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Gender Bias: Continuing Challenges and Opportunities

by Rebecca Korzec

In 1873 the U.S. Supreme Court denied Myra Bradwell the right to practice law, holding “the paramount destiny and mission of women are to fulfill the noble and benign office of wife and mother.” Now, just slightly more a century later, two women sit on the Supreme Court, and almost half of all law students and law school faculty are women.

Yet let us not be too exultant: Women law graduates hold only 14 percent of law firm partnerships and 6 percent of tenured faculty slots. Despite the Equal Pay Act of 1963 and the enactment in 1964 and 1972 of Title VII of the Civil Rights Act and Title IX of the Education Act, the coveted high-paying positions still belong almost exclusively to men. It strains credulity today to suggest that the reason for the inequity is that women “haven’t had the time to work their way up the ladder.” While that may have been the case 30 or 40 years ago when those laws were enacted, the reason for the gender gap suffered by women lawyers today is that they are being pushed off the ladder in mid-career, at the same time their male counterparts are taking their largest strides.

Sylvia Ann Hewlett, in her book *Creating a Life: Professional Women and the Quest for Children* (2002), tells the story of 44-year-old Yale Law School graduate Tizra Wahrman, who worked at the Department of Justice and then joined Cadwalader, Wickersham & Taft as an associate. A few years later she married and contemplated starting a family. Deciding to “trade earning power for shorter work-weeks and generous family benefits,” Wahrman went into public sector law. When her husband obtained a six-month assignment abroad, she left her job to accompany him. When they returned they were unable to find suitable care for their three young children; as a result Wahrman spent a year at home taking care of them. “I really feel the lost identity and the lowered self-esteem,” she says of her stay-at-home-mom arrangement. “And yet I know that this time with my children is very

important... But when I look into the future I’m frankly scared about being able to resurrect a career. Already I’m hitting an age wall ... the law firms I’ve talked to aren’t interested in hiring a 44-year-old associate.”

According to Hewlett, “the real world choices faced by Tizra Wahrman help explain why women with children earn so much less than women without children.” In another example Hewlett describes a seventh-year associate at a large law firm, struggling to succeed at work and as a mother: “She’d been working a reduced-hour schedule [so she] could leave in time to meet her children when they came home from school ... to get her work done, she had to go back to work after the children went to sleep. So for months she’d been working from 9:00 P.M. until 1:00 or 2:00 in the morning. Although her firm allowed part-time schedules, she felt they were regarded as a special accommodation ... for people ostensibly not tough enough to do everything.” Hewlett, at 279-80.

As these real-life stories show so vividly, the gender wage gap widens with time after law school graduation. Discriminatory results become more obvious later in a woman lawyer’s career. Surveys demonstrate that for younger attorneys, the female-to-male salary ratio is 93 percent. Among more senior lawyers, corporate general counsel, for example, the same wage ratio is only 80 percent. A study of 3,600 lawyers working in-house at 500 corporations found that, among general counsel, the female-to-male wage ratio was 74 percent. What’s worse is that despite attempts to eradicate gender discrimination and unequal pay, American women overall earn a mere 78 percent of the male wage, whereas Australian women earn 88 percent; Swedish women, 84 percent; and French women, 81 percent. *Id.* at 136.

The surveys of gender wage differentials of lawyers demonstrate three significant trends. First, women do not receive the same income premiums as men from attending prestigious law schools. Second, time away from the full-time labor force (spent either working part time or not working) is statistically significant only for women. Third, not only are

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women less likely than men to achieve partnership, but they also receive smaller income premiums as partners. The critical question: Why?

Significantly, marriage is associated with an income decrease for women, yet it is associated with income rises for men. Studies demonstrate that litigation, as a specialty, is associated with higher incomes. However, women litigators earn less than their male counterparts. One reason for this disparity is that clients and juries may practice “taste discrimination” against women, simply preferring to deal with male lawyers. As a result, women litigators may have fewer clients or win fewer cases.

Another reason may be that in litigation practice, unpredictable deadlines, uneven work schedules, and frequent travel pose significant difficulties for women who have family responsibilities. Women lawyers in two-career couples generally assume most of the childcare and household responsibilities, whether arranging and monitoring childcare, hiring and supervising household help, or performing these tasks themselves—making it difficult for many women to work the hours needed to earn the highest incomes.

Is the disproportionate burden placed on women litigators by family caretaking responsibilities a form of gender bias? Are these responsibilities the reason women lawyers at all levels earn less than their male counterparts? In a 2001 ABA study, a third of women lawyers and over half of male lawyers doubted that women lawyers could manage the roles of lawyer, wife, and mother simultaneously and successfully. Yet, as the popular joke goes, how often is the man of a newly engaged or married couple asked how he plans to balance family and career?

A 2001 Catalyst study of 1,400 lawyers found that 70 percent of respondents reported work/family conflicts. More than half the women reported that “family friendly” policies are the main reason for changing employers. Younger women lawyers expressed concern about emulating senior women who remain single or childless.

Also in 2001, the Boston Bar Association published a study, “Facing the Grail: Confronting the Cost of Work-Family Imbalance.” This study found that law firms are becoming increasingly bottom-line oriented—hardly an epiphany. This often creates a competitive ethos within the firm that encourages extremely long hours, making it extremely difficult for attorneys to balance work and home lives. Practices that fuel this environment are compensation systems based on billable hours, “up or out” policies, and the equation of merit with long working hours. Both male and female associates are leaving large-firm practice in large numbers, but the number of women leaving are higher than the number of men. The study concludes that the underlying culture of law firms must be addressed.

A 2001 ABA report noted that both men and women lawyers were willing to earn less if they could have more family time. The same study concluded that the wide disparity between what lawyers want and what their employers require is attributable to generation and gender gaps. Older men who are not expected to participate fully in family life often hold management positions. Generational and gender conflicts arise when senior lawyers who made substantial personal sacrifices to achieve professional success expect the younger generation of lawyers to make the same tradeoffs. Younger lawyers see other workplaces changing to accommodate more balanced lives and become frustrated by law firms’ resistance to change.



Although men and women lawyers both face work/family issues, a disproportionate burden of family care still falls to women. How should women lawyers navigate this situation? A woman partner in a prominent law firm speaking to the student chapter of the women’s bar at a local law school was asked, “What is the most important advice you can give us?” She responded, “Marry the right husband.” The law students snickered and jeered. The speaker thought her answer practical and realistic, not cynical, and explained that unsupportive husbands, unwilling or unable to partner a woman lawyer, had undermined many of her peers. “It’s not taking the baby to the doctor that’s so hard, it’s *knowing* that the baby needs to go,” she explained.

Women litigators have taken different approaches to solving work/family conflicts. Some leave law practice, and reports show women leave the profession in greater numbers than men. These women conclude they cannot “have it all.” Others develop innovative family and work lives. For example, Deborah Kochan, an adjunct professor at Hastings Law School and a partner in the San Francisco law firm Kochan and Stephenson, reports that she and her partner-husband alternate spending three work days a week at home with their three-year-old son and, except when they are in trial, do not work weekends. 11 *Hastings Women’s L.J.* 239 (2000).

Other women “mommy track,” sequence, or job share. These compromises have a downside because these lawyers leave the profession at higher rates than women lawyers who remain single or childless. ABA reports indicate that the mommy trackers earn less, receive no benefits, lose their opportunities for advancement or partnership, and are assigned less interesting cases. They are not viewed as “serious” lawyers.

Professor Joan Williams argues that:

Most women never even get near the glass ceiling. Most are stopped dead, long beforehand, by the maternal wall. That wall stems from the way we define our ideals at

work: in the law, the ideal worker is defined as someone who starts to work in early adulthood, and works fifty or sixty hours a week, without a break, for the next forty years. This requirement for forty years of unbroken “face time” eliminates most women from the pool for law partnership due to the time taken for motherhood.

Women litigators must learn to invent new ways of working. At first, the woman litigator may accept the rigid 2,000-plus billable hours paradigm because this is the only form offered to the young law school graduate. However, women lawyers who are willing to risk conventional success in terms of money, partnership, and status might discover new work models.

Some women lawyers simply take a break from practice, usually to care for a child. In Washington, D.C., a group called Lawyers at Home keeps women connected to other lawyers and provides mutual support. Because lawyers largely define themselves by their work, women lawyers who leave practice for a time may feel invisible and experience a loss of self-esteem.

However, the benefits of a work hiatus may be tremendous. For example, Jane, a litigator, felt tremendous burnout after seven years in a large firm where she had worked on one large case for five of those seven years. None of the male lawyers who were married when the case started were married when it ended. Three of the four women lawyers assigned to the case had left the firm. Jane requested a year off, went to China to teach English, and stayed for two years. After her return to the firm, she refused to resume her previous schedule and lifestyle. Having been away from the large firm culture, Jane was no longer invested in making partner. At the same time, her newly acquired Chinese language skills made her very appealing to the firm, which represented an American corporation trying to do business in China. Eventually, Jane became in-house counsel to that firm.

Sarah was a young litigator in the same original firm as Jane. She found it more practical to try an alternative work arrangement within the firm. After the birth of her first child, she took a six-week maternity leave and then began working three days a week at 60 percent salary. However, she quickly became disillusioned by a combination of schedule creep and undesirable work assignments. Sarah found that she worked more and more hours for the same reduced salary. Her assignments were “dog” cases that the firm took to benefit important business clients. After the birth of her second child, Sarah left the firm and the practice of law. Two years later, she joined the state’s attorney general’s office, where she works 40 hours litigating collection cases.

Although a 2000 study found that 96 percent of large law firms offer part-time work, only 3.9 percent of lawyers work part time. Moreover, according to a study by the Women’s Bar Association of Massachusetts, attrition among part-time lawyers is even higher than the high attrition rates among lawyers in general. Thirty-eight percent of new associates leave within three years, 70 percent within seven years. Women lawyers with reduced hours leave at higher rates than full-time women lawyers and at rates more than twice those for full-time male lawyers. Joan Williams suggests “the maternal wall in the law does not stem from the non-existence of part-time programs but from stigma and schedule creep.” “Stigma” means that women lawyers who work reduced hours are viewed as less serious and committed. “Schedule creep” refers to the fact that lawyers working reduced hours, say, three days a week, often work an additional day without

additional compensation. Yet these lawyers are not eligible for bonuses or choice assignments.

Jennifer worked for a large firm for six years, remaining single and childless. At first she loved the excitement, status, and money. However, she noticed that the women partners in the firm tended to be single or, if married, childless. Moreover, Jennifer felt she had no real control over her destiny—the partner for whom she worked decided everything from her work and vacation schedule to the type of cases assigned her. Eventually, she opened her own solo practice, specializing in healthcare law.

But why must lawyers like Jennifer be forced out of traditional law firms if they want to marry and have children, like their male counterparts? Law firms need to adopt some of the same contemporary approaches to the workplace already employed by their clients. Meaningful part-time work, job sharing, on-site childcare, and proportional benefit and promotion policies that lead to higher productivity and retention in other industries would work in law firms, too.

Some lawyers do not acknowledge work/family issues as gender bias issues at all. They argue that lawyers who cannot meet the demands of their law firms or the profession should leave. Yet for many women lawyers, the very structure of the profession, combined with traditional family responsibilities, creates additional costs. Almost 50 percent of women lawyers are single, compared to 15 percent of men, and women of every level earn less and occupy lower status positions.

Putting the wage gap and disproportionate family and domestic responsibilities aside, women litigators routinely have to deal with inappropriate comments and sexist remarks in the course of each workday. Those who have never endured such treatment may believe some women lawyers are simply too sensitive or not “tough litigators.” Others dismiss such incidents as isolated cases of incivility, insensitivity (on the part of men), oversensitivity (on the part of women), or even zealous advocacy that women litigators must learn to live with in the “real” world of lawyering and litigating.

Gender bias in the courtroom creates a dilemma for the woman litigator. If she responds, her client may suffer—she must speak “nicely” to avoid alienating the judge. If she stays quiet, her credibility may suffer. She may be seen as ineffective or incompetent—a patsy or a pushover. Assertive women lawyers have been described in terms ranging from unflattering to profane. Male attorneys engaged in the same conduct are viewed favorably, as zealous advocates, good tough lawyers.

Every woman litigator has a gender bias story. Often it is poignant. Here are a few.

For three weeks, attorney Franklin tried a tough case. Millions of dollars were riding on her ability to deliver. Now she was ready to tell the jury all of the reasons why its verdict must be for her client. Even the senior partner had come to watch. She stood and approached the jury. Her lips began to form the first words of a dynamic closing. Suddenly, the judge spoke: “Mrs. Franklin, please approach. Other counsel may come as well if they like.” She was taken aback, knocked off her stride. As she reached the bench and waited for other counsel, she searched her memory: What can this be? Opposing counsel arrived; the judge looked down, smiled, and said, “Mrs. Franklin, before we finish up here today, I just wanted to tell you how great you look in that suit. It really shows off your legs. I’ll bet your husband loves it.”

It will come as no surprise to women litigators that this

actually happened. In a social context, the judge's comments may have been benign or even complimentary. However, in the courtroom setting, calling attention to the appearance and marital status of a woman lawyer is inappropriate and denigrates her professional role as a litigator by emphasizing her private life. The effect, if not the actual purpose, of the judge's comment is to remind everyone that she is, first and foremost, a married lady interested in pleasing her husband. Although Franklin is a highly respected senior associate in the litigation department of the largest firm in the city, to the judge she is first and foremost an attractive woman. His comments undermine not only Franklin's effectiveness in this case; they undermine the progress made by women litigators.

Progress in raising the consciousness of judges like this one, and like-minded lawyers and courtroom personnel, has been achieved not by chance but by prolonged, persistent

This female litigator used the male expert's gender-biased thinking about women to undermine him.

efforts to rid the litigation system of gender bias. Perhaps the grossest, most obscene incidents of gender bias are behind us. Yet women litigators still must translate formal equality into everyday fairness and justice for women in the courts.

Throughout the country, state and federal courts have begun to insist that attorneys adhere to standards of civility and professionalism. This trend can be seen in the discovery guideline rules, which do not have the force of law but prescribe the etiquette that should attend discovery. States have enacted "civility guidelines" applicable to all phases of litigation. Some states require that some or all members of the bar attend professionalism courses as a condition of continued eligibility to practice. The evolution of these codes and requirements reflects the increasingly held view that gender-biased conduct is not just rude—it is unprofessional.

A judicial system in which female lawyers may be addressed as "sweetheart," "honey," or "baby" can undermine the effectiveness of these lawyers and of the system's integrity. Reports indicate that comments are made about women lawyers' physical appearance but not about men's. The Report of the Florida Supreme Court Gender Bias Study Commission specifically noted that such comments may seem innocent or flattering, but "no one would think so if a judge complimented a male attorney on the cut of his suit, or his broad shoulders." A woman litigator who is told, "I don't know if you're smart, but you sure have great legs," may find it difficult to establish her competence and authority in the courtroom. *Report of the N.Y. Task Force on Women in the Courts*. Even if they are not experienced as embarrassing and demeaning, these words undermine equality in the courtroom.

The Connecticut judiciary, in its *Gender and Justice Guidelines to Insure Fairness*, addresses gender stereotyping by instructing, "Do not expect attorneys who are women to be more passive in their advocacy or more tolerant of interrup-

tions or reprimands than attorneys who are male." Since the early 1980s, more than 40 states, the District of Columbia, and federal circuits have formed task forces to study gender bias in the courts. These task forces and the ABA Commission on Women in the Profession have investigated gender bias, documented its existence, and issued directives to eliminate it. The findings and recommendations of the reports and studies are remarkably similar, concluding that gender bias is a "pervasive problem with grave consequences" that permeates U.S. courtrooms.

Sexual harassment, in the broadest sense, is an ongoing fact of the woman litigator's life. As one woman said, "I've been patted on the head, endured condescending inquiries about whether I was having a bad hair day or a run in my stockings when my mood was less than perky. I have had judges stroke my hair and caress my shoulders as we discuss the upcoming docket." *Texas Final Report* 31 (1994).

Women lawyers report that this conduct can be even more pervasive at depositions (and negotiations) and is directed not only to them but to women deponents as well. How should female litigators handle these situations? One lawyer told his female counterpart during a deposition, "I don't have to talk to you, little lady"; "Be quiet, little girl"; "Go away, little girl." He was sanctioned for misconduct. *Principe v. Assay Partners*, 586 N.Y.S. 2d 182, 184 (1992). In Chicago, a lawyer wrote to his female opponent threatening to perform a "cliterectomy" on her if she did not act in what he thought a reasonable way. He was reprimanded, the mildest form of discipline available. *Chicago Daily L. Bull.*, (Apr. 23 1993). There is a growing belief that this sort of gender-biased, insipid conduct by lawyers and judges is not just rude, it is professional misconduct.

Communication theory may offer some guidance. Qualities considered essential for successful litigators—authority, control, competence, and power—often are viewed as male norms. In *Talking from 9-5—How Women's and Men's Conversational Styles Affect Who Gets Heard, Who Gets Credit, and What Gets Done at Work*, Deborah Tannen notes that men have the advantage of culturally recognized symbols of power and authority such as height, heft, and low-pitched voices. Male speech patterns and the body language and direct eye contact that accompany them are straightforward and dominating. *Id.* at 167 (1994)

Stereotypical thinking about women litigators' inexperience and incompetence, especially their perceived inability to understand complicated technological or scientific information, can be used to the female litigator's advantage. One litigation veteran recalls a products liability case she litigated as a young lawyer. She was deposing an expert witness who enjoyed a reputation for being extremely difficult and confrontational. Experienced lawyers grumbled that it was impossible to get any meaningful information out of him. She recalls:

Well, surprise. The sexist old geezer assumed that I was a sweet, young thing who just did not know what this product was all about. He decided to come to my rescue and he became very paternal and abandoned his former habit of monosyllabic answers. He started pontificating and preaching and explaining everything about the industry from its infancy up to the present. I could simply ask "what do you mean?" and he would go on for ten pages. We got a transcript worth its weight in gold, and to this day, I think that I succeeded where men had failed

because, instead of being threatening to him as my male predecessors had been, my femaleness and his sexism made it impossible for me to threaten him. Because I was a woman, he perceived me as vulnerable and in need of being rescued, and this brought out another side of his personality. Even during the deposition, men lawyers who had tried unsuccessfully to get information out of this witness were marveling at how loose his tongue had become.

This female litigator used the male expert's gender-biased thinking about women's competence to undermine him. She behaved as the older man expected her to—sweet, deferential, and unthreatening—as opposed to acting competent, decisive, and sure of herself. The technique worked brilliantly. Studies of ambivalent sexism demonstrate that men may be more welcoming to women who perform conventionally in gender terms but may react negatively to unconventional women.

As Robin Lakoff argues in *Talking Power*, it is men's language, verbal and non-verbal, that society considers the language of power. For example, men tend to move their hands infrequently as they speak. By contrast, women move their hands often, as though this enhances the power of their message. In fact, increased hand movement dilutes the message. Men interrupt women more frequently than they are interrupted. Because women's speech patterns are perceived as less powerful, women may carry an extra burden to establish their competence in depositions and at trial.

Communication experts categorize speaker credibility into four areas: (1) goodwill and fairness; (2) expertise; (3) prestige; and (4) self-presentation. Informal polls of judges indicate that judges perceive women lawyers *as a whole* as being more prepared than male lawyers. Nevertheless, women rank higher than men in only one of the four areas: goodwill and fairness. Men outrank women in expertise, prestige, and self-presentation. These studies thus underscore the role of speech patterns, voice, and body language in creating an image of power. This ability to project an image of power translates into tangible results for the client, credibility with the court and court personnel, and increased self-confidence for the attorney.



Women cannot merely adopt the male formula. Numerous studies and the task force reports show that women who project goodness and fairness may seem less competent than their male adversaries. On the other hand, women who adopt a more assertive stance may relinquish their hold on the “goodwill and fairness” category of speaker credibility. Another aspect of goodwill and fairness is seen in the context of maintaining collegial relationships with opposing counsel. Most practitioners do not engage in gender-biased conduct, and encountering it is disconcerting. For this reason women lawyers may be slow to recognize and squelch it, even when it is used strategically.

Many lawyers may consider sexist words and conduct to be just a litigation tactic, “nothing personal.” “Sexual trial tactics” describes male litigators’ use of gender bias to undermine their female opponents. Sexual trial tactics include in-court conduct such as addressing the female attorney by her first name, or blatantly sniffing the air over her shoulder while saying loudly enough for the jury to hear, “nice perfume.” At a minimum, these tactics threaten to interfere with the woman litigator’s pacing and organization. More significantly for the outcome of the case, they may encourage witnesses to be disrespectful and uncooperative. These unprofessional tactics need not succeed.

An effective woman litigator must anticipate the potential for gender-biased conduct and prepare for it in the same way she plans for procedural or evidentiary issues that may arise. She must respond with an equal assertion of authority and power:

Prepare the case flawlessly. She must have full command of the facts and law governing the case, and thoroughly organized documents and exhibits. In short, her case preparation must not leave her vulnerable to legitimate criticism.

Research opposing counsel and the trial judge and their reputations for gender-biased conduct. She must determine whether complaints of bias have been made about them. If so, what was the nature of the complaint? Was either of them sanctioned? If sanctions were imposed, does the conduct persist? Will the fact that the trial or deposition is recorded inhibit gender-biased conduct? What have other women lawyers experienced with this judge or lawyer, and how did they handle it?

Plan a strategy appropriate to the forum—deposition, court-ordered settlement conference, motion hearing, bench trial, and jury trial. She may even develop possible scenarios that might arise and plan her responses. Doing so, especially for less experienced or less spontaneous female litigators, frees them from having to formulate a response at the instant the objectionable conduct occurs.

In determining the best approach to these tactics, the woman litigator must demonstrate her confidence and competence while not offending societal notions of how a woman should behave. A woman litigator can best demonstrate her knowledge and skill to judge, jury, opposing counsel, and witnesses by resisting the typically “female” speech patterns that communicate weakness and insecurity. She should not pose statements as questions. She should not seek agreement with her every statement. She should not blunt the impact of her statements with “filler” language. Instead, her statements should be clear, audible, and powerful.

Studies show that women who speak powerfully, interrupt others, and behave assertively risk being disliked. Women

(Please turn to page 64)

the case is wrong—an injustice.

“Facts, not argument, are what persuade.”

“I don’t know,” said Jamie.

“Give it a try and let’s see what happens,” said Angus.

Fifteen minutes later she started over again.

When she finished her statement of facts, Angus and I both applauded. □

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Gender Bias

(Continued from page 18)

litigators who confront their opponents’ tactics may be labeled as “overly sensitive” or “humorless.” A male witness may become aggressive if he feels threatened by the woman litigator’s power. He may dislike answering to a woman, or his temperament may clash with her style. The woman litigator should approach this witness in the same manner as she would any other “troublesome” witness: She should conduct her examination in a way that will elicit the most information from that particular witness.

What should a woman litigator do if the abusive opposing counsel or witness cannot be controlled? This depends upon the context. At one extreme, she may request sanctions. In a New York decision, *In Re Jordan Schiff*, the court sanctioned a male attorney for being “unduly intimidating and abusive toward defendant’s counsel” because “he directed vulgar, obscene and sexist epithets toward her anatomy and gender.” 559 N.Y.S.2d 242. If sanctions are not immediately available or appropriate, female lawyers may report abusive and gender-biased behavior by other lawyers to their bar association or grievance commission. Such conduct by judges should be reported to the appropriate judicial ethics commission.

At the other extreme, a woman litigator may choose to ignore her opponent’s “sexual trial tactics” for the time being, and continue her own plan for the case. Nevertheless, even if she ignores these behaviors for the moment, she should be certain they are reflected in the record. Nonverbal tactics should be described for

the record where necessary. She should never agree to proceedings “off the record,” either in court or in deposition. Sometimes, faced with no response to his bullying and intimidation, the male lawyer may stop. At other times, ignoring unacceptable behavior could be interpreted as unwillingness or inability to deal with conflict. At some point, the woman litigator must confront opposing counsel’s inappropriate conduct with a demand that it stop. For example, in a jury trial, a woman litigator may request a bench conference, place on the record an objective description of opposing counsel’s gender-biased conduct, and request the court to order counsel to stop.

Sometimes the best interests of the client require the female litigator to defer her response until after the proceeding has concluded. One woman litigator was in the midst of trial when the judge instructed the clerk to turn off the tape recorder. The judge said to the lawyer, “Counsel, I’d like to tell you how very nice you look in that sweater.”



Quite surprised, she replied simply, “Thank you, Your Honor. Shall I resume my questioning now?” Later this incident, including the judge’s name, was reported to one of the state committees studying gender bias in the courts.

At other times, protective orders or sanctions are appropriate. In a 1999 Maryland case, *Mullaney v. Aude*, 126 Md. App. 639, 730 A.2d. 749 (1999), a female plaintiff successfully sued a male defendant in tort for infecting her with a sexually transmitted disease. During the plaintiff’s deposition, she was asked to retrieve a document from her car. The defendant’s male lawyer commented that the plaintiff was leaving to meet “[a]nother boyfriend.”

When the plaintiff’s lawyers complained, the defendant’s lawyer insulted the female lawyer and called her “babe.” When she objected, he replied that at least he hadn’t called her “bimbo.” The plaintiff’s lawyer sought and received a protective order and her attorneys’ fees, and the Maryland Court of Special Appeals upheld the imposition of sanctions. The court noted:

While strategy and tactics are part of litigation, and throwing your adversary off balance may well be a legitimate tactic, it is not legitimate to do so by the use of gender-based insults.... We have long passed the era when bias relating to sex ... is considered accepted as a litigation strategy.

A woman litigator’s preparation for resisting gender-biased conduct starts before she walks into the courtroom or deposition. Her reputation as an expert litigator precedes her there. It identifies her as someone who knows how to handle adversity effectively. She acquires this reputation by being prepared, by keeping her word, and by freely discussing her victories and accomplishments.

Both overt and subtle gender bias persist. Whether it is affirmatively perpetuated by judges and lawyers or merely permitted to occur, the result is the same. It is unlikely that commissions, studies, and task forces will change the hearts of those who practice gender bias. Nevertheless, courts can and should punish this conduct as unprofessional.

Performance evaluation issues also create problems. Some experts in the performance evaluation field argue that subjectivity is key to performance evaluations but that such subjectivity itself creates the possibility of gender bias. For example, people tend to react differently to women who speak decisively than to men who speak the same way. They tend to defer to the men but resent the women, from whom they want “softer” behavior. This may reflect subtle underlying gender biases.

Studies demonstrate that a majority of women litigators test as extroverts on the Myers-Briggs Type Inventory, but 60 percent of male litigators test as introverts. These personality traits inspire different ways of working. Introverts resist meetings and collaborative problem solving and tend to be independent, private, and taciturn. On

the other hand, women litigators, predominantly extroverts, solve problems through discussion, collaboration, and networking. The practical effect may be that women are viewed as indecisive and lacking self-confidence.

In my judgment and that of a number of those who have studied the issue, many male litigators have a “sensing” preference, as distinguished from an intuitive preference thought to be common to women litigators. Sensing litigators are often characterized as traditional, concrete, practical, and hierarchal. Intuitive litigators are thought to seek change and novel solutions and exercise creativity in finding solutions. Of course, the distinction may appear to many to either be nonexistent or semantic.

A number of researchers believe that women who choose traditionally male professions or roles tend to be intuitives and view membership in a male-dominated profession as an opportunity to implement a different vision of its purpose. If this view is accurate, the result can create stress and conflict for women lawyers.

Although the more obvious sexual trial tactics appear to be on their way out, the subtle and entrenched stereotypical roles that force women to choose between family and professional achievement remain. Harvard Law School’s Mary Ann Glendon summed up the potential consequences this way:

For the first time in history large numbers of women occupy leadership positions and almost half of these new female leaders—unlike male leaders—are childless.... People without children have a much weaker stake in our collective future. As our leadership group tilts toward childlessness, we can expect it to become even harder to pay for our schooling system or for measures that might prevent global warming. America’s rampant individualism is about to get a whole lot worse.

Hewlett, at 159.

If this conclusion strikes you as tentatively gloomy, the choice facing some women lawyers is certainly not one that ultimately will best serve our society. Who can say that the woman litigator who, but for the compelled choice, could be the next great justice of the Supreme Court (or a lower court) is not among the group who is forced pre-

maturely to leave the profession before her great skills can be realized? One need not subscribe to Professor Glendon’s philosophy to recognize that it is in society’s best interests to make the kinds of accommodations that have yet to be made. □

Poston-Horn

(Continued from page 13)

Arab information, and patriotic Arab-American citizens.

Legality. In 1942, the soldiers at Camp Horn protected Americans from the Axis governments but nobody protected the prisoners at Camp Poston from the United States government. As if the Constitution did not exist, the U.S. government exercised dictatorial power, stigmatized an entire racial population, and damaged lives, health, families, homes, businesses, educations, careers, hopes, and dreams. And, to their eternal discredit, the courts let it happen, first by cowering in absentia, and later by rubberstamping in deference.

Of course, the President and Congress must have temporary power to deal with life-threatening emergencies to protect public safety. However, once the government has stabilized the crisis at least temporarily, the courts must unflinchingly assert themselves and independently evaluate the legality of what the government has done. That means judicial review of gross events such as mass detentions, as well as judicial review of more subtle measures that invade privacy and chill speech.

More than 40 years after the “Relocation Centers” were established, Congress passed and President Reagan signed the Civil Liberties Restoration Act of 1988, which appropriated millions of dollars in reparations for the survivors of the camps. According to Congress, this money was paid to redress the wrongs done in the past and also, as Congress stated, to “discourage the occurrence of similar injustices and violations of civil liberties in the future.” At the same time, Congress made this extraordinary apology on behalf of the nation:

The Congress recognizes that a grave injustice was done to both cit-

izens and permanent resident aliens of Japanese ancestry by the evacuation, relocation and internment of civilians during World War Two ... The actions were carried out without adequate security reasons and without any acts of sabotage ... and were motivated largely by racial prejudice, wartime hysteria and a failure of political leadership ... For these fundamental violations of basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.

Perhaps times have changed because, in the wake of September 11, courts have not been entirely deferential and, in many instances they have ruled against the government on such issues as secret arrests, closed deportation hearings, access to counsel, and non-disclosure of names. However, the Supreme Court has yet to be heard from, and Chief Justice Rehnquist has said, reminiscent of the *Korematsu* decision, that in time of war the law speaks with a “muted voice.” *The National Law Journal* (September 9, 2002); see also William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (1998).

At Camp Poston, the law spoke “with a muted voice.” The silence was deafening. □

Free Press

(Continued from page 46)

fighter jet might appear over the Continental Divide on a mission to attack the courthouse.

These same concerns with safety prompted Judge Matsch to empanel an “anonymous” jury, whose identity was known to the parties and the court, but who were referred to in the public proceedings not by name but only by juror number. (Nevertheless, the press was able to determine the jurors’ identities through independent investigation, and so notified the court clerk.) In addition, throughout the trial, the jury was seated behind a physical barrier that screened their faces from the public and press attending the proceedings, including sketch artists.

When Judge Matsch discharged the