
A JUDGE'S GUIDE TO GENDER FAIR COURT PROCEEDINGS



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MINNESOTA GENDER FAIRNESS IMPLEMENTATION COMMITTEE

MINNESOTA DISTRICT JUDGES' ASSOCIATION

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**A JUDGE'S GUIDE TO GENDER FAIR
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I. PRELIMINARY

On first glancing at this handbook you might react in one of several ways. Perhaps the very idea of such a booklet irritates you. You are tired of complaints about gender bias in the courtroom or anywhere else, and you intend, at best, to give this thing a brief skim. Perhaps, on the other hand, you welcome the booklet wholeheartedly. You consider it long overdue. You wish that all your colleagues were as sensitive to this problem as you are. You have already begun a mental list of colleagues who you wish would read it. Or perhaps, while you strongly endorse the idea of equal justice, you think gender bias is a minor problem. You think that on the rare occasions when it occurs everyone sees its mischievous effects, and that therefore this booklet says much when nothing much needs to be said.

We hope for a reaction different from any of these.

The courtroom is the visible symbol of law and justice in our country. You, as a judge, have a duty to perform without bias or prejudice. You have the power and the duty to prevent gender-biased conduct by attorneys, court personnel, and others. You must be aware of what constitutes such behavior. You must insist that women,

whatever role they play in your courtroom, will always be treated with the same dignity and credibility as men. You must learn how to intervene if counsel, in a pretended attempt at fairness, treats women with avuncular condescension or mock-gallant courtesy. During conferences in chambers you must never, even inadvertently, exclude the women participants with "old boy clubiness" and easy conversation about, for example, last night's game. When the presence of women is diminished in any way, then women do not, by definition, have equality under the law.

Now stop for a moment. Set aside whether you agree or disagree with the content of the last paragraph. Consider instead whether you noticed that it gradually slid into language implying first that counsel will be male, and second that you are. Did you notice? Or did that kind of language seem so natural that you felt no twinge of discomfort at the implicit sexual bias?

If upon honest reflection you admit that you didn't notice, then perhaps sexual bias is neither as rare nor as obvious as you may have thought. Perhaps you yourself will benefit from this booklet as much as the colleagues on your mental list. Perhaps your irritation at the very idea is misdirected.

Justice does not depend upon legal dialectics so much as upon the atmosphere of the court room, and that in the end depends primarily upon the judge.

--Judge Learned Hand

II. SERIOUSNESS OF BIAS

The Code of Judicial Conduct asserts unequivocally that judges have a duty to prevent bias:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice including...bias based upon sex.

A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon...sex against parties, witnesses, counsel or others.

Canon 3 (5) & (6)

All judges want to be fair in the performance of their duties. No judge would willingly allow sexual bias to enter either courtroom or chambers.

Yet ample evidence indicates that gender bias does exist in the courts of Minnesota. A survey conducted by the Minnesota Supreme Court Task Force for Gender Fairness in the Courts provided these findings:

- A majority of Minnesota women attorneys have encountered gender-based differential treatment by other attorneys in the courtroom, including different forms of address, demeaning comments, inquiries about professional identity and inappropriate comments about physical appearance. A majority of women report that when such behavior occurs, judges rarely or never intervene to stop it.

- More than forty percent of women attorneys have observed, or have been subjected, at least sometimes, to gender-based differential treatment by judges, including comments about physical appearance, inquiries about professional identity and remarks or jokes demeaning to women:

Task force studies in thirteen states indicate that attorneys consciously use gender-biased comments to gain advantage in the courtroom. As one male attorney noted, "It's a game. It's tactics to throw you off." Attorneys have admitted that they appeal to what they hope will be the biases and stereotypical thinking of the judge or jurors to win their cases. Female attorneys have noted that male attorneys are far more likely to engage in biased behavior than male judges, but that nevertheless judges seldom intervene.

How can this be? If judges want to be fair, if they want to abide by the judicial code, how can there be such strong evidence of bias?

The following are a few observations about the legal system which might begin to explain the discrepancy:

- It was designed and created by men.
- In spite of recent and ongoing change it is still dominated by men.

- Its formal and informal rituals are ones with which men tend to be comfortable.
- Men make up the majority of all participants in courtroom proceedings.

The word "men" beats like a drum through those observations, and its repetition may sound accusatory. Perhaps you are beginning to think, "All right, but are men therefore supposed to bear the guilt for all this?"

Of course not. But suppose we add a few matters of objective fact:

- For most of American history, the law classified women with children and incompetents and forbade them to own property, enter into contracts, or vote.
- Until recently, rape laws required corroborating testimony, thereby codifying the legal system's doubt about women's competence to testify.
- Women attorneys have repeatedly noted biased treatment, not at some distant time and place, but recently, and here in Minnesota.

Finally, two general propositions seem self-evident:

- Those for whom the status quo works reasonably well tend not to recognize problems or the need for change.
- Even if recognized as undesirable, deeply rooted beliefs and behaviors are extremely difficult to change.

All these observations taken together indicate first that gender bias is present in the courts of Minnesota, and second that however serious it may be, male judges and attorneys probably will not consider it a very pressing problem.

But sexual bias based on inappropriate sexual stereotyping is not only injurious to women. It can negatively affect everyone in the system. If a male attorney has been raised to believe that women should be nurturing wives and mothers, he will be ill-prepared to deal with a woman lawyer who is his adversary. He will be uncomfortable and unsure. His responses may be awkward. If a male judge has for years told mildly dirty jokes to lawyers in chambers in order to create a relaxed and comfortable atmosphere for negotiation, he may be distressed to find that his jokes have exactly the opposite effect when women lawyers are present. If a female judge is considered biased against male attorneys and their clients, her credibility and effectiveness will be compromised.

Yet no one considers it advantageous to complain or intervene.

- Women, whatever their role in the courtroom, don't complain because they fear negative consequences.
- Attorneys of either sex don't complain partly because they don't want to be sidetracked onto gender issues when they are trying to argue a case, partly because they don't want to alienate the judge or opposing counsel, and partly because they fear negative consequences for themselves or their client.
- Judges don't intervene. Many judges prefer to intervene as rarely as possible, whatever the issue: they feel that justice is best served when attorneys are most free to argue their cases in their own way. Some judges may recognize bias but don't want to appear to take sides. Some fear they will make matters worse by appearing to rescue a "damsel in distress." In some cases, as is shown by the Task Force statistics, male judges simply don't agree with women that a given behavior is objectionable.

Of course all these refusals to complain or intervene assume that bias has even been perceived. But sometimes it is very easy to miss, as our "Preliminary Remarks" tried to make clear.

This pamphlet provides two steps towards solving the problem. First, we hope to help you become more attuned to the sometimes very subtle presence of bias. And second, we will provide some concrete suggestions on how to keep bias out of your courtroom and how to deal with it if it should nevertheless arise.

III. SPECIFIC BEHAVIORS

In what follows, nearly all the examples are taken from responses to the survey conducted in the late 1980's by the Minnesota Supreme Court Task Force for Gender Fairness. Attorneys of both sexes cited these as incidents that actually happened in their presence in the courts of Minnesota.

Forms of Address

The Situation: Roughly a third of female attorneys responding to the survey said that judges sometimes or often address them by their first names or with terms of endearment. Roughly two thirds said they were sometimes or often so addressed by other attorneys in court.

Examples:

- Female attorneys reported being called "girl," "girlie," "little lady," "young lady," "sweetie," "honey," "pretty eyes," and "dear." They noted that they were sometimes referred to by their first names in the same proceedings in which men were addressed as "counsel" or by their last names.

- Male attorneys or judges have sometimes inquired with elaborate irony about a woman's preferred courtesy title (Is it Miss, Mrs., or Ms. Jones?)
- Some judges refuse to use "Ms." at all or use it deprecatingly: ("Mzzzzzzz Jones").

Comments: All participants should be treated with the same courtesy and respect. The only neutral form of address comparable to "Mr." is "Ms.", and even that is not neutral if it is treated as amusingly radical or faddish.

Suggestions: Attorneys should simply be referred to or addressed as Attorney or Counselor "X". People for whom it is appropriate should be addressed as "Professor," "Doctor," "Lieutenant," or the like. All others should be Mr. or Ms. with the last name unless the participant specifically requests otherwise.

Comments about Appearance

The Situation: 42% of female attorneys in the same survey said judges at least sometimes made comments about their physical appearance. 59% of female attorneys reported male attorneys making such comments.

Examples:

- A defense attorney complimented a prosecutor in chambers for dressing "feminine." He said that he didn't like women who felt they had to wear suits to compete with men.
- A judge interrupted a prosecutor's opening statement and called her to the bench to say he liked her hairdo.

Comments: Sometimes such remarks are intended to be purely complimentary. Sometimes, however, they are meant to demean or rattle the subject, or to have an effect on other men. They may range from very mild ("You look nice today, Counselor") to very offensive ("Love the way you fill out that blouse"). They are in all cases unprofessional and the chance, however slight, that they may make a woman uncomfortable or impair her credibility makes them inappropriate.

Suggestions: Simply avoid such comments. Make clear that they will not be tolerated in your court.

Sexual Jokes and Innuendo

The Situation: 47% of female attorneys said the judges sometimes or often make remarks or tell jokes demeaning to women. 63% of female attorneys said such remarks are often or sometimes made by male attorneys.

Examples:

- One attorney reported that judges and lawyers in chambers discussed certain female attorneys who "needed a good lay."
- Another said that sexual remarks had been made to her by judges, attorneys, and court personnel, ranging from "Call me when your husband dies," to "Let's slip away for a quickie."
- Another remarked that jokes of a sexual nature were told constantly in chambers, and sexual quips were the rule rather than the exception.

Comments: An informal, relaxed, and sociable atmosphere in chambers can be extremely valuable for the proper functioning of the court. The judge's friendliness and courtesy can help to resolve disputes in a spirit of goodwill and cordiality.

It is also true, however, that objectionable conduct is more likely to occur with such informality. When women are viewed as sexual objects or objects

of beauty rather than as serious participants in the legal process, all the advantages of informality may be vitiating.

Suggestions: Judges should not participate in or allow demeaning comments or sexual jokes in the courtroom or in chambers, regardless of who is there to hear.

Sexist Assumptions about Employment or Role in Court

The Situation: 70% of women attorneys in the survey said that when they appeared in court they were asked at least sometimes whether they were attorneys.

Examples:

- Four attorneys were sitting at counsel table--three men and a woman. The judge asked, "Would you three attorneys please approach the bench?" Somewhat embarrassed, the attorneys asked, "Which three?" The judge then said to the woman, "Oh, I'm sorry (first name), you can come too."
- A male attorney who second-chaired a female attorney clearly identified himself and stated that the female would be arguing the motion. Nevertheless the judge persisted in addressing questions to the male,

even though the male repeatedly directed him back to the first chair attorney.

- An attorney questioning prospective jury members asked the men about their employment but asked the women about their husbands' employment.

Comments: A woman attorney appearing for the first time in a particular courtroom or chambers is sometimes assumed to be a secretary, legal assistant, or litigant. Although such a misunderstanding may be quickly cleared up, it can undermine confidence and credibility. Sometimes a judge's indication of even mild surprise (Oh? I see... you're Mr. Smith's lawyer!) can make a woman lawyer feel out of place and can have a negative impact on other courtroom participants.

Suggestions: Avoid misunderstandings by having all participants introduce themselves at the start of proceedings. Be aware of and try to avoid stereotypical assumptions about any of the participants.

IV. LANGUAGE OF WRITTEN DECISIONS

The Task Force on Gender Fairness in the Courts recognized the special significance of written communications in eliminating gender bias in the administration of justice:

Unlike a single, relatively ephemeral statement made in a courtroom which may reflect the speaker's personal bias, any gender-biased statement made in a document issued by the judicial system affects many more people and is appropriately viewed by the public as a reflection of the system's perspective.

The Task Force recommended that "masculine pronouns are not to be used as if they were neutral words" and that "all unnecessary gender-specific language should be deleted." Because language molds our thinking, careful choice of words can help us reject gender stereotypes that interfere with unbiased decisionmaking.

Those of us who are comfortable using the male pronoun indiscriminately for either sex may think it will be difficult to learn to speak and write differently. But in fact, English is slowly changing before our very eyes. Even though the results may be ungrammatical, people are unconsciously searching for alternatives to indiscriminate masculine pronouns. Colloquial speech has already accepted such sentences as "Each passenger will have to look after

their own belongings." Well-educated people have even said things like "Each student will have to decide for themselves" without raising many eyebrows.

Of course neither of these, especially not the second, is yet acceptable in print. Nor should legal writing be in the avant-garde of acceptable usage.

But avoidance of the masculine pronoun does not necessarily lead to awkwardness or barbarism. Many different grammatical constructions are available. Often pronouns can be eliminated entirely, replaced with a neutral article, changed from singular to plural, or replaced with a noun.

For example, "He should file his memorandum supporting his motion prior to the hearing..." can be written:

1) The attorney should file the memorandum supporting the motion prior to the hearing...; or

2) Attorneys should file memoranda supporting their motions prior to the hearing....

Similarly, use of the word "man" to apply to both sexes can be eliminated by using gender-neutral terms. One can easily change "businessman" to "business people" or "executives;" "workman" to "worker;" and "policeman" to "police officer." Anyone who thinks such a change is trivial

should refer to a recent ABA policy statement on gender-fair language which reported the following incident: a jury explained to a judge that they had not chosen a woman as jury leader because the court rules instructed them to appoint a "foreman."

Judges should also be attentive to whether they use different modes of expression to identify men and women. Identifying male parties by their last names and women by their first names can reasonably be viewed as reflecting a diminished respect for the women. Identifying both parties by last name may not be an available solution in a family law matter in which both parties have the same last names.

One Minnesota district judge realized, after issuing an order in a child support case, that he had consistently referred to the father by his full name while referring to the mother only as "Respondent." He decided to issue an amended order including the mother's full name as he had the father's. In the amendment, the judge apologized for having referred to her differently in the original order.

The judge's experience illustrates two important facts of gender-fair judging. First, in the absence of special attentiveness to issues of gender, judges may inadvertently convey an impression of bias. Second, judges, when

they recognize such errors, have the capacity to correct them and assure the public of equal treatment.

V. INTERVENTION TECHNIQUES

Most judges would prefer never to see gender bias in their court and never to have to deal with it. But the Task Force survey has made clear that biased behavior does occur in the courtrooms of Minnesota, and the Code of Judicial Conduct requires that judges do something about it.

There can be no question that the prevention of gender bias begins with the judge's own behavior. More than any other factor, your example will communicate your expectations of gender-neutral professionalism and civility both in and out of the courtroom.

If you wish to avoid the irritation and embarrassment of intervention during a proceeding, probably the best way is to take preventive measures before the proceeding begins. You should advise lawyers (at a bench conference, in chambers, or by written notice) of the standards of your court. These standards should include preferred terms of address, the sexist assumptions about which you will be sensitive, and the kinds of casual comments and innuendo which you will not tolerate. You should point out that if there is an objection based on failure to abide by these standards, the objection will be sustained.

You might go further. Realizing that women jurors generally do not participate as actively as men during deliberations, you may question prospective jurors about their willingness to speak, listen, and encourage others to speak. In jury instruction you can explain that no more credibility should be given one witness than another because of gender.

In spite of such proactive measures, you may find it necessary to intervene in the course of a trial or hearing. If so, that intervention should suit the degree of inappropriate behavior. If an attorney's comment MIGHT have been inappropriate, perhaps a raised eyebrow or a frown would be enough to make your sensitivity clear. If the behavior is obviously but only mildly inappropriate, a calm warning or rebuke might be called for. If the behavior is repeated or is clearly offensive, then a bench conference might be necessary. At the conference, you could sternly admonish the attorney, demand an apology, and warn what will happen if there is a recurrence.

In an effort to assess the effectiveness of your measures, you might ask a friend to sit in the courtroom and give feedback on the perceived behavior of attorneys, witnesses, court personnel, and yourself. You might also survey the jurors after trial for their impressions of the fairness of the proceeding.

SITUATIONS AND MULTIPLE CHOICE RESPONSES

The following are hypothetical situations which you may encounter. The choices given present a range of possible responses. The discussions following the responses are not meant necessarily to provide the "correct" answer but to provoke thought. In each case decide what you would do.

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1. An elderly male attorney tells the adult female witness that he is old fashioned and will call the witness Mrs. Smith until the laws of this state say otherwise.
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You should:

- a. Do nothing especially given the age and politeness of the lawyer.
- b. Inform the attorney that he should allow the witness to express a preference.
- c. Make a sound like a buzzer and in a loud voice say "wrong" or "NOT".
- d. At a bench conference ask counsel to address the witness as Ms.
- e. In open court indicate that you object, even if the witness doesn't and ask counsel to use the Ms. form of address.

Discussion:

Choice "a" is not appropriate. Even elderly lawyers should not be permitted to treat a witness in a gender-biased manner.

Choice "b" would be inappropriate since it allows the attorney to determine the behavior allowed in your courtroom based upon the consent of the witness.

Choice "c" is appropriate if you model yourself after Judge Harry Stone in the TV show Nightcourt.

Choice "d" is an appropriate but somewhat uninspired response.

Choice "e" is an appropriate and strong response.

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2. An attorney in your courtroom refers to an argument between two women as a "cat fight".
-

You should:

- a. Ignore the comment.
- b. Ask the attorney whether he is being intentionally sexist.
- c. At a bench conference ask the attorney how he would feel if a woman referred to an argument between two men as a "cock fight".

- d. At a bench conference point out to the attorney that his remark is demeaning to women.

Discussion:

Choice "a" would indicate a lack of control or lack of sensitivity.

Choice "b" would be a little too strong if stated in open court.

Choice "c" is probably too strong (unless you have an attorney who is still living in the stone age.)

Choice "d" is appropriate.

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- 3. Attorney to adult female witness: "Mary, tell us what happened on the morning in question".
-

You should:

- a. Allow the use of the first name if this is direct examination.
- b. At a bench conference politely ask that the attorney use last names preceded by Mrs. or Miss.
- c. In open court ask the attorney to address the witness as Ms. Smith.
- d. Tell the attorney that the only person who may be addressed by their first name is the Court and that your first name is "Judge".
- e. Other

Discussion:

Choice "a" is not appropriate. First names are only allowed in addressing children.

Choice "b" is not appropriate since Ms. is the appropriate form of address.

Choice "c" is appropriate.

Choice "d" is ok if you feel comfortable with the use of a little humor.

Choice "e" might include an instruction given prior to the beginning of the case instructing all counsel regarding forms of address, etc.

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4. During the course of a jury trial, as it becomes more and more apparent that the female attorney is very prepared and competent, the male attorney becomes angry, sarcastic and demeaning towards the female attorney.
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You should:

- a. Not interfere
- b. In open court admonish the attorney to "behave like a gentleman".
- c. At a bench conference inform the male attorney that if he continues his unprofessional behavior, he will be required to make an apology to the jury for his behavior.

- d. Same as above, but indicate that the female attorney will be allowed to draft the apology which may be up to 2 pages in length.

Discussion:

Choice "a" is inappropriate. The Court has a duty to prevent such conduct.

Choice "b" is not appropriate since it makes the court appear to be rescuing the defenseless damsel in distress.

Choice "c" is appropriate.

Choice "d" is a good way to get the attorney's attention.

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- 5. During a Court hearing, a woman attorney asks for an opportunity to meet with opposing male counsel to try to "work something out". The male attorney winks and says "Your place or mine?"
-

You should:

- a. Ignore the comment if the woman attorney laughs.
- b. Admonish the attorney that his comment is inappropriate.
- c. With a stern demeanor indicate that the attorneys can meet in the appropriate meeting room.

- d. Tell the male attorney that the days of getting away with making such comments are over and that you will not tolerate such sexist comments.

Discussion:

Choice "a" is wrong. Even if the woman attorney is not offended, the court should be.

Choice "b" is appropriate if somewhat weak.

Choice "c" is appropriate if you use a very stern demeanor.

Choice "d" is strong and certainly justified.

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- 6. In a courtroom setting, a witness refers to a female as a "loudmouthed broad". There is no objection made by counsel.
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You should:

- a. Fix the witness with an icy stare.
- b. Admonish the witness and order the comment stricken.
- c. Do nothing since it might show a lack of neutrality.
- d. Threaten the witness with contempt.

Discussion:

Choices "a" and "b" are appropriate. Choice "d" is a little strong unless this is repeat behavior. Choice "c" has been a common response. Should you interfere? Witnesses and attorneys may appeal to gender biases. They seek out a negative stereotype and attempt to portray a female as belonging to that stereotype. Prompt intervention will have the effect of producing a courtroom setting that is perceived as fair and evidence received will be relevant.

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7. At a week-long trial, a male lawyer and female lawyer are adversaries. Each morning after the first day, and in the presence of the jury, the male lawyer compliments his adversary on her dress or some other aspect of her appearance, and, on the fourth day, says "Really, now, how can I compete against such a stunning wardrobe?"
-

You should:

- a. Do nothing, unless the comments are made in a snide or sarcastic manner.
- b. In a bench conference, ask the female lawyer whether she objects to such comments.
- c. At a bench conference, admonish the lawyer.
- d. Admonish the lawyer in the presence of the jury.

- e. Suggest sarcastically to the lawyer that better trial preparation might help.

Discussion:

Choice "a" is an insufficient response to this comment.

Choice "b" is not appropriate because it places the female lawyer in an awkward position and because the tone of the proceeding should be set by the court, not determined by the sensitivity of a particular person to an inappropriate comment.

Choice "c" or "d" would be appropriate.

Choice "e" might not get across to the attorney why his comments are unacceptable.

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- 8. At a judges' meeting a male judge in a loud voice states "I'm a male chauvinist and I don't care who knows."
-

You should:

- a. Not laugh
- b. Ignore the comment
- c. Indicate that counseling might help.
- d. Ask- "Not even the voters?"

Discussion:

Choice "a" is a good start. Laughter encourages further inappropriate remarks.

Choice "b" is somewhat weak- the judge may take your silence for approval.

Choice "c" expresses disapproval in a somewhat humorous manner.

Choice "d" is a good response since it questions whether the judge is really serious and also brings up the fact such attitudes are no longer going to be tolerated by the public.

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9. Your law clerk writes a draft memorandum which states general propositions of law using exclusively the male pronoun. The case involves only male parties and attorneys.
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You should:

- a. Sign the memorandum as drafted because everyone understands that the male pronoun also includes women.
- b. Sign the memorandum as drafted because there are exclusively male parties and attorneys in the case.
- c. Redraft the memorandum using gender neutral language.

- d. Tell your law clerk that all memoranda should be drafted with gender neutral language and that this one should be corrected.

Discussion:

Choice "a" is inappropriate because gender specific language encourages gender based images and stereotypes. If you think the use of the male pronoun is neutral, think how you would feel if "she" was considered the neutral pronoun.

Choice "b" is inappropriate. The purpose of using gender neutral language is not merely to avoid offending women. The court system can affirmatively promote gender neutral behavior of litigants and attorneys by using gender neutral language in all settings.

Choice "c" is insufficient. While you could correct this memorandum and others that might follow, both the clerk's education and the efficiency of your office would be promoted by informing the clerk that gendered language is unacceptable in your court.

Choice "d" is appropriate. It would have been better to avoid the problem by including in your initial orientation of new law clerks a requirement that all documents should be drafted using gender neutral language.

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10. A plaintiff in a sexual harassment lawsuit testifies that his female supervisor routinely subjected him to dirty jokes and cartoons, requests to meet after hours, and explicit comments on sexual interaction. Despite these incidents the employee testifies that he did not quit his job and, in fact, requested references from the allegedly harassing employer years later.
-

You should:

- a. Discount what the witness is saying because if you were in a similar situation you would have quit and never had any voluntary interaction with the supervisor again.
- b. Credit what he is saying because women supervisors have had to set aside natural instincts to pursue professions and their frustrations and displacements are bound to surface somewhere.
- c. Discredit what he is saying because no healthy red-blooded man would have sat still for this. He would have either acted on the obvious invitation or told the supervisor to shut up.
- d. Evaluate the credibility of the witness as best you can realizing that the witness may have made choices that you or others may not have made but that a different choice of how to deal with improper harassment doesn't make the account of the harassment unbelievable.

Discussion:

Choices "a", "b" and "c" are inappropriate. Credibility is at the heart of our judicial process, and we must be on guard against stereotypes that would limit or distort our application of the law. If we attempt to understand the actions of others only through the filter of our own motivations or reactions, we may miss the truth. To listen well is to learn.

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11. In chambers discussions, where opposing parties are represented by a male and female attorney, the male attorney initiates conversation about his experiences as a student at a boys' parochial school that he knows the judge attended. He is obviously intending to engage the judge in personal reminiscences.
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The judge should:

- a. Talk for a while about his alma mater and then ask the female attorney about her high school years.
- b. Deflect the discussion back to the case at hand.
- c. Admonish the male lawyer aside after the discussion and point out the exclusivity of that discussion.
- d. Simply confine the discussion to a reasonable length.

Discussion:

Aside from choice "c", which is probably an overreaction, any of choices "a", "b", or "d" may be appropriate. The key is to avoid an atmosphere in which one attorney is permitted to pursue a topic of conversation that is intended, or likely, to exclude other counsel on the basis of gender.

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12. At a bar association social function, a male lawyer approached a male judge and says in a confidential tone: "On that XYZ case you're handling, that broad representing the ABC Corporation is a first-class bitch. It looks like we're all going to suffer through a long, totally unnecessary trial if she can't get off her high horse."
-

You should:

- a. Politely deflect talk to another subject.
- b. Inform the lawyer that he shouldn't be discussing a case pending before him.
- c. Admonish the lawyer for his sexist comments.
- d. Make a record of the conversation at the next opportunity, disclosing the comments to adverse counsel.
- e. Complain to the Lawyers' Professional Responsibility Board for improper ex parte contacts.

Discussion:

Choice "a" is an insufficient response to a blatantly sexist comment made to the judge in the context of a pending case.

Choice "b" while perhaps appropriate as far as it goes, does not address the sexist nature of the comment.

Choice "c" is probably the best alternative, especially if it is done immediately.

Choice "d" and "e" might be appropriate but are probably an overreaction in this precise circumstance.

-
13. You have been conferring in chambers with counsel and are about to enter the courtroom where the jury is waiting. One of the attorneys is female, and as you are about to enter the courtroom, you must decide which rule of courtesy should be applied.
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You should:

- a. Let the female attorney enter first and then follow her with the male attorney, female court administrator and male court reporter following you.
- b. You should enter first, then step aside after you are in the courtroom to let the female attorney go first.

- c. Follow "a" or "b" but let the female court administrator go ahead with the female attorney.
- d. Don't make such a big deal about it-- just do what you would do if all participants were the same gender and make the same decision irrespective of what gender that would be.

Discussion:

"a", "b" and "c" are unnecessary and inappropriate. Although such deference may be well intentioned, it conveys an attitude or suggests a power relationship that may adversely affect court proceedings. "d" is the appropriate choice.

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14. In considering whether to issue an ex parte Order for Protection, you note that the petitioner's sworn statement says that the petitioner's husband punched her in the face requiring medical attention two years ago. One year ago he pushed her down the stairs. During the last week she reports that he has repeatedly threatened to kill her and that she is afraid for her life.
-

In deciding whether to issue the petition you should ask yourself:

- a. Why she started a relationship with him in the first place?

- b. Why the court should be involved in these personal interactions? The kind of people who come in on these petitions usually deserve each other. If they really want to get out of the situation, they will.
- c. Whether it's necessary to issue the order until he punches her again? If there are no actual physical results in the last year, are the threats all that significant?
- d. Whether the statutory criteria for issuance of a domestic abuse order have been met?

Discussion:

Choice "d" is the appropriate answer. Responses to the Gender Fairness Task Force surveys suggest that some judges view domestic abuse offenses as reciprocal or jointly caused. This view has been evidenced in reciprocal restraining orders when only one petition was filed, and the evidence supports issuance of an order against only one person.

15. As a male judge, you have become concerned about how you are viewed by female judges on issues of gender fairness. At a judicial conference, you want to demonstrate a nonsexist attitude. In which of the following ways can you demonstrate your gender fair attitude:

- a. Be really careful to open doors for female judges and to recognize them when there is more than one or two in the room by saying "Well, how did we get so lucky"? or "These meetings are getting better and better with you ladies here."
- b. Be on the lookout for other judicial colleagues who may put the women judges in an awkward situation. For instance if someone is talking about retirement benefits, be sure to tell the women judges that, of course, women never age or have to tell their age. And make sure that if the male judges are talking about unsavory things like criminal sexual conduct trials that you change the subject back to safer and women-oriented judicial issues such as marital dissolution.
- c. If you see two or more women talking together, be sure to play the host and save them from being the most unpopular women at the gathering by going over to talk to them even if they look

engaged in serious conversation. They will be relieved that you saved them from being wallflowers.

- d. If you see two or more female judges talking together, be sure to avoid them since they are likely talking "women talk" or about their sexist women judges' organizations. Besides, you probably couldn't get a word in edgewise anyway.
- e. Try to treat them as you would any other judge.

Discussion:

The appropriate choice, of course, is "e".

In choice "a" there is nothing wrong with opening a door as a friendly gesture, however most people are embarrassed by over-obvious solicitousness. Although each person likes to be recognized, few like to be singled out as a category.

In choice "b" there is no reason to believe that women are different than men in claiming their ages. Women and men are both present in instances of criminal sexual conduct and both genders need to be concerned about these offenses. As many men as women are involved in marriages and marital dissolution. Both genders need to be concerned about the problems in this area of litigation.

Choices "c" and "d" are inappropriate. You should treat female judges as you would treat male judges. Don't interrupt a conversation assuming that the discussion was not a serious discussion. There is no basis for the assumption that female judges talk more about personal issues. The stereotype that women talk more than men is without basis in fact. (In fact studies have shown that men talk more than women). The National Association of Women Judges does not exclude on the basis of gender. The association has male members and encourages additional men who share the goals of the organization to join.

16. A judge approaches a group of lawyers and in a moment of spontaneous warmth places each arm around a lawyer. This action is appropriate:

- a. In all circumstances.
- b. Only if the judge is a woman and the attorneys are men.
- c. Only if the judge is a woman and the attorneys are both women.
- d. If the judge only rests the arms on the shoulders and does not exert force.

Discussion:

None of the answers are correct. These actions are generally inappropriate in a professional setting and the gender of the participants does not matter.

VI. CONCLUSION

We hope that these hypotheticals, many based on real events, provide insight or ideas for handling comparable situations. If, as Holmes says, the life of the law is experience, entering into the possible resolutions for the situations can be a method of extending our experience toward a fully inclusive rule of law.