

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 staff² — 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,

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

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.

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 opponents regardless 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

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 cohabitators 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 woman. 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

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 sex¹⁵ 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

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

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.

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

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;

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.