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Gender Bias Task Force: Comments on Courtroom Environment

Sam W Coleman, III*

I. Introduction

I was delighted to be back in Lexington and for the opportunity to return to my alma mater. Before my son graduated from the law school five years ago, I would stop by often to visit him and to enjoy walking around Washington and Lee and spending some time on the Maury River. I have missed being there the last several years, and I thank Professor Morant for the invitation and opportunity to return.

The Court Environment Committee focused not on gender being a factor that the judge considered in reaching a decision, but on whether gender affected or was perceived to have affected the process by personally having some impact upon the players – lawyers, litigants, judges, clerks, magistrates, witnesses, jurors, and others.¹ Did gender play a role in unfairly affecting the behavior and interpersonal relationships of a broad range of participants in the legal system? Did the process have the appearance that one party or another had an unfair advantage or was disadvantaged or was simply treated unfairly or disrespectfully because of the gender of any of the participants?

Often the various participants in the same proceedings viewed the proceedings differently. For example, the male attorney and male judge may have perceived that the female attorney was treated fairly and evenhandedly with the other participants. However, the female attorney and her client may well have felt "disadvantaged" or "marginalized" when the male judge and male attorney, while waiting for the arrival of a witness, discussed their latest golf outing or fishing trip or the results of the latest football game.² From our survey, the judge or attorney would not perceive such conduct as constituting gender bias, but the female attorney who was excluded from the conversation – because as a female she "has no interest in those subjects" – feels very much disadvantaged on the basis of gender when her client says "perhaps I

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1. See GENDER BIAS IN THE COURT TASK FORCE, GENDER BIAS IN THE COURTS OF THE COMMONWEALTH – FINAL REPORT 19-25 (2000) [hereinafter FINAL REPORT] (discussing gender bias in courtroom).

2. See *id.* at 22 (describing instances of perceived subtle bias).

should have hired a male attorney who will receive more friendly treatment from the judge." I can assure you that scenario is repeated every day in many courtrooms throughout the Commonwealth.

In addition to examining interpersonal relationships between the participants, we looked at "economic discrimination" based on gender.³ We asked the questions, "Is there a disparity in how men and women are compensated within Virginia's judicial system for doing the same job? Is there a difference in opportunity for professional advancement between men and women?" These inquiries entailed looking at differences in pay for different positions that more often might be filled by men or women, ranging from court appointed counsel to judgeships, from clerks and deputy clerks to magistrates, and from commissioners of accounts to guardians ad litem.⁴ We looked at the selection process for judges in an effort to determine whether the selection process itself had a built-in bias that favored men over women.⁵

After viewing what I have denominated as "economic discrimination," we looked at what I would call the "physical plant" – the courthouse and its "trappings" or "curtilage."⁶ By this, I mean such things as the courthouse design and its facilities, including such features as whether the courthouse design is more male friendly with regard to witness and jury boxes, witness amplification systems, and child care facilities (or the lack thereof). Here we were not looking for purposeful discrimination or bias but an attitude that showed an institutional insensitivity to different needs for the male and female participants. These included such things as disfavoring unisex bathrooms, particularly when they were just off the jury room,⁷ or having a security system where the guards either have no respect for or are not trained to respect the personal privacy of women, e.g., when the officers dump the contents of their purses on the security table.⁸ We also looked at the "literature" of the courts. This entailed examining such documents as judges' benchbooks, clerks' manuals, employees' handbooks, jury instruction books, form orders, policy and procedure manuals, and a host of pamphlets that are distributed through the courts – either by the courts themselves or by related agencies – to determine whether they were gender-neutral or gender-friendly.⁹ We also looked at whether courts had sexual harassment policies in place.¹⁰ I mention all these to illustrate the host of topics that we identified as potential areas where some form of gender bias might exist.

3. See *id.* at 69-71 (discussing occupational clustering).

4. *Id.*

5. See *id.* at 85-90 (discussing judicial and quasi-judicial appointments).

6. See *id.* at 79-83 (analyzing Virginia courthouse facilities).

7. See *id.* at 83-84 (discussing availability of facilities).

8. See *id.* at 80-83 (discussing security measures).

9. See *id.* at 77-78 (analyzing formal language of courts).

10. See *id.* at 72-73 (discussing sexual harassment policies).

At this point, it might be appropriate and informative to note that when we say "gender bias," we are not limited to conscious, intentional discrimination. In fact, more often than not we are talking about an unconscious or subconscious discrimination that occurs because we look at the individual based on stereotypes that we have accurately or inaccurately assigned to one gender or the other or because we have failed to consider legitimate social or physical differences based on gender.¹¹ Thus, gender bias encompasses not only conscious discrimination but also unconscious errors in reasoning and judgment.¹²

I am going to focus on the following three specific areas that the Environment Committee investigated: first, the treatment of attorneys by judges and other attorneys in and around the courtroom;¹³ second, "economic discrimination," – whether women in the system are compensated the same as men for the same work and whether they have equal advancement opportunities;¹⁴ and finally, observations concerning the "physical plant" and how it may be insensitive to different gender needs.¹⁵

II. Treatment of Attorneys

For me, the revelation was startling that male judges and attorneys, with some frequency, treat female attorneys in a demeaning, unprofessional, or uncivil manner based solely on their gender.¹⁶ Those of us who have observed and have been part of the judicial system for twenty years or more have vivid recollections of the stories of when women first came to the bar in significant numbers; judges would tell women attorneys to have their firms not send a secretary to docket call in the future. We also recall instances where clerks, judges, and lawyers would assume that the female attorneys were secretaries; instances when female attorneys would be addressed by terms of "endearment" such as "honey," "sweetie," or, as one female attorney noted, "little missy," or instances involving asking a female attorney to produce her bar card while never asking the male attorney to do the same. Nearly everyone in our survey uniformly reported that great strides have been made. This is probably because of a heightened awareness in the general population of a reduction in the incidences of gender bias in the courts, particularly the more overt "traditional" or "garden variety" forms of bias such as terms of endearment or inappropriate remarks.¹⁷ Thus, I was surprised when our survey disclosed significant inci-

11. See *id.* at 5-6 (discussing unconscious bias).

12. See Blake D. Morant, *Introductory Essay: The Relevance of Gender Bias Studies*, 58 WASH. & LEE L. REV. 1073 (2001) (discussing dangers of heuristic shortcuts).

13. See *infra* notes 16-26 and accompanying text (analyzing treatment of attorneys).

14. See *infra* notes 26-30 and accompanying text (discussing economic discrimination and opportunities for advancement).

15. See *infra* notes 31, 33-35 and accompanying text (discussing courthouse facilities).

16. See Morant, *supra* note 12 (discussing process of heuristics and social cognition).

17. See FINAL REPORT, *supra* note 1, at 19 (noting decline in overt bias).

dents of such overt gender bias behavior.¹⁸ One of our court watchers from Washington and Lee even reported an incident with one judge who, when told that she was there to observe any gender bias in the court, stated, "Well, honey, let me assure you that I am not biased against girls." While I have no doubt that this comment was probably made in jest, it still is perceived by many to show a lack of sensitivity to the situation and to be demeaning and disrespectful.

The survey disclosed basically the following two types of gender-bias behavior by judges and attorneys, and the nature of the behavior was different depending upon the age of the male judge or lawyer:

1. older judges and attorneys made patronizing or paternalistic comments and were more likely to use inappropriate terms of endearment,¹⁹ while
2. younger male attorneys would make overtly gender-biased comments or remarks that appeared to be designed to try to gain some tactical advantage over the female adversary by raising her ire or "getting under her skin."²⁰

As one female member of our committee from Roanoke pointed out, "Time will soon take care of those older lawyers and judges who do it because they don't know any better." But the alarming part of the survey from my perspective was that young lawyers who should be aware of and sensitive to the issue would resort to such unprofessional tactics that are inappropriate and demeaning to female attorneys.

One of the more controversial issues about this aspect of the study was whether judges bear any responsibility to sanction or admonish lawyers for this behavior when it occurs in and around the courtroom. The survey shows that judges uniformly do not consider it their responsibility to intervene in such situations, even when they observe such conduct in the courtroom, unless it somehow is otherwise disruptive of the proceedings.²¹

The more subtle forms of gender bias that the survey reported consisted of such conduct as male judges and attorneys excluding female attorneys from the camaraderie of social interaction that occurs between the male attorneys and judges.²² Of course, judges can avoid the appearance or perception of gender bias that results from this conduct either by avoiding engaging in such conduct or by including all attorneys in such conversations. However, judges need to be made aware of the inappropriate image that this type of conduct creates as far as litigants and the public are concerned. Also, several female

18. See *id.* at 19-23 (relaying incidences of overt discrimination and bias).

19. See *id.* at 20-21 (discussing treatment of women by male judges and attorneys).

20. *Id.* at 20.

21. See *id.* at 250, app. D (documenting how often judges will intervene in situations involving overtly biased conduct).

22. See *id.* at 22 (discussing female attorneys' perceptions regarding social interaction with male peers).

attorneys reported that their zealous advocacy was often viewed as being "strident" or "overly emotional," while the male attorney who engages in similar conduct would be commended for his "aggressive advocacy."²³

A more subtle form of gender bias in the judicial system occurs when a law firm assigns a female attorney to a case in order to create a certain image or aura based on gender to gain some tactical advantage – for example, assigning a female attorney to defend a horrendous sex crime to give the impression that the defendant sitting beside this female attorney is not dangerous or a threat to society, or conversely, assigning a female assistant prosecutor to a sex case in order to isolate the defendant and make him appear more threatening. Similar tactics have been reported in a host of other cases that might be influenced by playing on society's stereotyping by association.²⁴

III. Economic Discrimination and Opportunities for Advancement

One of the concerns heard most often over many decades by those who care about women's issues and women's equality is whether in business, industry, or the educational arena women are paid the same as men for the same day's work. Another concern is whether women have the same opportunity for advancement into the higher paying jobs – whether it be for a school principal or superintendent, or a corporate officer or executive. We wanted to examine these same questions as they relate to the employees of the judicial system.

One of the specific issues that we examined was whether courts or judges award or approve lesser legal fees for female attorneys in divorce or criminal cases than they would approve for male attorneys.²⁵ Happily, we saw absolutely no difference. We saw no indication that judges might assign male attorneys in criminal cases to those cases that might generate higher fees or that guardian ad litem appointments favored one gender over another.²⁶

Of course, the pay scale for judges at all levels is the same regardless of gender. However, we did find that a disproportionate number of female judges are in the juvenile and domestic relations courts in comparison to the number in the circuit courts, which is the higher paying of the trial courts. The study concluded that this is probably more a function of the areas of practice in which male and female attorneys predominantly engage rather than the function of gender bias in the selection process. Circuit court judges more often come from the criminal and tort litigation bar that is predominantly male, while juvenile and domestic relations judges often come from the domestic relations bar, which has a greater number of female practitioners. The fact that women gravitate toward that area of practice may reflect a form of societal gender bias.

23. See *id.* at 21 (noting one female attorney's perception of judge's biased reaction).

24. See Morant, *supra* note 12 (discussing social cognition's role in forming stereotypes).

25. See *id.* at 23 (analyzing fee awards and appointments).

26. *Id.*

Many females reported in the survey that male attorneys are often viewed as more aggressive and more adversarial, favoring them in the role of a litigator.

Another piece of data that supports this conclusion is that the Virginia Supreme Court and Court of Appeals of Virginia, the two highest courts in the system, have a higher percentage of women than the circuit or district courts. The Virginia Supreme Court and Court of Appeals of Virginia also have a higher percentage of females than the female population admitted to practice in Virginia. Three of the seven justices of our Supreme Court are female, and three of our eleven Court of Appeals judges are female. It has been suggested to me by some that this is due to the female intellectual superiority – with which I agree.

What we did find from our survey is that the positions of clerk of court, the highest paid administrative position in the court systems, are generally filled by men, and the lower paying clerical positions are usually filled by women.²⁷ Often entire clerical staffs are women. We received several comments that these clerks' offices experienced no interpersonal gender bias or discrimination from fellow employees because "we are all women in this office."²⁸ We had several survey responses that indicated qualified female employees would be passed over for advancement to promote a male employee into a higher paying position.²⁹

One area of particular concern to a number of female attorneys was the appointment of commissioners of accounts by circuit court judges.³⁰ These commissioners oversee and settle the accounts of all estates and all fiduciaries who administer funds under the supervision of the courts. These positions are particularly lucrative in some affluent geographical areas and are highly desired. The study showed that only two or three of the more than 100 commissioners in the state are women. I am not sure that the study reached a conclusion about this data or whether the disparity reflected some form of gender bias. Certainly that perception would exist just from viewing the statistics. However, many of these appointments are longstanding and, probably to some degree, have yet to reflect the make-up of the bar, although historically an institutional bias against appointing women as executors, trustees, or fiduciaries has existed.

IV Physical Plant – Courthouse Facilities

In my estimation, the study revealed two particularly significant deficiencies in the area of the courthouse as a physical plant. The first was the total lack of childcare facilities available in the judicial system in any jurisdiction,

27. See *id.* at 69-70 (discussing occupational clustering).

28. *Id.* at 71.

29. See *id.* at 73 (discussing lack of professional opportunities for women).

30. See *id.* at 248, app. D (documenting perception of bias in appointment process).

even in the large metropolitan areas in northern Virginia.³¹ The second was the lack of sexual harassment policies in the circuit court clerks' offices or, at least, a lack of awareness that such policies exist where they do.³² I think these findings were not surprising because from common knowledge we would not expect or anticipate that courts would maintain child care facilities. However, we might anticipate that courts would know about the availability of such facilities in their area because jurors, witnesses, or litigants may have the need for such services. Of course, the need and availability of childcare has been the topic of much discussion in business, industry, and government.³³ Similar needs were found to exist on occasion in the judicial system. In fact, women lawyers reported being asked to care for children of jurors or witnesses who had to bring their children to court because of the unavailability of child care.³⁴ We have proposed some type of pilot project in one of the larger metropolitan courts to see to what extent such services would be utilized and would be beneficial to females who have child care needs.³⁵

As to sexual harassment policies, the general district courts' clerks' offices, which are under the direct supervision of the Supreme Court, have a statewide sexual harassment policy.³⁶ However, circuit court clerks are elected constitutional officers, which means that within certain parameters they adopt and set their own policy.³⁷ Of the more than 100 circuit court clerks in the state, our survey indicated that only four had adopted sexual harassment policies, and the disparity between the quality of those policies was stark.³⁸ These figures may be misleading because it may well be that many of the clerks' offices and their employees are subject to the sexual harassment policies of the local governments. However, the remarkable finding was that the employees of the clerks' offices that responded were not aware of the existence of a sexual

31. See *id.* at 80 (discussing lack of accommodations for children in courthouses).

32. See *id.* at 72-73 (discussing sexual harassment policies).

33. See generally Stephen Barr, *Morella Pushes for Permanent Child Care Supplement for Low-Income Workers*, WASH. POST, Feb. 13, 2001, at B2 (discussing proposal for allowing federal agencies to assist low-income employees in paying for child care); Maria Glod, *Arlington Woman Admits Abuse of Day-Care Children*, WASH. POST, Feb. 9, 2001, at B4 (reporting on cases of child abuse by day-care provider); Jacqueline L. Salmon, *Va. Providers Of Child Care Get Organized*; *Alexandria Effort Reflects Growing National Trend*, WASH. POST, Mar. 14, 2001, at A10 (discussing organizing movement of child-care providers); Christina A. Samuels, *Day Care Scarce for Disabled Children; Long Waiting Lists, Untrained Staff Leave Many Parents With Few Options*, WASH. POST, Oct. 9, 2000, at B3 (noting problems that parents with "special needs" children face in seeking day care).

34. FINAL REPORT, *supra* note 1, at 80.

35. See *id.* at 84 (recommending pilot child-care centers in select locations).

36. See *id.* at 72 (discussing sexual harassment policies).

37. *Id.*

38. See *id.* at 72-73 (noting low response rate).

harassment policy³⁹ Perhaps that should be viewed as encouraging; hopefully, that means that those offices have never had an incident of sexual harassment that has required an employee to seek the protections of such policies.

We also considered a number of other issues, which I will discuss briefly. Many respondents mentioned that officers manning court security systems are not sensitive to women's personal privacy when they dump the contents of their purses on the security table or when they make inappropriate sexual comments.⁴⁰ We looked at whether the language in many court documents and manuals is gender neutral,⁴¹ and we even looked at courthouse and courtroom design, particularly restroom facilities, to see whether the needs of female employees and jurors were taken into consideration.⁴² We also looked at the judicial selection process,⁴³ and we looked at whether the judicial ethics enforcement mechanism is capable of addressing claims of gender bias by judges.⁴⁴

V Recommendations

Our primary recommendations to address many of these problems were that new judges' training and all judges' annual conferences include an educational component concerning gender fairness and gender sensitivity training.⁴⁵ We need to heighten the awareness of those who are associated with the system and who are in a position to effectuate change – whether they be judges, lawyers, bar association leaders, or members of the General Assembly – that a problem exists.

VI. Conclusion

In summary, while the last decade has shown considerable improvement, particularly showing fewer instances of overt gender bias and demeaning conduct, significant incidences of gender bias, both overt and subtle, still occur. Probably the more subtle incidences are more difficult to identify, making it more difficult to convince others that there is a problem. Therefore, we have our work cut out for us in making further inroads in identifying and promoting gender fairness in the courts of the Commonwealth.

39. See *id.* (relaying comments accompanying surveys regarding sexual harassment policies).

40. See *id.* at 81 (discussing gender bias in court security).

41. See *id.* at 77-79 (analyzing formal language of court).

42. See *id.* at 83-84 (examining gender bias in restroom availability).

43. See *id.* at 85-88 (discussing judicial and quasi-judicial appointment process).

44. See *id.* at 91-93 (discussing judicial ethics and discipline in context of gender bias).

45. See *id.* at 79, 94 (listing recommendations).

NOTES
