

Gender Fairness
in
North Dakota's Courts:
—A Ten-Year Assessment—

Submitted to
The North Dakota Supreme Court
by the
Gender Fairness Implementation Committee

EDITOR'S NOTE

The NORTH DAKOTA LAW REVIEW is pleased to present the Ten-Year Assessment Report on Gender Fairness in North Dakota's Courts of the Gender Fairness Implementation Committee. The original version of this Report was submitted to the North Dakota Supreme Court. This Report now appears in this volume of the North Dakota Law Review to ensure wider distribution within both North Dakota's legal and lay communities.

Because the Report is an official document, the LAW REVIEW somewhat suspended its usual editing process to preserve the Committee's work. Nonetheless, there are some variations between the Report as submitted to the Supreme Court and this version. For example, in some instances, footnotes have been added or modified where necessary, non-substantive word or numerical refinements have been made, and formatting has been adjusted to conform to LAW REVIEW presentation style and to ensure accuracy. These variations do not change the meaning or substance of the Report.

Table of Contents

I. THE BEGINNING	312
II. IMPLEMENTATION	312
III. AFTER IMPLEMENTATION—THE ASSESSMENT	315
IV. WHAT WE FOUND—AN OVERVIEW.....	316
A. PROFESSIONAL CONDUCT AND COURTHOUSE ENVIRONMENT ..	319
1. <i>Lawyer Conduct</i>	320
2. <i>Judicial Intervention</i>	323
3. <i>Judge Conduct</i>	325
4. <i>Professional Courtesies</i>	328
5. <i>Courthouse Environment</i>	331
B. DOMESTIC LAW AND DOMESTIC VIOLENCE	334
1. <i>Awareness of Bias—Judge Perspective</i>	334
2. <i>Education—Impact on Judges</i>	336
3. <i>Awareness of Bias—Lawyer Perspective</i>	337
4. <i>Domestic Violence—Awareness of Bias Issues</i>	339
5. <i>Domestic Violence Proceedings—Conduct</i>	340
6. <i>Education—Impact</i>	341
7. <i>The Protection Order Process</i>	343
C. CRIMINAL LAW	346
1. <i>Education—General Impact</i>	346
2. <i>Prosecution and Defense—Judicial Perspective</i>	348
D. JUDICIAL SYSTEM—THE EMPLOYMENT ENVIRONMENT	350
1. <i>Sexual Harassment</i>	350
2. <i>Awareness of System Policies</i>	352
3. <i>Guide to Proper Conduct</i>	353
4. <i>The Informal Complaint Process</i>	354
5. <i>Job Advancement</i>	356
E. GENERAL JUDICIAL SYSTEM ENVIRONMENT—WHAT JUDGES SEE	358
V. RECOMMENDATIONS	359

I. THE BEGINNING

In February 1994 Chief Justice Gerald W. VandeWalle appointed the 26-member Commission on Gender Fairness in the Courts. Its charge was to “examine the status and experience of women and men in our judicial system to determine whether or what inequities exist and . . . make recommendations concerning changes considered necessary to ensure that women and men receive equal treatment in North Dakota’s judicial system.” The importance of this effort, similar to efforts undertaken in other jurisdictions, was underscored by the Chief Justice’s fundamental observation that “[d]ecisions made or actions taken based on preconceived notions about the nature, roles, and abilities of women and men rather than upon evaluation of each individual situation strike at the heart of a judicial system that promises fairness and impartiality.”

Following the appointment of its members, the Commission on Gender Fairness in the Courts began a two-year study of the state’s judicial system and gathered data through the use of focus groups, surveys, public meetings, and informal research performed by law student volunteers. The Commission’s study culminated in a report presented to the Supreme Court in October 1996 and published in the *North Dakota Law Review*.¹ The Commission made 33 recommendations in six categories: professional conduct, jury service, domestic law, domestic violence, criminal law, and judicial system as employer.

II. IMPLEMENTATION

After receiving and considering the Commission’s Final Report, the Supreme Court adopted Administrative Order 7 establishing the Gender Fairness Implementation Committee. The Implementation Committee, chaired from its inception by Justice Mary Muehlen Maring, consists of membership appointed by the Chief Justice in consultation with the President of the State Bar Association. In addition to Chair Maring, current Committee membership consists of Pat Durick, Attorney, Bismarck; Jim Fitzsimmons, Attorney, New Town; District Judge Debbie Kleven, Grand Forks; Surrogate Judge Burt Riskedahl, Bismarck; and Assistant Professor Barbara Voglewede, UND School of Law. Previously serving on the Implementation Committee were Judith Howard, Attorney, Minot;

1. North Dakota Commission on Gender Fairness in the Courts, *A Difference in Perceptions: The Final Report of the North Dakota Commission on Gender Fairness in the Courts*, 72 N.D. L. Rev. 1113 (1996) [hereinafter *Perceptions*].

Professor Marcia O'Kelly, UND School of Law, now retired; and Judge Thomas Schneider, Mandan.

The Implementation Committee's principle mission under Administrative Order 7 is to "oversee the development of a detailed course of action to implement recommendations of the Final Report of the North Dakota Commission on Gender Fairness in the Courts"² and to "monitor the progress of the Judicial Branch toward eradicating gender bias in the courts."³ The Implementation Committee has additional responsibilities to recommend action beyond that identified by the Commission when considered necessary to achieve the goals of the Final Report and to review information and make recommendations on other bias-related matters not addressed in the Final Report but which may have an effect on the judicial system.

Since its establishment in 1997, the Implementation Committee has pursued a number of efforts to fulfill the recommendations set out in the Commission's Final Report. After an initial review and analysis of the recommendations, the Committee referred certain recommendations to other judicial system committees or other entities for consideration. The Committee monitored progress on these referrals and pursued implementation efforts itself with respect to several recommendations.

A common theme in the Commission's recommendations was the importance of affecting the professional environment in which lawyers and judges work and to underscore through education programs the importance of being aware of bias in its many forms and the corrosive effect bias has on the goals of equity and justice in the court system. As a result, the Implementation Committee coordinated several education programs with the State Bar Association to ensure that bias-related topics were regularly presented to attorneys. The Committee also monitored the inclusion of bias-related topics in numerous education programs for judges, judicial referees, and judicial system employees. As a result, numerous educational programs have been presented to judges, lawyers, and court personnel to enhance awareness of the presence, subtle and otherwise, of bias and its impact on lawyers, litigants, and participants in judicial proceedings and on the integrity of judicial proceedings.

In addition to recognizing the importance of education in enhancing awareness of the debilitating influence of bias on the operation of the judicial system, the Commission in its Final Report recommended formal

2. Gender Fairness Implementation Comm., N.D. Sup. Ct. Admin. Order 7 section C(1) (1996).

3. *Id.* section C(2).

changes to court rules and policies to emphasize the inappropriateness of gender bias in the professional environment of the judicial system. The Implementation Committee referred some of these recommendations to the appropriate judicial system committees for consideration and the Committee developed additional proposals that were submitted to the Supreme Court and ultimately adopted. Implementation work in these areas resulted in the following accomplishments.

- Rule 8.4 of the Rules of Professional Conduct was amended to identify manifestations of bias as a form of lawyer misconduct.
- Canon B(5) and (6) of the Code of Judicial Conduct were amended to identify manifestations of bias as a form of judicial misconduct. The commentaries to these provisions were amended to describe prohibited forms of conduct that may constitute bias and to emphasize a judge's responsibility to intervene when inappropriate conduct occurs in proceedings before the judge.
- An informal complaint process was established under Administrative Rule 44, which allows for an informal, confidential way of responding to conduct by court employees and judges.
- Rule 3(a) of the Rules for Continuing Legal Education was amended to add coursework related to gender equity, racial and ethnic diversity, disability access, and elimination of bias as kinds of coursework that would satisfy the current mandatory ethics education requirement under the rule.
- A guide to gender fair court proceedings was developed for judges to assist in avoiding biased conduct and in responding to biased conduct by lawyers, litigants, and others in court proceedings.
- A guide for court employees was developed to raise awareness among court employees of the dynamics of bias and the boundaries of permissible conduct.
- Following a request from the Implementation Committee, the Supreme Court sought and obtained STOP grant funding to develop a domestic violence bench book. The bench book was completed and is a valuable tool in assisting judges and judicial referees in recognizing the dynamics of domestic violence, including the impact of gender bias in the adjudication of domestic violence cases. An educational program was presented to judges and judicial referees on the bench book. The bench book is now in the process of being updated and revised to include more recent information.

III. AFTER IMPLEMENTATION—THE ASSESSMENT

Over the course of nearly ten years since its establishment, the Gender Fairness Implementation Committee pursued a variety of efforts to realize the goals articulated by the Commission on Gender Fairness in the Courts in its Final Report. Several rule and policy changes have been made. Bias-related education programs for judges, attorneys, and judicial system employees have been provided and continue to be provided. Contacts and discussions with numerous entities have occurred.

The remaining challenge was to assess the nature and extent of perceptible change in attitudes and behavior with respect to gender bias. As the Committee neared completion of its initial implementation work, it undertook a review of a national publication, *Gender Fairness in the Courts: Action in the New Millennium*, which is intended to assist in developing a long-term action plan to ensure that progress on gender-related issues continues in the judiciary. A key element in this effort is the development of an appropriate mechanism to evaluate whether the judicial system has, in fact, achieved progress on issues identified in the Commission's Final Report. After reviewing various methods outlined in the *New Millennium Manual* and informed by discussions at national workshops, the Committee concluded a series of focus group discussions, assisted by the use of questionnaires and surveys, would be the most effective way of gauging progress in North Dakota. The Committee requested, and was granted, funds to undertake this process. The Committee's approach to conducting the assessment effort was, in several aspects, similar to an earlier progress assessment conducted by the New York State Judicial System Committee on Women in the Courts. The New York Committee distributed approximately 4000 questionnaires to a wide variety of stakeholders in the judicial system. Approximately 140 responses were received. The Committee subsequently held a one-day conference at which questionnaire results were shared and further information concerning bias and its impact on the judicial process was solicited.

With the impending 10-year anniversary of the Commission's Final Report approaching in 2006, the Implementation Committee conducted its assessment work in the fall of 2005 and early 2006. The Committee first identified a representative sample of the state's lawyer population with the aim of soliciting opinions from lawyers who practiced in a variety of areas of law and who could provide a comparative assessment of how the system may have changed since the Commission's Final Report was issued. Lawyers who participated in the assessment process included civil litigators, specialists in family law, prosecutors, criminal defense, child support

enforcement, general practitioners, and government attorneys. The Committee conducted six regional focus group discussions with lawyers, child support enforcement personnel, domestic violence advocates, and victim/witness assistants. The Committee also conducted four regional focus group discussions with judicial system employees. Questionnaires were distributed to solicit background information and form a framework for the discussions and to provide a base of information for the assessment process. In the early summer of 2006, surveys were distributed to all judges, judicial referees, and surrogate judges. In total, approximately 450 questionnaires and surveys were distributed. Approximately 40% of the questionnaires and surveys were completed and returned.

The Implementation Committee solicited information concerning four central areas addressed in the Commission's Final Report: professional conduct and courtroom environment, domestic violence, domestic law, and criminal law. The Committee sought to assemble information reflecting the broad assessments of those generally representative of participants in the judicial process over the past 10 years. Progress on bias issues is difficult to define and often more difficult to recognize, except when bias has manifested itself in an indisputable way and later ceases or becomes less apparent. Whether the progress is substantive or only a matter of degree and perception remains the difficult question.

IV. WHAT WE FOUND—AN OVERVIEW

“The North Dakota Commission completes its work with the hope that through awareness we can continue to make improvements in our state’s court system which will ensure justice and equal treatment for all who are touched by the system.”⁴

The hope expressed in the Commission's Final Report seems to have been borne out in appreciable measure in the implementation years following its study. That sense of optimism is not, however, without a keen appreciation that there is still work to be done. Bias, real and perceived, is a continuing presence in human affairs. Judicial systems and those who participate in the judicial process as judges, lawyers, litigants, witnesses, advocates, and court personnel, are not unaffected. The implementation efforts outlined at the beginning of this assessment report sought to institutionalize awareness of bias and its corrosive effect on the judicial process. They sought to set in place mechanisms that would serve as

4. *Perceptions*, *supra* note 1, at 1128.

constant resources in ensuring that bias could be recognized and eliminated from the common workings of the judicial process. Aided by the coincidental effects of changes in societal, cultural, and professional norms, the implementation efforts have assisted in changing the professional environment in which those affected by the judicial process must work.

There is a general impression that the professional conduct of lawyers and judicial officers has improved since the Commission completed its work. The fact that more women are attending law schools and joining the legal community has forced an adjustment of attitudes. The composition of the judicial community has changed dramatically since the Commission issued its report. Newer, younger judges have brought a different perception to the bench. General impressions are not without exceptions however. Lingering manifestations of gender bias and differential treatment remain, illustrating the continuing important need for efforts to educate and inform. Judicial officers have indicated a heightened awareness of the need to control the professional environment of the courtroom and restrain biased or otherwise inappropriate conduct by counsel.

In particular areas of the law, there is also a general sense that lawyers and judges are increasingly aware of the impact that bias may have. Domestic law cases, often difficult and emotionally charged, have traditionally been the subject of charges of bias in results or treatment of parties. Judges and lawyers seem attuned to the risks bias poses for the equitable adjudication of these cases. However, the application of otherwise gender-neutral legal doctrines may, because of disparate results, give rise to the misperception that bias has driven a result, which complicates the ability of the judicial system to effectively represent the merits of judicial decision-making. Judges particularly must be sensitive to the equitable application of legal principles and to the need to create the appearance, and reality, of equitable treatment in the courtroom.

Responses concerning the domestic violence order process suggest the serious need for a review of the process. Education and awareness efforts are perceived as having positively affected how these cases are handled and professional conduct in the proceedings appears to have improved. There are, nevertheless, serious concerns about the basic integrity of the process. There appears to be general agreement, particularly among judicial officers, that the process does not serve the parties equally, or at least with some sense of balance, and is subject to misuse and abuse to achieve advantage in other legal proceedings. Additionally, the expedited hearing process may result in proceedings in which issues cannot be fully considered. The laudable objectives and intentions of domestic violence protection statutes

risk being undermined and the substantial interests of those to be protected by the statutes frustrated if the process cannot work effectively.

There is a general sense among those involved in criminal sex offense cases—prosecutors, defense attorneys, advocates—that education programs have had a positive effect on the awareness of how bias may affect the handling of these cases. Judges share this generally positive assessment. However, there are reservations that reflect the intricacies of sex offense cases and the related challenge of identifying and eliminating bias as a factor.

The employment environment of the judicial system appears to be generally regarded in a positive light. The incidents of sexual harassment appear to be few, which confirms early findings in the Commission’s Final Report. However, also consistent with the Final Report, there are isolated instances of sexually harassing conduct, which underscores the importance of ensuring that court employees are aware of relevant system policies and are comfortable and secure in using the protections afforded by the policies. Court employees seem generally aware of judicial system policies regarding sexual harassment, but there is a limited sense that the policies may not be effective. Additionally, judicial officers must be aware of and sensitive to issues in this area. The corrosive effect upon the court work environment of judicial misconduct in this area cannot be underestimated.

Most court employees indicate awareness of two tools developed to assist in addressing issues of proper conduct. Most are aware of the judicial system brochure designed to enhance awareness among employees of the dynamics of bias and the boundaries of permissible conduct. However, a substantial minority of court employees profess no knowledge of the brochure. Most court employees were also aware of the informal complaint process available under Administrative Rule 44, although few knew of any instances in which the process had actually been used. Some employee responses expressed skepticism that the process could achieve an effective result and some responses indicated a dynamic that would discourage use of the process. A significant number of responses from judicial officers indicated they were unaware of the process and those that knew of the process were not aware of any instance in which it had been used. Data regarding complaints submitted as part of the process indicates the process has hardly been used since its creation in 2001. It is unclear whether lack of use of the process is the result of a uniformly positive work environment or the result of a sense of discomfort and reluctance to use the process.

The prospects for job advancement by women within the judicial system are regarded positively by most court employee respondents. This

result is consistent with the Commission's earlier findings. Some responses, however, suggest there is room for improvement.

The remainder of this Assessment Report is in two parts. The first part consists of the categories of inquiry identified for review by the Implementation Committee, brief summaries, and illustrative responses of participants. Participants, through either their responses to questionnaires or comments at discussion meetings, speak for themselves and provide interesting, insightful, and sometimes unadorned comments concerning the workings of the judicial system. The second part of this Assessment Report consists of several recommendations to ensure that the progress that has been achieved continues and to ensure that complacency does not undermine the long-term effort to continually improve the operation of the judicial system.

A. PROFESSIONAL CONDUCT AND COURTHOUSE ENVIRONMENT

Surveys conducted by the Commission on Gender Fairness in the Courts garnered a "fundamental conclusion: all respondents . . . perceived that some degree of gender bias against women exists in North Dakota courtrooms."⁵

A sizeable percentage of women lawyers (46%) thought bias was widespread and subtle although about half of women attorneys thought occurrences of bias had declined in recent years.⁶ Women attorneys reported at notably higher percentages than men attorneys or judges that women attorneys were addressed by first names or terms of endearment or comments were made concerning physical appearance and apparel when such manners of address or comments were not directed toward men.⁷ Commission surveys elicited disquieting responses concerning perceived instances of biased behavior by judges. In keeping with the overarching observation of the Commission's Final Report, there appeared to be a marked difference in perception regarding the occurrence of biased conduct depending on whether the point of view was that of a female or male attorney. For example, 37% of women attorneys reported that women attorneys were addressed by first names or terms of endearment by judges and men attorneys were not, while only 11% of men attorneys offered that opinion. Similarly, women attorneys reported at a far higher percentage than men attorneys that judges made comments to women attorneys about physical appearance or apparel when no such comments were made about

5. *Id.* at 1141.

6. *Id.* at 1142.

7. *Id.* at 1151-53.

men.⁸ The Implementation Committee asked a series of questions concerning lawyer and judge conduct, specific forms of treatment, and general courthouse environment.

1. *Lawyer Conduct*

The Committee first sought general observations about changes, if any, in lawyer conduct.

Q: *Do you think the situation regarding the perception of gender-biased conduct by lawyers in courtroom proceedings is better, worse, or unchanged? Briefly explain.*

Several lawyer responses exhibited a cautiously positive assessment of how lawyer conduct may have changed:

- I think everyone perceives bias differently. I think any bias in the courtroom/in courtroom proceedings reflects the bias in our society. Among the more educated of our society, bias is less apparent. By the actions taken, lawyers in ND have become more aware of their own bias and behavior. Whether it's *changed* behavior or bias, I haven't noticed.
- In my opinion, the perception is probably better (although I don't think it has been that bad the last decade or so anyway).
- Better, but only minimally. I never experienced much of a problem, however, all attorneys do seem to be more aware of the situation and more careful generally.
- Better. I rarely see *any* gender-biased conduct by lawyers in the courtroom, only a few individuals are the exception.
- Better. Attorneys in general seem more aware of gender fairness, especially in custody and child support.
- Better—with more women lawyers in the courtroom, I think there has been a change.

Judicial officers appear to share this assessment. Most respondents regarded the perception of gender-biased conduct by lawyers as having improved over the past 10 years. Some responses noted the possible impact of education programs and awareness efforts.

- Again, I think it has changed as training and education have increased.
- Better—Judges are more aware of language used in the courtroom.

8. *Id.*

- Better—education has been offered.

Responses to this issue by women attorneys will probably be the most telling. However, from one judge's viewpoint, it has been several years since I have had to "chastise" any men attorneys for such conduct in my courtroom. Perhaps this is one sign that the educational programs directed at raising awareness and sensitivity levels with respect to these issues are bearing fruit.

The casualness that may result from interaction in a relatively small legal community was noted by one district judge new to the bench:

- In a small community where the same lawyers deal with each other daily, use of first names often occurs. I try to remind counsel to use Mr./Ms. etc. I believe use of first names is more a symptom of familiarity than of disrespect.

One district judge, however, offered a more guarded assessment.

- Situation may have improved slightly on surface.

The generally positive assessment of lawyers and judicial officers is shared by court employees, who are often in the unique position of being able to observe conduct by lawyers, judges, and others in the courtroom setting. Most employee respondents thought the conduct of lawyers had improved over the years or had remained essentially unchanged. Those who perceived conduct as unchanged appeared to be of the opinion that biased conduct had not, in the past, been noticeably present. Several responses illustrate the general dynamic.

- Unchanged—always been good [and] acceptable.
- In any juvenile court hearings, the judge(s) or referee(s) have always used Mr., Mrs., or Ms. I have never heard nor experienced terms of endearment or other comments. Attorneys seem to be more concerned [at] a young female's future as to more serious impact on her personal life. I see this as an improvement and taking a look at the individual's potential [and] outcomes.
- Unchanged. I have noticed no problems.
- Better overall.
- Better. Gender equality is a national issue as well [and] it is an inclusive part of conferences available to court personnel in professional training.
- I believe it has greatly improved, particularly concerning female attorneys. There are still a few men from the "old school" using terms of endearment, biased remarks, etc., but I believe it is much better.

- Better: I see more caution used so not even a misunderstanding or possible inference could be taken from statements. In one hearing the [j]udge corrected a male attorney in referring to the female attorney by her first name.
- I believe it has improved since I began working in the courtroom in 1988. I believe everyone is addressed properly.
- I have not observed this in the courtroom. I find it most professional in regard to women.
- Unchanged, I believe it was good before as I am unaware of any problems in the past or in the present.
- Unchanged—haven't noticed any of the situations mentioned either in the past or present in our courtroom.
- We have never had issues [with] gender bias that I have observed, so my answer of “unchanged” should be construed positively.

There remains, however, a sense from lawyer respondents that bias continues to be an elusive but noticeable part of professional conduct, although it may be exhibited by a minority of the profession.

- Lawyers need more training! Some of the worst culprits for gender fairness “violations” are opposing counsel, especially if they are of the 50 plus age group. But improvements have been made.
- While the overall feeling is of equality, there are still individual attorneys who make unnecessary innuendoes about gender.
- I began my practice at the time the final report was issued in 1996. I have noticed no major changes in the attitudes of the judges and opposing counsel with regard to courtroom decorum or the use of gender neutral language. The same “offenders” that existed back in 1996 still practice in the same manner. Their collective behavior has gone unchanged. However, this personally offensive behavior is limited to very few members of the local bar. I found most opposing counsel to be courteous and their treatment is fair and without regard to sex.
- Overall, I think the situation is better. Some lawyers may never change.

This last sentiment was shared by a district judge who had recently made the transition from private practice to the bench:

- In general, it has improved. However, there are still some lawyers that have not changed.

It appears most respondents consider professional conduct by lawyers to have improved. Reflecting the complexity of human and professional relationships, the improvement is not uniform. Improvement that has occurred is attributed to a variety of factors, including increased awareness, shifts in societal and cultural norms, education programs on specific bias issues, and the greater proportion of women in the legal profession. There is, however, a remnant of the legal profession for whom increased awareness and changed conduct is in shorter supply. The “work left to be done” illustrates the continuing importance of education and awareness efforts.

2. *Judicial Intervention*

The Implementation Committee sought to gauge how judicial officer attitudes may have changed concerning how to respond to biased conduct. Commission survey results indicated a decided difference of opinion among women attorneys and men attorneys about whether judges intervene to stop biased conduct in the courtroom. The Commentary to Canon 3B(6) of the Code of Judicial Conduct was amended to emphasize a judge’s obligation to intervene when inappropriate conduct occurs. While improvements in courtroom conduct appear to have occurred, the judicial response to biased conduct when it *does* occur remains important.

In light of amendments to the Code of Judicial Conduct emphasizing a judge’s obligation to intervene when inappropriate conduct occurs, the Implementation Committee asked whether there was a heightened awareness among judicial officers of the obligation. A clear majority of responses indicated increased sensitivity to the need by judges to address inappropriate conduct. The Implementation Committee then asked respondents to briefly describe their approaches to intervention. Responses described a general approach of quickly bringing the conduct to the attention of the lawyers and controlling the situation. The precise methods of addressing the situation differed.

- Depends—I use private talk(s) when possible.
- It has only happened a time or [two] where I felt that conduct was inappropriate. I tried to remind counsel to extend to each other professional courtesies.
- I would pull someone aside before openly admonishing in court.
- Interrupt, ask counsel to join me in chambers. Point out what I observe and prohibit such conduct. This has not happened personally.

- If not in the presence of the jury, I would interrupt the proceedings and express my concerns with the conduct. I would, of course, allow any record to be made. If serious and repeated, I would consider referral to the inquiry committees/Disciplinary Board. If the initial conduct occurred in the presence of the jury, I would immediately either a) hold a sidebar (on the record); or b) excuse the jury and deal with the matter.
- I indicate the conduct is inappropriate.
- If it occurs, I stop it immediately.
- Have and will courteously stop it—if it is not egregious. Others—openly address it.
- It has been ___ years since I retired. I do not recall any specific incident of gender biased “inappropriate conduct” that may have occurred in my presence. My approach would have been to call the counsel to sidebar to *call* the objectionable nature of the comment or action and give notice that such conduct was not allowed.
- Most courtroom bullies are equal opportunity bullies. The female attorneys that I have seen, for the most part, do a great job of holding their own ground.
- At the first indication of any such inappropriate conduct, I would go off record and meet with counsel in chambers. I would advise the offending party of what I felt was inappropriate conduct, and make clear that such conduct was not acceptable in my courtroom (or any courtroom for that matter). Further, the offending party would be advised of potential consequences for any further inappropriate conduct from contempt of court fees assessed to an ethics referral.
- Immediately addressing the situation and mandating no repetition.
- If I perceived it I would interrupt the proceeding and point out the offensive words or behavior *politely*.
- Courteous reminder that such conduct is inappropriate. If the conduct continues, perhaps a conference in chambers would be appropriate. Contempt of court may be appropriate in egregious instances.

The Commission's early concern that "judges act affirmatively to maintain a bias-free environment in their courtrooms",⁹ appears to have taken hold in the judicial community. The importance of controlling the professional environment within the courtroom is clearly recognized by most respondents. The precise method of control or intervention remains, however, a distinctly individual choice.

3. *Judge Conduct*

The Implementation Committee then asked whether the perception of biased conduct by judges had changed.

Q: Do you think the situation regarding the perception of gender-biased conduct by judges in courtroom proceedings is better, worse, or unchanged? Briefly explain.

The impact of changing judge demographics was illustrated in several lawyer responses.

- Better, partially because of the attrition of the older judges.
- It is better, among "younger" judges in particular. There are still problems with the age group of 50 plus. The education has helped judges understand the issues of gender fairness.
- This is an interesting question in _____ County because of the changes in the judiciary in the last few years. Several retirement aged judges have been replaced with younger male judges. The treatment I have experienced from the new judges has been exemplary with no concerns of gender bias in either treatment of the attorneys or in the rendering of decisions. My experience in front of the new judges has been limited, as they have been on the bench only a short period of time. The only exception to this general statement is in the area of domestic violence, which I discuss below.

Some court employee responses shared a similar perspective.

- Better with new judges.
- Better. A major change in judicial personnel.

The effect of high profile instances of judicial misconduct was evident in some responses.

- Better due to the removal of a judge who was a flagrant example of gender-biased conduct.

9. *Id.* at 1146.

- Worse. More women judges has helped. However, the recent issues [with] the [former Fargo area] judge make it clear there is a long way to go—and more problems than ever were evident.

For several lawyer respondents, perceptions of judicial conduct have improved or the courtroom experience was regarded in a positive light.

- Better. Simply [because] of the awareness that it is an issue.
- Better. The judges are doing a very good job of keeping gender-biased conduct out of the courtroom.
- I didn't sense a lot of gender-biased conduct prior to the report and the rule changes, but to the extent it may have existed, I feel it has gotten better. I think lawyers are being gender neutral. I believe judges are taking extra care to avoid even a hint of gender bias.
- I think this has become better because education and awareness of gender issues has been more prominent.

This generally positive assessment was again evident in responses from court employees, most of which succinctly considered the situation has being better or improving. Several responses provided more expansive evaluations.

- In any juvenile court hearings, the judge(s) or referee(s) have always used Mr., Mrs., or Ms.
- Better. From what I have witnessed, [j]udges refer to people in their courtroom by their last names consistently.
- I have never seen a judge use gender bias in the courtroom.
- Sometimes I have seen/heard judges refer to women defendants by first name and males as “Mr.”.
- Better. There always is gender-appropriate language in the courtroom during cases I have been involved in.
- I have worked with almost every judge in the _____ judicial district, and they are exemplary in their professionalism & ethical conduct, and should be applauded for this—years back it was different here.
- [In] court trials I have been a part of, the Judge's conduct has been by the book. No first names for anyone, whether a lawyer, witness or someone on the jury. Appearance—fine.
- Better—the attorneys that had been offensive have retired *or left the area*.
- Better. I see more caution used so not even a misunderstanding or possible inference could be taken from statements. In one hearing

the Judge corrected a male attorney in referring to the female attorney by her first name.

- But there is still room for improvement.
- Sometimes I have seen/heard judges refer to women defendants by first name and males as “Mr.”.
- There are just a few times when the older judges have still made some inappropriate comments on clothing/pregnancy. It happens less [and] less all the time.

A majority of judicial officers responding to this question agreed judicial conduct has improved. Some responses attribute the perceived improvement to education and awareness efforts, the changing judge population, or the changing legal community generally.

- Better. Again—change has been gradual.
- I think it is getting better. Again, I think this is due to the increased sensitivity by the newer judges.
- Judges are more aware of gender bias.
- Better. The world is changing. There are more women in the legal profession.
- Better. More awareness and sensitivity.
- Better—education.
- Better. Many of those who are our current judges went to law school and started practicing at a time when gender bias was articulated as an issue and are now more aware of it as judges.
- I think it is better. I am not sure there was a problem to begin with where I am. Perception is one thing, reality is another.
- Better. The composition of the judiciary, as well as awareness, has largely eliminated an ignorance that may have existed.

Mirroring in general degree the perceived improvement in lawyer conduct, assessments of judicial conduct indicate a general sense that biased conduct, or the perception that judges are biased, has declined. Changes in judge population, education, the changing face of the legal profession, and general awareness are cited as reasons for the perceived improvement. Responses from judicial officers illustrate a greater awareness of the important issues at stake. Sober responses about the impact of instances of judicial misconduct illustrate as well the importance of constant awareness and adherence to high standards by judges, who are the centers of authority in the courtroom.

4. *Professional Courtesies*

When the question turned to more specific kinds of treatment of women lawyers, a continuing difference in experience and perception among lawyer participants emerged.

Q: Do you think there is still a perception of an unwillingness, general or isolated, to extend the same professional courtesies to women lawyers as are extended to men lawyers? Particularly, are there inappropriate forms of address used for women lawyers or comments on personal appearance based on gender stereotypes? Briefly explain.

Some lawyer responses reflected a generally positive assessment of the treatment of women lawyers in the courtroom setting.

- No. I believe women are treated equally in the practice of law by other lawyers and the bench. Clients are sometimes another matter!
- I generally don't see an unwillingness to extend the professional courtesy to women attorneys or frankly the use of gender stereotypes.
- I do not believe female lawyers receive either more or less courtesy in the legal profession.
- None that I have felt. We happen to have an exceptionally great bar and judicial system here.
- No. I no longer see the courts addressing females differently than males. I think the perception is that all lawyers, regardless of gender, need to proceed in a professional manner.
- No. I am a female attorney. I have never felt disrespected or inappropriately addressed by any other attorneys or judges due to being female. The only time I have ever been disrespected for being female was by my own indigent defense contract client.

A nearly equal sentiment, however, was that a differential persists in the perception of how women and men attorneys are treated with respect to professional courtesies.

- Women lawyers seem to be labeled and categorized more readily than male lawyers.
- Yes. For example, on occasion an opposing attorney (older, male) will speak condescendingly and explain a statute when there is a dispute over its applicability. I've also had male attorneys refuse

to negotiate [a] settlement, but if a male attorney calls with similar facts, his case will settle.

- I do still sometimes see a female addressed by a first name rather than a title and a “surname.”
- Yes, there still are issues. I’ve heard state judges sort of dismiss gender fairness issues, saying it’s an over-reaction by women. Just wait until their daughters are lawyers, and experience gender bias! The inappropriate forms of address for women are still being used . . . the judge’s staff are “girls,” the women attorney is a “gal.” But the male attorney? It’s “Mr.” or “Attorney. . . [.]”
- The only complaint I am personally aware of is in the judge addressing a female [attorney] by her first name, while addressing the male as *Mr.*
- I have not personally observed any biased treatment. (The only exception to that would be a particular judge who has now retired. Several embarrassing incidents in relation to him. I perceived this to be isolated.) However, I have noticed a general decline [in] the decorum of the courtroom, i.e., use of first names for both counsel.
- Yes. Still have male lawyers comment on female lawyer’s personal appearance—when no similar comment would be made to male lawyer. Also [I] feel male lawyers [are] less likely to extend same courtesies to female lawyers as to male lawyers.

Interestingly, a majority of responses from judicial officers indicated there is no unwillingness to extend the same professional courtesies to women attorneys as are extended to men attorneys or that differential conduct had not been observed in the courtroom. This bears some resemblance to Commission survey results that indicated only 12% of judges observed the use of first names or terms of endearment with respect to women attorneys while 57% of women attorneys and 19% of men attorneys reported such conduct.

Some responses considered differential treatment still present in some measure even if not readily detected.

- I think it still happens, but with much less frequency[.]
- No. Not seen lately. I’m sure it still exists to some degree.
- There are still a fair number of older male lawyers who are uncomfortable working with women lawyers and do not conduct themselves appropriately.

Court employees were asked a similar question, but with an added reference concerning whether professional courtesies are extended to

women *court personnel*. Most respondents did not perceive an unwillingness to extend professional courtesies nor did they perceive a tendency to indulge inappropriate forms of address or comments about personal appearance. Some examples:

- I see no inappropriateness with regard to male or female.
- I feel in our courtroom women have been treated the same. Lawyers or court personnel all have been treated fairly. I do not believe a judge would give a male more slack. I do not feel a judge would be prejudiced, whether male or female.
- No, our judges are good at treating everyone fairly.
- I have not witnessed any behavior that I would view as offensive
- No. Men and women are treated the same.
- I have not witnessed inappropriate forms of address.
- Very equal where I work in juvenile court.
- All lawyers have been treated with equal respect by our Judges.

Some court employee responses, however, indicated there are vestiges of differential treatment that require vigilance.

- I have never seen the above mentioned. However, I do think that there are subtle expectations that some employees are at the beck [and] call of the judge(s) just by the fact that one is a judge. One employee in particular has to “drop everything” because he is “his Honor”, [and] ends up doing multiple jobs [and] catching up time for her own job. This person also has expressed numerous times feeling “talked down to,” not respected as a professional, or treated as a child. Is this due to positional power and expectations[?]
- Only with a couple of attorneys, “old school.”
- Not that I am aware of other than attorneys referring to a woman’s appearance (nice suit, professional looking, etc.) without commenting on a man’s appearance.
- Some inappropriate forms of address by attorneys when addressing staff on the telephone, but mostly it’s just annoying, not offensive.
- There are still some isolated incidents where a male judge will ask a female courthouse employee to do some things such as make copies, fetch mail or coffee, etc., when they could ask their own secretary instead. The male courthouse employees are not called upon for such tasks.

Professional courtesies, both with respect to lawyers and judges and court staff, continue to be marked by the “difference of perceptions” noted in the Commission’s Final Report. While perceived improvements are evident, differential treatment based on gender or status remain uncomfortably present.

5. *Courthouse Environment*

The Implementation Committee then asked participants about the *general* courthouse environment in which they practice or serve.

Q: Do you think the general courthouse environments in which you practice could be described as more, less, or unchanged regarding awareness of and sensitivity to biased conduct? Briefly explain.

There appears to be the general opinion among lawyer respondents, with some reservations, that the general courthouse environment has improved.

- More awareness and, to a lesser degree, sensitivity. The study and report and rule and canon additions help to develop a greater awareness.
- Probably more aware and sensitive to biased conduct.
- More awareness in the courtroom.
- More aware. However, there was no *problem* previously. Just seems to be more awareness re: jokes, political correctness, etc.
- I think there is greater sensitivity to issues of impropriety relative to gender and ethnicity in the courthouse at large than there was in 1995 when I came to the courthouse.
- More awareness on the part of male judges—improved situation overall.
- The courthouse environment in general is also improving.
- Less biased conduct, i.e., improved.
- Some changes have occurred, some improvements.
- The impact of changes in judicial demographics was again apparent.
- Due to significant turnover I would have to report that the atmosphere of the courthouse has changed dramatically. It will be interesting to see the long-term effects of this turnover. My concern is that there were a few local judges (who have not left the bench) that seemingly supported, condoned, and/or ignored boorish

behavior. I personally have not had any negative experience with the judges, but I do wonder about the long-term effects.

- More sensitive. We have more female judges at our courthouse than we do male judges. So gender-biased conduct is not a problem as far as I can see.

The impact on the courthouse environment of high profile instances of judicial misconduct was again the subject of comment.

- More since the removal of a judge who was a flagrant example of gender-biased conduct.
- More awareness because of [situation with a former Fargo judge]. Unchanged in sensitivity.

The responses of judicial officers also suggests an improvement in the general courthouse environment. A majority of responses indicated that a gradual change has occurred due in part to a combination of increased awareness and education.

- I think change has been gradual, and for the better[.]
- More aware, as training and education has increased[.]
- More awareness. In court and outside court, all participants (judges, clerks, staff) attempt gender neutrality and are always aware of how words or deeds may be taken.
- Much, much, much more sensitive since the influx of new judges in the ____ county courthouse.
- There is *more* awareness and sensitivity today. I have not seen such conduct in many years.
- In my opinion the issues of gender bias in the courts have diminished during the past ten years. Male and female judges and attorneys have grown accustomed to each others' legal abilities and contributions over time.
- More aware and sensitive because of education, training, and cases that have occurred.
- More aware. Education has occurred.

Court employees appear to share the general opinion that the courthouse environment has improved with respect to awareness of and sensitivity to biased or harassing conduct.

- I think people are more aware of inappropriate conduct when it happens [and] are more likely to report it.

- More aware. There's been more because of more education; wellness flyers; etc.
- More aware. Our general courthouse environments are appropriate, professional [and] respectful of all participants. Our [j]udges would never allow it any other way. Our immediate supervisor also maintains an appropriate working environment.
- More aware, based on co-worker's comments regarding awareness.
- Much more aware. Tremendous improvement here.
- More aware. Our department has informed employees as to what procedures need to be taken if [necessary] [and] what steps to be taken if [a problem] occurs.
- More aware. Harassment has been brought up [and] ways of handling it.
- I have not witnessed any offensive behavior.
- More aware—I haven't noticed any harassing conduct or behavior.
- More aware—there is more respect toward female employees.
- More aware. Court admin[istration] is doing a good job of briefing us.

However, several responses underscored the importance of continued efforts to educate courthouse employees on the dynamics of gender bias.

- Have noticed some inappropriate comments toward female staff. Mostly just one person.
- I think people are more aware. I think that there may be isolated incidents that involve comments that make persons uncomfortable.
- Less aware. Some personnel are aware of the do's and don'ts, but do not abide by [them].
- Think [it] needs to be made "more" aware. It appears that there have been several deliberate attempts to [?], hurt an individual coworker to the extent of that individual leaving employment.
- Unchanged—clothing comments are still made.
- More aware, but not necessarily more sensitive to biased or harassing conduct.

The impact on the general courthouse environment of high profile changes in courthouse personnel was also noted.

- More aware because of previous lawsuit in federal court regarding employees from _____ County and Governor removing commissioner and sheriff.

- More aware. Sheriff's removal has sensitized all employees.

Consistent with earlier observations about lawyer and judge conduct, the general assessment is that the courthouse environment has improved since the Commission's study. Contributing factors include changes in personnel, increased awareness, and education programs. There are, however, continuing instances of inappropriate conduct which underscore the importance of maintaining expectations concerning proper conduct.

B. DOMESTIC LAW AND DOMESTIC VIOLENCE

Commission's survey responses revealed that substantial majorities of women and men attorneys thought attorneys dissuade fathers from seeking custody because they believe judges will not give fair and individual consideration to the fathers request for custody. However, substantial majorities of women and men attorneys thought judges *do* give fair and individualized consideration to fathers who seek custody.¹⁰ The Commission concluded that the marked disparity in responses suggested that attorneys "may use the possibility of judicial gender bias as an excuse to discourage fathers from seeking custody rather than advising fathers not to seek custody for [other] reasons."¹¹

In its review of domestic law issues, the Commission did not find clear instances of bias in the application of legal doctrine in domestic cases. However, survey responses and discussion comments revealed the risk of misperceptions when gender neutral legal doctrine are perceived as biased because of disparate impact in case results. The Commission found concerns about neutral application of child support guidelines, neutral application of the "primary caretaking" criterion in custody determinations, realistic understandings of the economic consequences of divorce, and the consistency and predictability of property division.

1. *Awareness of Bias—Judge Perspective*

In light of these general observations, judicial respondents were asked a more narrowly focused question regarding custody, visitation, spousal support, and property division.

Q: Do you think judges and lawyers are more aware of and sensitive to perceptions and risks of gender bias in such areas as custody and visitation determinations, spousal support, and property division? Briefly explain.

10. *Id.* at 1180.

11. *Id.*

A majority of responses reflected a general sense that awareness of the potential impact of bias has increased among judges and lawyers.

- Judges, like the rest of society, are aware that gender roles are fluid and that parenting skills are not based upon gender.
- Lawyers and judges are aware of these issues. As a practical matter, most of the time the parties make the determinations—not the judge.
- Yes. Increased attention and sensitivity to the perception of bias and increased discussion have made most judges and lawyers more aware.

There was, however, a sense among some responses that awareness may not have contributed to changed results.

- I think they are more aware, but not sure if it has made any difference.
- I think the perceptions may still be there, and many men feel discriminated against in the custody and support areas.

The tension between application of the law to the facts of the case and perceptions regarding fairness of results was noted in several responses.

- Yes, but judges and lawyers are always careful to be clear about what is intended and there will always be a case where a disgruntled party will claim (a misperception of) bias.
- Lawyers and judges are aware of these issues. As a practical matter, most of the time the parties make the determinations—not the judge.
- They may be aware of the perceptions but that may not change the outcome of the case. What may be perceived in a case and [what] the facts actually are may not be biased.
- Yes—I personally believe a father has as fair a chance at custody as a mother but that doesn't mean the results are even when all custody issues are considered.
- Lawyers and judges are generally more aware and sensitive. But the litigants sometimes feel a judge has made a decision on the basis of gender versus application of law to the facts.

A district judge with significant experience on the bench, however, offered this unsettling observation.

- Yes, they are aware, but I still think that judges view traditional roles in reaching findings and conclusions where the facts may not be appropriate in a case.

The impact of outside forces was also noted in some responses.

- I do, especially in light of the initiated measure petitions that are circulating.
- Yes. Supreme Court will jump up and down if it observes bias.
- Yes—not only is there information from institutional sources, but we are also subject to the “father’s rights” lobby.

There appears to be a general awareness, illustrated in the responses, of the risks that bias poses in the adjudication of domestic cases. However, there is a sense also that what is perceived as bias may not be and may, instead, be the result of application of legal doctrine to the facts of the case or decisions made by the parties or their attorneys. Nevertheless, the Commission’s concern that application of doctrine may “mask” the indulgence of bias or stereotypes underscores the continued need for education and awareness efforts.

2. *Education—Impact on Judges*

Judicial officers were then asked as well whether education programs had an effect in this area.

Q: Do you think education programs have had an impact on the conduct of judges with respect to awarding child custody, visitation, spousal support, or property divisions? Briefly explain.

The general perception is that education has had a positive impact. There were, however, reservations about the extent to which education programs can affect the disposition of particular cases.

- Not really, the problem is as much in how a decision is made or announced or explained as the decision itself.
- No, judges know bias has no part in their decisions.
- No. I believe they may reinforce decision-making by judges who avoid bias but are not helpful [with] others.

Commission survey responses and public meeting comments highlighted continuing concerns related to victim blaming, lack of respect for victim concerns, and skepticism about the credibility of women in domestic violence proceedings. The Commission emphasized the need for ongoing education and training for those involved in the adjudication of these cases.¹²

12. *Id.* at 1208-10.

3. *Awareness of Bias—Lawyer Perspective*

In light of the Commission's findings and conclusions regarding perceptions of bias in the areas of domestic violence and child custody and visitation, the Implementation Committee solicited general observations from lawyers regarding any changes in perceptions and awareness.

Q: Do you think lawyers and judges are more aware of and sensitive to perceptions and risks of gender bias in such areas as domestic violence and custody and visitation determinations? Briefly explain.

Lawyer responses to this question revealed a persistent ambivalence about progress in this often emotionally charged area of the law.

- I do not practice domestic law and my representation is generally of male defendants accused of domestic violence. Although it is certainly not unheard of for women defendants to be accused of domestic violence, those are still rare. Similarly, men are often granted custody of children, in a contested setting, but those appear to be the exception rather than the rule.
- More aware, yes, but stereotypes still remain.
- I believe the entire system gives the perception that male defendants accused of domestic violence are presumed guilty. Similar problems exist with IV-D and child support.
- More. However, “party” mothers at times possibly have been viewed more harshly than “party” fathers.
- I continue to have grave concerns for the level of awareness for the dynamics and effects of domestic violence on families. Too often, I see the issue either under-emphasized or dismissed out of hand by the court. More needs to be done to educate the bench and bar on the dynamics of domestic violence and dispel myths associated with domestic violence. This is true not only for physical domestic violence but also for emotional or non-violent domestic abuse. I have also been involved in cases where a party has been punished because that party was suffering from the effects of domestic violence. Unfortunately, more needs to be done in this regard. The argument that “she knows how to push his buttons” is not only tolerated, it has been adopted in some cases. The cycle of violence will not be interrupted until we swiftly act to punish abusers and interrupt their pattern of behavior, which is being witnessed by their children. Judges seem reluctant to use the [statutory]

remedies available to correct situations. (Supervised visitation, attorney fees, etc.)

- I can only speak to domestic violence. I would like to believe that the court treats abusers the same. However, I think that females generally get a better sentence when they are the aggressor.

While some lawyer participants perceived a change in this area, there was concern that perhaps the change had gone too far.

- There has been an increase in awareness. However, the basic tendency is to favor women, give women more credibility. Men just “can’t” be victims! And just are not as capable to parent as a Mom is. Room for improvement. Additionally, very little effort needs to be made to get an ex parte order for a case alleging dom[estic] vio[lence]. It’s automatic . . . and unfortunate in many a case.
- Although lawyers and judges are more aware of possible bias, there is probably a slight bias in favor of women in custody matters. Nonetheless, more and more fathers seem to be fairing well in custody decisions.
- Yes, if anything, there has been a movement too far in the other direction in terms of the female clients, not female att[orne]ys. I feel female judges are more likely to be harder on female attorneys than male judges.

Some lawyer participants clearly saw improvements.

- Yes—I think lawyers and judges are acutely aware of societal changes and changing perceptions. More than ever, the appropriate father may be the primary physical custodian. More than ever, the appropriate mother receives sole physical custody when the father is abusive. In sum, behavior—not gender—controls.
- Yes, I believe judges are making more of an effort than in the past.
- Yes—absolutely. I do not think that attorneys/judges assume that only women can be victims or that the woman is automatically the best parent anymore.

And a perhaps common sentiment illustrates the difficulty in discerning the presence and impact of bias.

- I cannot tell. It’s not as if they are making biased statements from the bench (or otherwise) from which one can deduce the reasons for their conclusions.

4. *Domestic Violence—Awareness of Bias Issues*

Responses from judicial officers regarding increased awareness of the issues of gender bias *particularly* in domestic violence cases reflected a general sense that awareness has improved.

- Education, peer review, appellate review, and advocacy group review have made the judiciary very aware of perceptions of gender bias.
- Yes, I think society as a whole is much more sensitive on these issues and judges and lawyers, being members of society, are also more sensitive.
- Yes—There is much greater sensitivity to the grave nature of domestic violence - especially as a pattern of behavior.

However, there is still a level of skepticism about whether awareness has increased or translated into results.

- No—There is still a perception that abuse flows only [one] way— from the male to the female.
- I think they are more aware, but not sure if it has made any difference.
- Judges and lawyers are more aware of the perceptions, but the perceptions have not diminished in my opinion.

With respect to changes in the awareness of lawyers and judges of the risks associated with bias in the context of domestic violence, the Implementation Committee sought the observations of those regularly involved in assisting victims of domestic violence. Responses generally suggest the judicial system in general is improving in its approach to domestic violence cases.

- The attorneys and judges are responding better to petitioners' requests, making sure both sides are being heard in court.
- Yes, I think everyone is more aware and sensitive to perceptions and risks of gender bias. However, the problem I see is that we are looking at domestic violence the wrong way. Domestic violence is not a woman's issue; it's a problem that affects us all and should be looked at as a human issue. I read the Commission's Final Report and would like to add that I agree with most of what was stated. Rule 34 does allow advocates to go into court and this should place an obligation on advocates to screen those petitioners. However, once again training and education are the key issues. North Dakota should have new laws on training for criminal justice

advocates and there should be a law review on the protection order process.

- Yes, the attorneys and judges that have attended training or received education are aware of gender issues and biases. There appears to be an understanding of the dynamics of Domestic Violence and this definitely plays a role in custody and visitation determinations.
- I believe in the courtroom we are seeing more cautious approaches to women seeking protection orders. Careful scrutiny is given to protection orders to insure that danger is imminent and that incidents are immediate. Requests for relief are given when and if protection meets the standard in law. Survivors have indicated that attorneys use tactics, which are perceived as being not sensitive to victims.

5. *Domestic Violence Proceedings—Conduct*

The Implementation Committee sought comments from those assisting victims of domestic violence in the particular area of perceived changes in *professional conduct* and instances of gender-biased conduct by lawyers involved in domestic violence or related proceedings. As illustrated by the following comments, perceived bias continues to be a source of concern. Additionally, the dynamics of the adversarial system are often seen as contributing to an atmosphere that can be perceived as hostile or biased with respect to victims.

- I think gender-bias takes place occasionally. As professionals, we know better so I tend to think the negative comes from the frustration.
- Unchanged, for the most part. I still hear attorneys stating in court that if it was so bad the victim should have left long ago. This was stated last week by court personnel regarding a sexual assault case. This is not a rape case, but rather a case of sex without consent.
- This has somewhat improved within the State's Attorney's office. However, with regards to defense attorneys, there has been no improvement due to lack of training participation.
- The perception among survivors that I have talked to is that attorneys want factual information to make a case and they question women repeatedly regarding behaviors that as victims they may have provoked, caused, or instigated in order to make offenders look more abusive. I do not believe that this will change

because attorneys work in an adversarial system which encourages blame to be placed with one party or another.

6. *Education—Impact*

The Implementation Committee next sought observations concerning the perceived impact of the generally increased availability of education programs.

Q: Do you think education programs have had an impact on the conduct of judges, lawyers, and court personnel in cases involving domestic violence? Briefly explain.

Lawyer responses reflected a generally favorable impression of education programs but also reflected the difficulty in linking programs with changes in conduct.

- It's hard to know if education or just a general improvement in the lot of women has impacted the conduct. Nationwide, there is a greater awareness of the need to act protectively in domestic violence cases.
- I think education programs have generally been favorable on the conduct of all of us in cases involving domestic violence.
- Yes. I see more professional and respectful treatment of parties involved in domestic violence by judges, lawyers, and court staff.
- Stereotypes concerning domestic violence run deep. These emotional issues are hard to impact via education. Hence[,] I do not know.
- I don't know what education they've received, so it is difficult to say what impact if any it may have had. Plus, I cannot tell. It's not as if they are making biased statements from the bench (or otherwise) from which one can deduce the reasons for their conclusions.
- Yes. Judges used to be very patronizing to alleged victims and very condescending to alleged abusers. Judges seem, overall, more open-minded.
- I don't know. But—educational programs should be a staple to the legal profession overall.
- Yes. Education on issues of gender typing has received much media attention and therefore all parties are more aware of it.
- Yes! Although more education is always a good thing!

This generally positive assessment was also reflected in most responses from judicial officers.

- Again, [y]es, training is always a benefit.
- Programs reinforce good behaviors.
- Yes, better education and training helps prevent misuse.
- Yes—Judges are more aware of the dynamics of domestic violence.
- Yes. Learning the full extent of the damage caused by domestic violence allows a judge to put the facts of each case in context and do a better job in making a decision. For example, the North Dakota Domestic Violence Benchbook does a great job in this regard.

A minority of responses, however, indicated skepticism about whether education programs have had any influence on the consideration of cases.

- Very little.
- Not really.
- Don't see an impact.

From the standpoint of those regularly involved in providing assistance to the victims of domestic violence, educational initiatives were generally regarded as successful, with the caveat that attendance is often sporadic.

- We attend a lot of training in the year and do not see a lot of judges, attorneys, or law enforcement in attendance.
- Education programs are great. The problem is getting people there.
- Yes. There has been a greater understanding of the dynamics of abuse and this has had an impact on the conduct of court personnel in a positive way. There have been several cases of same sex relationships where violence is occurring and these have been dealt with appropriately and professionally. We believe that making national training available is much more effective than offering local training.
- In the past several years, ____ has provided at least ten opportunities within the state for judges and attorneys to receive education on domestic violence and a yearly opportunity to send at least one judge to a national training. STOP training dollars have allowed multi-disciplinary domestic violence trainings ([three] per year) to reach out to judges and court personnel in rural communities. National trainings in the past five years have

focused on the complexities of child custody when domestic violence is a factor and the unique role that supervised visitation and offender treatment can provide when applied by judicial order. The education programs provided have given judges and attorneys the opportunity not only to learn about domestic violence but to engage in discussions with advocates about the reactions of victims, long term effects and impact on children. I believe that interactive learning has been helpful with court personnel and attorneys who want to do family law. The impact of these trainings has been evidenced by the willingness of judges to use supervision and treatment in sentencing.

7. *The Protection Order Process*

Notwithstanding the ostensible positive influence of education programs and increased awareness regarding the dynamics of domestic violence, responses reflected some level of dissatisfaction with the domestic violence protection order process and the impact perceived bias may have. This dissatisfaction and suspicion that the process is unbalanced or flawed in achieving the ends contemplated by the domestic violence statutes was also expressed in discussion groups. To gauge the judicial perspective in this area, the Implementation Committee asked judicial officers two questions concerning the “mechanics” of the protection order process. First, the Committee asked:

Q: Do you think the current domestic violence protection order process within our court system serves both parties equally in terms of resources, review of petitions, and dispositions? Briefly explain.

About half of the responses reflected a general sentiment that the protection order process does serve both parties equally. A judicial referee, however, offered this apparently qualified endorsement:

- I don't have a better solution, so [y]es.

A significant number of responses alarmingly drew attention to issues concerning unequal resources, favor to one side, and the potential for the process to be misused.

- No—There is still a perception that abuse flows only [one] way— from the male to the female
- Although the great minority of ex parte orders are based on clearly frivolous or knowingly false allegations, there is not enough attention to sanctions when such allegations are made.

- I think the process is subject to misuse and some parties have unrealistic expectations of what can be accomplished. However, these problems occur both for petitioners and respondents.
- The respondent is at a disadvantage in some cases. The system is geared to protect the purported victim and a respondent is not fully informed of consequences.
- No—there is no assistance for the respondent.
- Not entirely. There should be a review of the domestic violence statutes to review the procedures to assure fairness. One concern I have is the administration of DV “treatment” programs. These should be more closely examined to determine effectiveness.
- Is still a race to dom[estic] violence center. All women advocates; perception—women’s center.
- If anything, the scales are tipped against the respondents since they don’t have advocates [and] can’t afford a lawyer.
- I’m not sure—but I am inclined to believe the system and resources may favor alleged victims over alleged perpetrators. Court hearing time is limited—so judge or referee, when in doubt, may tend to give more credibility to alleged victim’s version of the “facts.”
- In most cases the petitioner has an advocate to provide information and understanding of the process. In many cases the respondent does not have enough money to hire an attorney or [] someone to be an advocate. I am not sure how to solve this difference.
- I’m not familiar with specifics but surely the petitioner has access to advocacy that the respondent doesn’t have.
- No. The petitioners are provided [with] free legal services from CVIC. The respondents do not have legal services available to them based upon financial need.

Judicial officers were then asked a question concerning whether the protection order process is serving its intended purpose or is subject to manipulation to serve other ends.

Q: Commission survey results indicated that 80% of men attorney respondents and 73% of women attorney respondents thought the domestic violence protection order process was used for purposes other than what is intended by governing statutes. Do you think that is an accurate assessment of the process today? Briefly explain.

A clear majority of responses suggest that the protection order process is often used as a tool or litigation weapon in seeking to affect outcomes in other cases or achieve ends that do not reflect the goal of domestic violence statutes.

- Yes. Domestic violence is the thermonuclear warhead in custody disputes. It is too often used to gain control of a custody situation.
- Unfortunately the process is being used to gain advantages with family court issues.
- I agree that in some instances the purpose for seeking an order is for other purposes.
- Yes. It is used in place of divorce or eviction and may be used as a tool to gain advantage in divorce.
- I do not think that 80% of domestic violence cases are motivated for the wrong reasons, but there are cases where parties are using the system for strategic advantage.
- Yes. Some attorneys attempt to use it as a step in a divorce action.
- Probably so. In too many cases, domestic violence issues are used to manipulate custody and visitation decisions.
- Maybe—to get advantage in divorce.
- No, there is definitely some misuse and some ulterior motives but the percentage is too high.
- Yes. There is a greater tendency to use as a tool in a custody dispute.
- Maybe. I think most are legitimate, but some filings have ulterior motives.
- It happens on occasion as a step one in divorce [and] custody proceedings.
- Yes. Law enforcement authorities suggest a victim petition for a protection order in order to avoid dealing with the situation.
- That percentage seems high but there are cases when it seems that the petition is brought for the purpose of getting a leg up in a custody cases.
- I remain somewhat skeptical when petition for domestic violence protection order shortly precedes a divorce action with child custody dispute.

Responses in the category concerning the domestic violence protection order process suggest an unsettling degree of dissatisfaction. Education and

awareness efforts are regarded as having achieved some level of improvement in how domestic violence cases are handled. There is, however, a persistent concern about professional conduct in the hearing process and about whether the process fairly serves both sides. Responses from judicial officers are particularly clear in suggesting that the protection order process does not serve the parties equally, or at least with some measure of balance, and that the process is often used to achieve advantage or impose disadvantage in related litigation.

C. CRIMINAL LAW

Commission's survey responses indicated that significant percentage of men attorneys and judges (64% and 62% respectively) thought that prosecutors are less likely to pursue a sexual assault case if the alleged offender is the husband.¹³ There was substantial agreement that prosecutors are less likely to proceed on "date" or "acquaintance" rape charges.¹⁴ There was also substantial agreement among women attorneys, men attorneys, and judges that defense attorneys appeal to gender stereotypes in order to discredit the victim in criminal sexual conduct cases.¹⁵

1. *Education—General Impact*

The Implementation Committee again sought observations concerning the possible impact of increased education efforts on how judges and lawyers responded in criminal cases in which gender bias is documented as having an impact.

Q: Do you think education programs on the effect of bias have affected how judges and lawyers (prosecutors and defense attorneys) analyze and respond in cases involving sexual assault, domestic violence, acquaintance rape, and other criminal cases in which gender stereotypes may play a role? Briefly explain.

There is a general recognition that education programs may have a positive effect. There is also, however, a greater need for education programs in certain areas, such as law enforcement, and a sense that education programs have limits in what can be achieved.

- I do think educational programs have been effective in addressing biases in this area as well. Not just for the judges and the parties, but for law enforcement as well.

13. *Id.* at 1219.

14. *Id.* at 1220.

15. *Id.* at 1222.

- I am not aware of the training programs, but I believe gender bias is still quite prevalent in the aforementioned types of cases. I suggest that law enforcement training is particularly necessary, as much of the bias is evident in police reports/arrest decisions and law enforcement functions.
- Yes, but only minimally. The judiciary with which I work happens to be very in tune with [domestic violence], assault issues—again—I'm very lucky to have the opportunity to work with such well-informed judges.
- I don't know what education they've received, so it is difficult to say what impact[,] if any[,] it may have had. Plus, I cannot tell. It's not as if they are making biased statements from the bench (or otherwise) from which one can deduce the reasons for their conclusions.
- To some degree. Still need to work on this. Women attorneys seem to have a bias in favor of female alleged victims, so seem close-minded to certain facts. We all need to continually work at being aware of our gender bias and propensities to take sides at the outset. Wait for the facts to come in—all of them!
- Yes and no! Yes for the education on how each gender is perceived in court. No, because the court still must follow the law, i.e., rights of the accused and render a fair trial.

Responses from judicial officers were generally positive in their assessment of the effect of education programs on the prosecution, defense, and adjudication of sex offense cases. Some responses, however, expressed doubt about whether programs have had an appreciable impact.

- I don't think so. Programs should be re-examined to determine more effective content.
- Uncertain—probably yes.
- Very little.

Those regularly involved in providing assistance to victims of domestic violence and criminal sexual offenses remain generally positive concerning the value of educational programs. There is, however, the caution, as illustrated in these comments, that improvement is a continual challenge and the intricacies of criminal cases increase the difficulties of combating the effect of bias.

- Again, education programs can be a wonderful tool. Getting people there is a problem. I all too often see that many people in the criminal justice system don't understand the dynamics of

sexual assault or domestic violence. If they did I would not see all the Alford pleas, nor would I see people getting deferred sentences in domestic violence cases.

- Yes. With training and education we have enabled court personnel to make more informed decisions. Again there is always room for improvement, especially in the areas of acquaintance rape, sexual assault, stalking, and domestic violence.
- If physical assault is a factor, as in most criminal cases, gender bias is outweighed due to the physical nature of the evidence. However, the distinction between fighting back [versus] provoking the fight is still a difficult one for law enforcement to investigate, state's attorneys to sort out the facts, and judges to make a decision of guilt or innocence. Gender continues to play a significant role because the majority of domestic violence assaults are perpetrated on women by men who have the need for power and control over their environment.

2. *Prosecution and Defense—Judicial Perspective*

In light of particular Commission findings regarding the prosecution and defense of sex offense cases, judicial officers were asked two narrowly directed questions—one with respect to the prosecution of cases and one with respect to the defense of cases.

Q: Commission survey results indicated that 62% of judge respondents thought prosecutors were less likely to pursue a sexual assault case if the alleged offender is the husband. Do you think that assessment holds true today? Briefly explain.

Approximately half of the respondents either considered these cases as being equally as likely to be prosecuted as other sex offense cases or at least did not perceive reluctance on the part of prosecutors to pursue such cases. These comments illustrate this assessment.

- No, our prosecutors do a good job.
- Domestic assault, sexual or otherwise, is pursued [with] equal vigor regardless of marital status, in my experience. Judges don't see the matters not pursued.
- I do not think this [is] true. My experience is that these types of cases are actually treated more seriously than acquaintance cases.
- No, assault is not tolerated.
- However, some responses illustrated the difficulty prosecutors may perceive in successfully prosecuting such cases.

- Probably—the issue for the state however is can they prove their case.
- Yes. As a practical matter, the proof beyond a reasonable doubt standard would make a husband sexual assault case almost impossible to prove.
- Probably. Prosecutors perceive that convictions are unlikely.
- Judicial officers were then asked about particular defense tactics in sex offense cases.

Q: Commission survey results indicated that 71% of judge respondents thought defense attorneys appeal to gender stereotypes in order to discredit victims in sex offense cases. Do you think that remains a common trial practice? Briefly explain.

Responses were almost equally divided on this question. Some responses were consistent with the Commission's general finding that defense attorneys will appeal to gender stereotypes.

- Yes, I think defense attorneys will do what is necessary within the law and sometimes without the law.
- Defense attorneys will use such stereotypes if they believe it will benefit their client. This is a very broad concept—"gender stereotypes."
- Yes—defense will do what it can for defendant.
- If it is a trial tactic, it is generally successful.
- I think the practice is used.
- Yes, there still is some of that because it may be effective with the jurors.
- Yes. I believe defense attorneys feel they have to do this to defend their client.
- A defense attorney will do most anything to provide his client a good defense.

A nearly equal number of responses indicated that either the practice had not been witnessed or that the practice, while it may be indulged, is becoming less common.

- I think it is there, but less so today than in the past.
- I have not seen this. I doubt it would work (which is why I haven't seen it in all likelihood).
- Common—no. Occasionally—yes.

- From my experience I would not allege it is a common trial practice by all defense attorneys, but I believe it likely remains an issue of concern.
- I think the practice is much less likely due to our rules of procedure and the court's enforcement.
- No. There are statutes to prevent this type of conduct. Also, the prosecution can object thus bringing it to the court's attention and obtaining a gender-fairness ruling.

D. JUDICIAL SYSTEM—THE EMPLOYMENT ENVIRONMENT

The Commission sought to evaluate several aspects of court personnel work environment to gauge the possible presence and impact of gender bias. Particularly, the Commission assembled information in such areas as incidents of sexual harassment and opportunities for job advancement.¹⁶

Commission's survey results found that 22% of women attorneys observed court personnel engaging in the verbal sexual harassment of women court personnel. However, a far fewer percentage of men attorneys, men court personnel, and *women* court personnel reported such behavior. Notwithstanding this apparent difference of perceptions, Commission survey results indicated a percentage of women court personnel, albeit a small percentage, reported being subjected to sexually harassing behavior.¹⁷

1. *Sexual Harassment*

In light of these findings, the Implementation Committee asked questions to gauge the perception, or reality, of harassment in the court work environment and employee awareness of resources to address the problem.

Q: Have you personally experienced verbal or physical sexual harassment or witnessed such harassment of other court personnel? Briefly explain.

Consistent with the Commission's earlier survey results, a majority of participants indicated they had not experienced verbal or physical sexual harassment. However, also consistent, disconcertingly so, with the Commission's earlier survey results, a substantial minority of participants reported either being the subject of or witnessing harassing behavior.

- Yes—a male individual made an inappropriate comment—sexual in nature—to another female employee.

16. *Id.* at 1226-40.

17. *Id.* at 1238-39.

- I think there are individuals who, due to their background, will treat female staff [with] less respect, but again I fee this is more isolated cases.
- I have witnessed it. A former employee (female) would pick on another female employee. I even told her “that was not nice.” I also see a female employee presently harassing a male employee.
- Yes, sexual harassment. I am not offended by it, but some people would be. I just blow it off.
- Yes—years ago a judge made inappropriate comments [and] showed an inappropriate picture.
- Yes. Verbal harassment by a former employee in a supervisory position.
- I walked in on a scene once, years ago. The “victim” was visibly shaking. And one former employee had a huge problem with an attorney about 12 years ago. I had problems with an attorney who has since been disbarred.
- Yes—last year [and] that person was spoken to by his supervisor. There have been no more incidents. I do try to avoid that person now.
- Yes. I understand he was talked to by a supervisor and I just try to avoid contact with him.
- I have only experienced this in a situation of one woman to another woman. Since, the woman has taken a different position and left our courthouse.
- The only example I can think of would be a gender-based joke, or specific duties being given to specifically men or women. This has improved through the years.
- Yes. Witnessed continued comments on clothing when someone is wearing inappropriate, low cut, strapless short clothing. Not good office attire.

Some responses reflected the reality that harassing behavior may occur in situations involving actors that are not a part of the judicial system.

- Yes, but not court personnel (state)—two county prosecutors.
- The janitor in the county courthouse doesn’t always maintain appropriate boundaries (e.g., giving backrubs to female employees, asking personal questions, etc.), but I don’t think it’s always sexual in nature—it’s mostly just creepy.

- Yes—sheriff (more so as being treated as an inferior—but at times is the best person to work with.
- Yes, I have experienced verbal sexual harassment from a local attorney who addressed my identity with adjectives of my physical appearance. I have also witnessed male court employees “check out” new female employees.

2. *Awareness of System Policies*

The Implementation Committee then sought to assess employee awareness of policies and resources that would assist in addressing situations involving inappropriate conduct.

Q: Are you aware of the judicial system’s policy on sexual harassment and, if so, do you think it is effective? Briefly explain.

Nearly all respondents indicated awareness of the policy and considered it an effective tool for addressing harassing conduct. Several responses indicated awareness of the policy and stressed the importance of education and personnel leadership in ensuring awareness and effectiveness.

- Yes. Training that takes place periodically reminds people of what is expected.
- Yes, and highly effective. I believe the training we had last year was excellent [and] I learned a lot from it.
- Yes. Information and knowledge give avenues of help, if needed.
- I think it will be now that we have a new District Court Administrator.

Several responses indicated an awareness of the policy but could offer no assessment of its effectiveness. On the one hand, these responses indicate a lack of personal experience with the policy and its application. Some responses may, however, indicate a paucity of instances in which the policy was used as a remedy to address problematic behavior.

- Yes, I am aware. I have never utilized the policy [and] do not know anyone who has, so I cannot say if it really is effective.
- Yes [re awareness]. I have no personal experience to base it’s effectiveness.
- Yes [re awareness]. Unknown [re effectiveness].

Some responses exhibit a somewhat guarded assessment of whether the policy is regarded as essentially effective.

- Yes I am aware of the policy. I believe it is effective on a limited basis.
- For the majority of the time [re effectiveness].
- Some responses expressed unfortunate skepticism about whether the policy is a viable remedy in some instances.
- Yes, I am aware of the policy. I believe it may be effective at certain levels, however, in light of recent events regarding a judge in the _____ judicial district, I question its effectiveness in some situations.
- Yes—I'm aware but know that there is a perception that there is little to be done about behavior of elected judges unless it is really egregious.

An appreciable minority of respondents indicated they were not aware of the judicial system policy, which underscores the need for more aggressive education and information efforts concerning the policy and its function.

3. *Guide to Proper Conduct*

As part of its efforts to implement the recommendations in the Commission's Final Report, the Implementation Committee sought to make available to judicial system employees a basic guide outlining methods and actions by which employees could ensure that the judicial system remains free of bias. The Committee developed a short informational brochure to assist in enhancing awareness among employees of the dynamics of bias and the boundaries of permissible conduct in the court environment. The brochure was approved by the Supreme Court and distributed to all employees. In an effort to assess the usefulness of the brochure, the Committee asked the following question.

Q: Are you aware of the court employee brochure on maintaining a bias-free court environment. If yes, do you think it provides adequate guidance?

Most respondents indicated awareness of the brochure and considered it generally useful to employees as an information resource. However, approximately twenty-five percent of respondents indicated they were not aware of the brochure and had not received any information concerning the brochure.

Some respondents expressed awareness of the brochure but indicated skepticism that it would prove useful or dissatisfaction with the level of supporting information provided about the brochure.

- Yes. It provides adequate guidance of what it is, but is a disappointment when it comes to how an individual should handle themselves or deal with the situation. Especially, if it is from another courthouse employee that is not involved in the Court system.
- Yes, unfortunately people generally do not re[act] unless something involves them directly.
- Yes, I am aware of the employee brochure. I don't believe it provides adequate guidance because it is not discussed in any way. I was simply given the brochure with a stack of other papers.

4. *The Informal Complaint Process*

As part of its implementation efforts, the Implementation Committee developed and recommended to the Supreme Court a rule establishing an informal complaint process which provided an informal, confidential method of responding to alleged inappropriate conduct by judicial system employees and judicial officers. The process was a response to the Commission's recommendation that an informal system be established by which those accused of biased conduct would have the opportunity to have the matter reviewed and discussed.¹⁸ The objective was to offer an educational, ameliorative alternative to the formal disciplinary or grievance process. The Implementation Committee's proposed rule was subsequently adopted as Administrative Rule 44. The Committee, through the following question, sought to assess awareness *among court employees and judicial officers* of the informal procedure and whether it was considered a useful method for addressing problematic conduct.

Q: Are you aware of the informal complaint procedure by which court employees and others can confidentially submit complaints about employee or judicial conduct? If yes, do you think it is an effective or useful procedure?

A majority of *court employee* respondents were aware of the informal complaint procedure, but there was a difference of opinion about whether it is a useful tool to address issues of conduct.

Some respondents were aware of the procedure and considered it useful or were aware that it had been used.

- Yes—I am aware [and consider it a useful procedure].
- Yes and I believe it has been used.

18. *Id.* at 1246, 1248.

- Yes—we have it posted in our office. I believe it is very well done.
- Yes—useful procedure if needed. I personally have not used it.
- Yes [re awareness]. Yes I do [re usefulness].
- Yes—it is effective.
- Yes. Effective in allowing a feeling of safety.
- Yes. I have reported a problem in the past and it was dealt with promptly.
- Yes, and the confidential report is a positive factor.

Other respondents indicated awareness of the procedure but had no experience upon which to offer an opinion regarding effectiveness, thought the procedure simply would not serve as an effective method for addressing problem behavior, or considered the procedure flawed.

- I do not believe the informal complaint procedure is effective.
- Yes [re awareness]. No comment [re usefulness]
- Yes, I am aware. It could possibly be effective. However, when you're told by your supervisor that it is not your place [and] discourages you to complain—it becomes a catch-22.
- Yes. I am aware of this complaint [process]. I do not know if it is useful or not as I have not heard of it being used.
- Yes (aware)—most people are not willing to use it.
- No, it is not effective. Filing a complaint or grievance to a supervisor that cannot handle confrontation does not work.
- Yes. I still believe it is easier to complain to coworkers than to follow through with the complaint procedure, in my humble opinion.
- Yes. Past problems in this area, as well as local news coverage naming various employees involved, tells me any complaints filed are not handled effectively by the state, and definitely not confidential.

Approximately twenty-five percent of *court employee* respondents were not aware of the procedure or did not know of anyone having used it.

A slight majority of judicial officer responses indicated general awareness of the informal complaint process. Approximately 40% of respondents, however, said they did not know about the process. Of the respondents who were aware of the process, a majority indicated they had no experience with the process or did not know of an occasion on which the

process was used, and as a result could not offer an opinion regarding whether the process is useful in addressing issues of bias or questionable conduct. These comments illustrate the general dynamic among those who were aware of the process.

- Yes. I have never seen the system in operation, so I have no opinion.
- Yes. I have no personal experience with the process and so have no base of knowledge to respond to this question.
- Yes. Perhaps. If the conduct is “perceived” as biased, that usually would imply the judge is not aware of it as being biased. Any judge would appreciate being told that the conduct is perceived as biased. If the judge is aware it is biased or perceived to be, an informal process may not be of use.
- Yes. It may be useful, but has had very little use.
- Yes. Judges need to be told how their conduct affects others.
- Yes. It is useful since it is easier to use. However, I have not personally known of any use of this procedure.
- Yes, but I have had no personal experience with the informal complaint process.
- Yes. Yes - it just seems like a reasonable process - but I am not aware if those who may feel a grievance are using this process.
- Yes. It would be helpful if people remembered that the process exists.
- Yes. Perception is reality to those who feel offended, and provides an avenue for confidential response.

Data obtained by the Implementation Committee indicate that approximately ten complaints have been submitted since Administrative Rule 44 was adopted in March 2001. About one-half of those complaints were considered matters that ultimately could not be addressed through the informal complaint process.

5. *Job Advancement*

Commission’s survey results found that a majority of women and men court personnel, in similar percentages (67% for women and 74% for men) did not think women’s opportunities for job advancement in the judicial system were limited because of gender.¹⁹ The Implementation Committee

19. *Id.* at 1233.

asked the following question to assess whether that opinion holds true today.

Q: Do you think women court employees have an equal chance in terms of job advancement in the judiciary? Briefly explain.

Most respondents (approximately 75%) appeared to still agree that gender is not a limiting factor with respect to job advancement in the judicial system. Some examples of responses follow.

- I do. I think the recent reclassification of pay grades [and] salaries is a start.
- More now than ever.
- Yes, when a position is available it is posted for all to apply. Some positions have been filled internally and it appears it is not gender affected.
- Yes—if women are qualified [and] wish to pursue advancements, I think their chances are equal to me.
- Yes—it seems very fair [and] equal.
- I do think so. I've not been aware of a situation otherwise.
- Yes—the judiciary does well in this area.

Some responses exhibited a kind of tentative optimism.

- I hope they would.
- I sure hope so.
- I would hope so!
- I believe they do.

There is, however, a clear indication that some employees do not consider the employment environment as unaffected by gender or other, perhaps inequitable, considerations.

- The job class I am in was dropped one classification. Since all of these positions are held by women, an inference could be drawn.
- Yes, in most cases. In top administrative positions, not necessarily if a presiding judge prefers a man [and] he has control of the applicant selection.
- I think it is better, but I do not think it is equal yet.
- No. I still think women have to work harder to get where they are.
- Not sure whether advancement opportunities exist for most court employees.
- May be, with proper education.

- Yes—in most instances. If hired—salaries may be equitable. No women—other than justices at highest positions.

E. GENERAL JUDICIAL SYSTEM ENVIRONMENT—WHAT JUDGES SEE

One of the earlier questions asked by the Implementation Committee concerned the general *courthouse* environment, which elicited responses touching on issues of general professional conduct, employer-employee relationships, and simple considerations of decorum. The Committee asked judicial officers an additional, slightly differently directed question about the atmosphere of and the experience within the judicial system.

Q: In response to Commission surveys, 82% of judge respondents said gender bias exists in some fashion in the judicial system. Of these responses, 65% said bias existed “in a few areas and with certain individuals” and 16% said “gender bias against women is widespread but subtle and hard to detect”.

In your estimation, has the judicial system improved, gotten worse, or remained largely unchanged since these earlier assessments by judges? Briefly explain.

Responses indicate a firm impression that the judicial system has improved over the past ten years. Mirroring responses to questions concerning professional conduct, improvement is attributed to a variety of factors: changes in judicial demographics, increased awareness, and the changing composition of the legal community.

- I think it has changed for the better and will continue to change as the “players” change out and some of the older judges retire.
- Heightened awareness has improved gender neutrality in the judicial system.
- I think the system has improved greatly. Many of the problem people were the older folks in the system. With time, they have, by and large, retired or left the system. It seems the younger folks coming into the system are much more sensitive in this area.
- Yes, things have improved. There are more women on the bench which makes a difference. The language of the courts has improved if not the attitudes.
- It has improved. I see no gender bias as we have many women lawyers and judges.
- It is difficult to assess as an individual judge since I only see my own courtroom. But I believe that gender bias is less prevalent

today than 10 years ago. The number of women on the bench and in the bar association has *certainly* helped.

- In my opinion the issues of gender bias in the courts have diminished during the past ten years. Male and female judges and attorneys have grown accustomed to each others' legal abilities and contributions over time.
- Improved. Judges are more aware of the problem and are better educated to prevent bias.
- Perhaps education has done some good.
- My perspective is that of a very new judge, but I believe that any improvement is somewhat of a result of turnover of judges and staff.
- Improved. There are more female attorneys and the acceptance level is higher.
- It has improved slightly. The improvement is because court personnel must work directly with other employees that are women and minorities. By their interaction they learn to respect each other.
- Improved. Throughout the judiciary I see far more individual respect and do not hear gender oriented comments.
- I am not sure when the earlier assessment took place since I am a new judge. However, I have worked in the court system for about 20 years and feel that people are more aware of the issue and respectful.

V. RECOMMENDATIONS

The questionnaires, surveys, and discussion group comments provided a wealth of information concerning whether the judicial system has made any progress in addressing the issues identified in the Commission's Final Report. Notwithstanding generally positive assessments in many areas, the Commission's hope—to continue to make improvements—compels the Implementation Committee to the conclusion that additional, ongoing efforts are necessary.

- The judicial system should continue an aggressive program of education to ensure awareness among judicial officers of the risks gender bias, and other forms of bias, represent for the decision-making process.

- Judicial officers should become more aware of and versed in methods of control and intervention to ensure proper professional conduct by lawyers in judicial proceedings.
- The judicial system should ensure all employees are effectively and adequately informed of policies and procedures governing sexual harassment and other forms of impermissible conduct within the employment environment.
- The judicial system should institute a program to increase public awareness of the methods of judicial decision-making and the constraints on the decision-making process.
- The State Bar Association should continue an aggressive program of education to address in the appropriate venues the impact of bias in the practice of law.
- Processes and procedures governing the adjudication and disposition of domestic violence cases, including criminal cases for alleged violation of protection orders, should be reviewed. Processes, procedures, and statutes governing the issuance of domestic violence protection orders should also be thoroughly reviewed to ensure an equitable and timely resolution of cases and to ensure the interests of all parties are considered in a fair and reasonable manner. The review could be undertaken by a task force, an interim legislative study group, or both.
- Although the Implementation Committee's information gathering process was necessarily limited in scope, considerable effort was made to obtain and consider input from a cross-section of those most regularly involved in the judicial process. The judicial system should undertake a broader, more comprehensive survey or information gathering effort, similar perhaps to the survey implemented by the Commission, to assemble information from those who are immediate participants in the judicial process: judges; lawyers; advocates; court employees; litigants, to the extent possible; and other identified stakeholders. The effort should seek to assemble a broad spectrum of opinion concerning perceptions of bias, fairness, accessibility, and other issues that relate to the effective and equitable operation of the judicial process.