of their selection by male and female survey respondents. The numbers in boldface type show the five reasons given where the

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[17] Letter to the Editor, OR ST B BULL, July 1996, at 5.

[18] Comment of female lawyer to member of the Task Force in Oct 1997.

[19] Comment of female lawyer in a focus group in Southwestern Oregon in 1997.

[20] Only 32 of 571 respondents answered that they had lost a case assignment for reasons related to gender. When asked *why* a case had been assigned to a male lawyer rather than to a female lawyer (when two or more lawyers of different genders competed for the assignment), a higher percentage of lawyers responded. For example, 121 respondents selected "the male lawyer was more qualified" as a reason typically given for assigning a case to a male lawyer rather than to a female lawyer.

disparity between men's and women's answers was greatest.[21]

	Male Lawyers	Female Lawyers
Case requires a "heavy hitter"	**4.0%**	**23.8%**
Assigned Judge prefers male counsel	1.3%	4.8%
Client prefers male counsel	**5.6%**	**17.3%**
Male lawyer brought in client	4.8%	6.0%
Case requires more aggressive counsel	**1.3%**	**16.7%**
Case requires a particular type of expertise that the female lawyer lacks	**11.6%**	**26.8%**
Male lawyer is more qualified	19.4%	26.2%
Jury will respond better to a male lawyer	1.0%	6.5%
It isn't the sort of case for a woman lawyer	0.8%	6.5%
Male lawyer is more senior in the office	**10.1%**	**27.4%**
A male lawyer has a clear tie to the case	11.9%	13.7%

The most frequent reasons given by both men and women for a man's receiving a case assignment were that the male lawyer was senior, that the case required an expertise that the male lawyer had, that the male lawyer was more qualified, and that the male lawyer had a "clear tie" to the case. The survey did not explore the nature of what "more qualified" or "clear tie" meant to respondents.

In the following sections, we examine further those rationales that could suggest gender stereotyping or prejudice.

ii. "Heavy Hitter" and "Aggressive Counsel" Rationales

Of the lawyer and judge respondents who said that a case went to a man rather than a woman because he was a "heavy hitter," female lawyers (23.8%) and female judges (26.3%) were far more likely than male lawyers (4.0%) and male judges (6.8%) to have this perception. Similarly, female lawyers and judges were far more likely to have reported that a case went to a man because he is "aggressive."

Ironically, female lawyers sometimes are judged harshly for exhibiting traits of aggressiveness. Responding to the survey question that asked whether "[c]onduct tactics, or arguments of a female lawyer are viewed as inappropriate when the same conduct by a male attorney is viewed as good advocacy," more than one-third of lawyers, and more than one-fourth of judges, "strongly" or "somewhat" agreed. Men and women saw the issue differently: only 20% of male lawyers and 16.5% of male judges "strongly" or "somewhat" agreed. By contrast, nearly 75% of female lawyers and 86.5% of female judges had this perception.

Comments in response to the lawyer survey supported the statistical data:

> *"I have observed a number of female litigation attorneys that carry a big chip on their shoulder. They are more aggressive, assertive, less willing to be flexible."*[22]

> *"I have been surprised and disappointed at the number of younger female attorneys who think that to be effective they must emulate male traits of aggressiveness. I find some of them acting unprofessional in their relations with other lawyers, being uncooperative and angry."*[23]

In a statement to the Task Force, a woman described her experience in private practice when the promotion of an aggressive female litigator to partner was being considered:

> *"It was a major issue. Many of the male partners described her as being overly aggressive and not enough of a team player... At the same time, the female lawyers at the firm viewed her as a role model. She was someone who stuck up for herself and her clients. ....The exact traits that this female lawyer exhibited and was being penalized for, would have been tolerated — in fact, extolled — if they were exhibited by a male lawyer at that firm."*

In order to receive the best case assignments, lawyers of both sexes must be perceived as aggressive. Women may be expected to temper their aggressiveness in ways that men are not.

iii. "Client Prefers Male Counsel" Rationale

Approximately one-fourth of the lawyers and judges believe that, when a case goes to a male lawyer for gender-related reasons, it is because the client prefers *male* counsel. Female lawyers and judges are far more likely than male lawyers and judges to perceive this to be true.

We do not know what leads lawyers and judges to this perception, which is at odds with other information that we obtained. As noted in the chapter on

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[21] The numbers do not add up to 100% in either column, because respondents could select more than one answer. Also, not all survey respondents answered this question; the percentages in the chart are based on the number of male and the number of female survey respondents, respectively.

[22] Comment from the Task Force lawyer survey.

[23] Comment by a lawyer on the Task Force lawyer survey.

Interactions Between Lawyers, Clients, Staff, and Other Professionals, few clients actually appear to have a gender preference for a lawyer.

Additionally, many people commented at focus groups and at public hearings that it is not uncommon for clients to prefer a *female* lawyer some of the time, particularly in domestic relations cases, employment discrimination cases, or criminal cases involving a sex crime charged against a male defendant. Comments such as the following were common in the client survey:

- "I prefer a female for a divorce action"; and
- "Prefer gender of defense lawyer to match plaintiff when possible."

Similarly, some respondents to the inmate survey commented that they preferred female lawyers, because "females tend to be more open minded to circumstances and [to] what you want to have happen" or "because of the charge."

In a focus group discussion with male partners, the men observed that corporate clients may have an interest in having female lawyers in the firm:

> *"You know, one of the questions a lot of people ask is 'what are you doing for minorities? What are you doing for women?'"*

c. Compensation

We examined whether gender has an effect on lawyers' salaries and promotional opportunities. We began with a review of the 1994 Oregon State Bar Economic Survey of compensation of Oregon lawyers. According to that survey, female lawyers in Oregon earn less than male lawyers. The average gross compensation for male lawyers working full-time in 1993 was $85,083, compared with $54,530 for female lawyers. For lawyers working part-time, the average compensation for male lawyers was $51,248, while for female lawyers it was $31,255.

That 1994 survey and anecdotal data gathered in focus group discussions and in interviews of lawyers suggest that a variety of factors contribute to this disparity in income between male and female lawyers. Practice specialty, geographic location, number of hours worked, public versus private sector work, and number of years in practice all have an effect. For example, 25% of female lawyers who responded to the survey were government employees, while only 15% of men reported working in the public sector. Seventeen percent of female lawyers reported being in solo practice, and 20% reported working in 2- to 6-lawyer firms; the percentages for men were 23% and 27%, respectively.

The most significant factor affecting the overall compensation difference, as revealed in the 1994 economic survey, is the number of years admitted to practice. Men reported an average number of years admitted to practice of 17.3 years, nearly twice that of women at 8.8 years. However, the compensation of male lawyers outpaces that of female lawyers at every level, regardless whether the lawyers are working full-time, part-time, or have similar years in practice. For example, male lawyers in full-time practice from 21 to 30 years averaged $112,751, while women in the same category averaged $84,400. For full-time lawyers with 0 to 3 years of total experience, men reported an average compensation of $35,363, compared to $32,793 for women.

In an effort to learn why female lawyers earn less, we reviewed other data collected by the OSB during its economic survey. We discovered that factors in addition to those related to years in practice, geography, and practice specialty appear to be at work. For example, female lawyers appear to charge less for their time. They also appear to bill fewer hours per month.

Anecdotal evidence is to similar effect. Women often commented on an expectation on the part of clients that female lawyers would charge less. One woman participating in a focus group noted the tendency of others to refer *pro bono* cases to her, and she acknowledged her reluctance to turn the cases down:

> *"I get lots of referrals from people who either know, or think, [that] the best shot for talking someone into doing a pro bono case is to send them to me. So I get a lot of those, a lot of non-paying referrals."*

We did not hear similar remarks from male lawyers, suggesting that they are more comfortable charging (or that clients are more willing to pay) higher fees for their services, that their seniority results in higher fees from clients, or that fewer poor clients are referred to them.

We also heard comments that the income of female lawyers' spouses affects the compensation of female lawyers. Because it was hard to obtain data on compensation practices in private law firms, we relied on comments at public hearings and focus groups. Several men and women attested to the importance of the income of a female lawyer's spouse. For instance, a male lawyer cited the experience of his wife, whose compensation was adversely affected because the senior associate felt that her husband's income put her in a different situation from other associates. Another male lawyer in the same focus group made a similar remark; he described a nearly identical experience relayed to him by a female lawyer. A female lawyer with personal experience on this issue testified at a public hearing:

> *"When I requested a raise to match a recent promotion, I was told by my direct supervisor, 'What do you need a raise for? Didn't you just get married to a rich lawyer?'"*[24]

[24] Excerpt from statement at Eugene public hearing, Dec 13, 1996.

Male lawyers did not report similar experiences. Income of a spouse does not appear to play a role in determining a male lawyer's salary.

Within the public sector, compensation does not appear to have a gender component. Generally, salaries and benefits in the public sector are structured to take into account such factors as length of service, prior experience, and function within the organization.

d. Rainmaking

Historically, financial success and promotions in the private sector have depended in part on one's "rainmaking" ability, that is, the ability to generate and maintain clients. Accordingly, our surveys asked lawyers and judges to rank the factors having the most positive effect in generating and maintaining clients. Both male and female lawyers identified the following three factors, in order of importance: (1) "years in practice," (2) "professional recognition," and (3) "age." Judges, on the other hand, regardless of gender, ranked "law school attended" as the most important positive characteristic, although female judges gave "age" equal importance.

Age is seen as either a positive or a negative factor. Male and female lawyers commented that clients come to older lawyers more readily. On the other hand, age is a negative factor when it is equated with lack of experience. Because female lawyers, on average, have practiced for fewer years than male lawyers, age generally works to their disadvantage. In addition to youth, other negative factors cited by respondents included "sexual orientation" and "parenting." Female respondents also cited "gender" as a negative factor in generating and maintaining clients.

With the passage of time, as substantial numbers of women graduate from law school, the combined effect of age and gender in this respect may be expected to diminish. However, successful rainmaking also involves the opportunity to meet clients. The opportunity to meet clients often occurs when an older partner provides the introduction. We heard anecdotal evidence that female lawyers have been excluded from such opportunities on occasion. For example, one woman described client entertainment at an all-male golf tournament, another at an all-male club. One of these same women noted that, when she and an older partner entered an all-male bar in a popular club to be introduced to a client, she was required to leave.[25]

e. Personal Treatment

Two lawyers — one male and one female, and each from a different city — who have represented a number of female lawyers in various employment-related matters told us that many women in the profession experience, but fail to report or complain about, adverse treatment that they have received from other lawyers with whom they work. The reported adverse treatment included sexual harassment and denial of promotional opportunities. Some female lawyers declined to report their experiences, we were told, even when complaint procedures were in place at their places of employment. The women reported to their counsel that they feared active retaliation or more subtle forms of disapproval by their male colleagues. Other women wished to disclose their experiences but were prohibited from doing so because of confidential settlement agreements.

2. Geography

In order to compare possible gender unfairness in rural and urban areas, we considered whether the experiences of lawyers practicing in those settings were different. We gathered statistics from three sources: the Task Force surveys of lawyers and judges, the Oregon State Bar, and the 1994 Oregon State Bar Economic Survey. In addition, the work group conducted focus groups in five counties.

According to 1997 Oregon State Bar statistics, female lawyers constitute 26% of the total bar membership, but are under-represented in rural areas. In Eastern and Southern Oregon, women comprise about 19% of the practicing lawyers, whereas they comprise 27.7% and 38.3% of practicing lawyers in Multnomah County and the Mid-Willamette Valley, respectively.

Testimony at public hearings suggested that female lawyers have particular difficulty finding jobs in rural areas and that, in turn, their earning power is diminished. One female lawyer who has practiced for 10 years and who now works in Eastern Oregon described her experience looking for legal employment in a rural area:

> *"I came here actually two years ago....Within the last six months ...there's been an influx of male lawyers fresh out of law school. Now I finished law school almost ten years ago. There are three guys who just finished law school, and they got jobs....It's easier as a male to just fit into the established order."*

Others added these similar comments:

> *"They [the clients] go to the old boy network, in my town...to the old, established firms...to the ones that have several generations worth of history of being here."*[26]

> *"Women haven't been in the law forever. [Of the firms] that are built on families, and family relationships and friends of families, [very few] have women practicing law."*[27]

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[25] Comments by a female lawyer in April 1996 focus group in Southern Oregon, describing experiences in Portland, Oregon.

[26] Comment from female lawyer in Southern Oregon focus group in 1997.

[27] Comment from female lawyer in Southern Oregon focus group in 1997.

At a public hearing in Ontario, a male judge with many years of experience in Eastern Oregon corroborated that perception:

> *"When you come into Eastern Oregon, you realize that things are more conservative, that the role of women...involves more difficulties than it might in the Willamette Valley or the tri-county area. And thus, it is more difficult I think for women to have some of the same advantages for advancement...even simply to be recognized right at the outset of being fully capable of performing certain positions."*

Likewise, female lawyers from Eastern Oregon expressed their perception that, on the whole, male lawyers in Eastern Oregon are receptive to female lawyers, but that there continues to be difficulty with some male lawyers:

> *"The majority of men in Eastern Oregon, male attorneys, are very open to women practicing law, [but] the minority are a little more outspoken than you would expect in a city."*[28]

Moreover, more often in rural areas than in large cities, women find limited opportunities to enter certain practice specialties. We were told that it is difficult, for example, for a woman to enter such areas as environmental or mining and water law, because of the lack of a support or referral network.

Gay and lesbian lawyers also expressed a strong preference to work in a large-city setting, fearing intolerance in rural areas. Given the perception, noted above, that sexual orientation has a negative effect on a lawyer's ability to generate and maintain clients, this fear may be well-founded.

3. Practice of Law

a. Public and Private Sector Experiences

i. Demographics

Women constitute 26% of bar membership overall but only 20% of the private bar. By contrast, 80% of male lawyers are employed in the private bar, although men constitute 74% of the total bar membership.[29]

Female lawyers are almost 36% of the lawyers employed in the government sector, 55.2% of the lawyers employed in legal services, and 44.3% of the lawyers employed in public defenders' offices.

Oregon State Bar
General Areas of Practice by Gender

	Total	Male	Female	% Male	% Female
Active Members	9,351	6,924	2,427	74%	26%
Private Practice	6,011	4,793	1,218	79.7%	20.3%
Government Employees:					
Total	1,656	1,065	591	64.3%	35.7%
PLF Exempt	1,413	937	476	66.3%	33.7%
Legal Aid Lawyers	67	30	37	44.8%	55.2%
Public Defenders	176	98	78	55.7%	44.3%

ii. Discussion

Anecdotal evidence suggests that many women view the public sector as being a more desirable place to work than the private sector. Participants in focus groups cited four reasons: (1) entrenched attitudes against women in the private sector, (2) the perceived lack of mentors there, (3) the relatively smaller percentage of women at private firms, and (4) greater billing and time demands in private practice. Both male and female lawyers expressed their view that female lawyers are treated "more equally" in the public sector. In the private sector there is competition among lawyers to "make partner," and that competition may contribute to reduced cooperation with co-workers.

Whether there is a "male style" or a "female style" in approaching law practice is hard to document statistically; those concepts may be nothing more than stereotyping based on (actual or perceived) ingrained social patterns of behavior. However, our surveys of lawyers and judges revealed that, generally speaking, men are viewed as being more "aggressive" and women as more "cooperative" and that the private sector more than the public sector values and rewards the "aggressive" approach to cases. We heard that the greater presence of women in the public sector allows

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[28] Comment from female lawyer in Southern Oregon focus group in 1997.

[29] Gender fairness studies conducted in other states mirror our finding that proportionately fewer women than men engage in private practice. In Indiana, the figures for women and men are 53% and 74%, respectively. The New Hampshire study found 68% of women in private practice, compared with 80% of men. Similarly, the Wisconsin survey found 54% of women in private practice, compared with 68% of men. A study of University of Michigan Law School graduates found only 44% of female graduates in private practice, compared with 70% of male graduates. Likewise, in a survey conducted in the District of Columbia Circuit, a higher percentage of the male respondents were in private practice — 69% compared with 54% of the women.

In the public sector, by contrast, a higher percentage of women than men are lawyers in the United States Justice Department, other federal agencies, the United States Attorney's Office, and the Office of the Federal Public Defender — 26% of the women, compared with 19% of the men. The United States Court of Appeals for the Ninth Circuit also found higher concentrations of women in positions with the United States Attorney's and Federal Public Defender's offices than in private practice.

Of the Oregon district attorneys, 8% are women; of the deputy district attorneys, 35% are women; of county counsel, 17% are women; and of assistant county counsel, 35% are women. The results of a 1997 survey of the 10 largest law firms in Oregon reflects that women comprise on the low end 17% and on the high end 31% of the lawyers employed in the firms, with most falling approximately in the 25% range. Data from Oregon State Bar, March 11, 1997, and 1997 National Association for Law Placement (NALP) forms. (NALP forms are discussed *infra* at note 46.)

for a broader array of styles, including those styles that other women find comfortable.[30]

But the greater presence of women in government cannot be attributed solely to a perception that the litigation-based nature of much private firm practice is less welcoming to women than the less adversarial atmosphere of public sector work. Most lawyers, including female lawyers, who work in state or local government are engaged in adversarial litigation, both civil and criminal. Female trial lawyers also are common in indigent defense firms, including public defenders' offices.

Whether female lawyers *apply* for public sector jobs disproportionately to their overall numbers is unclear. We did not explore this factor, although we did hear several comments during focus group discussions that the public sector has a larger pool of female applicants from which to choose. A smaller pool of female applicants in the private sector may have an effect on the composition of law firms.

This is not to say that female lawyers uniformly regard the public sector as the preferred work place. For example, a female lawyer employed in the public sector expressed her belief that, in the public sector, women are treated unfairly:

> *"When a woman raises an issue, it is often ignored by the male lawyers or dismissed as 'the stupidest idea I've heard.' When a male lawyer raised that same issue as if it were his own, the male colleagues respond to it as a valuable concept."*[31]

Another female lawyer cited her public sector hiring interview with three female interviewers as her "toughest." Compelling testimony contradicting the perception of the public sector as welcoming to women came from a female lawyer who described her experience in the 1980s while working as a deputy district attorney:

> *"One assistant district attorney showed me a picture of a lineup of women all doing the can-can dance. He had transposed all the faces of the women in that picture with photographs of all the female DAs. And he had captioned the photograph, the V team. The Circuit Court teams in the district attorney's office are alphabetically designated: A team, B team, C team, D team. I did not think that V stood for Victory."*[32]

b. Practice Specialties

As noted earlier, female lawyers constitute 26% of the bar membership in Oregon. Women are dramatically over-represented in the practice specialties of poverty law (59%) and disability law (40%). Women are significantly under-represented in general practice, corporate law, real estate law, and environmental law.[33] Female judges tended to have backgrounds in the areas of juvenile law, labor law, poverty law, and public defender work.[34] Male judges commonly have backgrounds in appellate practice, general practice, and civil litigation.[35] This difference mirrors those areas in which female and male lawyers tend to practice currently.

We do not know *why* female lawyers are found in these areas of specialty. Several factors likely contribute: Women may be drawn to certain areas for reasons of personal interest, women may perceive that the opportunities for mentorship and advancement increase in specialties with higher numbers of female lawyers, or women may choose practice specialties that are likely to afford personal control over their cases. It also is possible that men in predominantly male-occupied practice areas may deliberately or unintentionally deny women access to those practice areas.

c. Family Obligations

We cannot consider gender fairness in the practice of law without acknowledging the changing environment for all lawyers: In the late 1990s, the practice of law entails significant economic pressures and is a business as well as a profession.[36] Men and women experience

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[30] Comment by female lawyer in Willamette Valley focus group in 1997.

[31] Comment by female lawyer in Willamette Valley focus group in 1997.

[32] Testimony from female lawyer at Eugene public hearing, Dec 13, 1996.

[33] Data provided by the Oregon State Bar. For a full listing of the bar sections and the percentages of female lawyers, see the Appendix.

[34] The relative percentages for female and male judges in these practice areas were: Juvenile Law (57.9% vs. 43.8%); Labor Law (26.3% vs. 6.8%); Legal Services (15.8% vs. 4.1%); and Public Defender (21.1% vs. 8.2%).

[35] The relative percentages for male and female judges in these practice areas were: General Practice (65.8% vs. 42.1%); Appellate (32.9% vs. 21.1%); and Civil Litigation (65.8% vs. 52.6%).

[36] *See, e.g.*, James W. Jones, *Law Firm Diversification: Is It the Wave of the Future?*, ABA J, Sept 1989, at 52, who wrote in his discussion of the topic:

> "The practice of law — however it may be defined and whatever its scope — has become far more complex and diverse in recent years than could have been imagined even 20 years ago."

Similarly, Sol Linowitz has observed:

> "Much of the hunger to make top dollar now. . . can be traced to . . . the possibility that a lawyer, like an athlete, will have only a few years to maximize his reward and must get what he can while his talents are in demand."

SOL M. LINOWITZ, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994).

ongoing difficulty in balancing the demands of work and the need for personal time. However, both men and women report that women especially feel pressure to meet the demands of family.[37]

Statistical information from the surveys of judges and lawyers was revealing in this regard. The majority of the judges responding to the survey were married. Although the percentage of married judges was similar for men (89%) and women (84%), there were many fewer female judges who had children (63%) than male judges (93%). Similarly, a majority of the male lawyers (83%) and female lawyers (63%) were married. However, female lawyers (53%) were more likely than male lawyers (39%) to have no children.

Several possible explanations exist for this disparity. Women who choose not to have children may be more attracted to the legal profession; women who delay bearing children to complete their legal education and to build their careers may be unable to have children later in life; women who are lawyers may experience the stress commonly associated with law practice that, apart from delay, may affect their ability to conceive; women be younger than their male counterparts and may yet start a family; or women in law practice may be discouraged by their employers from having children.

We heard testimony from women who delayed having families until they were assured of partnership or other tenured positions by their employers. There were other anecdotal reports from women who consciously chose career over children, particularly when the only role models available to them were men who chose not to place family obligations ahead of career advancement.

Female respondents (16%) were twice as likely as male respondents (7%) to be divorced or separated. As noted in the chapter on Domestic Relations Cases, it is more likely that divorced women with children are the custodial parents. This family responsibility necessarily affects the balancing issues with which lawyers and law firms grapple. A female lawyer commented that, as a single mother, she had chosen to work in a small private firm in a small city, instead of a large firm in a large city, believing that her ability to meet the needs of her family was enhanced by more reasonable work demands on her time.[38]

In focus group discussions, both male and female participants cited the need for female lawyers to attend to family obligations as the primary reason why women pursue solo practice and employment in the public sector. As noted in the earlier discussion, lawyers believe that the public sector provides more predictable hours and that solo private practice provides greater flexibility in controlling one's hours. By contrast, private and especially large-firm practice often is not viewed as conducive to successful balancing of work and family.

At the public hearing in Portland, a female managing partner corroborated the difficulty posed by issues of family needs and professional demands. Her large firm has many female partners:

> *"Now, while I think it is true that we have made substantial progress, it is also the case that there are a couple of issues that are particular challenges to us.... The first is not unique to large law firms: our women face the competing demands of family and career. That wasn't created by large law firms. It can't be solved by large law firms. It's just a fact of our society, and we have to deal with it."*

Her firm has addressed this issue with a less-than-full-time commitment program for male and female partners, as well as those on the partnership track. That program has not been entirely successful:

> *"[W]e suffer attrition, because many of our women have difficulty balancing the demands of family and the practice. It's just the way it is, and it's very difficult. And so we do see, a higher amount of attrition from our women based on those kinds of decisions that they make."*[39]

Other legal employers do not offer a less-than-full-time work schedule to lawyers.[40] A female lawyer with a five-month-old baby reported that her firm (a large urban law firm) does not allow anyone to work part-time. She expressed her disappointment at this policy and stated that she would be forced to seek employment elsewhere. Although the policy applies equally to all lawyers, regardless of gender, it has a disparate effect on female lawyers with children. Overall, the lack of part-time work opportunities creates an impediment to work in the profession for women who have, or want to have, children.

Even where part-time opportunities exist, compensation of female and male lawyers may differ. One male lawyer refused to discuss with us the details of his compensation agreement with his large, urban law firm. However, he did acknowledge that the female lawyers working part-time at his law firm did not have the same (advantageous) financial arrangement as he did and that there was no uniform policy for determining the salaries of part-time lawyers.[41]

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[37] The Oregon State Bar formed a task force to examine issues related to balancing family and career, which generated a report in 1990. Thereafter, the Bar formed an implementation committee, which supplemented that report in 1992.

[38] Note from female lawyer to Task Force co-chair, Dec 1997.

[39] Testimony by female partner at Portland public hearing, Oct 21, 1996.

[40] The 1992 report of the Oregon State Bar Committee on Balancing Personal Life, Family and Career concluded that a number of public agencies, as well as private law firms, consider part-time, flex-time requests on a case-by-case basis. Few have written policies. Lawyers working part-time rarely are considered for partnership.

Of course, some men also face difficulty in balancing the demands of family and professional life. For example, a female lawyer reported that, when she and her husband (who was employed in private practice) had their first child, her husband's firm "pulled his leave" the day she returned from the hospital, despite a promise that he would be granted some time off.[42] Another male lawyer reported that, following his return to the office after exercising his right to parental leave, he experienced what he perceived to be "punishment" for having been gone.[43] For example, when he asked for the assignment of associates to assist him in completing a project, his male partners denied his request, commenting that "it appears that you are about six weeks behind" — exactly the period of time that he had taken as leave. We heard several other comments of the same nature. All too often, private law firms accommodate a mother's decision to take parental leave, but not a father's.

d. Retention

The retention of lawyers of both genders, but particularly women, and in all sectors (albeit less in the public sector) is seen as a continuing challenge to employers. This is generally true throughout the country.

We did not find out how many men and women have left the practice of law in Oregon. However, we heard anecdotal evidence from men and women, in focus group discussions and at public hearings, that female lawyers leave the profession in greater numbers than do male lawyers. We do not know the reasons for women's or men's departures from the legal profession.

We did find, however, that female lawyers who leave private practice may be responding to the pressures of long hours in certain specialties, to family responsibilities, or to a perceived lack of satisfactory mentors.

Women are particularly likely to depart from certain practice specialties. For example, in civil litigation departments, both men and women often leave, but female lawyers are more likely to do so. As a male partner commented during a focus group discussion:

> *"We have had a hell of a time keeping women litigation associates. They either leave and go into the business department for more predictable hours or they jump out...for whatever reason. And we, have several young women partners who, you know, plowed right through it but we have just had a damn tough time, especially in litigation, keeping people there."*

In the discussion that followed, another male partner observed that the predictability of hours appeared to be the primary reason why female lawyers selected non-litigation departments in his firm:

> *"Employee benefits, labor and estate and trusts is where the women tend to be in higher numbers and higher percentages in our office because...[it's] pretty predictable work. You don't have to worry about, you know, what's going to happen when the nanny turns into a pumpkin at 5:30. Cause you're going to be there at 5:30. Every single day."*

This is not to say that only female lawyers feel the stress of child-care responsibilities. In a focus group in Southern Oregon, for example, two female lawyers noted the difficulties faced by male lawyers whom they know. To quote one:

> *"He has the same problems....his wife goes up to [another city] every Friday to work and he has problems getting to work."*

In discussions with lawyers throughout the state, we heard that the presence of a mentor is widely regarded as very important to retaining a junior lawyer. The absence of female mentors, in particular, poses a challenge in retaining female lawyers, especially in large firms. A sense of frustration pervaded the focus group of male partners practicing in an urban area, as they reflected on the variety of strategies that their firms have used to increase retention rates for promising lawyers.

> *"I would find some way of manufacturing more senior women partners generally and just sprinkling them around the firm. I think that would be a great thing. I mean you can't do it now. ...There aren't that many gray-haired eminent women lawyers right now. ...[T]en years from now, that's going to change."*[44]

e. Positions of Power

Nationally, 37% of all lawyers admitted to practice since 1985 have been women. However, the number of women who have obtained partnership positions in large firms is still in the low teens.[45] In Oregon, the trend is the same. Of the Oregon law firms completing the National Association for Law Placement (NALP) firm questionnaire, as of February 1, 1997, the total percentage of female partners was 15%.[46] The results of the Task Force survey of lawyers was nearly identical: Thirty-three (14.8%) of the 223 respondents who were partners in private law firms were women.

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[41] Telephone conversation between Jessica Mindlin, Task Force Coordinator, and male lawyer.

[42] Comment from female lawyer in Willamette Valley focus group.

[43] Comment from male lawyer to member of Task Force in 1997.

[44] Excerpt from comment by male partner in focus group. The statistical data from the lawyer survey support the foregoing perception to this extent: female respondents constitute 43.5% of the respondents who are under the age of 30, and 40% of the respondents under the age of 40. Women constitute only .6% (one out of 40) of the respondents aged 60 or over.

[45] COMMISSION ON WOMEN IN THE PROFESSION, AMERICAN BAR ASS'N, WOMEN IN THE LAW: A LOOK AT THE NUMBERS (1995).

We did not gather data respecting managerial positions occupied by lawyers in the public sector. However, focus group discussions suggested that, although a higher percentage of women occupy positions of power in that sector than in the private sector, male lawyers occupy managerial positions proportionately more than female lawyers. Nationally, this is true as well. At the United States Department of Justice, for example, in which 35% of the approximately 25,000 lawyers are women, only 18.5% of the women occupy supervisory positions, compared with 25.1% of the men.[47]

In the judiciary, the pattern is similar. Of the presiding judges in Oregon's 26 trial court districts, 4 (16%) are women. A woman also is the presiding judge of the Oregon Court of Appeals, while a man serves as Chief Justice of the Oregon Supreme Court. Tremendous progress in the appointment and election of women to the bench has been made in the last decade, as the table below reflects:[48]

1997 Snapshot of the Oregon Judiciary

	Total No. of Judges	Number of Women	Percentage of Women
District Court Judges	63	13	20.6%
Circuit Court Judges	93	19	20.4%
Tax Court[49]	1	0	0%
Court of Appeals	10	3	30%
Supreme Court	7	1	14.3%
Total Judges	174	36	20.7%
Presiding or Chief Judges	28	5	17.9%

Additionally, the percentages of women at each level of the judiciary who were appointed or elected initially after January 1, 1985, have been slightly higher (overall, about one-fourth).

We did not study whether there are gender-related disparities in case assignments among judges of the same court. However, we received anecdotal information from female judges that some female judges are perceived to obtain less favorable case assignments than their male peers.

E. CONCLUSIONS

Overall, tremendous progress has been made in the opportunities afforded to female lawyers. In Oregon, female lawyers now constitute 26% of the bar membership, up from approximately 2% in 1970, and 9% in 1980.[50] Women graduate from Oregon law schools in numbers nearly equal to men. Women hold nearly 21% of judicial positions in the Oregon judiciary.

However, a significant minority of female lawyers face gender bias or gender unfairness within the legal profession. Moreover, as reported in survey responses, Oregon's female judges and lawyers perceive more unfairness than do their male counterparts. For example:

- 73.7% of female judges (compared with 2.7% male judges), and 65.5% of female lawyers (compared with 19.2% male lawyers) reported being treated differently by *clients* because of their gender;
- 42.1% of female judges (compared with 1.4% male judges), and 61.3% of female lawyers (compared with 7.6% male lawyers) reported being treated differently by *lawyers* because of their gender; and

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[46] The NALP form is prepared by an individual at a law firm for distribution to law students seeking employment opportunities. The form describes law-firm characteristics, including information about the lawyers practicing in the firm, based on self-reports. At least with regard to sexual orientation and disability, we *know* that there is under-reporting by lawyers. The figures below must, therefore, be considered with caution.

Demographic Composition of Portland Law Firms in Numbers and as Percentages

	Partner/ Firm Member	Of Counsel	Associate	SeniorLawyer	Staff Lawyer	Summer 1997
Men	391 (85%)	40 (93%)	149 (64%)	5 (60%)	7 (58%)	40 (63%)
Women	68 (15%)	3 (7%)	83 (36%)	2 (40%)	5 (42%)	30 (37%)
Total	459	43	232	5	12	70
African-Am.	1 (.2%)	0 (0%)	5 (2%)	0 (0%)	0 (0%)	8 (11.4%)
Hispanic	2 (.4%)	0 (0%)	10 (4%)	0 (0%)	1 (8%)	4 (6%)
Asian-Am.	2 (.4%)	0 (0%)	13 (5.6%)	0 (0%)	1 (8%)	13 (18.6%)
Disabled	2 (.2%)	2 (5%)	1 (.4%)	0 (0%)	0 (0%)	0 (0%)
Openly Gay/Lesbian	1 (.2%)	0 (0%)	1 (.4%)	0 (0%)	0 (0%)	0 (0%)

[47] NATIONAL TECHNICAL INFO SERV, FEDERAL CIVILIAN WORKFORCE STATISTICS, OCCUPATIONS OF FEDERAL WHITE COLLAR AND BLUE COLLAR WORKERS (Sept 1993).

[48] Data provided by Doug Bray, Deputy Court Administrator, Office of the State Court Administrator, dated July 28, 29 & 30, 1997.

[49] In addition to the one Tax Court judge, there are five Tax Court magistrates; two are women and three are men. One male tax magistrate is disabled.

- 31.6% of female judges (compared with 2.7% male judges), 31.5% of female lawyers (compared with 5.6% male lawyers) reported being treated differently by *judges* because of their gender.

1. Work Environment

a. Hiring Practices

Gender plays a role in the hiring process in some cases. Personal issues are the subject of inquiry for female candidates more often than for male candidates. Women sometimes face intrusive questions about their marital status, child-bearing plans, and husbands' approval of their career choices. Men are not subjected to similar questioning during the interview process.

b. Case Assignment

Few case assignments are made on the basis of gender. Sometimes, however, case assignments are made to lawyers who are perceived to be "aggressive" or "heavy hitters," and such lawyers more often are men. Female lawyers displaying traits of aggressiveness may be criticized.

Male and female lawyers believe that case assignments are made to accommodate the preferences of clients. However, clients generally do not appear to prefer male counsel more than female counsel for reasons of gender.

c. Compensation

Female lawyers earn less than their male counterparts. Factors that appear to play a role include:

- female lawyers charge less for their time;
- female lawyers work fewer billable hours;
- some firms may consider the income of a female lawyer's spouse in setting the compensation of a female lawyer;
- women may have fewer "rainmaking" opportunities than men;
- female lawyers practice in fields that are less highly compensated (in part to have greater control of their work schedules and to accommodate family responsibilities); and
- women disproportionately practice in the public sector.

Additional objective and subjective factors may be at work.

For the most part, compensation in the public sector does not appear to be based on the gender of the lawyer.

In both private and public employment, positions of leadership and supervision are held disproportionately by male lawyers.

d. Personal Treatment

Some women are reluctant to report adverse treatment under existing procedures.

2. Geography

Judges and lawyers in rural areas are disproportionately male. Female lawyers in rural areas have fewer opportunities than their urban counterparts to associate with other female lawyers, particularly in the private sector. That fact, and the relative lack of mentoring opportunities, contribute to a sense of isolation for female lawyers in rural areas.

3. Practice Specialties

Female lawyers are under-represented significantly in several practice specialties: general practice, corporate law, real estate law, and environmental law.

Female lawyers predominate in government work, poverty law, disability law, and public defender practice, which are areas in which compensation is typically lower.

4. Public and Private Sector Experiences

The public sector appears to be a more welcoming work environment to female lawyers. Factors that may contribute to this perception are:

- a higher ratio of female to male lawyers than in the private sector;
- less competition and more collaboration in the public sector;
- more control over hours;
- more consideration of family issues and personal lives; and
- few or no "rainmaking" obligations.

5. Family and Outside Obligations

The practice of law often conflicts with family and personal obligations. All lawyers, regardless of gender, experience difficulty balancing work and family. However, women are more frequently responsible for home and family obligations. This factor, more than any other that we examined, appears to affect women's career decisions and career opportunities. The effort to achieve balance drives women to make career choices such as area of specialty, public sector versus private

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[50] This is slightly more than the national average; nationally, women comprise 20% of all lawyers. *See* Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry Into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 NYU L REV 829, 847-48 (1995).

sector, solo practice versus firm, and geographic location. Concerns about that balance also cause some employers to limit the opportunities that they make available to women.

Male lawyers, too, suffer from the inflexible or onerous demands of their law practices. When men assume family responsibilities, there is little tolerance for the choice.

Some law firms are developing and implementing part-time positions, including positions on a partnership track. To the extent that female lawyers bear greater responsibility for family and household obligations, this option assists in the balancing of family and career without undue sacrifice of financial reward and career success. Not all law firms' compensation arrangements with part-time lawyers are fairly applied, however.

6. Retention

Retention of female lawyers in the private sector, especially in areas such as civil litigation, presents a challenge to law firms, for a number of reasons. Female lawyers describe a male-dominated culture, an inability to control the hours worked, a lack of mentorship opportunities, and an unwillingness to address the need for female lawyers to meet family obligations. Part-time and flex-time options are available in some firms, but exercising those options may jeopardize a lawyer's attainment of partnership status.

7. Positions of Power

Women have made great strides in the last several years, not only in representation in the bar overall, but also in attaining positions in the judiciary and partnership status in the private sector. However, compared to their numbers in the bar, women are still under-represented in leadership roles, such as partnerships in private firms. Additionally, women are still somewhat under-represented in the judiciary and its leadership positions. Although time alone may help to change those facts, conscious effort also will be required.

8. Intersectionality

Young, female lawyers may be disadvantaged in their practice, both inside and outside the courtroom. Although most respondents to the judge and lawyer surveys considered the personal characteristics of the litigants to be more important to the outcome of litigation than the personal characteristics of counsel, significant numbers of both lawyers and judges responded that representation by a young, female lawyer in a civil case may have a negative effect on the outcome of the case for her client.[51]

F. COMMENDATIONS

We commend public sector legal employers for hiring substantial numbers of women and for establishing gender-neutral compensation policies and practices.

We commend the Oregon lawyers who participate in mentoring programs, including those sponsored by the Inns of Court, the Professional Partnership Program of the Oregon State Bar, Oregon Women Lawyers, the Multnomah Bar Association, the Oregon Trial Lawyers Association, the Association of Oregon Black Lawyers, and the Minority Law Students Association at Willamette University College of Law.

We commend the legal employers that have:

- implemented part-time and flex-time practice options for lawyers, especially those on partnership tracks;
- established structured mentoring programs for newer lawyers;
- recruited female lawyers and lawyers of color; and
- created structured evaluation procedures for lawyers to ensure fairness.[52]

G. RECOMMENDATIONS

1. The Oregon State Bar should:

a. gather and maintain data about its membership through regular anonymous surveys, conducted at least every three years. The data should contain basic demographic information about lawyers, including gender, race, ethnicity, and self-identified sexual orientation. Specifically, the Bar should maintain, and make easily accessible, the following information:

(i) the number of lawyers in the Oregon State Bar;

(ii) their years of experience;

(iii) their compensation, including benefits;

(iv) their positions with their firm, corporation, governmental unit, or other entity;

(v) their areas of practice;

(vi) their career paths (longitudinal study);

(vii) promotional opportunities offered and taken; and

(viii) status as active or inactive;

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[51] For further findings and discussion of this issue, see the Judicial Administration chapter.

[52] *See* COMMISSION ON WOMEN IN THE PROFESSION, AMERICAN BAR ASS'N, FAIR MEASURE — TOWARD EFFECTIVE ATTORNEY EVALUATIONS (1997).

b. beginning in 1999, sponsor periodic educational programs about state and federal laws that apply to lawyers in their roles as private and public employers, with an emphasis on appropriate hiring methods and responses to complaints of sexual harassment;

c. continue and expand mentoring programs for young lawyers, especially women and people of color;

d. undertake to consider, by January 1, 2000, the feasibility of establishing a process by which lawyers may complain of adverse treatment without the need to reveal that complaint, at least initially, to persons in the complainant's own firm or community;

e. by January 1, 2000, study whether lawyers who serve in contract lawyer, in-house counsel, and of-counsel positions experience unfairness on the basis of gender or other personal characteristics and, if so, make appropriate recommendations to remedy any such unfairness; and

f. encourage qualified lawyers who are women, people of color, gay men, lesbians, and disabled persons to apply for judicial positions.

2. Private and public legal employers should:

a. by January 1, 1999, implement written hiring policies to ensure that interviewers conduct interviews in accordance with legal requirements;

b. ensure diversity among the persons responsible for hiring decisions, in particular by including women and people of color;

c. by January 1, 1999, implement and distribute policies prohibiting discrimination and sexual harassment;

d. plan social and business events that are open to, and are of interest to, both male and female lawyers and clients;

e. by January 1, 1999, establish promotional policies respecting management positions to ensure fairness in promotions;

f. review case assignment procedures to ensure that women have an equal opportunity to participate in challenging and high-profile cases; and

g. by January 1, 2001, adopt part-time, flex-time, and similar policies that allow lawyers to meet the demands of their personal lives, and ensure that lawyers who take advantage of such policies are not placed at an inappropriate disadvantage for having done so.

3. The Governor should:

- continue to appoint qualified lawyers who are women, people of color, gay men, lesbians, and disabled persons to judicial positions (especially outside major metropolitan areas).

4. The Chief Justice should:

- by January 1, 2000, determine whether case assignments are made fairly to female and male judges and, if not, make appropriate recommendations to remedy any such unfairness.

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