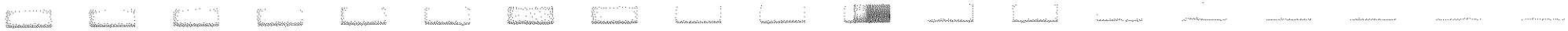
To The New Mexico Supreme Court and
The Board of Bar Commissioners of the State Bar of New Mexico

FINAL REPORT

The Status of Women Attorneys in New Mexico

Sarah M. Singleton
Chair

TASK FORCE ON WOMEN AND THE LEGAL PROFESSION



FINAL REPORT

of the

NEW MEXICO STATE BAR TASK FORCE ON WOMEN AND THE LEGAL PROFESSION

November 2, 1990

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(Note: Copies of the Appendices may be obtained from the State Bar of New Mexico for $6.00, including postage).

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TASK FORCE ON WOMEN AND THE LEGAL PROFESSION

REPORT

INTRODUCTION

The Task Force on Women and the Legal Profession was started by the State Bar of New Mexico in December 1987. The Task Force was organized with twenty original members. The current Task Force consists of thirty-one members. *See* Appendix 1. Six of the members are male. Five of the members are current or retired judges. Two law professors serve on the Task Force. One law student also serves. Dean Theodore Parnall and Associate Dean Peter Winograd of the Law School serve as ex-officio members of the Task Force. A member of the Task Force on Minorities in the Profession also serves as a liaison.

In 1987, then State Bar President C. Emery Cuddy, Jr., asked the Task Force to "examine the needs of women lawyers, their acceptance by the Bench and Bar in general, their needs and the degree to which the State Bar has addressed those needs." Cuddy letter dated December 10, 1987, Appendix 2. Simultaneously, the American Bar Association had established a Commission on Women in the Profession. Report of the Commission on Women in the Profession, Appendix 3 (hereinafter ABA Report). During the same time period, states throughout the country were establishing commissions to investigate gender bias.[1] The New Mexico Task Force was immediately in contact with the ABA Commission and with the National Judicial Education Program to Promote Equality for Men and Women in the Courts which serves as a clearinghouse for gender bias task forces.

One of the first communications which the Task Force received was from Lynn Hecht Schafran, one of the foremost women in the country on the study of gender bias. Ms. Schafran cautioned against misplacing the emphasis of the Task Force by concentrating on "court interaction, women lawyers' concerns about fees and judgeships and lawyers' attitudes about sex roles as opposed to focusing on judges' decisions in substantive law areas." Schafran memo dated April 5, 1988, Appendix 4. Ms. Schafran's advice was echoed in the manual *Operating a Task Force on Gender Bias in the Courts*. With these admonitions in mind, the New Mexico Task Force determined that the work of the Task Force had to include study of whether gender bias was affecting women who were not lawyers who came into contact with the legal profession either as litigants or as witnesses.

The Task Force did not, however, believe that its mission was the same as that of a Task Force established solely to investigate gender bias in the courts. Because we were established by the Bar, we believed that we also had an obligation to look at the role of women in the profession. To meet our dual objectives, we decided to investigate the following areas:

1. Professional Experience;
2. Women as Decision Makers;
3. Treatment of Women by the Courts; and
4. Impact of Gender Bias in Decision Making.

The Task Force reviewed a vast amount of information. The Task Force reviewed the reports that had been prepared by the commissions in other states. As of August 1990, Task Forces in California, Colorado, Florida, Illinois, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Utah, Washington, and Wisconsin had prepared reports which were reviewed by the New Mexico Task Force. The Task

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[1] The first gender bias task force was started in New Jersey in 1982. By December 1989, thirty states had gender bias task forces. Schafran, Overwhelming Evidence: Reports on Gender Bias in the Courts, 26 Trial 28 (1990).

Force also reviewed other literature in the areas studied. We analyzed the Supreme Court rules. A representative attended the National Conference on Gender Bias in the Courts. Thirty-eight law firms were surveyed regarding parental leave policies. The Report on Parental Leave Policies appears as Appendix 5. The Task Force held regional meetings in twelve locales around the state. The Report on the regional fact finding meetings is Appendix 6. With the assistance of John Temple, Assistant Director of the Bureau of Business & Economic Research at the University of New Mexico, the Task Force surveyed all active in-state members of the Bar. A copy of the survey appears as Appendix 7. The Task Force was permitted to use the data collected by Antoinette Sedillo Lopez, Lee E. Teitelbaum and Jeffrey Jenkins for their article, "Gender, Legal Education and Legal Careers" which is to be published in the *Journal of Legal Education*.

This report first looks at the experience of women as members of the Bar and as members of the profession. The report then analyzes the courtroom experience. The third area of the report focuses on substantive areas of law which may impact women: family law, domestic violence, juvenile justice, criminal law, and civil justice. Within each area, the Task Force has made findings and recommendations.

The Task Force's conclusion after completing its investigation is that, although the law has made significant gains towards eliminating gender bias, the attached recommendations in the report should be adopted by the Bar because bias still exists in the administration of the law and in the treatment of women as professionals.

The Task Force urges the Bar to recognize publicly that gender bias exists in the law and in the profession and to take steps to ameliorate, if not eliminate, it. Adoption of the recommendations will demonstrate the Bar's commitment to the principle that discrimination is incompatible with professionalism. Action by the Bar is particularly important because of the difference in which male members of the profession and female members of the profession see the problem. The survey indicated that men perceive fewer problems of discrimination than do women. By adopting the recommendations of the Task Force, the Bar will demonstrate its belief that concerns over gender bias are not the trivial complaints of a few female attorneys but are concerns which affect the profession's ability to render even-handed justice.

SURVEY METHODOLOGY

In order to examine whether there was gender bias in the profession, the Task Force developed and administered a comprehensive questionnaire which was sent to the 3,683 active instate members of the Bar. (The survey is Appendix 7.) Responses were received from 1,105 lawyers and judges. There was a differential rate of return between men and women. While men represent 75 percent of the Bar, males represented only 60 percent of the survey respondents. Similarly, while women represent 25 percent of the Bar, they represented 39 percent of our respondents.[2] To avoid possible response bias which might be caused by the over-responsiveness of females, the Task Force has attempted to distinguish between male responses and female responses. Where there is no breakdown between males and females, the reader should take into consideration the differential response rate.[3] The questionnaire addressed perceptions of the courtroom environment, family law, domestic violence, criminal law, juvenile law, civil law, the professional experience and Bar involvement.

The Task Force attempted to determine whether the responses were representative of the Bar as a whole except for the above-mentioned gender unrepresentativeness. We were pleased to discover that the respondents were very representative and thus were able to eliminate other potential types of response bias.

For example, the breakdown of respondents by ethnicity closely resembles the Bar as a whole. Of the males who responded 81 percent are Anglo which is the same percent of Anglo males shown by the Bar dues checkoff. Similarly, 16 percent of the male survey respondents were Hispanic compared to a 15 percent male Hispanic population in the Bar. Less than 1 percent of the male survey respondents were Black or Asian American/Pacific

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[2] Nineteen respondents declined to indicate a gender.

[3] The Task Force, while generally heartened by the response to the survey, was somewhat discouraged that only 25 percent of the men in the Bar took the time to respond and that only 49 percent of the women responded.

Islanders which is also the percentage of male Bar members of those ethnic backgrounds. One percent of the male survey respondents were Native Americans, as are 1 percent of male lawyers. [TF84; BD][4]

Eighty-two percent of the female lawyers are Anglo and 85 percent of the female respondents are Anglo. Thirteen percent of female lawyers are Hispanic, while 12 percent of the female respondents are Hispanic. Women who are Black represent less than 1 percent of the female Bar membership, and the same is true of the female respondents. The same statistics apply to Asian Americans/Pacific Islanders. Female Native Americans are almost 3 percent of the female lawyers and 2 percent of the respondents.

Analysis of the type of practice shown by the Bar dues checkoff and by the survey responses also shows no significant different characteristics between the Bar as a whole and the respondents. With respect to female members of the Bar and female survey respondents, the comparison of the Bar dues checkoff information with the survey responses shows:

	Bar	Survey
Firm	39%	41%
Sole Practice	16%	20%
Government	31%	34%
Corp./Banking	2%	2%

[TF75, BD]

With respect to male members of the Bar and male survey respondents, the comparison of the Bar dues checkoff information with the survey responses shows:

	Bar	Survey
Firm	48%	53%
Sole Practice	30%	26%
Government	17%	17%
Corp./Banking	<2%	<2%

[TF75; BD]

The similarity between the survey respondents and the Bar as a whole gave the Task Force confidence that the results from the survey can be taken to be representative of the active instate Bar.

Throughout this report there are discussion of "significant differences." As a general rule, the Task Force has used the term "statistically significant difference" only when the differences are great enough that they are not attributable to chance. There are, however, practical differences which must be distinguished from statistical differences. The Task Force has used its judgment in determining whether differences are large enough to be of practical consequence.

[4] Data has been taken from the Bar dues checkoff data and from the Task Force survey. When information is from the former, the citation is BD. When it is from the latter, the citation is TF followed by the question number. The Task Force has also been permitted to use information from a survey of UNM law graduates. The UNM survey is discussed in detail at pp. 12 - 16, *infra*. Citation to the UNM survey is UNM.

In analyzing the survey data, the Task Force has chosen to round percentages to the nearest whole number. Additionally, where it was important to communicate the thoughts of those attorneys with experience, those respondents with no experience have been excluded from the calculations of the percentages.

The use the Task Force made of the data gained from the survey has been reviewed by John Temple of the Bureau of Business and Economic Research. Because of Mr. Temple's review, we are confident that the information presented is fairly drawn from the responses received.

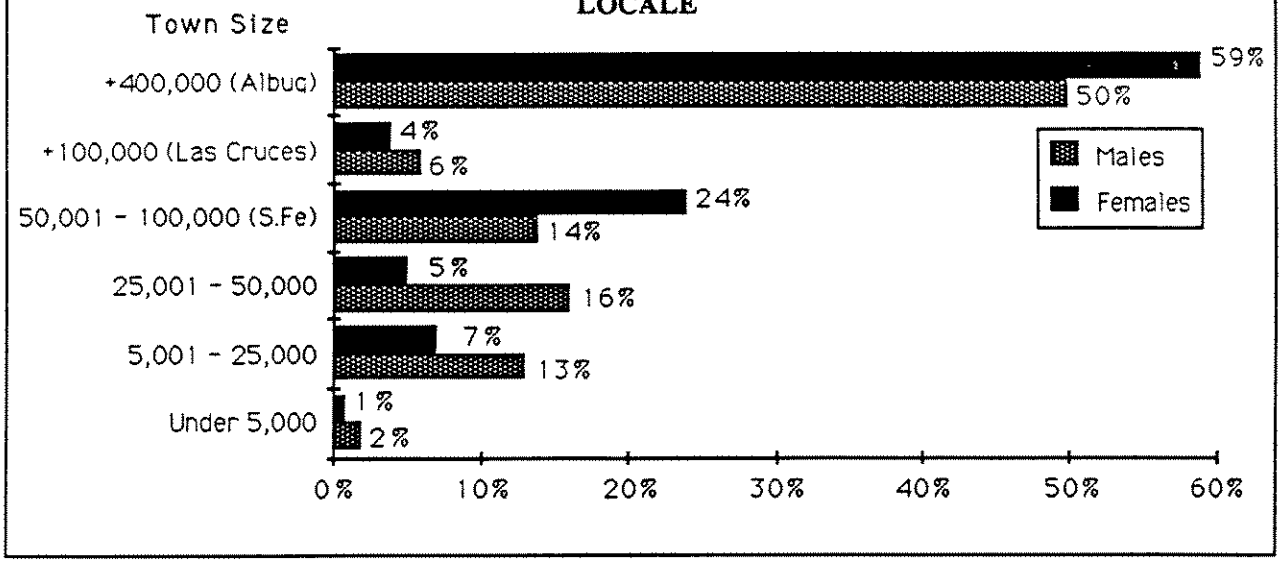
PROFILE OF FEMALE ATTORNEYS

Of the 3,683 active instate Bar Members 929 or 25 percent are women. [BD][5] Of the female attorneys, 82 percent are Anglo, 13 percent are Hispanic, 3 percent are Native American, 1 percent are Black, and less than 1 percent are Asian American or Pacific Islanders. For male attorneys, 81 percent are Anglo, 15 percent are Hispanic, 1 percent are Black, 1 percent are Native Americans, and less than 1 percent are Asian Americans or Pacific Islanders. [BD]

LOCALE

Women lawyers are more likely to practice in Santa Fe and Albuquerque and much less likely than their male counterparts to practice in a town of less than 50,000. [TF81] *See* Table 1.

TABLE 1
LOCALE

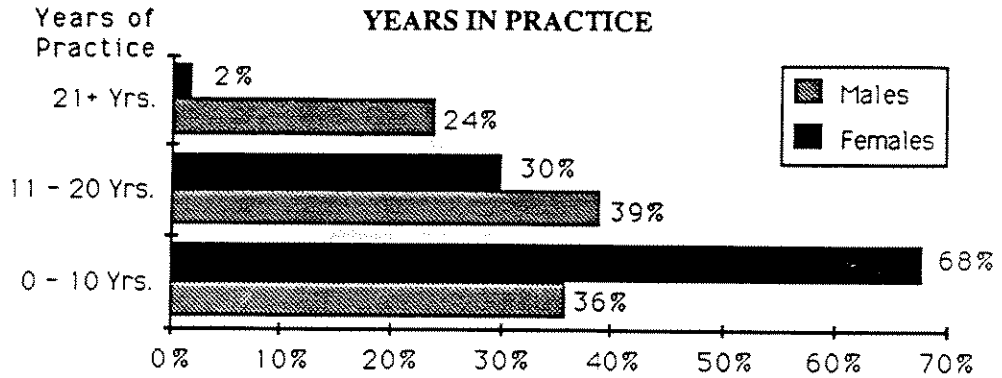


[5] Nationally, as of 1988, 20 percent of attorneys were female ABA Report, p. 5

YEARS IN PRACTICE

Women also tend to be among the newer members of the Bar. While 47 percent of male lawyers are under 40, 65 percent of female attorneys are younger than 40. [TF88][6] More than 68 percent of the women have practiced ten or fewer years while only 36 percent of the male lawyers fall in that category. [BD] *See* Table 2 for a more detailed breakdown.

TABLE 2
YEARS IN PRACTICE

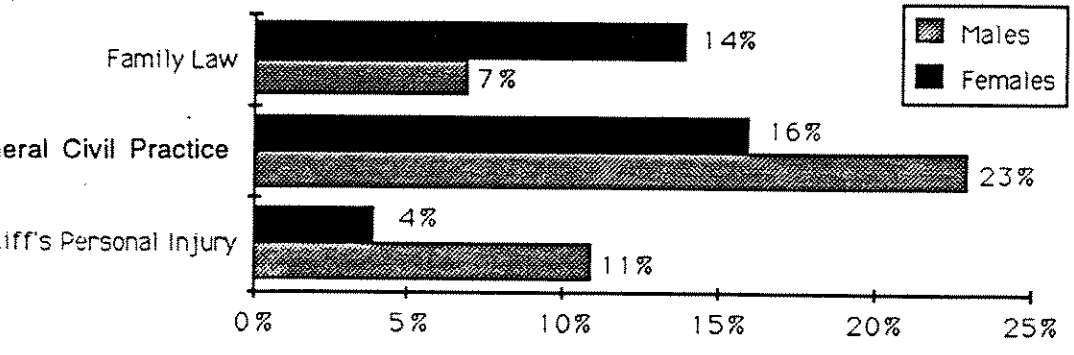


[BD] The average number of years in practice for men is 14.75, but the average for women is 8.15 years. Similarly, the median years in practice for men is 12.5 years whereas the median for women is 7 years. [TF80] The mean year of law school graduation for men is 1976 and 1982 for women. [TF79]

TYPES OF PRACTICE

The Task Force attempted to determine if men and women were engaging in different types of practice. To that end, survey respondents were asked to select their area of primary practice.[7] A comparable percentage of men and women picked as primary areas in which they practiced Plaintiffs Workers' Compensation, Appellate Law, Real Estate, Insurance Defense, Criminal Law, Administrative Law, Business or Corporate (Non-Litigation), and Commercial Litigation. The only large differences were found in Family Law, Plaintiff's Personal Injury, and General Civil Practice. Men are somewhat more likely to engage in Plaintiff's Personal Injury work and in General Civil Practice. *See* Table 3.

TABLE 3
TYPES OF PRACTICE



[TF74]

[6] Even though women as a whole tend to be younger than 40, a number of survey respondents commented that middle-aged women have a particularly difficult time, especially in the hiring process.

[7] Respondents were asked to pick one area of practice; however, many people selected more than one area. The percentages used reflect the percent of each gender which picked an area, including those who picked more than one.

JOB SETTINGS

Of the survey respondents, 96 percent of the men and 89 percent of the women work full time in the legal profession. Both men and women are spread among the various job settings the profession offers. Table 4 gives the distribution according to the Bar Dues check off information.

TABLE 4
JOB SETTINGS

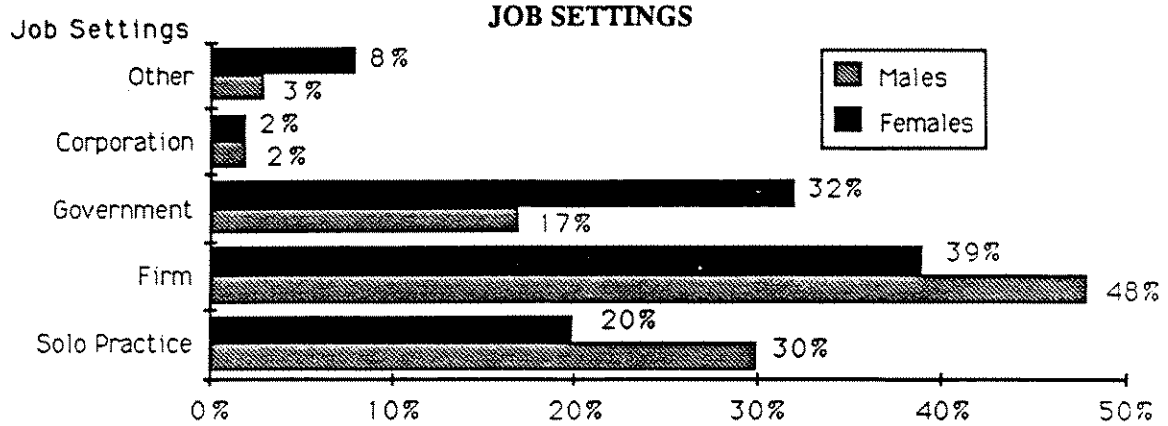


Table 4 shows that women are over represented in government work, but the reason why a disproportionate number of women chose government service is not clear. Many believe that women are attracted to government jobs because there may be fewer barriers to entry and advancement. Despite this widespread belief, a number of comments received from survey respondents indicate that discrimination exists in the public sector.[8] One government attorney discussed how a high level governmental official used sexist description of her conduct when he described her walk as "flouncing" and her discussions as "enticing." Another respondent described a government hiring decision which bypassed two experienced females in favor of a newly licensed male for a supervisory post. One comment told of a female supervisor who denies female attorneys equal access to training, advancement, and Bar and community activities. The public sector bias toward females was also reported to extend to the contracting process which hires private lawyers to represent government agencies. On the other hand, gender bias against men was also reported in the public sector. One respondent reported leaving a job because a female agency head harassed males and was biased against men.

While 63 percent of the men are in private practice, only 50 percent of the women are.[9] [TF75] Women in the law firm setting may have difficulty fitting into the non-work aspects of firm life which lead to advancement. Some respondents indicated that women did not participate in firm gatherings which involved sporting events (usually golf), drinking, and card playing. One commentator thought that women were unable to fit into the "good old boy" sports oriented frame of mind which hampered their ability to develop colleagues.

Many comments discussed firm practices beyond the impact of the informal side of firm life. One respondent noted that women with mid-level experience begin to leave large firms because of the difficulty in building a client base[10] or being seen as the heir apparent to a senior partner. The lack of significant availability of female lawyers to serve a mentoring role was also noted.

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8 One aspect of government involvement which was noted in the comments was lobbying. One comment revealed that legislators will use threats to "kill" a female lobbyist's bill unless the lobbyist accompanies the legislator to dinner.

9 The ABA Young Lawyers Division survey in 1990 found a similar disparity nationwide. Only 61 percent of women are in private practice compared to 73 percent of men. *State of the Legal Profession, Report No. 1*, p. 14 (1990) (hereinafter Report No. 1).

10 Many comments associated hurdles female attorneys face with prejudice held by clients, particularly senior corporate executives. One lawyer recounted the experience of leaving a practice in the hands of a very capable female attorney only to have the clients line up to take their files elsewhere. For a somewhat contrary view see p. 14, *infra*.

PERSONAL PROFILES

The personal profiles of male and female lawyers differ. For example, 78 percent of male attorneys are married but only 63 percent of females are. [TF85] With regard to children, a higher percentage of female respondents have no children. [TF86]

CHILD-CARE RESPONSIBILITIES

With regard to those lawyers with children, 57 percent of the men have spouses who take primary care of the children while only 4 percent of the women's spouses have primary child care responsibilities. Of the female attorneys with children, 35 percent of them have primary child care duties while only 3 percent of the male attorneys are also primary care providers. In this regard, 32 percent of the female respondents indicated they had left a job because of family considerations, but only 21 percent of the men had left for similar reasons. [TF59] Of those women who work part-time in the legal profession, 63 percent do so because of family responsibilities. Of the men who work part-time, 62 percent do so because they are retired. [TF74] Of those men who work part-time, 8 percent do so because of family responsibilities.

The potential conflict between the woman's role as primary child care provider and her role as a lawyer received more comment than any other aspect of the professional experience portion of the Task Force survey. The UNM survey found that neither marital status nor the presence of children in the home significantly affect the total hours worked by men or women. See p. 13, *infra*. Nevertheless, many respondents commented on this phenomenon. Some respondents described the woman's primary child care responsibilities as the principal impediment and as the single barrier to true equality. Many comments noted that child/family responsibilities affected opportunities for advancement.[11]

There were a number of very thoughtful comments which cited the lack of flexibility in the legal workplace as a primary barrier to people who also wished to be actively involved in raising their children. In particular, the failure of firms to permit part-time work was severely criticized. Respondents with this criticism questioned why lawyers who wanted to work part-time were seen as less than dedicated to the profession even when they had outstanding credentials. Others decried the loss of valuable, talented lawyers caused by the lack of alternative work arrangements. In this regard, the ABA Report stated:

> Members of the profession should recognize that men or women who seek to balance family responsibilities with work demands are demonstrating the depth of their career commitment because they are trying to find a way to remain actively engaged in their career while still meeting family needs.

ABA Report, p. 15. Furthermore, some New Mexico respondents who commented on the need for part-time work thought that a lower salary or slower partnership track would be appropriate if it did not have the stigma associated with the "mommy track." Affording lawyers the opportunity to make flexible working arrangements would foster loyalty and firm dedication, one respondent opined. The reason given for the failure to consider part-time work was the threat it posed to the billable hour system, which according to some exploits all associates in order to cover overhead and earn partner profits.[12] Respondents also questioned the lack of on-site day care facilities and greater maternity/paternity leave plans.

Despite the above-mentioned concerns, 64 percent of male and female respondents, indicated that some accommodation was made by their offices for child/family responsibilities.[13] Table 5 indicates the type of accommodations made.

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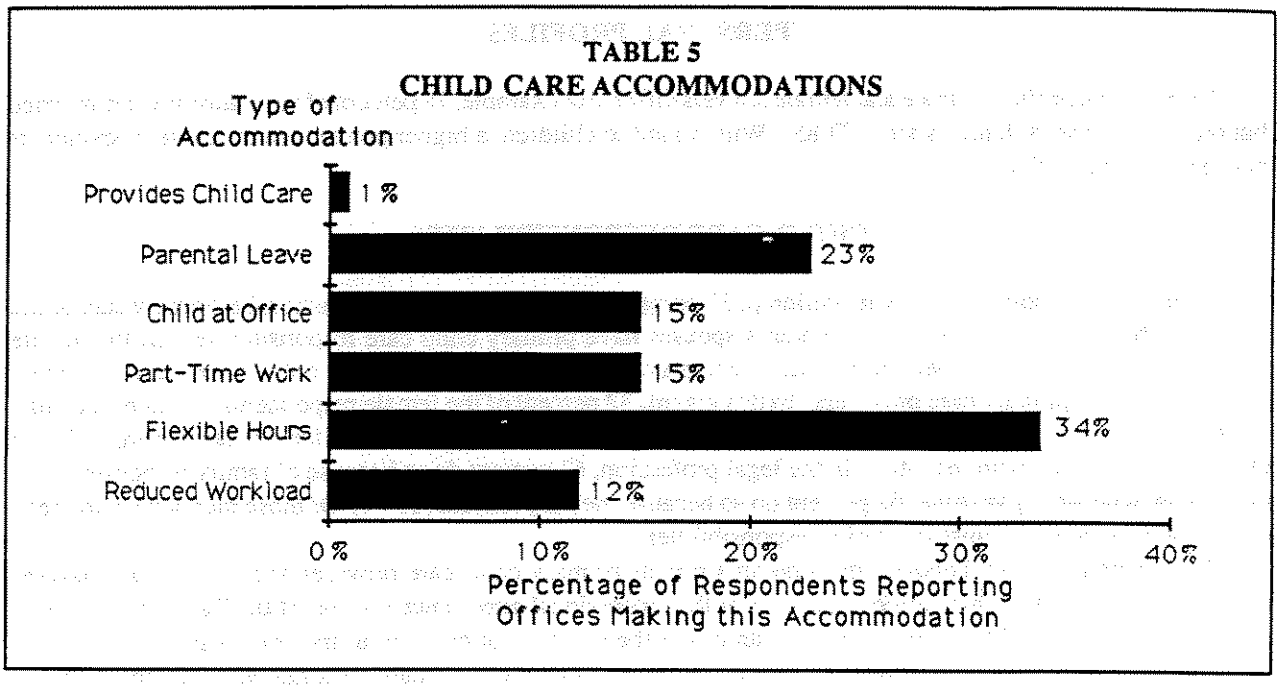
[11] One respondent noted that it was easier for the single woman with no children to work long hours and be a "team player."

[12] The ABA Young Lawyers Division survey found that all lawyers were working more now than lawyers worked in 1984. Report No. 1, p. 12. The increase in billable hours was cited as having disturbing implications for the profession because of the increasing social dysfunction and destructive behavior which impacts lawyers, their families and their work. *Id.* at 16.

[13] Some respondents viewed these accommodations as bias against men. One respondent questioned whether it was fair to treat a male associate who takes no parenting leave the same for partnership purposes as a female associate who takes two or more maternity leaves.

TABLE 5
CHILD CARE ACCOMMODATIONS



The parental leave survey report, Appendix 5, gives further illustrations of types of accommodations made for lawyers with parental responsibilities.

THE EMPLOYMENT EXPERIENCE

The perceptions of men and women differ markedly with respect to whether there is bias in the work place.[14] While 54 percent of the women believe that their employment opportunities are limited because of discrimination, only 19 percent of the men believe that their opportunities have been so limited. Of the survey respondents who believed their career opportunities had been limited because of discrimination, 222 or 64 percent listed gender as a basis of discrimination.[15]

HIRING & ADVANCEMENT

More women than men perceive that women have more trouble than men getting hired, getting promoted, and making partner. Table 6 shows the breakdown of the survey respondents with experience who answered that women always or often have more trouble in these areas.

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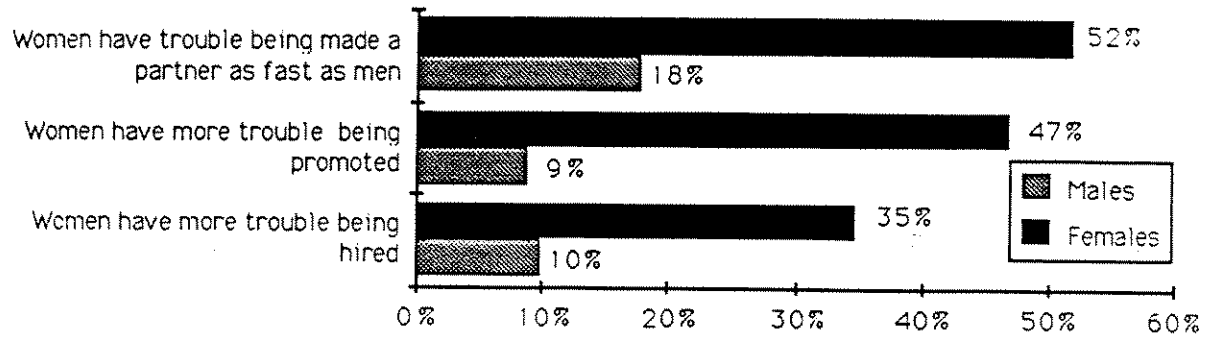
[14] Some comments observed that the bias exhibited against women was really a bias against values and attitudes which are traditionally considered either feminine or non-masculine: domination (winning) vs. accommodation; quality of services vs. billing dollars; mediation vs. litigation. The UNM survey found that on the whole both men and women were committed to the competitive aspects of practice, but women were more committed than men to the cooperative aspects of law. See p. 15, *infra*.

[15] One-hundred thirty-four people listed gender as the sole basis for discrimination and eighty-eight others listed gender as one basis on which they had been discriminated against. Of those respondents listing gender as one basis of discrimination and some other basis, the other reasons for discrimination were race/ethnicity—10%, sexual harassment—5%, age—4%, sexual preference—3%, religion—2%, other–2% and handicap—<1%.

TABLE 6
PERCEPTIONS OF BIAS IN HIRING AND ADVANCEMENT



[TF65, TF66, TF67] One response noted that the respondent's firm was pickier when hiring women because of the desire to have women remain with the firm for a long time.[16] Some respondents noted the inappropriate questions (about marital matters) which were asked during interviews.[17] With regard to advancement, the ABA Young Lawyers Division survey in 1990 noted that even after factoring out differences which would arise from women's more recent entry into the Bar, 81 percent of women are associates compared to only 54 percent of men and only 18 percent of women are partners compared to 45 percent of men. Report No. 1, p. 14.

It is interesting that the responses of attorneys practicing in firms of six or more lawyers varied from the responses overall.[18] For example, only 57 percent of the women in firms of 20 or more perceived that women have more trouble being hired (always, often or sometimes), as compared with 78 percent of all female respondents with experience. Only 12 percent of the men at the same size firms perceived this problem, as compared with 78 percent of all male respondents with experience. Similarly, fewer men and women at all firms with over six lawyers perceived discrimination in promotion than did the respondents as a whole; 76 percent of females in firms compared to 84 percent of all females, and 27 percent of males in firms compared to 40 percent of all males perceived difficulty in promotion.

Between 65 percent and 90 percent of female firm members[19] perceived males attaining partnership more quickly. Curiously, male firm members had a radically different perspective on this issue. While 34 percent of all male respondents believed men **never** achieve partnership more quickly, fully 63 percent of male attorneys at firms with more than 20 members answered "never" to this question. As firm size increased, male firm members grew more confident that gender **never** inhibited a woman's achieving partnership.[20]

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16 The same response noted that some opportunities are lost when women elect part-time work or have strong family commitments.

17 The ABA Report noted that women in job interviews still face inappropriate comments about their personal lives, child-bearing plans and physical appearance. ABA Report, p. 9.

18 Unless otherwise noted, percentages given are for attorneys with experience; those who responded "no experience" are excluded from the statistics in this paragraph and the following paragraph.

19 Female firm attorneys responding "always", "often", or "sometimes" were as follows:

6-9 member firms 90 percent
10-19 member firms 81 percent
20+ member firms 65 percent

20 Male firm attorneys responding "never" broke down as follows:

6-9 member firms 36 percent
10-19 member firms 51 percent
20+ member firms 63 percent

ESTEEM ON THE JOB

In terms of the more intangible aspects which may lead to success in a firm, men and women again have different perceptions. The ABA Report cited the greater degree of scrutiny given to women's work as one "subtle but significant" form of bias women experience. ABA Report, p. 12. In New Mexico, 43 percent of the women believe that women's work is judged differently, but only 10 percent of the men hold a similar belief.[21] [TF61] Fifty-nine percent of women compared to 17 percent of men believe that men are more likely to have a mentor. [TF63] Similarly, 71 percent of women compared to 22 percent believe that men get the choice cases at least sometimes. [TF68][22] Finally, 83 percent of women believe that sometimes, often or always men get more respect. On this matter, 64 percent of the men agree.[23] [TF69]

A number of respondents to the Task Force survey discussed conflicting values which are applied to men and women. Men are assertive but women are aggressive; men are leaders but women are domineering; men are well-informed but women are gossips.[24] While a man may be characterized as assertive, a woman may be called a bitch,[25] but a woman who was too nice was not a strong advocate.

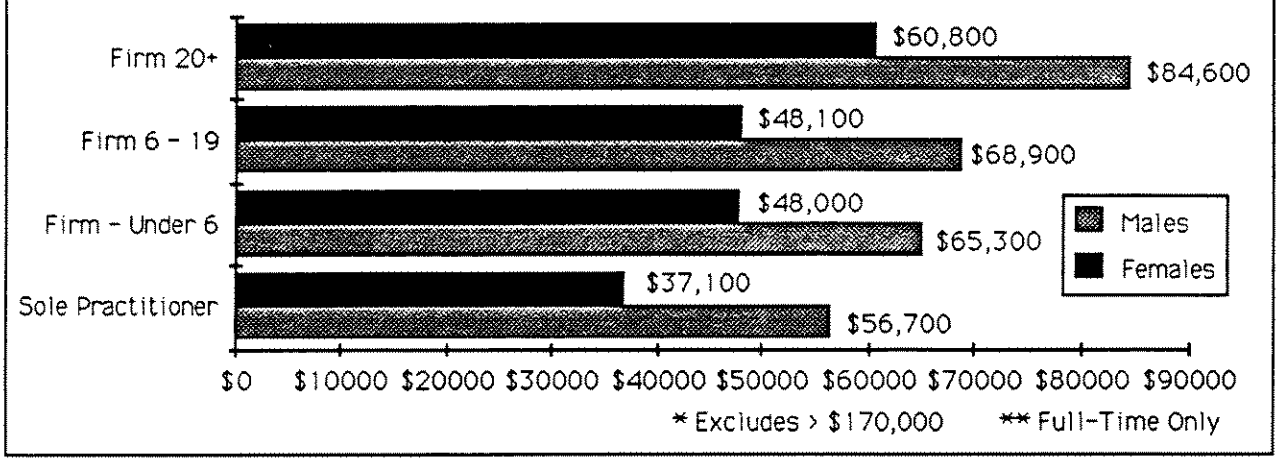
INCOME

The translation of these intangibles into reality may be shown by study of income levels. The ABA Young Lawyers Division 1990 survey found that women are "far worse off financially than their male colleagues in most positions." Report No. 1, p. 15. The New Mexico data are similar.

For those lawyers earning less than $170,000,[26] the average salary for men is $61,700 and for women $40,600. Even when only those working full-time are considered, the averages are $62,500 for men and $42,500 for women. [TF77, 74]

When one tries to determine whether the type of practice affects the average income, one learns that the disparity in average salary exists regardless of type of practice. For example, for all non-government lawyers, the average salary for men is $63,900 and $44,400 for women. The disparity exists regardless of size of firm. Table 7 shows that in all sizes of firms, the average salary of males working full-time is higher than the average salary of females working full-time.

TABLE 7
AVERAGE INCOME BY FIRM SIZE*



[21] Specific examples which were cited include closer scrutiny of hours and the need for women to be "better" than men to be successful.

[22] The ABA Report cited lack of mentoring, different work assignments, acquiescence in client requests not to have a woman lawyer, and heightened scrutiny of work as examples of discrimination which exist in the work place. ABA Report, p. 11 - 12.

[23] A number of respondents believe that the lower esteem accorded women has nothing to do with gender but with ability.

[24] *See also* ABA Report, p. 12.

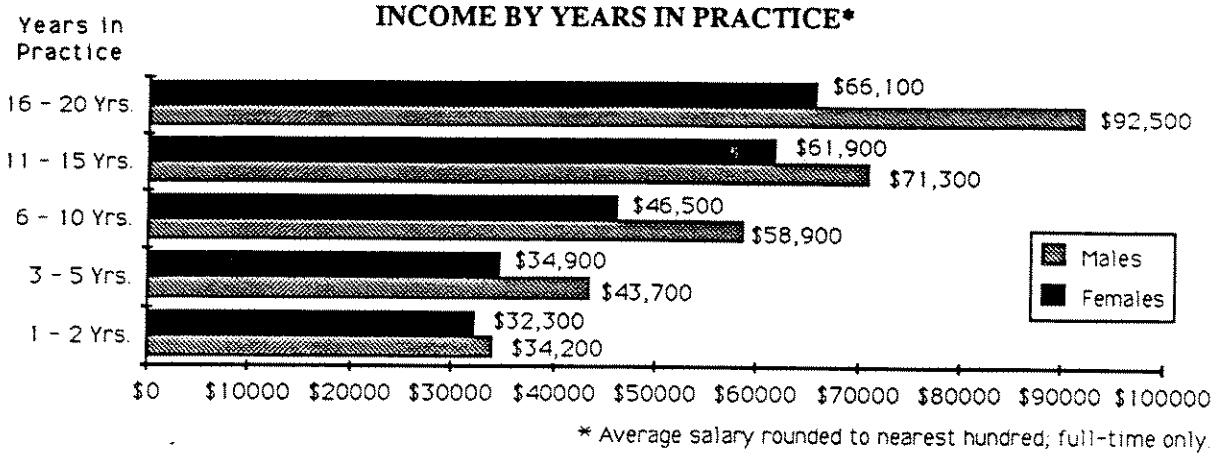
[25] There were some number of objections to being called "bitch."

[26] When calculating average salaries, the 23 survey respondents who answered that they earned over $170,000 were excluded because their exact salaries were not known. Of these 23, 20 were men and 3 were women.

(Footnote continued on next page)

Even when the fact that women have been in practice fewer years than men is taken into account, women still have average salaries which are below those of men who have been practicing for comparable number of years. Table 8 shows that in each category of years in practice, male average salaries exceed female average salaries.[27] The Task Force findings are consistent with the UNM findings. See p. 12, *infra*.

TABLE 8
INCOME BY YEARS IN PRACTICE*



Looking at the issue of income by comparing salary distribution for those working full-time by years of experience, we see that at the one or two year level there is very little difference between the percent of men at a given salary range and the percent of women at the same range. Beginning at the three to five year level, a greater percentage of men (31 percent) earn over $50,000 than do women (8 percent). The disparity continues. Table 9 sets forth this disparity in greater detail.

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[26] (continued)
Further, the salary estimates were derived from grouped data. The midpoint of each interval was used to determine the mean or average. Thus for the range $20,001 to $30,000, the average was $25,000. For the under $20,000 range, $10,000 was selected; again, unless otherwise noted, those over $170,000 have been excluded. The derived means or average are estimates. It should also be pointed out that the income estimates are calculated from sample data and there may be sampling error. These salary figures, therefore, provide rough indicators, not precise estimates.

[27] The average salary for each range was multiplied by the number of people within each year of practice group who selected that salary range. The totals for each salary range for each year of practice group w s divided by the number who were in the year of practice group to arrive at an average. [TF77, TF80]

TABLE 9
DISTRIBUTION OF SALARY BY YEARS OF EXPERIENCE

Year	<$50,000		>$50 ≤$80,000		>$80 ≤$100,000		>$100,000	
	Male	Female	Male	Female	Male	Female	Male	Female
1	93%	92%	0	0	0	0	0	0
2	100%	100%	0	0	0	0	0	0
3 - 5	65%	89%	31%	8%	3%	0	0	0
6 - 10	43%	62%	37%	28%	13%	4%	6%	4%
11 - 15	24%	39%	40%	36%	13%	10%	24%	14%
>15	20%	43%	32%	29%	13%	14%	35%	10%

Thus, what was observed by the ABA — that female lawyers are financially worse off than their male colleagues — is true in New Mexico.

THE UNM SURVEY

As an additional source, the Task Force is relying on a study of University of New Mexico Law School graduates.[28] The study supplements our findings in several areas.

INCOME

Adjusting for years out of law school and accounting for possible gender related variations in practice settings, the study found statistically significant differences in the income levels of male and female lawyers:

Average Income for Men and Women by Practice Setting

	Adjusted Mean Income	
Situation	**Women**	**Men**
1. Sole Practice	$44,000	$52,000
2. Large Firms	$54,000	$64,000
3. Medium Firms	$49,000	$64,000
4. Small Firms	$40,000	$52,000
5. Government	$38,000	$36,000
6. Other	$34,000	$34,000

[28] Teitelbaum, Sedillo Lopez & Jenkins, "Gender, Legal Education, and Legal Careers" to be published in the *Journal of Legal Education.*

TIME DEMANDS

There were some comments at Task Force regional fact-finding meetings and written comments on the surveys suggesting that women might be hampered in their careers by additional demands on their time, which might prevent them from billing as many hours as men without such additional demands. Hypothesizing that women generally, or those with family responsibilities in particular, might choose to work less than men, the study of UNM graduates found the following:

Average Billable and Total Hours for Men and Women

	Billable Hours	Total Hours
Women	33	47
Men	35	50

As a matter of statistical analysis, the UNM data showed that men work significantly more total but not billable hours than do women. The difference in billable hours did not have statistical significance because the results may be attributable to chance.

There are some real curiosities in these data. For one thing, marital status did not affect the **total** hours reported at work, as one would have thought. For another, the presence of children in the home did **not** produce the significant differences we might expect in hours worked by lawyers. The average number of hours worked by lawyers with children was 49 and that by childless lawyers was 50. Moreover, for those lawyers with children, whether female or male and whether married or not, the ages of children were not found to be significantly related to hours worked with the sole exception that women with children in the age range of two to five years work fewer hours than men with children in the same range.

Although there were no statistically significant differences in hours **worked** by marital or custodial situation, there were some situational differences with respect to hours **billed**. Married men on the average billed significantly more hours (36) than did married women (32), (although no significant difference in billable hours existed between single men and women, who averaged 32 and 34 hours, respectively). Moreover, fathers in intact families averaged 38 billable hours per week, whereas mothers in intact families billed on the average only 32 hours per week.

Several explanations of these differences may be plausible. They may reflect acceptance, at some operational level, of conventional role expectations according to which men must generate income in a tangible way and women feel less vulnerable, when they are married, to the financial pressures exerted by law firms. They may also reflect conventional roles in a more functional way. It is often assumed that working women with spouses and children remain responsible for household and child care arrangements. Their lower rates of billable and total hours may indicate a greater time commitment, even at the office, to nonprofessional tasks such as talking on the telephone with their children, arranging alternate child care, or scheduling service calls to the home.

THE QUESTION OF SATISFACTION

Two items in the UNM survey provide an overall measure of job satisfaction. Respondents were asked, "Would you leave the practice of law if circumstances allowed you to do so?" and "Do you plan to leave the practice of law within the next five years?" Just over one half of both women (52 percent) and men (51 percent) said that they would leave law practice if they could, and a small minority of both—18 percent of the women and 14 percent of the men—said that they really did plan to leave in the foreseeable future.

More specific items sought to address various circumstances (such as felt professional acceptance) which might influence the sense of satisfaction. Despite the literature which suggests that women lawyers are perceived as less committed to practice and thus less likely to be given, or believe they are given, equal responsibilities with

male attorneys at similar levels, UNM alumni respondents did not sense such disparities. Both women and men preponderantly felt that they had as much or more responsibility for clients than other attorneys in their firms.

Because small firms may be quite different from large firms, the UNM study examined the question of client responsibility separately for small, medium, and large firms. No significant differences appeared.

The study also examined individual job satisfaction more directly, asking respondents to assess satisfaction with sixteen aspects of practice on a five-point scale, where one meant "very dissatisfied" and five meant "very satisfied." One of these items addressed "overall satisfaction." The remaining fifteen items covered three more general areas: satisfaction with the relation between practice and personal life; satisfaction with professional relationships; and satisfaction with their office situations.

No significant differences were found with respect to overall satisfaction; indeed, the ratings of men and women were strikingly similar.[29] Seventy-three percent of both the men and women placed themselves within the top two levels of job satisfaction, and their distribution between those two top levels was almost identical. Only two percent of each group said they were "very dissatisfied" (5) on this scale.[30]

Close similarity rather than significant difference also characterized ratings of satisfaction with professional relations and office situations. Although there is basis in literature and Task Force comments for expecting that women would experience and/or perceive less acceptance by other (and particularly male) senior lawyers, judges and even peers, the UNM alumni population did not report different degrees of satisfaction with their relations with these groups. Indeed, their ratings are surprisingly consistent. While it seems to be true that women were less satisfied by their relations with senior lawyers than those with peers, and less satisfied with their relations with judges (typically male, senior members of the Bar) than with lawyers generally, men had the same experiences or perceptions and to the same extent as women. Moreover, these similarities held for relations both within and outside the office.

The one domain where women and men differed significantly was not within the professional setting itself, but in their satisfaction with the articulation between the professional and personal lives: matters such as flexibility of work schedule and opportunities for pursuing individual interests. One-third of the women, but only one-fifth of the men, were "very dissatisfied" or "dissatisfied" with the flexibility of work schedules and with the hours of work required of them. This difference is consistent with the hypothesis, discussed above, that for ideological and/or situational reasons, women are less entirely committed to the professional domain. It may also, not

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[29] The responses can be summarized in the following table:

Overall Satisfaction

	Very Dissatisfied 5	4	Neutral 3	2	Very Satisfied 1
Women	2%	14%	12%	54%	19%
Men	2%	10%	14%	57%	16%

[30] The UNM results should be contrasted with the results of the survey conducted by the ABA Young Lawyers Division in 1990. Report No. 1, p. 8.

ABA - YLD
Job Satisfaction
Private Practice v. Corporate

	Private Practice 1990		Corporate Counsel 1990	
	M	F	M	F
Satisfied + Neutral	72%	59%	66%	63%
Dissatisfied	28%	41%	34%	37%

inconsistently, indicate in some indirect way a sense of stress about competing role requirements—a stress not directly revealed by questionnaire items addressed to that issue.[31]

THE QUESTION OF COMPETITIVENESS

Hypothesizing that women would be likely to find the competition associated with law practice relatively less satisfactory, the study sought to measure differences using a series of six items focused on the degree and nature of commitment to competitive and cooperative aspects of practice. Commitment to the competitive aspects included concern for the firm's financial success, reputation, and accomplishment of client goals. Cooperative orientation was characterized by commitment to fair results in legal matters, to the reputation of the legal profession in general, and to improving community attitudes toward the profession.

The answers to these questions were interesting. On the one hand, both men and women were strongly committed to the competitive aspects of their practices. On the five point scale where 5 indicated "very strong" commitment, the average rating for men was 4.3 and that for women was 4.2 on these items. This difference is plainly not significant. On the other hand, women's commitment to cooperative values in law averaged 4.0, nearly as great as their commitment to competitive aspects, and was significantly stronger than the commitment claimed by men, who on average rated these items at 3.7 on a five-point scale.

These findings bear an obvious relation to the current discussion of differences in men and women's value orientations mentioned in the Task Force report. It appears that women perform hierarchical reasoning as well as men, both on moral development tests and in law school. It may nonetheless also be true that women attach greater significance to other kinds of values than do men, on average. It is, plainly, only a relatively stronger attachment. Men also value cooperative values generally and in law practices (indeed, their 3.7 average rating indicates more than moderate commitment to those values in legal practice). However, relative differences are also important.

THE QUESTION OF MOBILITY

Occupational mobility is a phenomenon which seemingly cuts across stress, satisfaction, and other practice experiences. Some literature and comments to the Task Force suggest that women may choose practice settings or fields consistent with their different value orientations and/or their social situation. The UNM study found relatively little evidence to support those hypotheses. However, the same set of considerations might lead women to move from one firm or agency to another, having particular regard to the fact that most young lawyers have little concrete idea about the firms or organizations with which they make initial employment commitments.

It does seem that lawyers change jobs relatively often; however, that is true for both women and men. Fifty-five percent of the women and 56 percent of the men reported having changed employers at least once during their careers. Of those who changed jobs, the plurality in both cases had done so only once. However, women were slightly more likely than men both to have changed jobs more than once and to have changed jobs more than twice.

The survey asked respondents who changed jobs to indicate whether one or more of a list of reasons was important to their decision. There are some differences between the ratings given by men and women; in the main, however, similarities in reasons for changing were far more striking than those differences. The two reasons most frequently cited as important to job changes by men and women were more interesting work and greater financial reward. These reasons were given by more than two-thirds of the men; more interesting work was thought important by slightly more than two-thirds of the women and greater financial reward by almost two-thirds of that group. Men tended to regard greater prestige as more important in the decision to change than did women; for both groups, however, reduction of stress was the third or fourth most frequently stated reason for change in

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[31] Two other aspects of the ABA Young Lawyers Division 1990 survey, p. 17, must be noted before leaving the discussion of job satisfaction. Eighty-four percent of women compared to 71 percent of men reported feeling worn out at the end of the work day. The ABA YLD Survey originally reported that female lawyers were consuming more alcohol than male lawyers. The ABA recently announced that the original report was in error and that male lawyers report more drinking then female lawyers.

employment. Moreover, both men and women cited a desire for more time with the family as a reason for changing jobs, although women were somewhat more likely than men to list this as an important factor.

The UNM alumni men and women also generally agreed on what were not reasons for changing jobs. They did not change jobs in order to improve political or social, as opposed to personal, conditions; very few listed a desire to cause social change or to help the disadvantaged as a reason for employment shifts. Nor, for that matter, was a desire for greater power or influence in the community a frequently cited reason by either men or women.

Summarily put, men and women were likely to give both professional and personal reasons for job changes. For both, greater professional satisfaction, often both in the nature of the work and in financial rewards, provided the most frequently stated reasons. Substantial numbers of men and women also counted nonprofessional values, including more time with family and for their own interests, as important to their decisions. On the other hand, pursuit of altruistic values did not often influence these decisions for either group.

EMPLOYMENT EXPERIENCE
FINDINGS AND RECOMMENDATIONS

Findings

1. Women face barriers in the employment experience which their male colleagues do not. These barriers are both overt—failure to advance as quickly, more problem achieving partnership—and subtle—closer scrutiny of hours and work.

2. Females are less likely to have a mentor within a law firm due in part to the unavailability of experienced female lawyers to fill this role and to the unwillingness of experienced male lawyers to serve this function for women.

3. Womens' salaries, shortly after they begin in practice, fall behind those of males with similar experience and in similar work settings.

4. While most men and women are satisfied with their jobs, there is significant dissatisfaction with the practice of law which is felt by both men and women.

5. Women more than men are dissatisfied with the division between professional and personal lives.

6. Female lawyers with children are the primary child care providers much more often than male lawyers with children.

7. Women and men who try to balance family responsibilities and careers are demonstrating a commitment to the profession.

8. Employers have not made sufficient accommodations for parents with child-rearing responsibilities and have not permitted flexible working assignments to the degree which they should.

Recommendations

1. The State Bar of New Mexico should adopt a resolution similar to that adopted by the ABA House of Delegates (attached as Appendix 3) which recognizes that bias exists, that there is no place in the profession for bias and that calls upon all members of the profession to eliminate barriers to full participation by women in the profession.

2. The State Bar should study alternative working arrangements which accommodate more flexibility in the work place and should make such information available to employers of lawyers. Employers who make such accommodations should be publicly recognized for their innovation.

3. All employers should review salaries and should correct salary differences which seem to adversely affect women.

4. All employers should review the criteria used to evaluate work and should articulate nondiscriminatory standards.

5. The Bar should collect information on mentoring programs and should make it available to all employers throughout the state. The Bar should also investigate a mentoring program which would be available to all female lawyers, particularly the sole practitioner and small firm lawyer.

6. The Employment and Labor Law Section of the State Bar should present continuing legal education programs concerning gender bias in employment, particularly in the legal profession, and the Section should prepare materials for publication in the *Bar Bulletin* which would assist employers in eliminating gender bias.

JUDICIAL SELECTION AND GENDER

HISTORY OF WOMEN ON THE BENCH

The first woman to serve on a court of general or appellate jurisdiction was Mary Walters who was appointed to the district court bench in 1971. Judge Walters served until December 1972. Thereafter, no woman served as a district or appellate court judge until January 1979, when Judge Walters and Leila Andrews began serving on the Court of Appeals and Patricia Madrid took a seat on the district court bench. In 1982, Judge Madrid was joined at the district court level by Petra Jimenez-Maes;[32] Judge Walters was appointed to the Supreme Court, and Pamela Minzner took a seat on the Court of Appeals. Shortly thereafter, Rebecca Sitterly became a district court judge. By 1984, Anne Kass and Sandra Grisham were also serving at the district court level. Soon thereafter, Susan Conway began sitting as a district judge. In 1988, Peggy Nelson joined the ranks of district judges.

All of the above-named judges were either appointed or elected prior to the 1988 constitutional amendment which changed the manner of judicial selection. Between 1979 and 1982, women filled less than 5 percent of the district court judgeships. From 1983 to 1988, 8 percent to 10 percent of the district court judges were women.[33] Only one woman has ever served on the Supreme Court, and since her retirement, there has been no female justice of the Supreme Court. Between 1979 and 1981, two women served on the Court of Appeals, but since the death of one of those judges, there has never been more than one woman on that court.

APPOINTMENT UNDER THE AMENDMENT

Since the adoption of the constitutional amendment, one woman has been appointed to a district court judge position. The addition of Judge Diane Dal Santo, the only women appointed to the district or appellate courts under the new system, briefly increased the percentage of female judges to 12 percent.

Since the constitutional amendment, there have been nine vacancies on the district court and three vacancies on the Supreme Court. For two of the three Supreme Court positions, one woman applied, but the nominating commission did not recommend her to the governor. For three of the district court positions, no women applied. Table 10 shows a break down of the remaining positions, the applicants, and the recommendations.

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[32] Judges Madrid and Maes were the first Hispanic women admitted to the Bar.

[33] In 1988, only 7.4 percent of federal judges were women and only 7.2 percent of states judges were women. ABA Report, p. 6.

JUDICIAL SELECTION
TABLE 10

Location	Total Applications	Female Applications	Total Recommendations	Female Recommendations
2nd District 2 positions	31	8	6	2
2nd District	32	8	4	2
2nd District	24	6	5	2*
3rd District	5	1	2	0
2nd District	17	5	3	1
	154	**28**	**20**	**7**

* Judge Dal Santo was selected by the governor.

Table 10 shows that women seeking district court judgeships have been recommended by the commission at a higher rate than male applicants.[34] For example, of the female applicants for the two Second District positions, 25 percent were recommended to the governor while only 17 percent of the men were recommended. Overall, of the six positions for which there have been female applicants, there have been 154 applicants of whom 28 have been women. Even though women represent only 18 percent of the applicants, women represent 35 percent of the recommendations. The one woman selected represents only 16 percent of the selections by the governor.

Input of the Task Force was sought by the president of the State Bar when making his selection for the Appellate Judicial Nominating Committee. The Task Force hopes that input from it or from similar groups will be sought by future presidents. The Task Force hopes that the Judicial Nominating Committees will not require applicants to have years of experience in practice which exceeds the legal requirement. Any such criteria would adversely impact women who are among the newer members of the Bar. It is also hoped that those involved in the nominating process and other interested people will encourage qualified women to apply for judicial positions, particularly on the appellate level.

JUDICIAL SELECTION FINDINGS AND RECOMMENDATIONS

Findings

1. The judicial nominating commissions' procedures under the 1988 constitutional amendment have not discriminated against women; however, the final appointment process has discriminated against women.

2. Too few women who would make excellent judges have applied for judicial positions at the appellate level and in some districts.

3. Using experience, beyond that required by law, as a significant criterion for judicial selection may have a disparate impact on women applicants because a large percentage of women are among the newer members of the Bar.

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[34] In the case of the two metro court vacancies, 9 out of the 28 applicants were women; 4 out of the 9 recommendations were women; and both of the appointments were women.

Recommendations

1. Each judicial nominating commission should be sensitive to the fact that any experience requirement may have a disparate impact on women which may be unrelated to qualification for judgeship.
2. The president of the Bar should continue to solicit the input of the Task Force, female attorneys, and other interested groups in appointing members of the judicial nominating commissions.
3. Members of the nominating commissions and the Bar leadership should encourage qualified women to apply for judicial vacancies.
4. The governor should increase the number of female judicial appointments.

BAR ACTIVITY

The desire for full integration of women into State Bar activities appears to have been a primary motivation for establishing the Task Force. For this reason, the Task Force undertook to study whether there were differences in Bar participation which were the result of gender.

Answers to survey questions directed toward participation in Bar activities by New Mexico lawyers (Questions 71-73, Appendix 7) provide little solid data upon which to draw accurate findings or recommendations concerning the impact of gender on participation in Bar activities. Nevertheless, based on the survey responses and on committee membership data from the State Bar records, we might reach some tentative findings and recommendations.

PARTICIPATION IN STATE BAR ACTIVITIES

According to those answering the survey, women lawyers participate slightly more than their male counterparts in all State Bar functions and programs, with the exception of the following areas: in social events, as speakers bureau and lawyer referral programs, as elected officials, or as Bar Commissioners. Twelve percent of the female respondents participate in lawyer referral programs; approximately 16 percent of the men indicated that they do. Very few respondents of either sex are active in speakers bureau activities; nevertheless, male participation among those responding was twice as high as for female members. In all other categories (annual convention, section membership and leadership, Task Force activity, CLE lecturer or panelist, rate.

The Bar Directory listings provide information regarding comparative committee and Task Force leadership percentages within the Bar as follows:

	Males	Females
Board of Bar Commissioners		
Board Membership, by Gender	16	4
	80%	20%
Young Lawyers Division		
Board membership, by gender	70%	30%
Section representatives (19)	74%	26%
Committee chairs (18)	56%	44%
Sections (42)		
Section chairs or co-chairs	81%	19%
Section Memberships, by Gender	86%	14%
Task Forces (4)		
Membership	73 (69%)	33 (31%)
Chairs	3 (75%)	1 (25%)

PARTICIPATION IN SUPREME COURT APPOINTED BOARDS OR COMMITTEES

The Bar Directory also lists those 1990 members of the five boards appointed by the Supreme Court. The make-up of these boards is as follows:

	Males	Females
Board of Bar Examiners		
Membership	8 (73%)	3 (27%)
Chair	1	
Disciplinary Board		
Membership	8 (73%)	3 (27%)
Chair	1	
Judicial Advisory Commission		
Membership	3 (75%)	1 (25%)
Chair	1	
MCLE Board		
Membership	7 (88%)	1 (12%)
Chair	1	
Specialization Board		
Membership	7 (88%)	1 (12%)
Chair	1	

The Judicial Volumes of the Statutes list in the 1990 supplements the members of various Supreme Court committees which review and recommend rule revisions. These committees have the following membership ratios:

	Males	Females
Rules of Appellate Proc.		
Members	7 (88%)	2 (22%)
Chair	1	
UJI - Civil		
Members	8 (89%)	1 (11%)
Chair	2	
R. Civ. Proc.		
Members	9 (100%)	0
Chair	1	
R. Ct. of Lim. Jur.		
Members	6 (75%)	2 (25%)
Chair	1	
Rules of Evidence		
Members	9 (100%)	0
Chair	1	
R. Crim. Proc; Ch. Ct. R. & UJI - Crim.		
Members	6 (75%)	2 (25%)
Chair		1

DEGREE OF PARTICIPATION IN LOCAL BAR ACTIVITIES

Approximately one-third of the female (30 percent) and more than one-fourth of male lawyers (27 percent) responding to the survey said that they attended local bar events at least once a year. Almost as many of both genders (female 20 percent; male 26 percent) participated in local activities four times annually, but nearly as many women (18 percent) reported never joining in local bar events, while only 13 percent of the males answered "never" to the same question. Slightly more women, proportionally, attend local programs as often as twice a year (female 18 percent; male 16 percent), but an almost identical percentage of men and women (25 percent vs. 26 percent) participate more frequently than four times a year.

Of the 23 local bar associations, women are presidents of five of them, and in 18 responses from the local bar presidents, it was reported that 32 women have held office in the local bar associations over the past five years. One association indicated that women's participation was nil for the past five years; five reported that women's membership figures had remained steady during the same period, but women's numbers and participation grew in eleven local associations. One local bar was formed as an outgrowth of a women lawyers' group, and women attend and participate in its activities more frequently than do its male members.

HOW PARTICIPATION COULD BE INCREASED

Based on the survey responses, suggestions for obtaining greater participation in the Bar by both sexes were answered and rated as follows:

	Female		Male	
	No.	%	No.	%
1. If practice not so busy	178	42%	293	44%
2. If program oriented to practice	114	27%	168	25%
3. If family responsibilities fewer	109	26%	101	15%
4. If activities less expensive	106	25%	127	19%
5. If asked to speak or serve on a committee	84	20%	145	22%
6. If there was section for women	86	20%	1	<1%
7. Other	55	13%	81	12%
8. If day care provided	29	7%	6	<1%
9. If had voice in section policy making	15	4%	27	<1%

From these responses, one can glean that Bar participation for both men and women is seen primarily as an adjunct of their practices. The biggest deterrent to more participation by both men and women is their workloads. About a quarter of both men (25 percent) and women (27 percent) would participate more if activities were more geared to their practices. Financial concerns are a deterrent to slightly more women (25 percent) than to men (19 percent). Family concerns prevent greater participation by one-quarter of the women and 15 percent of the men.

BAR ACTIVITY FINDINGS AND RECOMMENDATIONS

Findings

1. Female membership in the State Bar is slightly less than one-fourth of the total membership. The State Bar has an 80-20 percent male-female representation in its governing body. As of 1990 and 1991, the State Bar has selected its first female president in its 104 year history.

2. During the 1989-1990 year, the Young Lawyers Division committee chairs are almost evenly divided between female and male lawyers. There are 7 men and 3 women on the YLD board. Seventy-four percent of the YLD liaisons to Bar sections are men.

   The Young Lawyers Division membership is much more closely divided between men and women than the division throughout the Bar as a whole because of the large number of women entering the profession in the last 10 years. Fewer women than men have leadership roles in YLD.

3. Men serve as section chairs or section officers to a considerably greater degree than the ratio of men to women in the Bar would predict. Women considered expense a limiting factor to section memberships, and cited family responsibilities as another compelling impediment to increased participation. Both men and women felt constrained from greater participation in Bar activities by practices that were too busy and by Bar programs not sufficiently attuned to their fields.

4. Although the female leadership on Bar task forces is proportionate and although the membership of women among the four task forces exceeds the male-female ratio of Bar membership, the figures are misleading. The largest task force is the Task Force on Women and the Legal Profession. This Task Force is chaired by the sole woman chairperson and is unrepresentative of the Bar as a whole because of its predominantly female membership (25 women, 6 men).

5. Those five boards or commissions whose membership is made up of appointees solely by the Supreme Court are chaired in every instance by male lawyers. With the exception of the Minumum Continuing Legal Education and the Specialization Boards, the male-female ratio of membership is representative of the ratio in the Bar membership; the two exceptions reduce a comparative female ratio on those boards to less than half its representative ratio. Two of the boards have non-lawyer female members.

6. The rules committees appointed by the Supreme Court have an underrepresentation of women. As of 1990, two committees have no women members; one committee has only one woman member. On the remaining three committees, the female participation roughly equals, but does not exceed, female percentage of membership in the Bar. Only one of the six committees has a female chair.

Recommendations

1. Women should seek, and the Bar leadership should encourage, board and representative positions earlier in women's careers.

2. Reassessment and lowering of program costs or provision of taped programs in various locales might make some Bar activities more accessible to those lawyers, male and female, who currently find it difficult to juggle their practices and their finances to fit existing activity patterns.

3. The Board of Bar Commissioners and the Supreme Court should be sensitive to the underrepresentation of women in the fact-finding and rule revision concerns of the Bar, and appoint greater numbers of female attorneys to task forces and to rule committees. Female non-lawyers who serve on boards should not be considered as representing female Bar membership.

4. The Bar and CLE providers should encourage women to be speakers at all programs.

5. In giving awards, the Bar should be sensitive to the contribution of women members.

COURTROOM ENVIRONMENT

In our system of government, it is imperative that all citizens have confidence in the fairness and neutrality of our judicial process. If participants in the judicial system, whether they be litigants, attorneys or the public at large, sense that one group is more credible, more powerful and more effective in the judicial arena than another group, then a system premised on the concept of equal rights and equal access to justice for all, is weakened.

In formulating this section of the Report, the Task Force has reviewed the results of a portion of the questionnaire sent to all current members of the New Mexico Bar directed specifically to the perception of gender bias in the courtroom, as well as written comments which were provided by respondents to the questionnaire; public hearings have been conducted statewide; the Rules of Civil Procedure, Uniform Forms and Uniform Jury Instructions have been analyzed to determine if there is a gender bias content contained in them; and interviews of five past and present female judges located throughout the state have been conducted. This section of the Report attempts to summarize the results of this investigation. Unless otherwise specified, references to "attorneys" as stated throughout this section is inclusive of attorneys and judges.

Half of the survey questions in the section entitled Courtroom/Practice Experience were directed solely to perceptions concerning the treatment of women as attorneys, litigants or witnesses. As a result, a large portion of this section of the Report addresses gender bias toward women. Additionally, a significantly greater number of written comments were submitted by women.

THE COURTROOM ENVIRONMENT FOR FEMALE LITIGANTS, WITNESSES AND ATTORNEYS

Perhaps the most significant finding resulting from the survey was that women indicated to a much higher degree than men, their perception that judges and attorneys do engage in gender biased behavior with respect to their treatment of female attorneys as professionals and that this behavior does have an impact on the outcome of cases.

The survey asked if female attorneys, litigants or witnesses are addressed by judges by their first names or called "dear" or "sweetheart", when similarly situated men are addressed by their surnames. Twenty-seven percent of female attorneys responding said that judges sometimes do this, compared to 4 percent of male attorneys responding. Ninety-five percent of the male attorneys said this never or rarely occurs, compared to 68 percent of female attorneys. Only 5 percent of female attorneys and 1 percent of male attorneys felt that this occurred often or always. A sample of the comments received on this issue follows:

> The most common courtroom problem that I observe is that judges frequently address women counsel by their first names but male counsel by "Mr." I think this tends to give women less respect and credibility.

> There are times when male opposing counsel are addressed by their first name by judges but I am addressed by my surname—sometimes it's unfamiliarity, but sometimes I suspect the judge is bending over backwards so as not to demean me (in his opinion I fear).

Forty-eight percent of female attorneys reported that counsel sometimes refer to female attorneys, litigants or witnesses in an overly familiar manner. Only 12 percent of male attorneys said counsel sometimes does. Court personnel were thought to refer to women in this manner more often than judges. Thirty-three percent of women attorneys who had experienced this conduct reported that this occurs sometimes by court personnel, while only 2 percent of the men thought this sometimes occurred by court personnel.

The survey asked if hostile or sexist jokes about women were made in court, in chambers or at social gatherings. Twenty-three percent of the women responding to this question reported that such comments are sometimes made by judges. Only 8 percent of the men with experience indicated that this sometimes occurs. Ninety percent of the men responding stated that this rarely or never occurs compared to 68 percent of the women. Eighteen percent of female attorneys indicated that this occurs often or always with counsel, while 5 percent of men responding noted this degree of frequency. Although only 23 percent of male attorneys felt that counsel sometimes made such comments, twice as many female attorneys (46 percent) reported that this sometimes occurred.

One factor which emerged in the comments provided by several survey participants indicated that female attorneys are privately characterized by some male judges as "whiners" and difficult.

Another question asked if comments on the dress or personal appearance of female litigants, witnesses or attorneys were made in court or in chambers. Three times as many women responding (24 percent) indicated that judges sometimes make such comments, in contrast to 8 percent of the male respondents. Ninety-one percent of the men with experience indicated that judges rarely or never make such comments, compared to 69 percent of the women. Thirty-nine percent of female attorneys and 19 percent of male attorneys felt that such comments were sometimes made by counsel.

Task Forces in other states have found that female witnesses are accorded less credibility than male witnesses. In addressing witness credibility, the New York Task Force found that there appeared to be greater credence given to male witnesses than to female witnesses, effectively resulting in a greater burden of proof with respect to the testimony of females. New Jersey reported that counsel treat women litigants and witnesses disadvantageously because they are women. Perhaps the most colorful (and hopefully increasingly archaic) description of the difficulties faced by women as witnesses is contained in a quotation selected by the New York Task Force:

> [W]omen, like children, are prone to exasperate; they generally have poor memory as to previous fabrication and exaggeration.They are also stubborn. You will have difficulty trying to induce them to qualify their testimony. Rather, it might be easier to induce to exaggerate and cause their testimony to appear incredible. An intelligent woman will very often be evasive. She will avoid making a direct answer to a damaging question. Keep after her until you get a direct answer - but always be the gentlemen.

F.L. Bailey and H.B. Rothblatt, *Successful Techniques for Criminal Trials*, Section 205, at 190-191 (1st Edition 1971) (this text was not deleted until the 1985 edition, *see Id.* (2nd Edition 1985)).

The results of the Task Force survey would indicate that New Mexico may not suffer from the problem of giving less credence to female witnesses which was observed in other states. Only 5 percent of male attorneys feel that male judges sometimes give less credibility to female witnesses, while 6 percent felt that female judges do this. Almost six times as many women (28 percent) reported that male judges sometimes give less credibility to female witnesses, while 22 percent of female attorneys felt that female judges sometimes do this.

Neither female attorneys nor male attorneys seemed to feel that female expert witnesses have less credibility than similarly qualified males. Of those with experience, 86 percent of female attorneys and 96 percent of male attorneys reported that they had not failed to use female experts out of a concern that they might be viewed with less credibility than their male counterparts.

Some male respondents reported that they felt that they were subject to gender bias discrimination.

> The premise of your survey appears to be that gender bias occurs only from the female perspective. Yet, my experience also includes situations where a female judge and female opposing counsel overtly acted in a discriminatory manner towards myself and my client. I have negotiated cases with women attorneys who have expressly taken the position that either I accept their settlement position or I was a "macho bigot." In one case a woman attorney stated that she couldn't win the case because the assigned judge and I were colluding against her; a fact which was not true at all.

> My experience has been that female attorneys and judges will frequently discount the positions of male attorneys and witnesses and ascribe greater credibility to female litigants and witnesses.
>
> I have also observed **at least** two occasions during the past year where a female attorney . . . made sexist remarks toward/about a male attorney. One of these comments was made during the course of a deposition, on the record and in the presence of at least ten other persons.
>
> I have experienced what I perceive to be gender bias in Domestic Relations Court . . . in favor of female attorneys and against me, a male attorney.

When asked if gender biased conduct affected the outcome of the case, of those who had experience, more than twice as many men (76 percent) as women (33 percent) felt that it did not affect the outcome of the case. Twenty-four percent of the women who responded to this question felt that gender biased behavior did affect the outcome of a case, compared to 8 percent of the males responding. Forty-three percent of the women responding reported that they did not know if it did.

The survey also asked if judges or counsel have intervened to correct gender biased conduct. Less than 10 percent (9 percent) of the female attorneys who indicated they had experience with this situation reported that judges do intervene. Forty-four percent of the female attorneys reported that judges do not intervene. The majority of attorneys who answered the question responded "not applicable" (75 percent of male attorneys and 46 percent of female attorneys).

Gender based tensions appear to be most significant between counsel. Some of the comments received from female survey participants are printed below.

> Most of the intolerable gender bias comes from opposing counsel, who are very often less cordial and cooperative, more likely to be obnoxious at depositions, settlement conferences and other meetings having to do with a case. In cases where a male was co-counsel as second chair, he was treated better at depositions he conducted or defended. This male counsel has commented on the marked difference just in the tone of voice. He has told me he attributes these occurrences to gender bias because they are invariably unprovoked. Female expert witnesses have also commented to me how they have seen male attorneys treat other male attorneys (depositions, etc.) far better than they treat female attorneys. I have myself seen male opposing counsel treat my female experts with far less respect and courtesy than they would treat a male expert with the same qualifications. Most of these problems, to be fair, come from inexperienced male counsel who seem threatened by a female with (over 10) years of experience. They are, however, a major problem.
>
> I don't perceive much sexual discrimination in the court system. I have always been treated with respect by judges and court personnel. However, I have experienced many instances of gender bias when dealing with opposing counsel in just the one year I have been in practice. I have been called "dear" several times and have had some attorneys infer I did not fully understand what I was doing (which was later proven wrong when I won in trial or during motions hearings). I have even had one attorney write me a letter suggesting I turn over a case to one of the other male lawyers in my firm since they would be more reasonable and knowledgeable. The more experienced male attorneys in my firm assure me that these particular attorneys are jerks to everyone and choose to attack my gender as their particular way of attacking me. I would also like to note that each of the instances of gender bias I have experienced involved opposing counsel over the age of 45.

> The good ol' boy system is alive and thriving. In one recent high profile prosecution . . . I was widely criticized as being vindictive as opposed to being aggressive. The defense counsel personally attacked me at all stages of the proceedings. The defense attorney also stole my work product and committed various ethical violations. I doubt that the defense attorney would have treated a male attorney in the same manner and I doubt that any of the judges would have treated my protests as casually had I been a man. . .
>
> On two separate occasions male attorneys have forcibly taken documents out of my files which I had previously declined to provide to them. On the first occasion, during trial, counsel reached over to my table and attempted to pull photographs out of my file. On the second occasion, while we were negotiating a settlement, another counsel attempted to grab a file out of my arms and take the document he wanted. I doubt that either attorney would have resorted so quickly to physical force had I been a man. I suspect that their ready use of force resulted not so much from their perception of my size as of my stature.

Several respondents felt that female attorneys displayed hostility toward male attorneys. Others noted that women attorneys tended to act in a defensive manner. Some typical comments received from male survey participants follow:

> I have found that women attorneys tend to be overly defensive and thus turn normal negotiations and trials into very aggressive and difficult situations.
>
> My clients have suffered unnecessary expenses because in my perception, certain female attorneys (but not all) seem to carry their gender on their sleeve and allow their feelings to interfere with the resolution of issues in an amicable manner. In my perception, recent attitudes regarding differences in treatment of attorneys does not relate so much to gender as to other personal qualities.
>
> I believe that sometimes female attorneys are defensive or feel that they must be super-aggressive toward male attorneys. This can make negotiations difficult and creates a danger of breakdown in settlement negotiation. Of course I cannot be sure that the aggressive negotiating stance is a function of gender rather than style; however, I believe that there is a higher percentage of aggressive (as opposed to cooperative) female negotiators.

The clearest distinction in reported experience between male and female respondents was with respect to their experiences with opposing counsel. In response to the question, "Have you experienced opposing counsel devaluing or diminishing your settlement position or factual assertions in negotiations for reasons that you thought were based on gender?" [Question 6], 77 percent of the men responded "No," and 13 percent did not know whether they had ever had such experience. In contrast, 49 percent of the women responded "Yes," and 19 percent did not know if they had ever had such an experience.

In response to the following question, "Have you experienced counsel of the opposite gender responding less favorably to an assertive or aggressive settlement posture than you believe would have occurred with an opposing counsel of the same gender?" [Question 7], 63 percent of the male respondents had not, and 14 percent did not know whether they had ever had such experience. Women had the opposite response, in about the same proportions. Sixty-four percent of the women responded "Yes" to this question, and 15 percent did not know.

A sample of the written comments submitted by respondents relating to gender bias in the courtroom follows:

> Particularly with judges, I feel the attitude of some may be affected by my sex, but few if any are dumb enough to say so. It's much more subtle than that. I also think often it's not a direct gender issue—with some of the judges it's more a matter of favoring their buddies, and due to the age of the judges and/or their years in practice, their buddies and former colleagues are all male.
>
> I showed up for a hearing a few minutes early, gave the secretary and bailiff my name (the judge was also in the room listening), told them I represented the defendant and was there for a hearing. The bailiff (male) told me the hearing would be in the jury room and he led me in there to wait. At ten minutes after the time for the hearing, the court reporter came in and asked who I was. The court reporter told me the judge and opposing counsel (both male) were out front chatting and waiting for defendant's counsel to arrive. I had to walk back out to the judge and opposing counsel, state again that I **was** counsel for defendant and had been waiting for **them** where the bailiff had led me. The judge looked momentarily embarrassed, but there was no acknowledgment by the judge and bailiff that they had inappropriately 1) assumed I was not the attorney 2) forgotten about me.
>
> I (am in) private practice in a small town in New Mexico... The area I practice in limits my experience with women attorneys. My perception is one would never survive in the local Bar. We have a woman judge, bias against her in the local Bar (if comments, etc. are indicative) is rampant.

One respondent asserted that female judges are more inclined to rule in favor of male attorneys; that judges in general are more tolerant of flamboyant behavior by male attorneys in the courtroom; and that female attorneys receive less attention when arguing before the appellate courts.

FEMALE JUDGES

Five past and present female judges located in various areas around the state were interviewed concerning their perceptions of the issue of gender bias. These judges uniformly stressed that gender bias has become more subtle over time but still remains an issue.

Two judges noted that there is a tendency to call female judges by their first names, as opposed to using their titles. One judge is frequently called "sir" by male and female attorneys, which may reflect the association of positions of authority with men. Two judges also noted that groups of judges are frequently called "gentlemen," without acknowledging the presence of female judges.

All five of the judges interviewed felt that they were insulated to some extent, by virtue of their position, from the effect of gender bias.

Overall, the judges expressed optimism with regard to the issue. As more women enter the profession and attain judicial positions, resistance to women will dissipate. One judge in the Albuquerque area noted that networks are forming amongst women to encourage qualified female attorneys to seek judicial positions.

One judge suggested that gender biased behavior can be countered most effectively with the use of humor. She felt that offensive conduct or statements should not be tolerated and that a woman who experiences this type of behavior should be firm in letting the individual know that such behavior is unacceptable. She felt that more subtle behavior which seems to be gender biased, however, could best be handled with humor rather than anger. This approach enlightens the individual and avoids the hostile rhetoric which may elicit defensiveness.

COURTROOM ENVIRONMENT FINDINGS AND RECOMMENDATIONS

Findings

1. More women than men report instances of gender-biased behavior in the courtroom. Significant numbers of attorneys of both sexes report that women are the objects of different forms of address, demeaning comments, and inappropriate comments on appearance. Additionally, some men report their perceptions that they are treated differently because of their gender.

2. Survey results addressing the apparent credibility given by judges to witnesses, including expert witnesses, reflect the general perception of both male and female respondents that judges usually appear unbiased.

3. One-quarter of the female lawyers responding to the survey perceive that gender bias affects the outcome of cases.

4. One half or more of the women responding to the survey believe that their gender impacts the outcome of negotiations. There is a significant perception among women that gender bias negatively and inappropriately impacts the settlement process. A substantial majority of men report that they have not experienced gender bias which impacted settlement negotiations in their cases.

Recommendations

1. The Supreme Court should adopt the provision in the proposed Model Code of Judicial Conduct, *See* Canon 3B 5 & 6, which sets standards of gender fair behavior for judges. *See* Appendix 10.

2. The New Mexico Supreme Court should adopt a statement directed to all judges mandating the elimination of any practices which are gender biased and instructing all attorneys and judges to strive for gender neutrality inside and outside of the courtroom. A sample statement appears as Appendix 8. The statement should be published in the *Bar Bulletin.*

3. The Supreme Court should create a task force on gender bias in the courts as called for by the Conference of State Court Administrators, which is Appendix 9, to expand on this study and to study other areas of relevance to the court system.

4. Efforts should be made in CLE presentations and in judicial education sessions to include good programs on gender fairness.

COURT DOCUMENTS

Despite a general trend away from the uniform use of masculine pronouns in court documents and procedural rules, at least some resistance continues to the use of gender neutral or gender appropriate language in court documents. Following the approach taken at the federal level, amendments to state procedural rules have generally incorporated gender neutral language. Gender neutral local rules have been in place for some time in United States District Court, and have been adopted in several of the state's judicial districts. Gender neutral local rules had not been adopted at the time of the draft report in the Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, or Thirteenth Judicial Districts.

New Mexico's civil and criminal uniform jury instructions use masculine singular pronouns throughout their text. General use instructions provide that ". . . pronouns should be changed in the instructions read to the jury as the situation requires." The Supreme Court Committee on Uniform Jury Instructions for Civil Cases has begun using bracketed masculine and feminine pronouns in the text of draft revisions and additions to existing instructions. The Supreme Court Committee on Uniform Jury Instructions for Criminal Cases, while not rejecting

the concept that gender appropriate instructions should be used, has expressed at least some concern with respect to the additional publication costs associated with revisions to the instructions.

COURT DOCUMENTS FINDING AND RECOMMENDATION

Finding

1. Bracketing rather than general use instructions better ensures that instructions are gender appropriate. The use of bracketing is consistent with trends in other jurisdictions which have considered these issues.

Recommendation

1. Civil and criminal jury instructions should be revised to include bracketed pronouns (masculine, feminine, or neuter). In order to accommodate cost considerations, these modifications should be made when the applicable pamphlets are being reprinted for other reasons. Gender neutral language should be adopted in all local district court rules where this has not already happened when these rules are next amended or reprinted.

CIVIL JUSTICE

Task forces and committees in other jurisdictions addressing issues of gender bias in the legal profession generally have devoted very little attention to gender bias in civil damage awards. The Minnesota Bar explored perceptions of damage awards with respect to certain components of claims for lost wages, in particular the valuation of homemaker services and damages for loss of future earning capacity. Illinois has also addressed civil damage awards, and their comments are fairly typical of results elsewhere:

> First, both judges and juries are likely to assume that women should receive higher damages for injuries affecting physical attractiveness than men and that men should receive higher damages for injuries affecting physical strength and capacity for manual labor than women. These assumptions, although gender-based, may in fact reflect disparate burdens and expectations which society is perceived to impose upon women and men.
>
> Second, because of assumptions about women's earning capacity and their tendency to leave the work force, at least temporarily, in order to care for children, the typical female plaintiff is likely to receive a smaller award for loss of future income than is a male plaintiff. The application of this assumption to the individual case may produce a gender-biased award if it does not reflect the facts pertinent to the individual female plaintiff. Such assumptions are also non-market services as homemakers in the calculation of lost income.

Illinois Task Force on Gender Bias in the Courts, 1990 Report (Executive Summary) 25-26.

RESULTS OF REGIONAL FACT FINDING MEETINGS

In general, the regional meetings contained few comments concerning civil damages, other than consistently perceived undervaluation of the contribution of homemakers. One member of the Fourth Judicial District speculated that valuation of a woman's services may be more difficult because the woman may have no work history.

SURVEY RESULTS

The Task Force survey addressed various aspects of the civil litigation system, including awards of damages and settlement outcomes for pain and suffering, lost wages, disfigurement and wrongful death. The survey results indicate that male and female respondents differ in their perception of outcomes with respect to some categories of damages, but agreed with regard to others. Responses indicating "No Experience" have been omitted from the calculations of percentages.

DAMAGES AWARDS FOR PAIN AND SUFFERING

Gender of Injured Party [TF32(a)]. With respect to awards of damages for pain and suffering, female respondents were more likely to feel that men received better awards. Male respondents were slightly more likely to feel that women received better awards. Both sexes were most likely to feel there is no difference between awards to injured men and women.

		Injured Party Receiving Better Award		
		Men	Women	No Difference
Gender of Survey Respondent	M	9	31	60
	F	26	21	53

Gender of Attorney [TF34(a)]. Both male and female respondents tended to perceive that there was no difference in awards of damages for pain and suffering between clients of female attorneys and clients of male attorneys. Female respondents were more likely to feel that men's clients received better awards than they were to feel that women's clients received better awards; the same was true for male respondents, but to a lesser degree of difference.

		Gender of Attorney with Better Award		
		Men	Women	No Difference
Gender of Survey Respondent	M	15	6	79
	F	36	8	56

DAMAGES FOR LOST WAGES

Gender of Injured Party [TF32(b)]. Both male and female respondents are more likely to perceive that men receive better damages awards for lost wages, and equally do not perceive that women do better in this regard. However, male respondents were more likely than female respondents to perceive no difference in damages awards for lost wages.

		Injured Party Receiving Better Award		
		Men	Women	No Difference
Gender of Survey Respondents	M	50	4	46
	F	68	1	31

Gender of Attorney [TF34(b)]. With respect to damages for lost wages, men were much more likely to respond that there was no difference between awards to clients of male and female attorneys than they were to respond that awards were higher for clients of male attorneys. They were much less likely to respond that awards of damages were more favorable for clients of female attorneys. Female respondents were also more likely to perceive no difference between awards of damages for lost wages between clients of male and female attorneys than they were to perceive that awards of damages for male attorneys are more favorable, but there is a much narrower margin of difference between the percentage of women responding "No Difference" and the percentage who felt that clients of male attorneys would get a better award. No female respondents felt that the clients of female attorneys would receive a more favorable award.

		Gender of Attorney with Better Award		
		Men	Women	No Difference
Gender of Survey Respondent	M	18	2	80
	F	44	0	56

The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts (hereinafter referred to as First New Jersey Report) discusses in some detail the proposition that the substantive rules of law which guide judges and juries in fixing personal injury damages are themselves unfairly skewed to the detriment of women. The available data from our survey reflects the respondents' perception that men receive better personal injury damage awards. There is no data analyzing whether this is actually the case; however, we suggest, as did the New Jersey Task Force, that assuming the perception to accurately reflect actual awards, the substantive rules of law guiding judges and juries in fixing personal injury damages are partially at fault.

The elements of personal injury damages recognized in New Mexico's civil uniform jury instructions ("UJI") for any award of damages include the value of lost earnings; reasonable medical expense; non-medical expense; the nature, extent and duration of injury, including disfigurement; pain and suffering **and the loss of services of a wife.** SCRA 1986, 13-1803 *et. seq.* Under the UJI language, one who chooses to work in the home may not be compensated for any loss of earning since he or she works without wages.

We suggest that, because a personal injury damage award is closely tied to actual wage-earning, women who remain at home receive only modest awards because their choice of work is not compensated. As noted by the First New Jersey Report, p. 28, some cases from other jurisdictions have recognized that a woman's decision to work in the home has a provable economic value and that a tortfeasor may fairly be required to compensate a woman for any "disability or impairment" which affects her ability to realize that economic value.[36]

It is significant that the New Mexico UJIs provide for an award of damages to the husband for "the reasonable value of the services of his wife, of which the family has been deprived." SCRA 1986, 13-1810. New Mexico case law has clarified that where a single person suffers the loss of capacity to perform household services for one's self, that person is also entitled to recover the reasonable value of loss of household services. *McNeely v. Henry*, 100 N.M. 794, 767 P.2d 1359 (Ct. App. 1984). However, a woman who has chosen to work in the home and whose choice of work is presented as merely her husband's entitlement is surely disadvantaged in her claim for damages.

In order to alleviate any possible gender bias, we suggest that the civil UJIs be supplemented with instructions specifically addre. sed to the measurement of damage awards for a plaintiff who chooses to work in the home. A suggested instruction is attached to this Report. Although we can never be sure that juries will be free of gender bias in applying the instructions for awarding damages, we can at least assure that the instructions themselves are free from gender bias.

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[35] *See eg., Fox v. Fox*, 296 P.2d 252 (Wyo. 1956); *Johnson v. Claiborne*, 328 S.W.2d 215, 18 (Tex. Ct. App. 1959); *Clark v. Brewer*, 471 S.W.2d 639 (Tex. Ct. App. 1971); *Rodgers v. Boynton*, 52 N.E.2d 576, 578 (Mass. 1943); *Cornett v. City of Neodesha*, 353 P.2d 975 (Kan. 1960); *Links v. Highway Express Lines, Inc.*, 282 A.2d 727 (Pa. 1971); *Daly v. General Steam Navigation Co.*, Ltd., 1 W.I.R. 120 (C.A. 1980).

DAMAGES AWARDS FOR DISFIGUREMENT

The results of the survey are consistent with results from other jurisdictions in finding that women are more likely to receive better damages awards for disfigurement. It is easy to speculate on the reasons for there to exist a tendency to award higher damages for disfigurement to women than to men. Perhaps the comments of one survey respondent are illustrative of the underlying attitude:

> Any lawyer who expects a jury to return the amount of damage for a facial scar on a man as it would return for a woman is a fool.

Gender of Injured Party [TF32(c)]. Both male and female respondents were far more likely to perceive that women received better damages awards for disfigurement.

		Injured Party Receiving Better Award		
		Men	Women	No Difference
Gender of Survey Respondent	M	1	63	36
	F	8	62	30

Gender of Attorney [TF34(c)]. With respect to awards of damages for disfigurement, male respondents were most likely to perceive no difference between awards of damages to female and awards of damages to male attorneys, and were least likely to respond that clients of female attorneys would receive a more favorable damages award, regardless of size of town or ethnic background of respondent. Females generally responded along the same lines, but were more likely than male respondents to feel that clients of male attorneys received a better award.

		Gender of Attorney with Better Award		
		Men	Women	No Difference
Gender of Survey Respondents	M	14	6	80
	F	33	7	60

DAMAGES AWARDS FOR WRONGFUL DEATH

Gender of Injured Party [TF32(d)]. With respect to wrongful death awards, both female and male respondents tended to feel there was either no difference between awards to men and women or that men received better awards. Both genders were far less likely to find that women received better wrongful death awards than men.

		Injured Party Receiving Better Award		
		Men	Women	No Difference
Gender of Survey Respondent	M	32	13	55
	F	55	9	36

Gender of Attorney [TF34(d)]. Male respondents were again much more likely to perceive no difference between awards of damages to clients of male or female attorneys and were much less likely to perceive that clients of female attorneys received a more favorable award. And again, female respondents were generally more likely to respond in the same pattern.

		Gender of Attorney with Better Award		
		Men	Women	No Difference
Gender of Survey Respondent	M	17	2	81
	F	44	1	55

SETTLEMENTS

Gender of Injured Party [TF33]. With respect to settlements, both male and female respondents felt that there was no difference between awards to men and women for pain and suffering. Female respondents felt that men were more likely to receive a better settlement for pain and suffering than were women, and male respondents conversely felt that women were more likely to receive a better settlement than men.

Male respondents were most likely to perceive that there was no difference between men and women in settlements for lost wages. Women were most likely to perceive that men received better settlements.

Both male and female respondents perceived that women were far more likely than men to receive a good settlement for disfigurement.

Male respondents were far more likely to find no difference in wrongful death settlements than they were to find that a man would receive a more favorable settlement, and were far less likely to perceive that a woman would receive a more favorable wrongful death settlement.

		Injured Party with Better Settlement		
		Men	Women	No Difference
Gender of Survey Respondent				
		Pain and Suffering		
	M	7	26	67
	F	27	17	56
		Lost Wages		
	M	46	4	50
	F	70	0	30
		Disfigurement		
	M	1	60	39
	F	6	62	32
		Wrongful Death		
	M	29	12	59
	F	55	5	40

Gender of Attorney [TF35]. With respect to settlements for pain and suffering, wage loss, disfigurement, and wrongful death, male respondents were generally much more likely to perceive no difference in the settlements received by clients of male attorneys and clients of female attorneys, and were much less likely to perceive that clients of female attorneys would receive a more favorable settlement.

Female respondents were also more likely to perceive no difference in settlements between clients of male and female attorneys.

Gender of Survey Respondent	Gender of Attorney with Better Settlement		
	Men	Women	No Difference
Pain and Suffering			
M	16	4	80
F	34	5	61
Lost Wages			
M	20	2	78
F	38	2	60
Disfigurement			
M	14	8	78
F	25	10	65
Wrongful Death			
M	17	1	82
F	35	5	60

CIVIL JUSTICE FINDINGS AND RECOMMENDATIONS

Findings

1. The survey revealed some differences in perception by male and female respondents with respect to certain types of damages awards and clear agreement among respondents of both sexes that some awards, i.e., disfigurement and lost wages, appear likely to differ depending upon the sex of the injured party.

2. It appears that the gender of the attorney makes no difference in the outcome of a claim for pain and suffering, lost wages, disfigurement or wrongful death, regardless of whether the case is resolved by award or by settlement.

3. Because household services are not compensated, litigants have not successfully recovered for the value of their services. The jury instructions do not adequately permit this recovery.

Recommendation

1. Jury instructions should be supplemented or amended to eliminate gender bias.

DOMESTIC VIOLENCE

The battering of a spouse or partner within the home has only recently been acknowledged to be a crime that demands the intervention of the police and the attention of the state in adopting and enforcing laws to protect victims. Cases involving domestic violence also demand understanding of the cycle of violence by judges, attorneys and court personnel who are called on to intervene and aid the victims. Whereas until the 1980's domestic violence was routinely viewed within the system as "family squabbles," there is now greater recognition that the abuse suffered by the victim is a crime, requiring both civil and criminal remedies.

The Task Force approached its review of this substantive area with the understanding that an overwhelming majority of the victims of domestic violence are women. The Task Force sought to answer the following questions: what is the scope of New Mexico law and how does it work; what data is kept on records of domestic violence and the use of civil or criminal proceedings to respond to incidents of violence; what communities have shelters for victims of domestic violence; and how do members of the legal profession perceive the enforcement of the Family Protection Act and response of the legal system to the problem of domestic violence.

CYCLE OF VIOLENCE

The overwhelming majority of victims of domestic violence are women. Recent U.S. Justice Department figures indicate that 78 percent of victims are women and that 87 percent of offenders are men. Thus, practitioners may find themselves most frequently dealing with female clients who are seeking restraining orders or divorces as a result of physical abuse by a male partner or spouse.

Many social and psychological factors make it difficult for these women to leave marriages or relationships in which abuse has occurred or continues to occur. The "cycle of violence" or "battered woman syndrome," as it is sometimes called, is a complex phenomenon which has been documented and analyzed in numerous studies. These studies show that the violence is not caused by the victim; that the battering is one of the ways that the abuser exercises control over the victim and that the batterer does not give up control when the victim leaves; and that the batterer will try to manipulate the victim to affect the judicial process. The victim is often economically dependent on the batterer. She has been socialized to feel responsible for the conduct and behavior of the abuser and believes or feels that she is at fault for being beaten. She often knows that separation from the abuser, including divorce, may not assure her safety. If there are children, she will be concerned about their safety, as they may have either experienced abuse also or be used by the batterer to maintain control through threats of child snatching, custody claims or violence. Any attorney, judge, police officer, or court personnel who is unfamiliar with the nature of the domestic violence victim's dilemma, may well fall prey to such common misconceptions, categorized as "myths," such as women who stay in such relationships are masochistic, a stereotype that has been contradicted by clinical evidence. Another significant finding from these studies indicates that, in fact, an abused spouse will leave the relationship when she is able to do so. The factors that will allow this resolution and change in the relationship include resolving emotional and economic dependence and securing adequate alternative resources and support.

Failure to understand and take such factors into account could conceivably cause attorneys or court personnel to make false assumptions about a victim's motivations, thus limiting their ability to assist the victim/petitioner in seeking the protection and intervention necessary to interrupt the cycle of violence.

Civil Process: Orders for Protection and Support Under the New Mexico Family Protection Act

Family Violence Protection Act (FVPA), NMSA § 40-13-1 *et seq.*, (1978)

The FVPA was enacted in 1987 in response to growing concern over the high incidence of domestic violence in New Mexico. Police were reluctant to respond promptly or become involved in domestic disputes due to the volatile nature of the disputes; attorneys expressed frustration with the ambivalence demonstrated by victims in pursuing criminal charges or divorce. The abusive relationship was often repeated after a brief separation period, causing a high recidivism rate. The end result was that victims, abusers and families were not getting either help or appropriate intervention by the judicial and law enforcement system. The FVPA changed the manner in which different entities both react to and provide assistance for victims of domestic abuse.

The FVPA requires that a family or special relationship exists between the parties, i.e., parent, husband and wife, ex-spouses, former or current household members or other blood relatives. The act also defines "domestic abuse" not just as physical violence, but as an "assault or a threat causing imminent fear of bodily harm." Under the Act, the court is granted the power to issue a protection order. But the most important language in the Act is that directed to law enforcement agencies. Not only **must** the police and/or sheriff get involved in reported incidents of domestic violence, but they are now required to assist and protect victims from further abuse. Specific remedies are set out in Section 40-13-7 of the Act. Finally, for the protection of responding officers, the Act sets forth an immunity provision for officers for civil liability to the extent allowed by law.

COURT PROCEDURES

Under the provisions of the FVPA, the responding officer is required to hand to the victim a petition for an order prohibiting domestic abuse. Victims may proceed to file the petition in the district court of the judicial district in which they reside.

The first remedy afforded to the victim is the issuance of a protection order based on the sworn allegations of the petitioner alone, without notice to the respondent. NMSA § 40-13-4 (A), 1978 Comp. If the judge or commissioner finds probable cause to believe that an act of abuse has occurred, a ten (10) day protection order should be immediately granted, NMSA § 40-13-4(A), 1978 Comp.

The ten day order may accomplish the following:

1. Prohibit the parties from having any contact with each other;

2. Prohibit the parties from going within 100 yards of each other's work place, residence or other private addresses;

3. Require that both parties appear for a second hearing within ten days to determine if the order of protection should be continued;

4. Prohibit the parties from selling, destroying, damaging, removing or hiding any property owned separately or jointly by the parties;

5. Address timesharing or visitation with minor children;

6. Allow for the eviction of the abuser and the return of the victim to the home; and

7. Notice of law enforcement agencies regarding enforcement of the order.

After issuance of the ex parte order, service is made upon the respondent.

90-DAY ORDER PROHIBITING DOMESTIC ABUSE

Both parties are called to appear before the court for a second hearing after the issuance of the ex parte order. If the petitioner fails to appear, the protection order may be dismissed and/or a bench warrant may be ordered. If the respondent fails to appear, the order of protection may be extended for another ten days. If the respondent was duly served, then a bench warrant may also be requested.

The court may enter a 90 day order prohibiting domestic abuse on the following grounds:

1. Finding of abuse by the respondent;

2. Stipulated to entry of a mutual 90 day order, without a finding of abuse; and

3. A finding of mutual abuse.

The 90 day order is similar to the ten day order, with the potential for additional provisions to allow for exchange of property and arrangements to be made for financial matters. Under the 90 day order, either or both parties may be referred or ordered to appropriate counseling. If minor children are involved, a status hearing should be scheduled for six weeks from the entry of the order.

CONSTITUTIONAL CONCERNS

Attorneys, judges, and the parties themselves have raised concerns regarding the ex parte, ten day order of protection. The argument raised is that respondents may be deprived of property rights without due process of law — in violation of their constitutional rights.

A respondent of an order issued out of the district court in Las Cruces challenged the constitutionality of the Act itself. The New Mexico Supreme Court denied the writ of certiorari. In other states with similar acts, the issue has also been raised. To date all domestic violence state acts have withstood constitutional challenge.[36] The courts have made these determinations by weighing the state's interests regarding the issuance of an ex parte order of protection to protect the victim versus the respondent's constitutional right of due process. The recognized state interests include the state's goal of reducing domestic violence, and reducing injuries to citizens, protecting children from exposure to domestic abuse and reducing the cost to the state of dealing with domestic violence.

CRIMINAL ENFORCEMENT

The Task Force believes that in order for the judicial system to respond adequately to cases of criminal domestic violence, the effective use of criminal sanctions by prosecutors in these cases must be reviewed. Whether these cases are prosecuted as zealously as crimes of assault and battery is not known. Other jurisdictions that have studied this area have found that discretionary dismissals of these cases, problems with victim cooperation, and lack of intervention and support services are barriers to utilizing the criminal justice system to prevent repeated domestic battering. These reports also conclude that prosecutors are perceived as insensitive and often hostile to women who are victims of domestic violence. They found that because of a reluctance to view domestic violence as a crime and the failure to understand the dynamics and impact of this violence on women and children, prosecutorial discretion to drop domestic violence prosecutions was a frequent occurrence. The willingness to dismiss criminal charges in these cases was believed to contribute to the cycle of violence and the inability of the criminal process to be a positive factor in intervention. The Minnesota study suggests that victim advocacy projects have a positive impact on increasing victim cooperation in these cases, and therefore, would also have a positive impact on effective prosecution if more widely available and utilized.

Insufficient data is available to draw similar conclusions for New Mexico. However, these trends argue for mandated data collection in these matters to enable aggressive enforcement of criminal sanctions in these cases.

SURVEY AND HEARING RESULTS

Results of the public hearings and survey show that problems exist in the vigorous enforcement of the protections provided to victims under the Act. The results also show that perceptions of the extent of enforcement problems vary based upon the size of the town, the gender of the survey respondent and the job held within the legal system.

SURVEY RESULTS

The survey sought information on the use and enforcement of support awards, restraining orders, protective orders to enable the victim to return to the home, and the assistance provided by court personnel to victims seeking restraining orders. [TF51-56].[37]

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[36] *See* Report of Florida Supreme Court Gender Bias Study Commission, 1990, at 16 (hereinafter referred to as Florida Report); and Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report, September 1989, at 42, *et. seq.* (hereinafter referred to as Minnesota Report).

[37] Question 55 is excluded from this analysis. The Task Force determined that significant problems existed in the phrasing of the question, thus precluding a reasonable analysis of the responses.

Based on reports about the incidences of court issued restraining orders, it appeared that restraining orders are more frequently issued when compared to support awards or protective orders to allow the victim to return safely to the home.

JUDGES AND ATTORNEYS

The perception of judges differed significantly from the overall perception of attorneys.[38] Whereas, 100 percent of judges reported that restraining orders were always or often granted when petitioners were physically and/or mentally endangered, 86.9 percent of attorneys and court personnel believed that restraining orders were always or often granted in these cases. [TF53].

In responding to Question 52, on whether support awards to domestic violence victims who are not pursuing a divorce are enforced as vigorously as those for victims seeking a divorce, a difference in perception between judges and attorneys was noted as follows:

	Always/Often	Rarely/Never
Judges	44%	11%
Attorneys	29%	46%

This difference in perception exists also when considering the issuance of protective orders to enable the petitioner/victim to return to the home and directing the perpetrator of the abuse to leave the home. In these cases, 49 percent of attorneys and court personnel reported that these orders were always or often issued, as contrasted with 69 percent of judges. No judge reported that these orders were rarely or never issued, whereas 12 percent of attorneys and court personnel reported that these orders were rarely or never issued. [TF54].

More judges (92%) than attorneys and court personnel (66%) believe that court personnel assist the potential petitioner adequately. [TF56].

Thus, in all areas of the survey, judges responding believe that the FVPA is working better than attorneys with experience in the law.

GEOGRAPHIC DIFFERENCES

The survey data repeatedly shows that in all aspects of use and enforcement of the Act to provide protection to victims, the Act is more effectively and vigorously utilized in the smaller towns and Albuquerque than in Santa Fe and Las Cruces. This trend held true for each aspect of the Act for which data was gathered.

Forty-four percent of those answering from small towns and 36 percent of Albuquerque survey respondents reported that support awards were rarely or never as vigorously enforced when the victim did not seek a divorce; however, in Santa Fe and Las Cruces, 57 percent of those reporting perceived this to be the case.

The granting of restraining orders, the most frequently used aspect of the Act, also reflected this difference.

Survey Response	Always/Often	Rarely/Never
Towns less than 50,000	87%	13%
Cities of 50,000-400,000	74%	26%
Cities greater than 400,000	89%	11%

[38] Because of the small number of judges completing this survey, the response differential may be subject to error. The number of judges responding for each question, as compared to total number of responses, is as follows: Q52, 9 of 136; Q53, 13 of 227; A54, 13 of 193; Q56, 12 of 189.

The issuance of protective orders to return the victim to the familial home varies also, based on where in the state the victim lives. Again, in Las Cruces and Santa Fe, these orders are less frequently granted. [TF54].

These geographic differences also exist when evaluating the assistance available to potential petitioners from court personnel. Court personnel in Albuquerque and small towns provide adequate assistance more frequently in these cases than in the mid-size towns. [TF56].

GENDER DIFFERENCES

The perception of the frequency of court issued restraining orders in cases of domestic violence in which the petitioner is endangered did not differ when comparing the responses of men and women. However, women and men reported different perceptions about the enforcement of support awards and the issuance of protective orders to allow the woman/victim to return to the home. More women respondents than men reported that support awards were rarely or never as vigorously enforced as in a divorce proceeding (50 percent as compared to 40 percent). More women than men reported that protective orders were rarely or never issued to remove the abuser from the home and enable the victim to return to the home (16 percent as compared to 8 percent).

When gender is added as a factor in the consideration of geographic-based differences, the trend that demonstrates a strong and persistent difference in the perception of women and men on questions of enforcement of the Act remains.

EXPERIENCE OF THE PROFESSION WITH CASES INVOLVING DOMESTIC VIOLENCE

Sixty-four percent of those answering reported having no experience in cases involving domestic violence. The response of women and men was not appreciably different. However, of those persons reporting experience in cases involving domestic violence, a significantly higher percentage of women (33 percent) than men (10 percent) stated that more than 20 percent of their practice involved issues of domestic violence. Statewide, two times as many women reported having practices where 20 percent of the cases involved domestic violence.

Among people with practical experience in these matters, the area with the least reported experience was enforcement of support awards when no divorce was pending. The higher incidence of non-experience in this aspect of the Act, which might mean that it is being used less frequently than other remedies available under the Act, may call for further investigation.

The Task Force looked at which private practitioners do provide representation in cases involving domestic violence. Most attorneys who reported experience in these cases were sole practitioners. As the law firm size increased, the experience in cases involving domestic violence decreased substantially.

Although the number of people who answered was about the same when comparing small towns with mid-size towns (0-50,000 and 50,000 to 399,000), the percentage of individuals within those geographic categories differed; 59 percent of practitioners in small towns reported experience in these cases while 32 percent of mid-size town practitioners reported experience.

REPORTED INCIDENTS OF DOMESTIC VIOLENCE

New Mexico does not maintain cumulative data on the number of incidents of reported cases of domestic violence. The Task Force found that although data for cases reported to the police, cases filed in the Family Court, and persons served by a shelter is maintained by each of these entities in Bernalillo County, similar data is not uniformly available from other communities throughout the state. Although shelters maintain records that track the gender of the persons seeking assistance, it was particularly striking that although domestic violence is generally recognized as a crime for which the predominant number of victims are female, few if any of the courts, service providers or police departments include this information in their statistical summaries.

DATA ON CASES REPORTED BY COMMUNITY, SHELTER, POLICE DEPARTMENT OR COURTS

Fifteen communities in New Mexico have Shelters for Victims of Domestic Violence. These communities include: Alamogordo, Albuquerque, Carlsbad, Clovis, Farmington, Gallup, Hobbs, Laguna, Las Cruces, Roswell, Santa Fe, Silver City, Taos, Socorro and Shiprock. A chart of reported incidence of domestic violence by community is attached as Appendix 11.

DOMESTIC VIOLENCE FINDINGS AND RECOMMENDATIONS

Findings

1. Domestic violence is a serious problem faced by our society.

2. New Mexico statute has established a procedure and remedies by which to afford protection to victims of domestic violence; however, the statute has not adequately been implemented or enforced.

3. Court staff is not always available or appropriately trained to provide assistance to petitioners seeking to utilize the act pro se.
4. Judges, lawyers, court personnel and law enforcement officers may not always be sufficiently sensitive to or aware of the problems of victims of domestic violence and may not understand or be aware of the cycle of violence and its impact on victims.

5. In some cases, petitioners for protection orders do not receive adequate relief through the court systems. This perception is especially strong in the use of support awards for petitioners who do not also seek divorce.

6. Few attorneys have experience in or provide representation in cases involving domestic violence. Many women who are victims of violence lack financial resources to secure private counsel.

Recommendations

1. Judges, attorneys, law students, court personnel and law enforcement officers should be sensitized to and made aware of the problems of individuals who have been victims of domestic abuse through training and educational materials, and continuing judicial and legal education programs.

2. State funding should be provided for the hiring and training of lay advocates and attorneys. The ongoing development of the pro bono panels, such as that in Albuquerque, to provide representation in these matters throughout the state, should be continued and expanded by the Bar.

3. The forms used to petition the court for protection orders should be simplified and available in Spanish.

4. The Legislature should amend the statute as follows:

   a. new funding to develop a standard computer program for monitoring local and statewide statutory compliance through analysis of all domestic violence arrests or reports;

b. creation of statewide and local task forces on domestic violence for the following purpose:

(1) to facilitate interagency education;
(2) recommend and implement appropriate methods to increase interagency communication;
(3) develop intervention and treatment services for the victims and offender; and
(4) educate public about dynamics of cycle of violence and about services and resources available.

c. extend the time period in which a domestic violence protection order may be enforced; and

d. include a provision that would allow the granting of a permanent injunction in those cases where a separate divorce action is not contemplated.

5. The courts should establish mechanisms to monitor compliance with the Act by court personnel.

6. District attorney offices should review prosecution of domestic violence matters. If too many discretionary dismissals are occurring, district attorneys should implement policies to assure effective prosecutions of these cases.

7. The judiciary should award child support whenever appropriate in domestic violence cases even if divorce is not being sought.

8. The Administrative Office of the Courts or the district attorneys should study whether criminal assault cases involving family members are treated similarly to or differently from assault cases involving non-family members with respect to such matters as degree of culpability and severity of sentence.

9. The Legislature should appropriate funds or increase funds to establish adequate statewide support programs and services for domestic violence victims, including but not limited to intervention and counseling services for victims, offenders and their families.

10. The State Bar should develop an information video and pamphlet in non-lawyer language describing:

a. rights and remedies under both Acts;
b. how the legal process works;
c. what to expect from attorneys; and
d. what support services are available and how to access them. These materials should be distributed widely.

11. Counties throughout the state should consider adopting programs like those in place in Albuquerque.

CRIMINAL LAW

SEXUAL ASSAULT

Criminal sexual conduct or sexual assault is an area which has undergone considerable change over the last two decades. Women have demonstrated and shown their concern about issues of safety in their lives. Courts and legislatures have responded slowly, and the instances of women victims of sexual assault being "put on trial" are diminishing. While progress has been made, more is needed.

In 1975, the New Mexico Legislature repealed the state's rape statutes and enacted in their stead the crimes defined as "sexual offenses," found in Sections 30-9-10 through 30-9-13, NMSA, 1978 Comp., as amended. The new statutes defined a sexual offense as the commission of sexual penetration ("CSP") or sexual contact ("CSC") with an element of force. It eliminated reference to the victim as "female," "statutory rape" of minors, and placed offenses in the context of the age of the victim and the authority, coercion or force used by a perpetrator. In the statutory scheme, the offenses are to be measured by proof of authority, force or coercion, or in other words, by the improper conduct of the accused.

This was a conceptual shift, reflected in the statutory scheme, from years of blaming women for rape under the assumption that as a group, women are seductive and misleading in their intentions and that men are not quite at fault for losing control in the confusion of sexual signals. As recently as 1975, The British House of Lords, the supreme appellate body in Great Britain, held that "if a man believes a woman is consenting to sex, he cannot be convicted of rape, no matter how unreasonable his belief may be."[39] Or, as a Minnesota suburban judge was heard to comment in chambers, "Rape is simply a case of poor salesmanship."[40]

In spite of the conceptual shift in the law, too often judges, lawyers and the public regard the victim of a sexual assault as a sex object and think of the crime as a seduction. Such was the case with a Colorado judge who said that trying garden-variety rape cases gave him vicarious pleasure. Until the focus is squarely on the conduct of the defendant and objective manifestations of violence rather than on the defendant's subjective view of the victim's conduct, rape will continue to be viewed as a sexual crime, not a violent one.[41]

One positive step has been the development of "rape shield laws" which exclude evidence of the victim's past sexual conduct. That one judge in New Mexico can confidently state that a rape victim's past sexual conduct is inadmissible under a rape shield law shows that progress has been made.[42] However, not all victims' stories are the same, and we all know of cases in which the victim ended up "on trial."

This report will attempt to discuss criminal sexual conduct cases in New Mexico. The Task Force was hard put to find New Mexico data to rely on. Since 1981, there has been no statewide data-gathering on crime in general, or sex crimes in particular. Nor was the Task Force able to discover any studies related to this topic within the State of New Mexico.

Penalties

A study released by the Statistical Analysis Center of the University of New Mexico in 1988 shows that New Mexico ranks 7th in the nation in rape crimes. In spite of this fact, we have very little information, compiled statewide, on numbers of rapes reported, estimations of numbers of rapes committed, and the progress those reported cases made though law enforcement agencies, district attorneys' offices and the courts.

In a report by the New Mexico Statistical Analysis Center (SAC) entitled "Sentencing in New Mexico: An Analysis of Prison, Probation and Pre-Prosecution Diversion," a report submitted to the New Mexico Legislative Council November 15, 1989, some interesting information is brought to light. In examining the impact of four different types of crime on sentencing, the authors note that while violent crimes, personal crimes and drug crimes are not significantly more likely to result in incarceration for convicted offenders, offenders convicted of sex crimes were significantly more likely to receive incarceration.[43] Sex crime offenders also received considerably

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39 *Director of Public Prosecutions v. Moroan*, 2 W.L.R. 923 (1975).

40 Minnesota Report at 57.

41 Singleton, *Gender Bias Skews Justice for Women*, 26 Trial, No. 2, February 1990, at 39.

42 *Id.*

43 New Mexico Statistical Analysis Center, *Sentencing in New Mexico: An Analysis of Prison, Probation and Pre-Prosecution Diversion.* A report submitted to the New Mexico Legislative Council, November 1989, at 95.

longer prison terms.[44] Offenders who committed sex crimes also received significantly longer probation lengths.[45] Commission of a sex crime was the only variable that produced these statistically significant results. The authors also note, though, that there were relatively few cases among the incarcerated offender sample involving sex crimes. And unfortunately, the SAC study does not define "sex crimes."

In reviewing Task Force survey data, "no experience" responses have been factored out, so that the following statistics reflect response from those answering who had some experience with the subject area. Data from the Task Force survey indicate that beliefs conform to actual facts. In general, respondents believe that rape, once it makes its way to court, is treated seriously. Forty-two percent of all respondents (42 percent of males; 41 percent of females) believe that bail in CSP cases is **rarely** set lower than in other felonies of the same grade. [TF39]. Forty-six percent of all respondents (46 percent of males; 46 percent of females) believe defendants in CSP cases are **rarely** released on their own recognizance more often than defendants charged with other felonies of the same degree. [TF40]. And, 47 percent of all respondents (49 percent of males; 42 percent of females) believe that sentences imposed in CSP cases are **rarely** shorter than in other felonies of the same degree. [TF41].

Most rapes involving adult victims are prosecuted as third degree felonies. Where there is great bodily harm or great mental anguish, it may be prosecuted as a second degree felony. The question often raised is, "are the penalties appropriate to the crime?" A three-year sentence for a third degree CSP conviction with one-half off for "good time" seems meager, especially considering rape perpetrators' rates of recidivism.

In addition to the question of how many cases fail to make their way into the court system, (see "Rape and Acquaintance Rape," below) possible penalties for the offense undermine the ability of the judicial system to dispose of CSC and CSP cases in a manner commensurate with their seriousness.

Rape and Acquaintance Rape

Research gathered and used in Susan Estrich's comprehensive study of acquaintance rape in *Real Rape*[46] indicates that approximately 10 percent of reported rapes involve assault by strangers. The remaining 90 percent are fairly evenly divided between intrafamilial sexual assault and sexual assaults by friends, coworkers, and acquaintances. Estrich notes that "rape," as traditionally defined (sexual assault by a stranger), is one of the most fully reported crimes according to the FBI Uniform Crime Reports and the Department of Justice Bureau of Justice Statistics. But she goes on to state that, according to numerous crime victimization studies, the majority of victims sexually assaulted by someone **they** know do not report to rape crisis centers, hospitals, or the police. She concludes, based upon the available research, crime report statistics, and victimization studies, that only ten percent of "acquaintance rapes" are reported. And of **all** reported rape cases, 83 percent do not fit the cultural rape stereotype.[47]

Marlise Riffel-Gregor, a sociologist who reviewed literature for the Minnesota Task Force, concluded that the most common educated estimate is that 20 percent of the country's female population suffers a sexual assault at the hands of an acquaintance.

Estrich, Riffel-Gregor, and the Minnesota Attorney General's Task Force described a type of acquaintance rape far broader than "date rape" incidents. Most acquaintance rapes, as discussed in these studies, do not include prior close or sexual relationships between the victim and the assailant.[48]

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[44] *Id.*, at 98.

[45] *Id.*, at 100.

[46] Susan Estrich, *Real Rape* (1986).

[47] Minnesota Report at 58.

[48] Riffel-Gregor states: "The term acquaintance, in the research literature, is used to mean that the victim of a sexual assault RECOGNIZES the perpetrator, at a minimum. Most of the research on perceptions of and reactions to acquaintance rape use scenarios which depict the victim and perpetrator to be dating, either casually, or seriously dating with intimate romantic involvement. However, it is clear that acquaintance rape can also mean sexual assault by a perpetrator who is known by appearance only (i.e., the person who lives down the street, the student in my biology class), by name and appearance, by previous relationship (i.e., ex-dating partner, ex-spouse, coworker at previous job), or by indirect relationship (i.e., father of current dating partner, brother of friend)." *Acquaintance Rape* (1989).

In its Preliminary Recommendations, the Minnesota Attorney General's Task Force stated:

> Sexual assault is not merely a violent act committed against a person. It is the most extreme manifestation of a set of values and beliefs which prevail in our society. Although attitudes alone do not cause sexual violence, there is evidence that a culture's prevailing belief system can create a climate which is more or less tolerant of sexual aggression.
>
> Rape is not only the spectacular crime perpetrated by a predatory stranger. It is a crime committed by spouses, dates and acquaintances. Not every rapist is a sexual psychopath.[49]

The treatment of rape, particularly of acquaintance rape, by police, courts, and the public, reflects what Riffel-Gregor calls a "rape-supportive" social attitude. The Minnesota Attorney General's Task Force found evidence that a culture's prevailing belief system can create a climate either more or less tolerant of sexual aggression.

Confusion about consent and the potential of blaming the victim is ingrained as early as the early teen years. In a 1988 Rhode Island study[50] of 1,500 seventh-, eighth-, and ninth-graders, the central question asked was under what circumstances a man on a date with a woman was justified in having sexual intercourse with her against her consent. If the woman had allowed the man to touch her above the waist, 57 percent of the boys and 39 percent of the girls said the act was justified; if the two had a long-term dating relationship, 60 percent of the boys, and 47 percent the girls said it was justified; if the man spent a lot of money on the date, 25 percent of the boys and 16 percent of the girls said the act was justified.

Other studies show that for the very same offense, including factors of violence, injury, and preceding events, sample groups viewed acquaintance rape as less serious than stranger rape. In other words, the introduction of acquaintance lessened the perceived severity of the offense regardless of other circumstances. University of Minnesota Psychology Professor Eugene Borgida has conducted many studies on juror responses to rape trials, including isolation of trial variables. The work explores many "rape myths," and whether they result in correspondingly narrow perceptions as to which sexual assaults deserve criminal sanction. Borgida concludes that different prosecutorial tactics may be necessary to effectively present rape cases with an acquaintance factor. In studies that included mock trials testing variable factors, Borgida found that the use of expert testimony early on in the prosecution case can assist prosecutors in the "casual acquaintance rapes," where statutory and procedural reforms appear to be ineffectual.[51]

An Indiana study of 331 jurors in recent forcible rape trials concluded that jurors were more influenced by the biographical and socioeconomic characteristics of the victim and defendant than they were by the facts of the incident.[52] As for judges, Riffel-Gregor cites a 1986 study in which 83 percent of acquaintance rape victims voiced a view that their assailants should receive imprisonment, while at the same time the sentences varied downward with the degree to which the victim knew the defendant. Riffel-Gregor concludes that, as a consequence of such attitudes, acquaintance rapes are likely to be seen by the police as unfounded, dropped or plea-bargained by prosecutors, disbelieved by jurors, and treated leniently by judges in setting bail and sentencing.[53]

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49 Minnesota Attorney General's Task Force on the Prevention of Sexual Violence Against Women, Preliminary Recommendation, Nov. 1988.

50 Rhode Island Rape Crises Center (1988).

51 Brekke and Borgida, *Expert Psychological Testimony in Rape Trials: A Social Cognitive Analysis*, 55 J. Personality & Soc. Psychology 383 (1988).

52 LaFree, Reskin and Visher, *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 Soc. Problems 390 (1985).

53 Thanks to the Minnesota Task Force for the preceding information and reports on acquaintance rape.

The University of New Mexico SAC's report notes "the criminal justice system's well-known tendency to punish offenders more severely when they commit crimes against victims who are strangers to them."[54] And, while not specifically related to sex crimes, the SAC authors note that cases involving acquaintances resulted in less severe punishments for offenders.[55]

It is difficult to imagine that New Mexico statistics, if known, would be different from the national statistics cited. If acquaintance rape is the overwhelming percentage of rapes as a whole, as we now believe, the victims of these crimes are being given short shrift by the criminal justice system.

Data from the Task Force survey tend to support the proposition that we have a problem in the area of acquaintance rape. Thirty-nine percent of all respondents believe judges are **sometimes** less concerned about CSP cases where the parties have a current or past relationship. [TF45]. Those respondents also believe that 48 percent of all prosecutors and 41 percent of all defense counsel **sometimes** have less concern in this area. The difference in these responses by males and females is not statistically significant. Male respondents, however, appeared to be more firmly resolved than female respondents that judges **rarely** (38 percent to 18 percent) or **never** (19 percent to 3 percent) showed less concern in CSP cases where there was an acquaintanceship. [TF45].

Forty-two percent of all respondents believed bail is **sometimes** set lower in CSP cases where the parties know one another than where the parties are strangers (43 percent of males; 38 percent of females). [TF42]. Once again, however, 25 percent of all male respondents believe bail is **rarely** set lower compared to only 19 percent of females, and 16 percent of males believed bail was **never** set lower in acquaintance rape cases, compared to only 3 percent of female respondents.

The Task Force believes that these attitudes, which tend to excuse sexual assault by acquaintances and blame the victims of these assaults, and which may directly affect courtroom response to charges, cannot be discounted or taken lightly.

These attitudes illustrate a rape-supportive attitude in our society for those sexual assaults which fall outside the accepted "rape" stereotype by a stranger. This tolerance, and a resultant lack of reporting, raises the question of whether acquaintance rapists are able to rape almost without consequence. Offenders' self-reports indicate that their conduct is seldom limited to one partner, that a major factor in their conduct is the presence of peers engaging in similar conduct, and that their attitude is that prevention is the responsibility of the women who are their targets. As Riffel-Gregor's review of the Minnesota Task Force concludes:

> [H]istorically, the focus for prevention has been on women: learn assertiveness, self-defense. However, as . . . researchers have clearly shown in societies where rape is rare, even the most unassertive women are not raped. Rape happens in our society because men in society rape. When women are not available as targets (such as in prisons), or are not the preferred sexual partner, men rape other men. Women have little to do with rape, except that they are the most acceptable target. And in the case of acquaintance rape, they are the most available target.
>
> Prevention aimed at women cannot, has not, and will not reduce or stop rape. Rape will not stop until men stop raping.[56]

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[54] New Mexico Statistical Analysis Center, *Sentencing in New Mexico: An Analysis of Prison, Probation and Pre-Prosecution Diversion.* A report submitted to the New Mexico Legislative Council, November 1989, at 73.

[55] *Id.* at 91.

[56] Minnesota Report at 60-61.

Issues of Consent

While there is little evidence before the Task Force, it is widely agreed that stereotypical notions of how women manifest consent to sex too often become an issue at trial. This is especially true in the few cases involving "acquaintance rape" that find their way into the court system.

In a study of practice since the enactment of Michigan's reform legislation which focused on defendants' conduct, researchers concluded that the model law had little, if any impact to this area. The Michigan defense lawyers surveyed said that they continued to investigate the victim's sexual history as a matter of course and to seek ways to use it to discredit the victim.[57]

According to the New Mexico Task Force survey, 36 percent of all respondents answered that judges **sometimes** believe female victims might have invited sexual assault by their behavior in clothing (30 percent of males; 50 percent of females). [TF43]. Forty percent of males answered judges **rarely** believe victims invited assault, compared to 26 percent of females, and 28 percent of males stated judges **never** believe a victim might invite sexual assault, compared to only 12 percent of female respondents. [TF43]. Not only is it perceived that judges may sometimes believe victims invited assault, but female respondents are far less likely than are their male counterparts state that judges **never or rarely** hold such beliefs.

Fifty-eight percent of all respondents stated that juries **sometimes** believe female victims might have invited sexual assault by their behavior or clothing. Twenty-four percent of males and 7 percent of females believed juries **rarely**, and 8 percent of males and 3 percent of female believed juries **never** believed female victims might have invited sexual assault. [TF44].

Estrich's research and Riffel-Gregor's literature review for the Minnesota Task Force indicate in no uncertain terms that culturally pervasive gender stereotypes are at the root of the consent issue as it surfaces in sexual assault court proceedings. Estrich cites jury studies, which show that jurors will go to great lengths in sexual assault cases if there is a suggestion of contributory behavior by the victims such as "talking to men at parties."[58]

CRIMINAL LAW
SEXUAL ASSAULT FINDINGS AND RECOMMENDATIONS

Findings

1. New Mexico lacks a significant data base from which to draw conclusions regarding treatment of sexual assault crimes.

2. Significant numbers of serious sex offenses are not heard in court due to gender-based stereotypes about acquaintance rape.

3. Victim blaming is found in the conduct of sexual assault cases, unfairly focusing on the question of the victim's conduct rather than on the conduct of the defendant and the issue of force.

4. Because of general sentencing laws, statutory penalties in sex offense cases inadequately address the seriousness of the crime, even though sentences imposed may be greater than those imposed in comparable felony level offenses.

5. New Mexico law currently excludes prosecution for spousal rape.

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[57] Marsh, Giest and Caplan, *Rape and The Limits of Law Reform* (1982).

[58] Minnesota Report at 62.

Recommendations

1. Statewide information needs to be compiled and made available regarding:
   a. Reported incidents of stranger rape;
   b. Reported incidents of acquaintance rape;
   c. Numbers of reported cases that lead to indictment;
   d. Results of cases taken to court, including numbers plea bargained, numbers tried, convictions (and the conviction-relationship to original charges) and sentences imposed.

2. An appropriate law enforcement agency should determine the incidence of "acquaintance rape" in New Mexico, and ascertain what proportion is formally prosecuted in criminal courts. This examination should be sufficiently detailed to separately examine intrafamilial and nonfamilial cases, and those involving intimate sexual relationships and platonic relationship.

3. District attorneys should increase prosecution of "acquaintance rape" cases.

4. Judicial education programs should be designed and taught, to heighten judicial awareness about the subject of acquaintance rape.

5. A judicial education program should be designed and taught to heighten judicial awareness about the pervasive gender-based stereotypes employed in the trial of a criminal sexual conduct case and to develop judicial skills in distinguishing between the presentation of a legitimate consent defense and the improper assertion of a gender biased defense.

6. Judges should curtail improper reference to irrelevant gender stereotypes in criminal sexual conduct cases during the voir dire process, counsel's argument, witness examination, and cross-examination of the victim.

7. Judges should scrutinize proffered plea negotiations in criminal sexual conduct cases to ensure that they are not grounded upon improper gender-based stereotypes about the victim and should determine whether the conduct of defendant is part of a history of recidivistic sexual assault.

8. Victims should be given the opportunity to present their views on sentencing.

9. The Legislature should remove the exclusion of spousal rape from the criminal sexual penetration statute.

CRIMINAL LAW
SENTENCING ADULT FELONS

One of the findings at the preliminary statewide meetings conducted by Task Force members was the widespread perception among attorneys at the meetings that female defendants generally receive lighter sentences than male defendants in New Mexico. Factors cited as reasons for preferential sentencing treatment included family situations (women are frequently the primary caretaker of children, number of children and pregnancy), lack of available prison facilities and programs, and a "chivalrous" attitude toward female defendants.

As a follow-up effort to determine the extent to which gender actually affects sentencing in New Mexico, the Task Force included several questions on the sentencing of adult felons in the survey mailed to all attorneys and judges in the state. Our inquiry focused on verdict, probation, fines and incarceration and asked whether men or women fared better in each category. Limited resources and a wide range of areas to be covered in the survey precluded questions on the impact of family situation, prior convictions, nature of the crime and available prison facilities. Respondents were asked to control for all factors except for gender in their responses.

A majority (66 percent) of the responses to the Task Force survey were from attorneys who had no criminal law experience and therefore did not complete the criminal law section of the survey, Questions 36 through 45. Of the attorneys who did complete the criminal law section, only 12.9 percent indicated that more than 50 percent of their practice is in the area of criminal law. [TF36]. This results in a small survey population, however, individual responses which indicated "no experience" to a particular question have not been included in this summary of the responses, to provide for experientially valid conclusions.

Results of the Task Force survey track the findings of the preliminary meetings with regard to sentencing. While gender of a defendant is considered to be a factor in verdict, probation, fines and incarceration decisions, the perceived degree of its importance varies. There are differences between responses from females and males as to the extent to which women actually fare better in sentencing decisions. However, there is a general consensus that men rarely benefit from gender in sentencing matters.

Gender was seen as having the least impact on verdicts of the four focus areas, with 49 percent of total responses indicating that there was no difference in verdicts between those rendered for male and female defendants, all else being equal. [TF37] Forty-eight percent of the total responses to Question 37 indicated that women fared better than men with regard to verdicts. Fifty percent of male respondents, compared with 43 percent of female respondents, felt that women received more favorable verdicts.

TF QUESTION 37 - VERDICT

	TOTAL NUMBER	TOTAL PERCENT
MEN	10	3%
WOMEN	152	48%
NO DIFFERENCE	155	49%

	MALES NUMBER	MALES PERCENT	FEMALES NUMBER	FEMALES PERCENT
MEN	5	2%	4	4%
WOMEN	109	50%	41	43%
NO DIFFERENCE	103	47%	51	53%

A majority (65 percent) of the total survey responses indicated that women defendants fare better than male defendants with regard to fines imposed. [TF37] This perception was held by 70 percent of male respondents and 56 percent of female respondents. Forty-two of female respondents felt that there was no difference in treatment with regard to fines as compared with 28 percent of male respondents.

TF QUESTION 37 - FINES

	TOTAL FREQUENCY	TOTAL PERCENT
MEN	6	2%
WOMEN	205	65%
NO DIFFERENCE	103	33%

	MALES NUMBER	MALES PERCENT	FEMALES NUMBER	FEMALES PERCENT
MEN	4	2%	2	2%
WOMEN	149	70%	54	56%
NO DIFFERENCE	60	28%	41	42%

Gender was seen as having a significant impact on probation and incarceration decisions by both female and male respondents to the survey. [TF37] A strong majority indicated that women defendants in New Mexico are more likely to receive probation (79 percent) and less likely to be incarcerated (85 percent) than male defendants.

TF QUESTION 37 - PROBATION

	TOTAL NUMBER	TOTAL PERCENT
MEN	4	1%
WOMEN	263	79%
NO DIFFERENCE	64	19%

	MALES NUMBER	MALES PERCENT	FEMALES NUMBER	FEMALES PERCENT
MEN	1	4%	3	3%
WOMEN	180	81%	79	75%
NO DIFFERENCE	41	18%	23	22%

TF QUESTION 37 - INCARCERATION

	TOTAL NUMBER	TOTAL PERCENT
MEN	6	2%
WOMEN	279	85%
NO DIFFERENCE	44	13%

	MALES NUMBER	MALES PERCENT	FEMALES NUMBER	FEMALES PERCENT
MEN	3	1%	3	3%
WOMEN	189	86%	86	82%
NO DIFFERENCE	28	13%	16	15%

The survey responses are reflected in a surface analysis of New Mexico's prison population. An extensive survey on sentencing in New Mexico, completed in 1989 by the University of New Mexico Statistical Analysis Center, found that convicted female defendants are more likely to receive some combination of pre-prosecution diversion, probation, suspension or deferral of sentences than are convicted male defendants.[59]

Interestingly, however, the SAC survey also found that when such factors as prior convictions, severity of the instant offense, use of weapons and injury to victim are controlled for, gender does not play a significant role in sentencing decisions in New Mexico.[60] In other words, defendants with similar criminal histories charged with similar crimes receive comparable sentences, regardless of their gender. The above-listed factors, as well as location in the state, play a greater role in sentencing outcome than does the gender of the defendant.

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[59] New Mexico Statistical Analysis Center *Sentencing in New Mexico: An Analysis of Prison, Probation and Pre-Prosecution Diversion.* A report submitted to the New Mexico Legislative Council November 15, 1989, at 12.

[60] *Id.* at Sections IV and V.

The survey also inquired as to whether the gender of the attorney had any impact upon sentencing received by criminal clients. [TF38] A strong majority of both men and women indicated that the gender of the attorney made no difference as to verdict (men 80 percent, women 83 percent), probation (men 78 percent, women 7? percent), fines (men 83 percent, women 82 percent) or incarceration (men 78 percent, women 79 percent).

Although numerous sentencing studies are available from other states, locating, compiling and analyzing statistically reliable information on the effect of gender on sentencing in New Mexico is a project beyond the resources of this Task Force. Few studies have been completed on sentencing in the state, none of which directly address the impact of gender upon sentencing. The dearth of information is due in large part to the problems of obtaining and processing data. Data collection practices and aims vary widely between the numerous entities responsible for the various segments of the criminal justice system. The lack of uniformity in types of information gathered, and the fact that data collection is not routinely automated in New Mexico pose a tremendous barrier to analysis of the impact of gender on sentencing.

CRIMINAL LAW
SENTENCING ADULT FELONS FINDINGS AND RECOMMENDATIONS

Findings

1. The perception exists among a majority of the members of the Bar that convicted female defendants fare better in the New Mexico courts than male defendants do in sentencing decisions.

2. The limited research conducted on sentencing in New Mexico indicates that when factors other than the defendant's sex are controlled for, gender does not appear to be a significant factor in sentencing decisions.

3. Insufficient data has been compiled and analyzed to determine whether, in fact, sentencing in New Mexico is gender neutral.

Recommendations

1. The Bar should support and encourage efforts to institute uniform collection of criminal justice data by the Department of Corrections, public defenders, district attorneys, courts, probation and parole officers and all other entities involved in the prosecution, sentencing and punishment of adult felons.

2. The courts should automate record keeping so that data will be readily available to the study for study.

3. The Supreme Court should direct that a comprehensive study of sentencing in New Mexico be completed which addresses the impact of gender, race, regional differences within the state, prison facilities and programs, family circumstances, charging and plea practices, prior convictions, nature of crime, and drug/weapon involvement on sentencing decisions.

JUVENILE JUSTICE

INTRODUCTION

Juvenile Justice is an often overlooked and forgotten area of the law. Although family law, tort, criminal, evidentiary, and constitutional issues often arise in the context of the juvenile justice system, practice in this area is perceived as "soft" and not particularly prestigious. This view is reflected both in the small number of lawyers who practice in the area and in the scarcity of information available about the juvenile justice system and how it operates. Not surprisingly, there is even less information available on female juvenile offenders.

The Task Force sought to address this paucity of information by seeking input from lawyers throughout the state at regional fact finding meetings and by including a series of questions addressing the issue of juvenile justice in the gender bias survey which was distributed to all members of the Bar. The Task Force's focus was by necessity quite narrow. The five questions under the heading of juvenile justice were simply designed to identify the number of respondents with experience in the area and to determine if these practitioners believed that juvenile offenders were treated differently on the basis of their gender. Survey results indicate that there is gender bias in the juvenile justice system and that young men are treated more harshly than young women. Before discussing the New Mexico survey results, it is helpful to review the findings from other states.

SIGNIFICANT FINDINGS IN OTHER STATES

Very few research studies or congressional inquiries have focused specifically on female juvenile offenders. Nor are statistics on juvenile offenders usually broken down by gender. As a result, very little is known about females in the juvenile justice system. What little information there is suggests that the typical juvenile female offender is Black or Hispanic, 16 years old, lives in an urban ghetto, is a high school drop out, and is a victim of sexual and/or physical abuse or exploitation.[61] Most of these young women use alcohol, marijuana, speed and cocaine, and over one half of them have attempted suicide.[62]

Gender Bias Task Forces in other states have consistently reported differential treatment of males and females throughout the juvenile justice system. Police are more likely to arrest young women for status offenses than for criminal conduct. Nationwide statistics for 1987 show that 18 percent of all female juvenile arrests are for curfew, loitering, or running away while only 6.4 percent of young men are arrested for these offenses. Once arrested only 1.6 percent of males are held in training school for the commission of status offenses while 9.3 percent of all females are held.[63]

Once detained, female offenders are more likely to be: (1) referred to social or welfare agencies rather than being released from custody; (2) placed on informal probation supervision; (3) placed in secure treatment facilities for the commission of status offenses; and (4) sentenced more severely than their male counterparts.[64] Task force studies in other states have also found that there are fewer resources, programs and facilities available to female juvenile offenders.[65]

GENDER BIAS IN THE NEW MEXICO JUVENILE JUSTICE SYSTEM

This subcommittee was able to find only one published objective study of the status of female juvenile offenders in New Mexico. In 1987, Linda I. Smith submitted a thesis to the Graduate Division, School of Behavior Sciences, New Mexico Highlands University. The title of the thesis was "Female Juvenile Delinquency In A

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61 Bergman, Ilene R., *The Forgotten Few: Juvenile Female Offenders*, Federal Probation, March 1989.

62 Crawford, J., *Tabulation of a Nationwide Survey of Female Inmates*, Phoenix, Arizona: Research Advisory Services, 1988.

63 Deck, A., Kline, S., and Greenfield, L., *Survey of Youth in Custody*, 1987, Washington, D.C.: Department of Justice, Bureau of Justice Statistics, 1988.

64 Bowker, L.H., *Women Crime and the Criminal Justice System*, 1978, pp. 171-196; Minnesota Report.

65 *See eg.*, Achieving Equal Justice for Women and Men in the Courts, Los Angeles, Ca. 1990; Florida Report.

Northern New Mexico Tri-County Area." This study examined different tales of offenses committed by male and female juvenile delinquents in the Fourth Judicial District (Mora, San Miguel and Guadalupe Counties). The study focused on the years 1982, 1983 and 1984, and specifically sought to determine whether the types of offenses traditionally committed by female juveniles had changed and whether the female offender had entered the arena of offenses historically dominated by the male juvenile offender. The data utilized for the study included statistics maintained by the juvenile probation office for the Fourth Judicial District relating to referrals made to that office, from the initial referral stage to final disposition.

The findings and conclusions drawn from the survey by Ms. Smith support the trend apparent throughout the nation.

For the year 1982, there were 398 total cases. Of these, 48 percent were delinquent males and 18.25 percent were males charged with status offenses; 16.25 percent were delinquent females and 16.50 percent were females charged with status offenses.

For the year 1983, there were 247 total cases. Of these, 39.85 percent were delinquent males and 8.43 percent were males charged with status offenses; 22.9 percent were delinquent females and 23.37 percent were females charged with status offenses.

For the year 1984, there were 330 total cases. Of these, 42.17 percent were delinquent males and 19.58 percent were males charged with status offenses; 22.89 percent were delinquent females and 14.76 percent were females charged with status offenses.

Ms. Smith compared the rates of offenses among female offenders in the area of violent/non-violent offenses and aggravated and all other assaults. With respect to the violent/non-violent category, she found an increase in the last two years in females committing violent offenses and a decrease in female non-violent offenses over the same period. In actual numbers during that period of time, female violent offenders either outnumbered or matched the number of male violent offenders.

In the area of assaults, Ms. Smith found that the number of assaults committed by females increased each year. In the last two years, the number of females charged with assaults outnumbered the males.

Although there is very little hard data available regarding juvenile offenders in New Mexico, the general perception among members of the New Mexico Bar is that females do receive differential treatment throughout the juvenile justice system. The exact nature of this differential treatment, however, is unclear. Comments made at regional fact finding meetings indicated that some members of the Bar believed that female juvenile offenders received more **stringent** sentences, while others believed that these young women received more **lenient** sentences. There was widespread belief that children's court judges tend to follow the recommendations of the probation officer assigned to the case and that the gender of both the probation officer and the child influenced the officer's recommendation. There was substantial disagreement however, as to the nature of the interplay between the probation officer's gender and the child's gender. Some meeting participants believed that female probation officers were tougher on females and more lenient with males, while others believed that male probation officers were tougher on males and more lenient with females. Still others believed that probation officers, whether male or female, were likely to recommend more stringent sentences for male offenders than for female offenders.

In an attempt to shed some light on these apparently conflicting views, the Task Force included in the survey 5 questions dealing with the juvenile justice system. While the survey results are interesting, they must be viewed with some caution. The majority of those responding (74 percent) to the survey claimed to have no experience with the juvenile justice system. Of the remaining 26 percent (264 individuals) who had some experience with the juvenile justice system in the last three years, only 1.5 percent (15 persons) devoted more than 50 percent of their practice to the area; while it made up 20 percent-50 percent of the practice of 46 respondents (4.5 percent) and 20 percent or less of the practice of the remaining 203 (20 percent) respondents. The survey questions and results follow:

TF 47

Are female juveniles who are considered children in need of supervision (CHINS) treated more harshly overall by the Juvenile Justice System than male juveniles who are also considered to be CHINS?

The majority (64 percent) of those responding to this question reported that female CHINS are rarely or never treated more harshly than males. Adjusting for experience, however, women were more likely than men to believe that female CHINS are always/often (23 percent v. 2 percent) or sometimes (24 percent v. 11.4 percent) treated differently than males.

TF 48

Are male juveniles charged with delinquent offenses (offenses which would be crimes if committed by adults) treated more harshly overall by the juvenile justice system than female juveniles charged with similar delinquent offenses?

A majority (73 percent) of those responding reported that male juveniles charged with delinquent offenses are likely to be treated more harshly than females charged with similar delinquent offenses. Thirty-eight (38) percent believed that this was true "always" or "often" while an additional thirty-five (35) percent believed this to be true at least "sometimes." There were again, however, differences in the responses between men and women. Men were much more likely than women to report that male juvenile delinquents are treated more harshly than female juvenile delinquents.

TF 49

Of those adjudicated status offenders, who spends the most time in secure placements?

Nearly one-third (30.8 percent) of those responding to this question answered that they did not know whether male status offenders or female status offenders spent more time in secure placements. Of those who did have an opinion, the majority (73 percent) believed that male status offenders spent more time in secure placements than females. This perception, if accurate, would be inconsistent with national data which suggests that young women spend more time incarcerated for status offenses than young men.

TF 50

Of those adjudicated delinquents, who spends longer periods in secure placement for similar offenses?

Just over one-fifth (21.6 percent) of those responding reported that they did not know whether male or female juvenile delinquents spend more time in secure placements. The majority (86 percent) of those remaining, however, reported that males spent more time incarcerated for delinquent offenses than did females.

JUVENILE JUSTICE FINDINGS AND RECOMMENDATIONS

Findings

1. Lawyers in New Mexico perceive that gender bias exists in the juvenile justice system.

2. Male juveniles charged with delinquent offenses are perceived to be treated more harshly than females charged with delinquent offenses.

3. Male juveniles adjudicated as status offenders or delinquents are perceived to spend longer periods of time in secure placements than female juveniles similarly adjudicated.

4. Juvenile probation officer's recommendations concerning the resolution of a case involving a child are perceived to vary or are influenced according to the sex of the alleged offender.

5. Reliable data concerning the impact of gender on the adjudication of juveniles as status offenders or as delinquents are not available.

Recommendations

1. The New Mexico State Bar, Juvenile Probation, or the legislature should provide funding for an in-depth objective study of the status of New Mexico's juvenile justice system. Precise data regarding the number and gender of children adjudicated delinquent and status offenders, a comparison of the sentences imposed on male vs. female offenders convicted of similar offenses, and a comparison of the amount of time males and females spend incarcerated for similar offenses are necessary to confirm that gender bias in the juvenile justice system is more than a subjective perception among those attorneys who practice in the area.

2. In any future study, the entire scope of the Children's Code should be addressed, including the prosecution of child abuse and child neglect cases under its provisions.

3. In any future study, inquiry should be made of the manner in which children, as witnesses, are viewed as to credibility by both judges and lawyers, and with respect to differences in gender.

FAMILY LAW

INTRODUCTION

The Task Force focused on five areas of family law: access to courts, property division, alimony, physical custody of children, and support of children. For each of the four substantive law areas, the Task Force presents:

1. a historical introduction,

2. a brief review of findings of Task Force findings in other states,

3. results from regional fact-finding meetings, and

4. the results of the Task Force survey of the Bar membership.

The main sources of information were the findings of other state task forces, the comments of attorneys at regional fact-finding meetings held throughout New Mexico in the fall of 1989, and the responses to a survey developed by the Task Force.

The survey was distributed to all members of the Bar in the state of New Mexico. However, respondents were asked to answer the questions relating to family law only if they had practiced in that area within the last three years. As a result, the number and percentage of people responding to this section of the survey is not the same as the number and percentage of people responding to the survey as a whole.

Of those responding to the Task Force survey, approximately 452 respondents, or 39 percent of the women and 48 percent of the men,indicated that they had experience in practicing family law. Thus, the responses discussed below reflect the perceptions of those members of the Bar who actually have practiced family law.

On the other hand, it is important to remember that the number of people responding to these questions is relatively small. Moreover, that number is reduced when responses for particular subgroups are discussed. Indeed, some subgroups have so few members that generalizations concerning that group must be treated with caution. For example, we were interested in determining whether the responses of the judges differed from the responses of attorneys as a whole. However, only 13 judges, 10 men and 3 women, responded to the survey. According to the 1989 Annual Report of the judicial branch, in 1989 there were a total of 71 judges serving in the Supreme Court, Court of Appeals, and district courts. Eight of the 71 judges were women; the other 63 were men. Three out of eight responses is a significant proportion of the female judges in the state; it is, however, a very small number of responses, and thus generalizations about the group as a whole must be viewed with some caution.

Similarly, each question allowed the respondent to indicate "no experience" with the situation. The number of respondents with experience in family law that had no experience with a particular situation or issue is discussed when appropriate. When the percentage of respondents with no experience was a significant percentage, the percentages were recalculated to reflect the percentages of respondents who reported some experience with a situation or issue. In addition, percentages were rounded to the nearest whole number.

The family law section of the survey was designed to accomplish two purposes: to determine the extent to which problems exist in particular areas of the law, and to determine the extent to which persons actively practicing in the area perceive that gender inappropriately affects the outcome of cases. With respect to the law itself, our findings suggest that particular problems exist with respect to alimony, child support, and, to a lesser extent, in the division of marital property on divorce. In addition, the results of the survey indicate that a substantial percentage of family law practitioners perceive gender to affect judicial decisions relating to child support and physical custody of children. This perception was shared by both male and female respondents; however, in a number of areas, men perceived more bias against men, while women perceived more bias against women.

ACCESS TO THE COURTS

Family breakdown - that is, divorce and illegitimacy - is increasingly the cause of poverty in the United States. National experts on poverty and welfare issues have coined the phrase "feminization of poverty" because, as of 1987, female-headed families with children under eighteen were almost three times as likely to be poor as other families with children. According to the U.S. Bureau of the Census (1987), for all families with children the poverty rate was 16.2 percent ; for female-headed families with children, it was 46.1 percent. While 21 percent of female-headed families made up 60 percent of all such families that fell below the poverty line.

As a change in family composition or status has become a major cause of poverty, the need for representation in family law matters for those with limited incomes has increased. Many female-headed families lack the financial resources to seek counsel in matters pertaining to child support, custody, divorce or domestic violence matters.

This trend holds true in New Mexico where low-income families are often unable to secure representation in family law matters, and therefore are denied access to the judicial system for redress, solely because they lack the money to pay for counsel. Non-profit organizations such as legal services or volunteer lawyers programs lack sufficient resources to meet this need.

Because a significant number of low-income families are female-headed families with children, the lack of access to representation in family law matters has the greatest impact on women with children.

There is also a problem obtaining meaningful access faced by those who must resort to the courts. The lack of specialized family courts in most judicial districts means that parties with family problems may be forced to litigate before judges without either family law expertise or sympathy towards the unique problems faced by those

with domestic relations problems. While it would be impractical to create a family court division in all districts, family law cases, where possible, should be assigned to judges with an interest in the subject area.

FAMILY LAW
ACCESS TO THE COURTS
FINDINGS AND RECOMMENDATIONS

Findings

1. A significant number of women with family law problems cannot utilize the legal system because they lack the financial means to secure representation.

2. Legal services that are provided without fee cannot meet this need because of the limited resources of these programs and the overwhelming demand for services in poverty law matters, including, but not limited to, family law matters.

3. Increased funding should be secured to provide legal services to high-priority family law matters for low-income families.

4. In most districts, domestic relations cases are not assigned to judges with specialized knowledge in family law.

Recommendations

1. The State Legislature should allocate funds to legal services programs to provide representation for low-income families in family law and related poverty law matters.

2. The Bar should adopt and promote pro bono programs which will result in the provision of services to poor families with domestic relations problems.

3. Where feasible, domestic relations cases should be assigned to judges who have a particular interest in and an affinity for domestic relations matters.

PROPERTY DIVISION
Historical Introduction

Unlike many states, New Mexico's community property law requires that community property be divided equally upon divorce. Separate property that is acquired prior to marriage, obtained by gift or inheritance during marriage, or designated separate by valid contract or court decree, is allocated to the individual owner upon divorce. Under tracing principles, assets that have been sold or exchanged may retain their original character, although commingling may result in the transmutation of separate property into community property. Recent New Mexico case law permits equitable apportionment of the increase in value of appreciated separate real property. Individual assets need not be physically divided between the divorcing couple; rather, a monetary award may be made to compensate the spouse receiving fewer assets.

Community property law is based on a partnership concept of marriage that inherently recognizes the intangible contribution of a homemaker spouse. However, New Mexico law does not acknowledge a community property interest in professional degrees, licenses, or enhanced earning capacity acquired by one spouse during marriage, even though the enhanced earning capacity may be the most valuable marital asset. Further, New Mexico's community property law does not take into account the lost earning capacity of a homemaker or underemployed spouse.

Conclusions of Task Forces in Other States

Task Forces in other states have noted that many alimony and property distribution awards do not adequately reflect the economic realities for working women. Judges often underestimate the difficulties that women face when re-entering the work force after a lengthy absence.[66] Women are frequently awarded assets, such as the family residence, that are less liquid, do not generate income, and are not business resources. Similarly, the type of property awarded to women may limit their mobility or saddle them with debt service and maintenance.[67]

Research studies demonstrate that the standard of living of the women after divorce is lower than that of their former husbands because women are left with a larger share of the cost of raising children and a disproportionately smaller share of the couple's assets and earning potential.[68] At least one task force has noted that women may be uninformed about the nature and extent of the marital property at the time of dissolution.[69]

Results of Regional Fact-Finding Meetings

In response to questions regarding awards of property based on gender, lawyers indicated concern that gender of a party sometimes plays a role in the award of property. In the past, men seemed to be allotted investment property more frequently than women, especially by specific judges, but this practice no longer exists to a significant extent. Some lawyers commented that women judges tend to be more sympathetic to older housewives with no earning power.

Results of Survey

The survey asked whether New Mexico law regarding division of property generally results in a long-term reduction of the standard of living for women but not for men. Overall, almost two-thirds of the respondents (63 percent) thought this was often or sometimes the case. However, female respondents sensed a considerably greater problem in this regard than their male counterparts; 75 percent of the women but only 55 percent of the men perceived that this often or sometimes happened. Several respondents commented on the absence of a converse question asking whether the standard of living generally declines for men following divorce, and a number noted that both parties suffer a decline in their standard of living.

The majority of respondents (53 percent) believed that effective steps are always or often taken by the court, when needed, to maintain the existing marital assets for property division purposes. Again, the gender of the respondent affected the perception of the situation. Sixty percent of the men, but only 36 percent of the women perceived this as always or often happening. Judges observed less of a problem than non-judges.

FAMILY LAW
PROPERTY DIVISION
FINDING AND RECOMMENDATION

Finding

1. Property division in New Mexico does not seem to be significantly affected by gender discrimination. However, a community property interest in professional degrees, licenses or enhanced earning

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66 *See, e.g.*, Utah Task Force on Gender and Justice, Report to the Utah Judicial Council, S-10 (1990) (hereafter referred to as Utah Report).

67 Judicial Council Advisory Committee on Gender Bias in the Courts, Achieving Equal Justice for Women and Men in the Courts, 15 (California 1990) (hereafter referred to as Achieving Equal Justice): Minnesota Report; Utah Report at S-10.

68 Achieving Equal Justice at 11; Florida Report.

69 Achieving Equal Justice at 15.

capacity acquired by one spouse is not recognized and community property law does not adequately take into account the lost earning capacity of a homemaker or under-employed spouse.

Recommendation

1. Recognition should be given to contributions to intangible but valuable assets relating to career enhancement, as well career sacrifices by homemaker spouses.

ALIMONY

Historical Introduction

At common law, a husband had a duty to support his wife. Since the enactment of the state equal rights amendment, the duty of support can no longer fall on the man alone as such a requirement discriminates against men based on sex and marital status. The common law duty was thus modified to impose upon the husband and wife obligations of mutual respect, fidelity and support. A spouse's duty of support extends to the provision of necessities, that is, suitable lodging, food, clothing, and medical attention.

Alimony is simply a continuation of the common law and statutory duty to provide support to one's spouse. There is no fixed rule regarding the amount of alimony a court can or should award. Need is the first criteria in determining the amount of alimony to be awarded. In addition to need, the spouse's age, health, means of support, earning capacity and future earnings, the duration of the marriage, the amount of property owned by the parties and the length of time over which alimony has been paid should be considered. Alimony can be reduced where, over time, the recipients are able to support themselves. Thus, the ability of the courts to award permanent alimony has been restricted.

Conclusions of Task Forces in Other States

Task forces in other states have found alimony awards to be unpredictable and insufficient in amount and duration.[70] According to some task forces, the two groups of women most adversely affected by the present state of affairs are the older homemaker who has had no significant employment experience and the young homemaker with children and no employment skills. [71] Other task forces have noted that there is a disparity in earning power between men and women regardless of education, qualifications, or experience.[72]

Task forces in other states have noted that attorneys are reluctant to represent non-working women in divorce proceedings because they often do not have the financial resources their husbands have and judges often reduce attorney's fees, if they are awarded at all.[73] Thus, many women may find themselves without adequate legal counsel during divorce proceedings. When women do not receive their alimony payments, they may have insufficient funds to hire an attorney to launch an effective collection effort, according to other task forces.[74]

Post divorce families headed by women are the fastest growing segment of the population living in poverty.[75] Some task forces have found that this number is growing due to inadequate alimony awards.[76] The extent to which other problems — the lack of job skills by those who have devoted most of their married lives to raising children or being a homemaker, the lack of adequate legal counsel, or the general disparity in earning power between men and women in America — contribute to this phenomenon is an open question. In any event, inadequate alimony awards exacerbate the problem.

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70 *See, e.g.*, Achieving Equal Justice at 12.
71 *Id.*; Florida Report at 4-5.
72 *See, e.g.*, Utah Report at S-10.
73 *See, e.g.*, Florida Report at 5; Min :sota Report at 31-34.
74 Achieving Equal Justice.
75 Florida Report at 5.
76 Achieving Equal Justice.

Results of Regional Fact-Finding Meetings

Consistent with what other task forces found, attorneys with experience in litigating the issue of alimony indicate that the awards are consistently for an inadequate period of time and in an inadequate amount. There were isolated instances cited at the meetings in which alimony was requested for a husband. No cases were cited in which alimony was actually awarded to a husband.

An isolated comment was that women judges tend to be more sympathetic to older housewives with no earning power. Another concern was that judges were reluctant to impose harsh sanctions for violation of orders.

Results of Survey

Forty percent of all respondents indicated that New Mexico's law regarding alimony always or often results in a long-term reduction of the standard of living for women but not for men. However, female respondents sense a considerably greater problem in this regard than their male counterparts; 80 percent of the women believed this was always or often the case, while only 19 percent of the men indicated this always or often happened.

Of the 10 male judges and 3 female judges who responded to the survey, all three female judges believed that New Mexico's law regarding alimony either always or often results in a long-term reduction of the standard of living for women but not for men. The responses of the 10 male judges were more diverse (3 often, 4 sometimes, 2 never, 1 no experience).

Similarly, 40 percent of the respondents indicated that difficulty in enforcement of alimony awards always or often results in a long-term reduction of the standard of living for women but not for men. Again, the response varied significantly by gender. Seventy-two percent of the female respondents believed this always or often happened, while only 25 percent of the male respondents believed this always or often happened.

In response to the question of whether women with limited or few marketable skills are awarded permanent alimony after long-term marriages, there was no clear overall perception: only 1 percent of all respondents believed this always happened, 24 percent believed this often happened, 37 percent believed it sometimes happened, 34 percent believed it rarely happened, and 4 percent said it never happened. These figures suggest that judges prefer rehabilitative alimony in this situation. Again, the breakdown by gender was significant. Sixty-nine percent of the male respondents believe that women with limited skills were often or sometimes awarded permanent alimony after long-term marriages. By contrast, 54 percent of the female respondents indicated that this rarely or never happened.

The last question on the survey asked whether the courts were awarding men alimony when appropriate. Only sixty-two percent of the respondents indicated they had experience with the situation. Of those respondents who had experience with the issue, 82 percent perceived that courts rarely or never awarded men alimony. Again, gender affected the perceptions; 86 percent of the men, but only 71 percent of the women perceived that men were rarely or never awarded alimony.

FAMILY LAW
ALIMONY
FINDINGS AND RECOMMENDATIONS

Findings

1. Alimony awards to women are sometimes not given in appropriate cases and even when given are consistently for an inadequate period of time and for an inadequate amount. Moreover, the vast majority of lawyers perceive that men are not being awarded alimony when it would be appropriate.

2. Insufficient alimony awards contribute to a long-term reduction in the standard of living for women. Alimony awards do not adequately take into account the disproportionate responsibility women bear as homemakers and parents, both before and after divorce, and employment opportunities for displaced homemakers.

3. Enforcement of alimony awards is inadequate.

Recommendations

1. Substantive changes in the law regarding the awarding of alimony, the duration of the award, and the amount of alimony should be made. Awards should be enforced.

2. Judges and attorneys should be further educated with respect to the economic consequences of divorce, including women's more limited employment opportunities, wage potential, and the cost of child rearing.

CHILD SUPPORT

Introduction

Prior to June 1989, the New Mexico statutes concerning the amount of child support awards were short, simple, and vague, and, therefore, of little practical guidance to judges or lawyers. Case law at least acknowledged that the paramount concern was the welfare of the children. In 1975, the New Mexico Supreme Court in *Spingola v. Spingola*, 91 N.M. 737, 580 P.2d 958 (1978), gave more guidance by outlining almost a dozen factors for a court to consider in determining child support. Even so, the multiple factors did not encourage predictability or consistency.

By the 1980s, most judicial districts had adopted child support guidelines. The guidelines led to some semblance of consistency and predictability, at least by individual judges. Under these guidelines, child support was generally set as a percentage of the noncustodial parent's monthly net income.

In 1988, Congress enacted the Family Support Act which required states to have statewide guidelines in effect by October of 1989 in order to continue receiving certain federal funding. Accordingly, the New Mexico Legislature enacted statewide presumptive child support guidelines effective June of 1989 through June of 1991.

New Mexico's guidelines are based upon the most commonly used model, the "income shares" model. Both parents are required to contribute to the support of their children. The guidelines determine the amount of support based upon the gross income to each parent from all sources and the time sharing schedule established for the children. The levels of support established in the guidelines were based upon national statistics of average household expenditures on children in intact families in 1972 and 1973. This was the best data available when most states began working on statewide guidelines. The guideline amounts are a rebuttable presumption for the amount of child support; deviations must be supported by a finding that the application of the guidelines would be unjust or inappropriate.

The guidelines had been in effect less than a year when the survey was mailed out. The survey provides some insight into how the new law is working; however, it is important to remember that it is at best a preliminary view.

Under New Mexico law, the guidelines will sunset June 30, 1991. Accordingly, a committee has been established to review the guidelines prior to the 1991 New Mexico Legislature. The committee report will be complete in the fall of 1990.

It appears at this time that the committee will recommend a reenactment of the guidelines with only a few minor changes.

Conclusions of Task Forces in Other States

While task force findings and recommendations in other states regarding child support differ considerably, depending upon some unique situations in all states, most other states have found, in general, that:

1. Child support awards are too low to adequately support children;

2. There is a disparate financial impact from divorce on the custodial parent;

3. The enforcement of child support payments is inadequate; and

4. Child support modifications are not frequent enough.[77]

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[77] *See, e.g.*, Achieving Equal Justice at 11; Florida Report at 8; Gender Bias Study Committee of the Supreme Judicial Court, Gender Bias Study of the Court System in Massachusetts, at 42-43, (1989) (hereafter referred to as Massachusetts Report); Minnesota Report at 21.

Results of Regional Fact Finding Committees

A significant number of attorneys attending the regional meetings indicated that judges frequently awarded support lower than the guidelines but failed to provide the statutorily required statement of the reasons for deviating from the guidelines. There were no reported instances of a judge awarding child support higher than the guidelines. Also, a large number of attorneys attending the regional meetings stated that they felt the guidelines were too high.

Other observations from the regional meetings were that judges gave too much consideration to debts assigned to the party paying support; judges were reluctant to impose harsh sanctions for violations of support orders; and that judges were not imputing potential income to parents to establish child support as required by the guidelines.

Results of the Survey

The results of the survey on child support issues confirm many of the findings of other Task Forces and of the regional meetings. In general, the results indicate that gender bias affects the establishment and enforcement of child support awards. In addition, the survey results indicate that men and women have substantially different perceptions of the situation. And, last but certainly not least, the results reflect general problems in the establishment and enforcement of child support that need to be addressed.

In the following discussion of the results of the survey, the words "respondents" and "attorneys" both refer to the individuals answering the survey questions, and the words are used interchangeably. Also, a notable number of attorneys did not answer some of the questions because of a lack of experience in the area. Accordingly, in order to present a correct picture of the results, the statistics cited in the following discussion include, in all instances, only those attorneys with experience in the areas.

In all six child support survey questions, the most significant difference between categories of respondents answering the survey was gender, not size of town, size of firm, years of practice, ethnicity, or age of respondents. On some issues, there were differences in the answers based upon the percentage of the respondent's practice devoted to family law. In general, as the percentage of the practice devoted to family law increased, the respondents as a group were somewhat less likely to perceive that gender biased the results.

Respondents clearly believe that judges are more inclined to deviate from the guidelines when the parent paying child support (the obligor) is the mother than when the obligor is the father. The survey results also showed that it is not uncommon for judges to deviate from application of the guidelines. Given the comments at the regional meetings, it is reasonable to conclude that in most cases judges set the amount of support as less than that required by the guidelines. However, two respondents wrote comments indicating that, in their experience, judges had set an amount that was higher than the guidelines.

Ninety-four percent of all attorneys indicated that judges always or often apply the guidelines when the obligor is the father. By contrast, only 63 percent indicated the judges always or often apply the guidelines when the obligor is the mother. In both instances, however, substantial minorities (36 percent for female obligors and 49 percent for male obligors) indicated the guidelines were applied "often" rather than "always," indicating that deviations are not uncommon. On the other end of the scale, only 2 percent of all respondents believed that judges rarely or never applied the guidelines when the obligor was male, while 15 percent believed judges rarely or never applied the guidelines when the obligor was female.

The perceptions of the respondents were significantly affected by the percent of the practice devoted to family law. Respondents who devoted 20 percent or more of their practice to family law indicated judges were less likely to deviate from the application of the guidelines when the obligor was male than those respondents with 20 percent or less of their practice in family law. Also, the more experienced male respondents indicated judges were less likely to deviate from the application of the guidelines when the obligor was female. However, the more experienced female attorneys were closer to their less experienced colleagues in their belief about judges deviating from the application of the guidelines when the obligor was the mother.

The survey asked whether New Mexico law regarding child support generally resulted in a long-term reduction in the standard of living for the custodial parent. Overall, 49 percent of the respondents believed this always or often happened when the custodial parent was the mother, while only 21 percent believed this always or often happened when the custodial parent was the father. Male and female attorneys had different perceptions

of the situation. Seventy-two percent of the women believed long-term reduction always or often happens when a mother has custody while only 37 percent of the men thought this was the case. And, the majority of the women respondents (57 percent) believed there was rarely or never a reduction in the standard of living for custodial fathers, while only 27 percent of the men believed this.

The survey also indicated that attorneys perceive that judges are more likely to enforce a child support award if it is the father, rather than the mother, who is paying support. The vast majority of all respondents (80 percent) believed judges always or often enforced child support awards when the obligor was the father. However, female respondents believed this was less true (67 percent) than male respondents (86 percent). Again, more respondents indicated this "often" happened rather than "always" happened, suggesting some problems in the enforcement of support.

When the mother was the obligor, only 48 percent of the male respondents believed awards were always or often enforced, and only 37 percent of the female respondents believed awards were always or often enforced. Twenty-seven percent of the male respondents and 34 percent of the female respondents had no experience with this issue, indicating that female obligors are less common than male obligors.

This perception that gender influences the outcome is reinforced when one looks at the other end of the spectrum, the percentage of respondents who perceived that judges rarely or never enforced awards. Only 3 percent of all respondents believed that judges rarely or never enforced awards when the obligor was male. However, when the obligor was female, 19 percent of all respondents indicated that they perceived that judges rarely or never enforced support awards. Male and female attorneys perceived the situation differently, with more men than women believing that judges rarely or never enforced support awards against mothers (21 percent of men, but only 13 percent of women).

New Mexico law does not allow a trial court to modify or forgive child support that accrued but was unpaid (arrearages) prior to the time that a motion to modify the amount of support is filed. However, the results of the survey indicate that this does in fact happens. It is difficult to quantify how often this happens from the results of the survey; however, 41 percent of all respondents indicated this happened always, often, or sometimes when the obligor was male, and 44 percent of all respondents indicated this happened always, often, or sometimes when the obligor was female. Based on this, it appears that neither gender is particularly favored in this practice.

Once again, male and female attorneys had somewhat different perceptions of how often courts modified arrearages. A solid majority of the male respondents believed such arrears were rarely or never reduced or forgiven whether the obligor was male (66 percent) or female (60 percent). By contrast, fewer than one-half of the female respondents believed arrearages were rarely or never reduced or forgiven (42 percent for male obligors and 48 percent for female obligors). In a similar vein, only 6 percent of the male respondents indicated that arrearages were always or often modified for male obligors, while 22 percent of the female respondents believed arrearages were always or often modified for male obligors.

New Mexico law allows judges to assign a portion of the obligor's wages to the custodial parent in order to ensure that support is paid regularly. However, the results of the survey indicate that judges are more likely to use this enforcement tool if the father, rather than the mother, is the one paying support. Almost two-thirds of all respondents (64 percent) indicated judges used this method of enforcement when the obligor was male. When the obligor was female, however, only 42 percent of all respondents indicated wage assignment was used with the same frequency.

The perceptions of female and male respondents differed. In general, male respondents believed wage assignments were used more frequently than female respondents, for both men and women obligors. Of female respondents, only 51 percent believed judges always or often used this method for male obligors, while 70 percent of the male respondents believed this. As to female obligors, 38 percent of the female respondents indicated judges always or often used wage assignments, while 43 percent of the male respondents indicated this was always or often done.

Finally, New Mexico law allows judges to put an obligor in jail for contempt when the person deliberately fails to pay support. However, once again, our respondents perceived that judges were much more likely to use this sanction on fathers rather than mothers.

It is difficult to tell how frequently jail is used as a sanction for deliberate nonpayment of support. Overall, 43 percent of all respondents indicated that judges rarely or never jailed fathers for non-payment, while 79 percent indicated that judges rarely or never jailed mothers. The gender of the respondent made some difference in the perception of how often mothers were jailed: 82 percent of the male respondents and 73 percent of the female

respondents indicated that judges would never or rarely jail the female obligor. When it came to male obligors, a majority of the female respondents (53 percent) but only 39 percent of the male respondents indicated that judges would rarely or never put them in jail.

The influence of gender is equally clear when examining results at the other end of the scale. Only 4 percent of all respondents believed women obligors would always or often be jailed, while 17 percent of all respondents believed that male obligors would always or often be jailed. There was little disparity of perception on the frequency, or lack of it, with which mothers were jailed: only 5 percent of the women and 4 percent of the men indicated this always or often happened. However, there was a greater disparity of perception with regard to the frequency with which fathers were jailed. Only 11 percent of the female respondents, but 20 percent of the male respondents believed male obligors would always or often be jailed.

FAMILY LAW
CHILD SUPPORT
FINDINGS AND RECOMMENDATIONS

Findings

1. Judges are more inclined to deviate from the application of the child support guidelines in establishing child support awards when the mother is the paying parent than when the father is the paying parent.

2. It is not uncommon for judges to deviate from the application of the child support guidelines in establishing child support awards without specifying the reasons for doing so.

3. Female attorneys believe that the New Mexico law regarding child support generally results in a long-term reduction in the standard of living for custodial mothers.

4. Judges are more inclined to enforce child support awards when the paying parent is the father than when the paying parent is the mother.

5. Wage assignments (as an enforcement tool) are more frequently used when the father is the paying parent than when the mother is the paying parent.

6. The use of jail for contempt when obligors deliberately fail to pay child support is more frequently used when the father is the paying parent than when the mother is the paying parent.

7. The enforcement of the payment of child support awards is not adequate.

8. Lack of enforcement of child support obligations significantly contributes to the dramatic increase of women and children living in poverty after divorce.

Recommendations

1. District court judges need to be made aware of the gender bias that exists in the establishment of child support and the enforcement of child support awards, and encouraged to apply the law of New Mexico in these areas, which is simply that they cannot discriminate on the basis of sex.

2. District court judges need to be educated about the use of the child support guidelines. The guidelines are presumptive, and deviations from them should be the exception, not the rule. If there is a deviation, the specific reasons for it must be stated in the order and the decree. Before a downward deviation from the guidelines is made, the effect on the standard of living for the children and the custodial parent should be carefully considered.

3. District court judges need to be educated about the available child support enforcement mechanisms that exist under federal and state law, and encouraged to use those mechanisms more frequently and more consistently.

4. Attorneys need to be educated about the use of the child support guidelines and the child support enforcement mechanisms that are available to help ensure that the guidelines are followed and enforcement mechanisms are used more frequently and consistently.

PHYSICAL CUSTODY

Historical Introduction

Historically, custody of children after divorce has been determined by "the best interests of the child." This standard has been supplemented by statutes setting out specific criteria that are considered in determining the best interests of the child. In 1981, the Legislature passed New Mexico's first joint custody statute; however, the ambiguous language made the new form of custody something less than useful. Prior to 1986, most custody cases were resolved by giving one parent physical custody of the children and the other parent visitation rights.

In 1986, the New Mexico Legislature passed legislation defining joint custody. Under the statute, custody has two main components: legal custody, or decision making, and physical custody, having the child in one's care. The statute creates a rebuttable presumption that joint custody is in the best interests of children, at least in the initial custody determination. The joint custody statute specifically provides that no custody decision by the court should be made on the basis of the parent's gender.

Findings of Task Forces in Other States

Task Forces in other states have found that custody determinations are frequently influenced by gender based stereotypes and that this disadvantages both men and women.[78] A number of states have noted that fathers are disadvantaged by stereotypes that view them as unable to care for children, particularly young children.[79] Despite this, at least two states have found that when fathers actively seek physical custody, they are surprisingly successful in obtaining it. For example, in Massachusetts, fathers who actively seek custody obtain either primary or joint physical custody 70 percent of the time.[80] In Minnesota, of the cases that actually went to trial on custody, mothers obtained sole physical custody of all children exactly half the time, while fathers obtained sole physical custody 33 percent of the time. (The rest of the cases were resolved by joint physical custody, split (siblings split up) custody, and other arrangements.)[81] Several task forces express concern that mothers are held to higher standards of conduct than fathers when custody is at issue.[82]

Several states have found that custody determinations are inappropriately influenced by financial considerations. Some states have expressed concern that custody is given to the parent in the stronger financial situation rather than compensating for the weak financial situation by increasing child support.[83] In a similar vein, a number of states note that custody requests are sometimes used by a parent in order to obtain leverage in financial negotiations, particularly property settlement.[84]

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78 *See, e.g.*, Achieving Equal Justice; Utah Report at S-8; Minnesota Report at 23-26.

79 *Id.*

80 Massachusetts Report at 2.

81 Minnesota Report at 24.

82 Massachusetts Report at 2; Minnesota Report at 23-26. *See also* Florida Report at 7.

83 Minnesota Report at 23-26.

84 Florida Report at 7; Utah Report at 7; Minnesota Report at 23-26.

Results of the Regional Fact Finding Meetings

Attorneys at these meetings indicated that more fathers are expressing an interest in custody than in the past, and that judges are more open to granting fathers custody than had been true in the past. Even so, the attorneys attending believed that mothers were still favored as the custodial parent, especially for young children.

There was considerable concern that joint custody requests were being used as leverage in financial matters. In particular, there was substantial concern that women were giving up property rights to avoid custody battles. Some attorneys expressed concern that children were given to the parent in the better financial position, either by judicial decision or by stipulation of the parties. A number of attorneys attending expressed concern that visitation orders were not being enforced by the courts.

In addition, a majority of the attorneys attending the meetings indicated that charges of sexual abuse in custody fights are increasing; the consensus appears to be that judges almost always take such charges seriously. At least one comment was made that on certain occasions judges may take such charges too seriously, and that the charges are sometimes used as leverage in negotiations and at trial. The survey did not address this issue; however, further study of this issue appears to be warranted.

Results of the Survey

In response to the question "do judges give fair and serious consideration to petitions by fathers (mothers) for primary physical custody," all respondents viewed judges as more often fair to mothers than to fathers. As in other areas of the survey, the most striking difference between groups of respondents was not age, size of community, length of practice or size of firm; it was gender. Male respondents perceived disparate treatment to a much greater extent than female respondents. The only other group that had a consistently different perception of the issues were the attorneys who devoted more than 50 percent of their practice to family. As a group and by gender, they tended to perceive somewhat less bias than those who devoted less of their practice to family law.

Slightly more than one fourth of all male respondents (26 percent) stated that judges rarely or never gave fair consideration to fathers. By contrast, none of the women respondents said judges were never fair to fathers, and only 8 percent said they were rarely fair. Less than half of the males (41 percent) but considerably more than half the females (63 percent) felt judges always or often gave fair consideration to fathers' custody petitions.

TABLE 11

Male and Female Respondents
Are Judges Giving Fair and Serious Consideration to Custody Petitions of:

	Fathers		Mothers	
	Male	Female	Male	Female
Always	14%	16%	44%	30%
Often	27%	47%	51%	63%
Sometimes	32%	29%	4%	7%
Rarely	25%	8%	1%	0%
Never	2%	0%	0%*	0%

* One male respondent (less than one-half of one percent) answered "never." No women did.

The significant difference between male and female responses should not obscure the most important fact: fewer than half of the total respondents (49 percent) believe that judges in New Mexico always or often give fair and serious consideration to fathers' requests to be awarded primary physical custody of their children.

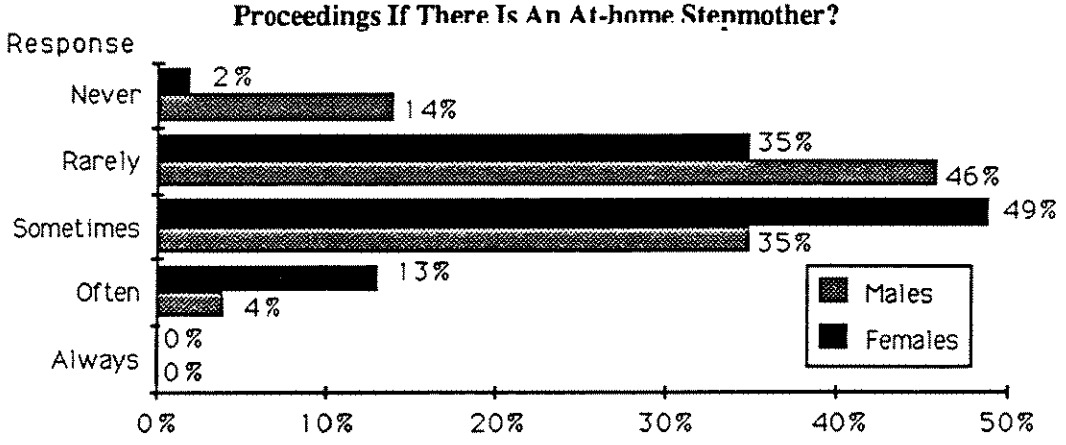
Male and female respondents both saw judges as being routinely fair to mothers. Ninety-five percent of the male respondents and 93 percent of the female respondents said judges were often or always fair to mothers' custody petitions. The remaining 7 percent of female respondents saw judges as sometimes fair; 1 percent of the males saw judges as rarely (3 men) or never (1 man) fair to mothers' petitions.

Given the difference between male and female perception of judges' fairness to men in custody cases, it is not surprising that more men than women report they discourage fathers from seeking physical custody. Slightly more than one-fifth of men always or often do (21 percent), while none of the women said they always do; only 2 percent of the women said they often do. Forty-six percent of men and 75 percent of women who had experience with this issue rarely or never discourage fathers from seeking custody.[85]

The question of whether a mother in the work force loses in post divorce custody disputes if the father had acquired a homemaker spouse elicited a large number of "no experience" responses (40 percent). Therefore, the responses received should be viewed with some caution. Of the respondents who had experience with this situation, none said that such mothers always lose, and very few (7 percent) thought work force mothers often lose. Again, male and female respondents had differing views. Sixty percent of men but only 37 percent of women thought such mothers rarely or never lost in these proceedings. In other words, significantly more than half the female respondents thought mothers in the work force lost in post-dissolution custody disputes if the father had remarried a woman who stays at home.

TABLE 12

Male and Female Respondents
Do Work Force Mothers Lose in Custody Modification Proceedings If There Is An At-home Stepmother?



Male and female responses were strikingly different on whether fathers and mothers seek custody to gain economic advantages in divorce and related litigation. Female respondents viewed the actions of mothers and fathers as almost the opposite of each other, seeing fathers as routinely engaging in this activity and mothers are eschewing it. Almost two-thirds (65 percent) of the women said fathers always or often use custody for economic leverage, and well over half (59 percent) said mothers rarely or never do.

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[85] The question in the survey concerning whether custody awards were made on the basis of financial position elicited persuasive comments on its incomprehensibility, and we concluded that analysis of the few responses received would not be meaningful.

No women thought mothers always use custody or fathers never do. Only 5 percent of the women thought mothers often or fathers rarely used custody for economic gain (note: it may not be the same 5 percent who said "often" to mothers and "rarely" to fathers).

In significant contrast, male respondents saw fewer differences between mothers and fathers. Approximately one-fourth (26 percent) of the males said mothers always or often use custody for leverage, and 25 percent said fathers often or always do it. Another one-fourth (24 percent) said fathers rarely or never use custody this way, while 36 percent said mothers rarely or never use the children for leverage.

TABLE 13

Male and Female Respondents
Do Fathers/Mothers Use Custody for Economic Leverage?

	Fathers		Mothers	
	Male	**Female**	**Male**	**Female**
Always	1%	3%	4%	0%
Often	24%	62%	22%	5%
Sometimes	51%	30%	39%	36%
Rarely	20%	5%	31%	52%
Never	4%	0%	5%	7%

The majority of all respondents states that judges always or often enforce the noncustodial rights of both mothers (74 percent) and fathers (59 percent), but significantly more men thought mothers' rights were more frequently enforced (53 percent fathers always or often; 77 percent mothers always or often). Ten percent of men and 3 percent of women said fathers' rights were rarely enforced. Two men answered that fathers' noncustodial rights were never enforced.

FAMILY LAW
PHYSICAL CUSTODY
FINDINGS AND RECOMMENDATIONS

Findings

1. Trial judges in New Mexico apparently do not treat men fairly in custody litigation. Despite this, men are seeking primary physical custody in larger numbers and lawyers are not discouraging them.

2. Sexual abuse allegations against the male parent have increased in domestic litigation. Judges are apparently giving them serious consideration. There is concern as to whether some allegations are unfounded.

3. Mothers who work outside the home are at some risk of losing custody if the father has remarried a woman who stays at home.

4. A significant number of both genders, but more often fathers, are seeking custody in order to gain economic advantage in the domestic litigation.

5. Males and females who work in the legal system have substantially divergent views of the legal system in the context of child custody litigation. Men see fathers as more disadvantaged than mothers in requests for custody. Women see mothers as more genuinely interested in obtaining custody than fathers are. Women also perceive that mothers are at some risk of losing custody if they are in a non-traditional role.

6. Sometimes judges have awarded primary physical custody to the party in a better economic situation, rather than using alimony and child support awards to provide adequate resources for the child.

Recommendations

1. Trial judges in New Mexico who hear child custody cases should ponder whether they in fact fail to accord the petitions of fathers for primary physical custody fair and serious consideration. A simple method to use when considering such petitions is mentally to switch the genders of the two parents, but keep the other pertinent facts of the case the same, and then determine whether that makes a difference in the custody decision.

2. There should be educational programs for lawyers and judges to educate them about the investigations, determinations and treatment of sexual abuse, to avoid ignoring a genuine case and to reduce the chances of a successful manipulation of the child into false allegations. Delayed, inexpert, suggestive or repeated interrogation must be avoided. Judges should consider whether guardians ad litem should be appointed in cases where these allegations are made.

3. Judges should consider whether their decisions regarding custody between working mothers and a father with a stay at home wife should consider whether their decisions are based on biases against working mothers or to legitimate factors.

4. If a judge determines that allegations of sexual abuse are spurious or that child custody is sought solely for economic advantage in the litigation, then judges should consider a substantial award of fees to the other side and should consider where Rule 1-011 has been violated.

5. Judges should not award primary physical custody based on economic circumstances but should use alimony and child support awards to provide adequate resources for the child and should award custody based on parenting ability.