FINAL REPORT & RECOMMENDATIONS
OF

THE EIGHTH CIRCUIT
GENDER FAIRNESS TASK FORCE
September, 1997

Gender Fairness Task Force
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Executive Summary

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In the summer of 1993 the Judicial Council of the Eighth Circuit passed a resolution calling for the establishment of a task force to study and report on the role of gender as it affects the lawyers, litigants, judges, employees, and others who participate in the courts of the Eighth Circuit. The task has been formidable -- the data are complex and varied, the issues sometimes politically-charged, and the process of reaching conclusions calls for difficult integration of personal experiences and collective findings. We are proud to present this summary of our work with the hope that publicizing our results will facilitate the constructive undertaking of an effort to improve our judicial system.

The Task Force first discussed and then determined that its mission was:

1. To study effects of gender on both processes and people in the Eighth Circuit judicial system, by gathering data through a variety of methods and from a cross section of persons involved in the Eighth Circuit judicial system;

2. To analyze the gathered data;

3. To recommend appropriate action; and

4. To make provision for the implementation of any such recommendations as approved and authorized by the Judicial Council of the Eighth Circuit.

As is inevitably the case for a group report, not every nuance or turn-of-phrase in this report is the exact choice of each Task Force member. Nevertheless, the report is the consensus of the Task Force. It is with the goals of understanding, identifying, isolating, and eliminating gender bias that we turn our attention to the substantive areas we have studied and the conclusions we have reached.
SUMMARY OF FINDINGS

Demographics of Judiciary and Practicing Attorneys

Since 1980, the number of women judges has increased almost sevenfold in the Eighth Circuit. In 1997, out of 149 federal judges, there was one woman on the court of appeals, and there were seven female district court judges, four female bankruptcy judges and seven female magistrate judges. However, although the national percentage of female federal judges collectively is 17.8%, in the Eighth Circuit, the percentage of women judges was below 13%. Thus, although the number of female judges in the Eighth Circuit has increased since 1980, the Circuit today has proportionately somewhat fewer women judges when compared to the national collective circuit average.

Over 90% of judges were married and had children. Only 28% of judges had children under the age of 18 living at home.

On average, women judges are younger, have fewer years of practice experience and fewer years on the bench than male judges. However, when female judges are compared to male judges of the same age, there are no significant differences in years-of-practice experience or years on the bench. Overall, more recent appointees are younger and have fewer years of legal practice.

Judges, both men and women, most frequently reported the following areas of specialization in legal practice: personal injury, commercial litigation, and criminal law. Nineteen judges reported specialties in civil rights or employment/labor. Over half of the judges reported prior judicial experience.

Judges, both men and women, most frequently cited private practice or government practice (state or local agency, United States Attorney's Office, and/or other federal agency) as past positions. None of the respondent judges had been an attorney in a Federal Public Defender's office.

Women constitute from 11.8 to 19.2% of the attorneys practicing in the federal courts of the Eighth Circuit, which is slightly less than the percentage of women practicing nationwide (23%).

Women attorneys in the Eighth Circuit are less likely to be married or to have minor children living at home than their male counterparts across all age groups, a statistic likely reflecting the difficulty women face in combining marriage and often-disproportionate child rearing responsibilities with a demanding professional career.

The overwhelming majority of attorneys practicing in the Eighth Circuit are engaged in private practice. The survey showed, however, that women are significantly less likely than men to achieve partner status across nearly all experience levels.
Consistent with national averages, women are proportionately more likely to be employed as government attorneys than are men. Among federal government attorneys, men were more likely to be U.S. Attorneys or Assistant U.S. Attorneys, whereas women were more likely to be attorneys for other federal, state, and local government agencies.

Male government attorneys reported that they spent more time in the courtroom than did female government attorneys, perhaps because men were more likely to be Assistant U.S. Attorneys.

The survey results challenged the sometimes-heard assertion that government practice is a "mommy track" for female attorneys, as there was no significant difference in the proportion of mothers with children under the age of 18 living at home in private practice, government practice, or practice in private/public entities.

No significant difference was found between the frequency with which male and female attorneys report serving as "lead counsel" in federal cases. Analysis of attorney survey data suggests that differences in the frequency of court appearances and jury trials between men and women are not due to gender per se, but to differences in years-of-practice experience. Among attorneys with more than five years' experience, women are significantly less likely than men to appear in bench trials in federal court.

In the civil practice area, male attorneys outnumber female attorneys four to one. The docket study demonstrated that female attorneys were more prevalent in the district courts in the areas of tax, social security and civil rights/employment, whereas men were more prevalent in cases involving securities, intellectual property, and products liability/personal injury than they were in district court practice overall.

In the area of criminal law, the one-year docket study revealed that there are eight male attorneys practicing as attorneys of record for every one female attorney. Survey data reflected that twice as many men as women serve as criminal defense counsel.

Marital status, as well as gender, appears to affect the ability of attorneys to balance work and family. Married, divorced and separated attorneys, both men and women, reported greater difficulty achieving a balance than did those who had never married. Women were significantly more likely to find it difficult to balance their work and family obligations.

According to the survey analysis, female attorneys were significantly more likely to have changed their work schedules or requested accommodations from the court for reasons of family responsibilities. Women with children under the age of 18 living at home reported substantially more difficulty balancing work and family than any other group of attorneys.

Nearly two-thirds of the judges reported that they received requests for scheduling or accommodations due to family responsibilities often or sometimes. The majority of judges were of the opinion that serious consideration should be given to such requests. However, a small minority of judges expressed the view that such requests did not merit serious consideration. Some attorneys, male and female, described what they viewed as unfair denials of accommodations for childbirth and pregnancy.
Civil Practice

Women comprise, on average, 16.4% of civil practitioners of record in the courts of the Eighth Circuit, ranging from a low of 11% to a high of 20% (in the Court of Appeals).

The survey data on requests and awards of attorneys' fees in civil cases suggest that among attorneys who have practiced less than five years, women were significantly more likely to have their hours reduced than their male counterparts.

The experiences of women and men regarding settlement negotiations were both similar and different in a variety of ways. First, very few attorneys reported either reaching settlement with the assistance of a judge or alternative dispute resolution professional or having been pushed to settle by either authority. Similarly, very few attorneys reported accepting a less favorable settlement because the judge exhibited bias against an attorney, litigant, or witness of a particular gender. However, women were more likely than men to report such bias against a female attorney, litigant, or witness. Respondents of each gender reported their own gender as more effective negotiators and attorneys of the other gender as more likely to use "emotional tactics" in the settlement process. Finally, while men suggested that male and female attorneys were equally likely to use "power tactics" as well as "annoying and unpleasant negotiation styles" during settlement, women saw male attorneys as significantly more likely than female attorneys to do so.

One-third of attorney survey respondents had observed unreasonably intrusive offensive or hostile interrogatories, depositions, or document requests in the last five years. Both male and female attorneys agreed that such hostile discovery occurred more often with female parties than with male parties.

Attorneys, whether male or female, agreed that female parties and witnesses were more frequently exposed to unreasonable physical and mental examinations than male parties and witnesses. Further, attorneys specializing in civil rights or employment law described a greater frequency of such examinations than attorneys in other types of civil specialties. These findings did not change even when years of legal practice experience were held constant.

With regard to civil discovery, a majority of respondents reported serious disputes or uncivil behavior from opposing counsel. Female attorneys reported experiencing a somewhat greater incidence of disputes and uncivil behavior than did male attorneys. Attorneys specializing in civil practice reported the greatest frequency of such disputes, with women reporting higher frequencies of such disputes regardless of specialty. Thus, not only female attorneys but also female parties and witnesses appear to be more likely than their male counterparts to encounter hostility during the discovery process.

Female attorneys were also more likely than male attorneys to request judicial assistance to help resolve discovery disputes. At the same time, women were more likely to perceive that the judge would not intervene or that such a request would not be in their clients' or their own best interests. Overall, about one-fourth of attorneys who had sought judicial assistance reported that the judge did not intervene effectively, with women reporting this more than men.
Judges reported that requests for intervention in hostile or intrusive discovery and in unreasonably hostile physical and mental examinations occurred infrequently and were as likely to come from counsel for male litigants or examinees as from counsel for female litigants or examinees. However, judges reported that on the relatively infrequent occasions when they received requests for intervention in depositions conducted in an unnecessarily personal, intrusive, or offensive manner, the deponents were more likely to be male.

Almost 75% of judges had never been asked to intervene or address inappropriate gender bias in federal litigation. However, 30% had intervened upon request of an attorney and almost 40% had intervened *sua sponte* to address such bias. The vast majority of judges indicated that the person whose conduct manifested bias was an attorney.

Male and female attorneys' job stress increased at similar rates as discovery disputes became more frequent. However, female attorneys' job satisfaction was adversely affected to a greater extent than male attorneys' as the frequency of discovery disputes increased.

Experiences and opinions regarding sex discrimination litigation were relatively unaffected by respondent gender but were significantly influenced by type of practice in that the attorneys representing plaintiffs (usually female litigants) reported experiences and opinions different from those reported by attorneys representing defendants.

One-third of plaintiffs' attorneys and one-quarter of defendants' attorneys reported that sex discrimination cases had been pushed through the courts without adequate time for discovery with some frequency. Plaintiffs' attorneys (29%) were more likely than defendants' attorneys (11%) to report that judges indicated such cases were frivolous, unimportant, or undeserving of federal court time (sometimes/often/many times). Plaintiffs' attorneys (52.5%) were considerably more likely than defendants' attorneys (17.3%) to report that discovery in sex discrimination cases was inappropriately intrusive into the lives of parties and witnesses (sometimes/often/many times). The great majority of judges expressed no opinion on this issue. However, 13.6% of judges agreed with the statement that discovery requests were often intrusive discovery when the litigants/witnesses were female, while fewer (4.1%) agreed that such requests were often made when litigants/witnesses were male.

There was considerable disagreement over questions of summary judgment in sex discrimination cases. Over half of plaintiffs' attorneys reported that summary judgment was granted too readily to defendants, while only 10% of defendants' attorneys reported that this occurred sometimes/often/many times. Judges reported summary judgments are granted to defendants relatively frequently (47% sometimes, 12% often, and 5% many times) and that summary judgment is infrequently granted to plaintiffs (19% once or twice and 16% sometimes).

Generally, defendants' attorneys were more likely than plaintiffs' attorneys to report that when plaintiffs prevailed in sex discrimination cases, compensatory damages were adequate (94% vs. 37% sometimes/often/many times), punitive damages were sufficient to punish the defendants (83% vs. 37% sometimes/often/many times) and to deter employers from engaging in discriminatory conduct (80% vs. 20% sometimes/often/many times) and that attorneys' fee awards were high enough to encourage attorneys to take such cases (86% vs. 45% sometimes/often/many times).

Although the majority of attorney respondents did not report any known effects of Rules 412 and 415, the respondents who did perceive any consequences of the new rules agreed that
the effect has been to restrict the admission of evidence regarding a plaintiff’s past sexual history. Male and female judges did not respond differently to any of the items concerning Rules 412 or 415.

Judges viewed expert psychological or medical testimony as moderately useful in sex discrimination cases in both bench and jury trials. Judges found such testimony to be most useful for assessing the “nature and extent of damages” and least useful in assessing the “welcomeness of any sexual attention.”

A review of the jury plans and selection procedures used within the circuit showed that seven of ten districts used voter registration lists as the source for potential jurors. However, two districts used a narrower list (actual voters) and one district, reflecting a national trend, used an expanded source list which included registered voters, licensed drivers, and state identification card holders.

An analysis of the gender composition of the Master Jury Wheels demonstrated that women and men are represented in proportions comparable to their presence in the district populations, as reflected by census data. An analysis of jurors in one district suggests that some discretionary excuse categories may operate to exclude disproportionate numbers of females from jury pools circuit-wide.

The Local Rules of the Eighth Circuit Court of Appeals and the local rules of most of the district courts of the Eighth Circuit have gendered language which needs to be neutralized.

**Bankruptcy Practice**

The percentage of female bankruptcy judges in the Eighth Circuit (19%) is higher than the national average of 16.8%. There have been fifteen vacant judgeships since the Eighth Circuit started appointing bankruptcy judges in 1984. Four of the fifteen vacancies or 26.7% were filled by women.

Only 7% of the total number of Chapter 7 trustees are female, but 17% of Chapter 12 trustees and 15% of Chapter 13 trustees are women. Four out of thirty-three (12%) trustees appointed during the five-year period ending September 30, 1995, were women.

While male and female Chapter 7 trustees earned approximately the same amount of average compensation, female trustees were being assigned more cases than male trustees (495 as opposed to 295). Chapter 12 and Chapter 13 standing trustees show similarly interesting differences. The three female Chapter 12 trustees were assigned, on average, one-tenth the number of cases that the fifteen male Chapter 12 trustees were assigned during 1995, but on average, earned slightly more than their male counterparts. Similarly, during 1995, the two female Chapter 13 trustees were assigned approximately one-fourth of the number of cases that the eleven male Chapter 13 trustees were assigned, but, on average, they earned slightly more than their male counterparts. We are unable to draw any conclusions as to why this disparity exists.
Bankruptcy judges and attorneys agree that male debtors, more often than female debtors, use bankruptcy courts to try to avoid financial obligations to former spouses and to third parties. Male and female attorneys indicated that debts to former spouses were as likely to be discharged as to be excepted from discharge. Attorneys also agreed that bankruptcy courts rarely abstain from deciding the issue of the dischargeability of such debts. Attorneys and judges agreed that attorneys infrequently represent both husband and wife in joint bankruptcy while a divorce is pending.

Although a large majority of bankruptcy attorneys and judges report that men and women are treated similarly in bankruptcy court, women are more likely than men to perceive that women receive more negative treatment. Male attorneys agree that female trustees receive less respect than their male counterparts.

Criminal Practice

Women constitute 13% of attorneys and men constitute 86% of the attorneys of record in criminal cases in the district courts of the Eighth Circuit. Women are employed as almost one-third of Assistant United States Attorney prosecutors and Assistant Federal Public Defenders. That proportion exceeds the percentage of female attorneys practicing in the Circuit.

In 1995, 13% of criminal sentencing in this Circuit involved female defendants, compared to 15% of sentencings nationwide. Eighth Circuit sentencing data reflect that female defendants were older, more educated, and more likely to have dependents than were male defendants.

We found some district variation in the process by which private counsel were appointed in indigent criminal cases and in the numbers of men and women appointed. The female proportion of private attorneys appointed ranged from 8% to 21%. Some attorneys expressed the view that criminal appointments are not made on a gender-fair basis; however, the lack of information on the pool of attorneys interested in such appointments did not permit us to reach conclusions in this area.

Grand jury data reflect that approximately half of all summoned grand jurors and impaneled grand jurors were female. Judges in the districts examined, appointed women to nearly half of foreperson and deputy foreperson positions.

The Eighth Circuit Model Criminal Jury Instructions were reviewed for inappropriately gendered language and were generally found not to evince gender bias.

Many attorneys and judges took a neutral position about the effects of Rules of Evidence 412, 413, and 415, suggesting that the rules may be too new to have yet affected the practice. Among those who expressed their views, however, attorneys were more likely to report that evidentiary rules are construed to protect the alleged victim. Attorneys and judges were of the opinion that generally evidence of a defendant's commission of a past sexual assault should be admitted and that evidence of an alleged victim's past sexual history should not be admitted.

Judges and attorneys were divided in their opinions about a number of criminal issues. More attorneys and judges agreed than disagreed that domestic violence should be a duress defense to a criminal prosecution. Nearly equal numbers of attorneys agreed as disagreed with the proposition that defense attorneys appeal to common misperceptions of prejudice toward victims. More judges disagreed than agreed with this proposition.
With respect to the treatment of female victims of violent crime, criminal practitioners were in accord in their views that prosecutors do not inappropriately decline to prosecute, and that prosecutors and judges understand the behavior and emotional reactions of victims. Female attorneys were less likely than male attorneys to find the courts hospitable to female victims of violent crime.

Unlike some other circuits, the Eighth Circuit has not explicitly prohibited the inclusion of family responsibility as a sentencing factor when based on the mere existence of dependent children. The majority of judge survey respondents agreed that the Sentencing Guidelines do not make adequate provisions for consideration of caretaking and financial responsibilities for children and also agreed that the Guidelines should allow consideration of these factors.

The Eighth Circuit Court of Appeals has adopted a subjective standard which permits downward sentencing departure in instances where abuse, coercion, blackmail, and duress are causally linked with the crime for which a defendant (such as a battered woman) is being sentenced. The majority of judges and criminal attorneys surveyed agreed that domestic violence should be a mitigating factor in sentencing.

**Courtroom Interaction**

Almost two-thirds of female attorneys and half of male attorneys have experienced general incivility in the course of federal litigation in the Eighth Circuit within the last five years.

Women were considerably more likely to report other attorneys as the source of uncivil behavior, whereas men were slightly more likely to identify judges as the source. Nevertheless, a majority of women who experienced incivility also identified judges as a source.

The greatest difference in the general incivility experiences of male and female attorneys is the extent to which women are excluded from professional camaraderie in the course of federal litigation, an experience encountered by more than a third of women, but only 10% of men in the last five years. Women are most likely to identify other attorneys and judges, while men are more likely to identify judges, as the principal source of general incivility.

A substantial number of judges, too, experienced incivility; three-quarters of male judges and two-thirds of female judges reported experiencing incivility in the context of federal litigation. Male judges identified attorneys, and female judges identified other judges and attorneys, as the primary sources of such behavior.

Sixty percent of female attorneys have experienced some form of gender-based incivility during litigation in the Eighth Circuit during the past five years. Such behaviors include unprofessional forms of address, offensive comments about appearance, offensive jokes and comments, and, most commonly, being mistaken for a non-lawyer.

Unwanted sexual attention is rarely experienced in the actual course of federal litigation. When it occurs, however, it is most likely to take the form of sexually suggestive comments, rather than sexual threats or promises. That at least 132 female attorneys have been subjected
to unwanted sexual attention in the actual course of federal litigation is a matter of serious concern. Because Eighth Circuit survey questions were limited in scope to conduct in the context of federal litigation, one should not conclude that sexual harassment of female attorneys is less frequent than in other jurisdictions in which task force studies addressed conduct in broader contexts.

A small percentage of judges also experienced unwanted sexual attention in the context of federal litigation. Fourteen per cent of women and 9.5% of men reported that they had been the object of unwanted sexual attention. Court personnel were the most common source of behavior.

General incivility and gender-based incivility experienced in the course of litigation were associated with increased job stress, decreased job satisfaction and an increased desire to limit one’s involvement in federal litigation.

Women are more likely than men to have experienced every category of general incivility, gender-related incivility, and unwanted sexual attention.

Attorneys who experience general incivility, gender-related incivility, and unwanted sexual attention were extremely unlikely to make it the subject of a formal (or informal) complaint often because they thought it would be useless or unwise to complain. The infrequency of formal complaints in the Eighth Circuit does not establish the absence of gender-related problems in court interactions.

The Court as an Employer

The work force in the Eighth Circuit courts is predominantly female, but is gender-divided and stratified with respect to both position and level. For example, although 73% of the staff positions are filled by women, 65% of management employees are men. In particular, judges and unit heads tend to be male.

Personnel practices are relatively unsystematic. Many employees lack written job descriptions or evaluations or both. The courts maintain a word-of-mouth recruiting system and largely informal practices regarding notices of vacancies and job interviews.

Over three-fourths of the units lacked a written parental leave policy that is in compliance with the Family and Medical Leave Act of 1993. Although most judges reported having such policies for their chambers staff, these policies were usually unwritten. One-third of employees had taken some form of family leave; however, a number of employees reported not requesting such leaves because they feared the negative reactions of others. This was particularly true for those with young children who might be expected to be most in need of such leave.

There is a substantial need for daycare among court employees. Almost half of court employees responding to the survey had children under the age of 18 living at home. Almost 15% of employees had become parents and more than 25% of respondents had needed daycare services in the five years before the survey. The majority of employees indicated that no government-sponsored daycare services were available at or near their court sites.
The availability of schedule flexibility varies greatly across the Eighth Circuit. The majority of unit heads reported that some kind of flexible scheduling is available in their units; however, one-fourth of employees who had requested flexible scheduling had been refused.

At least seven court units had no written EEO plan or lacked the minimum standards of the Model EEO Plan; over half of the units had made no effort to publicize the EEO plan to employees. Despite the predominately female work force, 67% of the EEO coordinators were men.

The Model EDR Plan is superior to the Model EEO Plan in that it covers judges, references sexual harassment, and extends the period of time for filing complaints to 30 days. However, the EDR Plan still provides no definition of sexual harassment, and its 30-day filing period is considerably shorter than that available under state or federal law.

Only one-third of judges had written discrimination and sexual harassment policies and procedures for chambers staff, and 75% of unit heads reported they had no sexual harassment policy at all. At the time of our survey, the majority of employees did not know whether their units had such policies or had provided training on them.

Court employees in general are satisfied with their work and committed to their jobs. In the previous five years, however, approximately 70% had experienced some form of incivility, 40% had experienced gender-related incivility, and over 30% had been the target of unwanted sexual attention at work. Women reported significantly more such experiences than men, especially unwanted sexual attention. Although most offenders were co-workers, some female employees experiencing unwanted sexual attention reported that the offender was a judge.

Women saw their workplace as significantly more tolerant of sexually harassing behavior than men, i.e., they were more likely to believe that it was risky to complain, that complaints would not be taken seriously, and that there were few meaningful sanctions for perpetrators.

One hundred thirty-one employees who complained or refused to cooperate with uncivil or offensive behavior indicated that they had experienced adverse consequences. Of those few employees (118) who had complained, either formally or informally, almost half were dissatisfied with how their complaints were handled.

Uncivil and offensive behavior and its tolerance by the organization appear to take a substantial toll on employees and the court system itself. Both offensive behavior itself and perceptions that the organization tolerated such behavior were related to lower job satisfaction, increased job stress, work withdrawal, and intentions to leave the federal workplace. Women who reported such experiences also reported lower satisfaction with their health. Overall, targeted employees experienced greater psychological distress and lowered feelings of well-being; this pattern was strong and similar for both women and men.
Conclusion

The problems cited in our Final Report can only impair the credibility of the courts, diminish the sense in participants and observers that justice is being done and make any result that is achieved more prolonged and expensive than it should have been. We found that many of the problems identified in the Eighth Circuit are the inevitable consequences of its history and structure and that much of the objectionable conduct reported was clearly not intended to offend or disadvantage women. In a few areas, however, such as civil discovery, our results suggest that belittling, hostile, or offensive conduct is sometimes directed toward female litigants, witnesses, and attorneys in a manner that is difficult to interpret as unintentional.

Citing these problems is not meant to diminish the considerable successes that our report recounts. The progress we have documented gives us confidence that the issues we raise can also be successfully addressed. In fact, during the period of our study we observed real progress in some areas, such as the methods for selecting potential jurors. Those who have experienced unfair treatment, however, are little comforted by the fact that others were spared their fate. The problems must be confronted and surmounted, a process of organizational change which begins with the leaders of the Eighth Circuit: the Circuit's judges. Judges set the standards of conduct; they make and enforce the rules; they are the employers in a system largely exempt from the protections and laws that others enjoy.

But the courts cannot achieve change alone - there simply can never be enough judges to ensure that abusive discovery or uncivil behaviors cease to be commonplace in some quarters. The practicing bar, as well, must address the issues of gender fairness raised by our report.
RECOMMENDATIONS

A. IMPLEMENTATION

1. The Judicial Council should appoint a committee to oversee the implementation of the Gender Fairness Task Force recommendations that are accepted and to monitor the issues of gender fairness in the courts of the Eighth Circuit on an ongoing basis. The committee should provide leadership toward forming court policies and practices to improve the fairness of the courts and to assure the public confidence in the judicial system.

2. It is recommended that such committee be small enough to permit it to meet as needed at minimal expense and yet be representative of the judiciary and its constituent groups.

3. In establishing this implementation committee, the Judicial Council should be prepared to allocate sufficient staff and financial support to permit the implementation committee to effectively meet its responsibilities.

B. DATA GATHERING & DISSEMINATION

1. The Judicial Council should widely distribute the Final Report of the Eighth Circuit Gender Fairness Task Force within the courts in the Eighth Circuit, including distribution to those responsible for selection and hiring for the courts in the Eighth Circuit, and to the American Bar Association and other bar and attorney organizations within the states in the Circuit. The Task Force suggests that the Final Report be accompanied by a letter from the Chief Judge of the Circuit noting that issues of gender fairness and the demographic makeup of those who work in the courts of the Circuit are important to the administration of justice.

2. The Final Report should be made available electronically in the Circuit, with notice to all employees of its availability.

3. The Implementation Committee should consider what demographic and other gender data should be gathered on an ongoing basis by the courts in the Circuit, and compiled for publication in the Circuit’s annual reports.

4. The Implementation Committee should undertake a review of the courts’ recordkeeping practices in the Circuit and make recommendations to ensure consistent maintenance of gender data.

C. GENDER FAIRNESS IN THE COURTS & IN THE LITIGATION PROCESS

1. The courts in the Circuit should prohibit gender bias and sexual harassment in the conduct of federal court litigation, and adopt procedures for receiving and resolving complaints about such conduct. The procedures should be disseminated during the new attorney admission process and at Rule 16 conferences conducted by the court. Each district court should adopt those portions of the relevant state Code of Professional Responsibility which prohibit biased conduct and sexual harassment by attorneys.
2. The judges in the Circuit and their courtroom employees should be encouraged to employ in their day-to-day judicial activities appropriate gender-neutral behavior, such as the use of appropriate forms of address, avoidance of inappropriate comments on appearance, and avoidance of informal or chambers discussions which tend to exclude members of one gender.

3. The courts in the Circuit should develop guidelines or policies defining reasonable accommodations for attorneys with family responsibilities who appear in federal court litigation, including consideration during the Rule 16 conference of attorneys' family needs for scheduling purposes. Courts should encourage attorneys to come forward with needs for accommodations for family emergencies and responsibilities, and should be sensitive as well to such needs of all court participants, including jurors, witnesses, and litigants.

4. The courts in the Circuit should periodically review their local rules and model jury instructions to ensure that they employ gender neutral language.

5. The Implementation Committee should prepare model policies and procedures, including a "Guide to the Conduct of Gender Fair Court Proceedings" and make them available to any court desiring to consider them.

D. APPOINTMENTS ISSUES

1. The courts in the Circuit should adopt and widely publicize procedures for attorney appointments in both civil and criminal cases. Both the procedures and their implementation should encourage equal opportunities for both men and women to receive attorney appointments by the courts in the Circuit. The courts in the Circuit should consider equal opportunity as well in terms of the nature of the appointment being made, for example the role of lead counsel in a multi-defendent criminal case.

2. The courts in the Circuit should encourage women to apply for, and should increase the number of women appointed to, the various court committees and advisory groups. In making such appointments, the courts should consider equal opportunity in terms of the nature of the appointment being made, for example leadership positions on such committees and advisory groups.

3. The district courts in the Circuit should review their juror questionnaire forms to ensure that discretionary excuse categories do not exclude potential jurors of either gender disproportionately. The Implementation Committee should prepare and disseminate a model juror questionnaire form for any district court wishing to consider it.

E. EDUCATIONAL EFFORTS

1. The courts in the Circuit should work with the organized bar and legal education providers in each district to develop and deliver seminars, workshops and continuing legal education programs dealing with gender fairness and increasing civility in the litigation process.

2. Law schools in the Circuit should be encouraged to include gender and civility issues in their curricula and other programs.

3. The Implementation Committee should work with the Federal Judicial Center to incorporate material regarding gender fairness and civility in judicial education programs.
F. THE COURT AS EMPLOYER

1. The Judicial Council should direct the Implementation Committee to draft model personnel policies regarding family leave, flex-time, part-time, job-sharing, and sexual harassment for use by all courts in the Circuit. All court units should be encouraged to consider such policies, and adopt and disseminate those which they choose to adopt to all court employees.

2. The Implementation Committee should work with the Personnel Committee of the Judicial Council to develop appropriate procedures, implementation, and training regarding the new Model Employment Dispute Resolution Plan adopted by the Council. The Implementation Committee should encourage consistency and elimination of confusion or overlap in personnel policies, and should make recommendations regarding fair filing periods, use of reporting channels which minimize intimidation or fear of reporting by court employees, effective dissemination of such policies to all employees, and means of ensuring understanding on the part of employees of the appropriate means to make complaints regarding conduct of judicial officers.

3. Courts in the Circuit should be encouraged to post all vacancies and promotional opportunities in their offices, and to make the posting information available to the Circuit Executive, who should disseminate such postings and promotional opportunities to court units throughout the Circuit.

4. Court employment units should take identifiable steps to ensure equal opportunity for advancement by women into management and supervisory positions within the court units.

5. The Judicial Council should direct the Circuit Executive to make available to court units in the Circuit training programs for court managers and court employees on subjects such as sexual harassment, employee dispute resolution procedures, hiring and promotional practices, and interpersonal skills and civility.
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EIGHTH CIRCUIT GENDER FAIRNESS TASK FORCE

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U.S. Circuit Judge
The Honorable Diana E. Murphy
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We also wish to thank the following:
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American Bar Foundation  
Eighth Circuit Unit Heads and Courtroom Clerks  
Faegre & Benson LLP and its Information Processing Department  
Starr Litigation Services  
University of Illinois Department of Psychology and Mailing Services  
University of Minnesota Law School  
Focus Group Participants  
Survey Respondents
INTRODUCTION

In the summer of 1993, the Judicial Council of the Eighth Circuit passed a resolution calling for the establishment of a task force to study and report on the role of gender as it affects the lawyers, litigants, judges, employees and others who participate in the courts of the Eighth Circuit. The task has been formidable — the data are complex and varied, the issues sometimes politically-charged, and the process of reaching conclusions calls for difficult integration of personal experiences and collective findings. We are proud to present this summary of our work with the hope that publicizing our results will facilitate the constructive undertaking of an effort to improve our judicial system.

The members of the Eighth Circuit Gender Fairness Task Force were selected in the fall of 1993 by Judge Diana E. Murphy, then Chief Judge of the District of Minnesota and now of the United States Court of Appeals for the Eighth Circuit, at the request of Eighth Circuit Chief Judge Richard S. Arnold. Judge Murphy selected 30 judges, lawyers, law professors, law clerks and court administrators to constitute the Task Force, with then Chief Judge (now Senior Judge) Lyle E. Strom of the District of Nebraska as the chair. The Task Force represented all seven states and every level of the judiciary, and included a membership that was diverse in terms of the age, gender and experience of its members.

The Task Force first discussed and then determined that its mission was:

1. To study effects of gender on both processes and people in the Eighth Circuit judicial system, by gathering data through a variety of methods and from a cross section of persons involved in the Eighth Circuit judicial system;
2. To analyze the gathered data;
3. To recommend appropriate action; and
4. To make provision for the implementation of any such recommendations as approved and authorized by the Judicial Council of the Eighth Circuit.

As our mission statement suggests, much of the work of the Task Force involved collecting data. We undertook three separate surveys — of all judges, of a large sample of lawyers, and of all court employees — and collected a wide variety of demographic and other primary source data from the courts directly. We met with focus groups throughout the Circuit to learn possible areas for research and to understand more fully the concerns of those who participate in or work for the courts of this Circuit. We were fortunate to retain an executive director, Ms. Leslie V. Freeman, Esq., whose guidance and hard work
have been invaluable to the Task Force. We were also blessed with the assistance, on a pro bono basis, of Professor Louise F. Fitzgerald and her team of researchers at the University of Illinois. Professor Fitzgerald and her team assisted us in designing the surveys, compiled and analyzed the responses we received, and gave us extensive analytical reports on the significance of those responses.

It has been the Task Force's intention to base our conclusions and recommendations on the data we gathered, rather than our personal observations or preconceptions. To that end, we instructed the respondents to all three of the survey questionnaires — judges, lawyers and court employees — to limit their responses to events in the last five years and to matters in the courts of this Circuit, excluding state courts, administrative agencies or other contexts. And we asked all survey respondents to give us their own direct experiences and observations so we could use firsthand “evidence” wherever possible.

By keeping our focus on the data we were gathering we hoped to avoid the myopia of those who would say there are no problems and the despair of those who would say there are no solutions. Our report gives little solace to the occupants of either camp: we found evidence that would suggest serious gender fairness issues both in the courts and with the court as employer (our demographic data amply demonstrate the lack of women in the judiciary and in management roles in the court system, for example), but we also found evidence of real progress in women’s participation in the judicial process (for example, our survey data showed that women are as likely as men of equal age and experience to be “lead counsel” in federal cases). Whether the proverbial glass is “half full” or “half empty” we leave to readers to conclude, but there is no doubt that the glass is substantially more “full” than it was years ago. We routinely heard from respondents in all the surveys that their answers would have been substantially more negative had we asked about experiences outside the five-year window we had imposed.

Finally, we were often asked why we were undertaking this task. After all, hasn’t the issue of gender fairness been studied to death and isn’t this all misplaced “political correctness” anyway? To those with such questions we have three answers:

1. The judges of this Circuit, through the Judicial Council, asked us to undertake this project;
2. This country's federal judges, through the Judicial Conference of the United States, in 1995 urged the circuits to conduct studies with respect to gender bias with a view towards elimi-

---

1. Our acknowledgment pages contain a description of this outstanding group.
nating unfairness and perceptions of unfairness in the federal courts. Congress did the same as part of the 1994 Violence Against Women Act; and

3. For those unswayed by judicial or political pronouncements on the subject, we suggest that a moment's reflection on the central role of the federal courts in our constitutional, social, commercial and political structures makes it imperative that bias — actual or perceived, if there is a difference — be eliminated. The courts are successful in carrying out their crucially-important functions largely because of the enormous respect most people feel for them as institutions. Bias, whether based on gender or some other factor, is so fundamentally at odds with the courts' role and so impairs their standing with the public that both moral and pragmatic considerations compel us to isolate and eliminate bias wherever we can. Hence the need for studies like ours.2

As is inevitably the case with a group report, not every nuance or turn of phrase in this report is the exact choice of each Task Force member. Nevertheless, the report is the consensus of the Task Force. It is with the goals of understanding, identifying, isolating and eliminating gender bias that we turn our attention to the substantive areas we have studied and the conclusions we have reached.

Chapter 1
DEMOGRAPHIC SUMMARY

In this chapter, we describe the demographic composition of the judges and attorneys working in the courts of the Eighth Circuit. The demographic information regarding court employees appears in Chapter 6, “The Court as Employer.” Rather than limit our portrait to a single, one-dimensional snapshot, we have wherever possible viewed our subjects from multiple angles. We believe that this type of analysis will provide a clear and comprehensive view of both male and female judges and attorneys who participate in the federal courts within the Eighth Circuit. In addition, the demographic information presented in this chapter lays the foundation and sets the context for the substantive discussion in subsequent chapters of this report.

Following the example set by other gender fairness task forces, we relied on large-scale surveys as primary sources of information. The

2. At numerous points, the data we generated may also bear on issues of racial bias. Certainly such issues deserve full consideration as well, but we felt compelled to focus on our assigned task of considering gender issues. The data we assembled can be made available to others who may undertake the important job of considering what our survey responses and other data may tell us about issues of racial bias.
surveys targeted court participants: judges, attorneys, and court employees. Three separate surveys were drafted and released in staggered sequence. A number of important demographic findings can be gleaned from these data; for example, the attorney results provide several noteworthy observations concerning the marital and parental status, years of practice, partner status, and patterns of practice of female attorneys compared to their male counterparts in the Eighth Circuit. The court employee survey reveals significant findings concerning issues of a gender divided and stratified workplace, job satisfaction, general incivility, and sexual harassment, which are discussed in Chapter 6. The judge survey provides a range of demographic information regarding judges' ages, marital and family status, judicial experience and legal practice experience, as well as the judges' views on issues such as scheduling accommodations.

Although the surveys provide the most comprehensive source of data, we also obtained additional demographic data from a number of sources. For example, we conducted a historical comparison of data concerning the Eighth Circuit judiciary over a 17-year period, providing comparative snapshots of the gender composition of the appellate, district, bankruptcy and magistrate judges in each of these succeeding periods. These historical data show that, although the absolute number of female judges has increased within the Eighth Circuit, the percentage remains somewhat below the national average.

Our third project analyzed the "nature of suit" data from the Court of Appeals and district court clerks' dockets. Information available in court databases regarding the types of cases that male and female attorneys are handling (e.g., criminal, complex civil, civil rights, or regulatory and administrative) allows for deeper insight into the experience of federal practice for attorneys. "Nature of suit" information paints a picture of the practicing bar in each area of litigation in the district courts and court of appeals.

Thus, our demographic study of the judges and attorneys in the Eighth Circuit is multi-textured and evokes, we believe, a richer, more accurate portrait than simple "headcounts" of who plays what roles in the day-to-day administration of justice in the Eighth Circuit.

I. METHODOLOGY

We mailed our attorney survey to a random sample containing 9,223 practitioners, distributed as equally as possible across gender, district and type of practice (criminal, civil, bankruptcy, appellate). Of the total number of attorney surveys sent out, 4,880 (53%) were re-
turned. The judge survey was sent to all federal judges working in the Eighth Circuit and 102 (68%) were returned. Details of the attorney sampling plan are presented in our Appendix re: Methodology.

The Task Force also analyzed statistical data compiled by the Circuit Executive’s Office showing the numeric and gender composition of all courts within the Eighth Circuit for the years 1980, 1990, and 1997. Nationwide judicial composition data were obtained from the Federal Judicial Center. We felt that a historical comparison of this demographic information would provide still another dimension to our portrait of the judges of the Eighth Circuit.

In addition we examined the computerized data bases for the court of appeals and district courts for a one-year period ending June 30, 1995 to determine the gender composition of the practicing bar in each jurisdiction in 15 representative areas of civil practice and in criminal practice. The civil specialties included antitrust, bankruptcy appeals, civil rights (both as a general category as well as the specific subcategory of employment discrimination), contract, environmental, labor, personal injury (both generally, as well as the specific subcategory of product liability), prisoner rights, intellectual property (copyright, trademark and patent), real property, securities, social security and tax. These data are referred to as “nature of suit” data.

II. GENDER PROFILE OF THE JUDICIARY

A. THEN AND NOW: A HISTORICAL ANALYSIS OF THE U.S. EIGHTH CIRCUIT

In 1872, the United States Supreme Court ruled that Myra Bradwell was not entitled to practice law because she was a woman and her “paramount destiny and mission” was to be wife and mother. Although the role of women in society has changed dramatically over the last 125 years, a separate-sphere notion has persisted well into this century and worked to keep women in their “special sphere” of the home and hearth by discouraging their service on juries. For example,

---

3. This is an excellent rate of return and is similar to the rates of return of other circuits conducting similar studies. The Ninth Circuit had a 50%+ return rate whereas the D.C. Circuit obtained a 64% return rate on its litigation survey.

4. If an attorney had more than one suit of a particular nature on file (e.g., two antitrust suits), he or she was counted only once in the antitrust category; if that attorney had multiple suits of different natures (e.g., one antitrust and one products liability suit), he or she was counted once in each category. Thus the “nature of suit” data cannot be compared to data indicating the number of women and men attorneys listed as attorneys of record to determine whether either is under- or over-represented in any particular area of federal practice. In addition, an attorney is included in this count if he or she worked on a case along with another attorney of record.

in a 1961 case, *Hoyt v. Florida*, the Supreme Court rejected a Fourteenth Amendment challenge brought by a female defendant who had been convicted of second degree murder by an all-male jury. The Supreme Court sustained Hoyt's conviction, declaring the automatic exemption of women from jury service "reasonable" because women belonged in the home caring for the family.

The world of the federal courts is still predominantly, though not exclusively, male. In this section we describe the judiciary itself. What follows are comparative snapshots of our courts in 1980, 1990 and 1997. Data are provided on the gender composition of the appellate, district, and bankruptcy courts.

**Court of Appeals Judges**

Pursuant to Article 2 of the Constitution and to 28 U.S.C. § 44, the President, with the "advice and consent of the Senate," appoints the circuit judges for each circuit. Circuit judges are appointed for life. The data from this historical examination include the chief judge, all active judges and all senior judges of the United States Court of Appeals for the Eighth Circuit.

In 1980, nine circuit judges sat on the Court of Appeals; none were women. In 1990, 15 circuit judges sat on the Court of Appeals; none were women. In 1997, of the 18 circuit judges sitting on the Court of Appeals, one is a woman. Appointed to the court in 1994, she is the first woman to serve on the Eighth Circuit. The percentage of women judges sitting on the appellate court of the Eighth Circuit is below the percentage of women circuit judges nationwide. As of September 30, 1996 the female proportion of circuit court judges nationwide was 18.6%, whereas the percentage of women circuit judges in the Eighth Circuit was below 6%.

---

8. The totals used for judge demographics include senior judges.
The United States district courts were created pursuant to 28 U.S.C. § 81-133 and Article 3 of the United States Constitution. The President appoints district judges with "the advice and consent of the Senate," and their appointment is for life.

Historical data indicate that in 1980 there were 53 judges sitting on the district courts of the Eighth Circuit, including all active and senior district court judges. Of that number, only two were women (4%). In 1990, four of the 52 judges sitting on the district courts of the Eighth Circuit were women (8%). In 1997, there were 65 district court judges sitting in the Eighth Circuit, of whom seven were women (11%). As of September 30, 1996, the percentage of district judges nationwide was over 17% female. The percentage of district judges in the Eighth Circuit who were female was lower, at 11%.

Bankruptcy Judges

Pursuant to 28 U.S.C. § 151, Congress creates bankruptcy courts and fixes the number of United States bankruptcy judges in consultation with the Judicial Conference. The Court of Appeals appoints bankruptcy judges.  

Bankruptcy judges are “judicial officers,” 28 U.S.C. § 152(a)(1), and are appointed to 14-year terms. In the Eighth Circuit, the number of female bankruptcy judges has ranged from zero in 1980 (when the total number of bankruptcy judges in the Eighth Circuit was 18) to four in 1990 (when the total number of bankruptcy judges in the Eighth Circuit was 22). In 1997, four of 21 bankruptcy judges are women (19%). As of 1996, almost 17% of bankruptcy judges nationwide were women. Thus, the percentage of female bankruptcy judges in the Eighth Circuit slightly exceeds the national average.

Number of 8th Circuit Bankruptcy Court Judges 1980, 1990, 1997

Magistrate Judges

United States Magistrate judges are appointed by a majority of the district judges of each district court. If a majority cannot agree, the chief judge appoints the magistrate judge. 20 A magistrate judge must be "for at least five years a member in good standing of the bar of the highest court of the state. ..." Full-time magistrate judges serve for eight-year terms and part-time magistrates serve for four years. 21 There is no prohibition against reappointment. 22

The Judicial Conference of the United States requires that public notice of all vacancies be given, and that "merit selection panels, composed of residents of the individual judicial districts [be established] to assist the courts in identifying and recommending persons who are best qualified to fill such positions." 23 In addition, Congress requires that: "the merit selection panels ... in recommending persons to the district court, shall give due consideration to all qualified individuals,

especially such groups as women, blacks, Hispanics, and other minorities.”

In 1980, one of the 41 magistrate judges in the Eighth Circuit was a woman. In 1990, the figure was eight of 43. In 1997, there are 45 magistrate judges, of whom seven are women (16%). This is lower than the nationwide average of 24%, as of September 30, 1996.25

These data confirm that significant changes have occurred in the past 17 years with regard to gender representation on the bench. In 1980, there were no women on the court of appeals, two women among the district judges, no women bankruptcy judges and one woman magistrate in the Eighth Circuit. Thus, in 1980, the grand total of female judges in the federal courts of the Eighth Circuit was three. By 1997, 19 of 149 judicial positions in the Eighth Circuit were held by women, an almost-sevenfold increase. Nevertheless the nationwide percent-

age of female federal judges collectively is 17.8%,\textsuperscript{26} whereas in the Eighth Circuit the percentage of women is still below 13%.

Both male and female lawyers surveyed expressed concern about the gender composition of the Eighth Circuit judiciary: “There are still a woefully inadequate number of female judges in the Eighth Circuit.” “I think the federal court system as a whole could do a better job of having more females in ‘power positions.’” “I still see a federal court system in the Eighth Circuit that has very few female judges and clerks of court.” “I think lack of female judges contributes to how women feel about practicing in federal court — it does not feel accessible to me. If my peers were there, I would be too.”

B. Personal Characteristics of the Judiciary

The survey returns from the Circuit’s current appellate, district, magistrate, and bankruptcy judges provide a more detailed picture of the judiciary. One hundred and two of the judges responded,\textsuperscript{27} including 85 men, 14 women and three respondents who provided no gender information.

\textit{Age and Experience.} In terms of age, the women judges of the Circuit, on the average, are ten years younger than the men (49.79 compared to 59.84). The ages range from 40 to 87. Female judges reported an average of 9.36 years of legal practice before their appointments, compared to 18.12 years for their male counterparts. Younger judges, however, reported fewer years of law practice prior to their appointments, without regard to gender, than their more senior peers.

On average, judge respondents had served on the federal bench for twelve years. Male and female judges of comparable age had comparable tenure on the bench.

Prior to their current appointments, 61 of the judges had held previous judicial positions while 40 did not have prior judicial service. One judge did not respond to the question. The most common form of prior judicial experience was the state trial court (22%). For the Court of Appeals judges, the most common form of prior judicial experience was as a United States district judge.

\textit{Practice Background.} The most common practice background of the judges was in private practice, followed by government practice (including state/local, Assistant U. S. Attorneys, and “other” federal

\textsuperscript{26} Source: Federal Judicial Center, September 30, 1996.

\textsuperscript{27} The overall return rate of 68% on the Judges’ Survey is considered excellent by statistical experts, providing a sound database for the work of the Task Force. In some instances, however, the small number of female judges precluded statistical gender comparison. In those instances no such comparisons have been provided.
agencies). None of the responding judges had served as a federal public defender.

Judges described their substantive practice backgrounds by choosing from a list their top three areas of specialization. Of those, 44 judges ranked personal injury law as a specialty, and 36 judges had concentrations in commercial litigation, with 33 reporting concentration in criminal law. Nineteen reported concentration in family law and, when civil rights and employment/labor are combined, another 19 reported it as a practice concentration. Of the female judges, six had a concentration in criminal law, five reported a concentration in personal injury law, and four listed commercial litigation. More than half the judges reported that they had most frequently represented individuals, rather than organizations, prior to their appointments.

**Family Status.** All but 10 of the responding judges were married. Only five had never been married (three women and two men), and only four (two men and two women) were separated or divorced. One judge was widowed. Ninety-four percent of the male judges had children, but only 71% of the female judges had children. Twenty-eight percent of judges had children under the age of 18 living at home.

**Race/Ethnicity.** The judges’ survey requested no information about racial background, in order to preserve confidentiality of the responding judges. Data compiled by the Circuit Executive’s Office shows the racial makeup of the Circuit’s judiciary to be overwhelmingly white. Only seven judges (4.7%) were African-American/Black and none were of other racial/ethnic groups. Of the African-American judges, one male sits on the court of appeals, four men and one woman are district judges, and one man serves as a magistrate judge.

III. GENDER PROFILE OF ATTORNEYS PRACTICING IN THE EIGHTH CIRCUIT COURTS

A. PERSONAL CHARACTERISTICS OF EIGHTH CIRCUIT ATTORNEYS

The one-year docket study provides the most accurate numerical data on the attorneys practicing in the Eighth Circuit courts — that is the *best estimate* of the actual numbers of men and women practicing in the courts. The table below displays the gender composition of the attorneys of record in the court of appeals and district courts during the one-year period.28

---

28. Although occasionally we were unable to determine the gender of the attorneys of record, these instances were few and had limited effects on the analysis. This information is included in the table but did not affect our conclusions.
As of 1995, 23% of all lawyers nationwide were women. In the district courts of the Eighth Circuit, however, the proportion of attorneys of record who were female ranged from 11.8% to 17.5% and averaged 16.3%. In the Eighth Circuit Court of Appeals 19.2% of attorneys of record were women. These proportions indicate that the numbers of women practicing in our federal courts are fewer than the national average of women licensed to practice law.

Age of Respondents. The attorney survey revealed little substantive age difference between the male and female respondents. Male attorneys reported an average age of 44.95 years, with a range from 24 to 87 years; women, on the other hand, reported an average age of 39.09 years, with a range from 24 to 79 years. However, there was also substantial overlap between the age distributions for men and women.

Race/Ethnicity. The data revealed an overwhelmingly European/American White attorney population. The next largest racial/ethnic group was African-American/Black, but this group still constituted only 1.5% of the sample. Minority women comprised almost 5% of female attorneys, while minority men comprised approximately 3% of male attorneys in the sample.

---

29. Source: Commission on Women in the Profession, Women in the Law: A Look at the Numbers American Bar Association (1995). The Task Force was unable to obtain data showing the gender proportion of attorneys licensed to practice in the seven states of the Eighth Circuit. Neither the Supreme Courts nor the state bar associations compile gender-composition information.
Race/Ethnicity of Respondents

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<th>Overall</th>
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<th>Men</th>
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<td>African American/Black</td>
<td>1.5%</td>
<td>2.9%</td>
<td>0.9%</td>
</tr>
<tr>
<td>Asian American</td>
<td>0.4</td>
<td>0.6</td>
<td>0.3</td>
</tr>
<tr>
<td>Hispanic</td>
<td>0.7</td>
<td>0.9</td>
<td>0.6</td>
</tr>
<tr>
<td>Native American</td>
<td>1.0</td>
<td>0.4</td>
<td>1.3</td>
</tr>
<tr>
<td>European American/White</td>
<td>95.5</td>
<td>94.5</td>
<td>96.0</td>
</tr>
<tr>
<td>Other(^{30})</td>
<td>0.8</td>
<td>0.8</td>
<td>0.9</td>
</tr>
</tbody>
</table>

Marital Status. Although most responding attorneys were or had been married (90.2%), men were significantly more likely to be married currently than women (87% compared to 69%). This difference appears to be mainly due to the fact that 18.4% of the women (as opposed to only 5.9% of the men) had never married. Not only did fewer of these women marry than did their male counterparts, but a greater percentage of their marriages ended in divorce or separation. Proportionately, those women who did marry were separated or divorced almost twice as often as men (11.9% vs. 6.7%).

Current Marital Status of Respondents

<table>
<thead>
<tr>
<th></th>
<th>Overall</th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never married</td>
<td>9.8%</td>
<td>18.4%</td>
<td>5.9%</td>
</tr>
<tr>
<td>Married/Partnered</td>
<td>81.4</td>
<td>69.0</td>
<td>86.9</td>
</tr>
<tr>
<td>Widowed</td>
<td>0.6</td>
<td>0.7</td>
<td>0.5</td>
</tr>
<tr>
<td>Separated/Divorced</td>
<td>8.3</td>
<td>11.9</td>
<td>6.7</td>
</tr>
</tbody>
</table>

Parental Status. An even more striking pattern emerged regarding parental status in that women were considerably less likely to be parents than their male counterparts. Indeed 84% of men but only 55.8% of women reported having children. Men were also more likely than women to report having children under the age of 18 living at home. Parental status was also examined within age groups of attorneys. The following table demonstrates that male attorneys in each age group were more likely than female attorneys of the same age to have children under the age of 18 living at home.

\(^{30}\) Attorneys marking “other” were asked to write in their specific racial/ethnic background. An examination of these responses revealed that many wrote in “White,” “American,” “Caucasian,” etc., thus inflating the proportion of respondents in the “other” category and reducing the “European-American/White” numbers.
B. Professional Demographics

**Years of Active Legal Practice.** The greatest number of respondents were in mid-career. Approximately 40% of all attorneys responding to the survey had practiced 11-20 years, irrespective of gender. The majority of men (54.5%) and women (69.37%) had practiced law for 6-20 years. However, a substantially larger proportion of men (36.2%) than women (4.8%) had practiced for more than 20 years, while a substantially larger proportion of women (26%) than men (9.2%) had practiced for less than 5 years. In order to address this issue, researchers statistically controlled for years of experience in subsequent analyses to ensure that any apparent gender differences could not be better accounted for by experience.

<table>
<thead>
<tr>
<th>Number of Years Respondents Had Actively Practiced Law</th>
<th>Overall</th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Percent</td>
<td>Count</td>
<td>Percent</td>
</tr>
<tr>
<td>0-5 years</td>
<td>14.4%</td>
<td>26.0%</td>
<td>9.2%</td>
</tr>
<tr>
<td>6-10 years</td>
<td>19.6</td>
<td>29.6</td>
<td>15.1</td>
</tr>
<tr>
<td>11-20 years</td>
<td>39.5</td>
<td>39.7</td>
<td>39.4</td>
</tr>
<tr>
<td>21-30 years</td>
<td>19.2</td>
<td>4.4</td>
<td>25.9</td>
</tr>
<tr>
<td>31+ years</td>
<td>7.3</td>
<td>0.4</td>
<td>10.3</td>
</tr>
</tbody>
</table>

**Private Practice.** The majority of attorneys (85%) responding to the survey were employed in private practice. However, men were proportionately more likely to be in private practice than women; 90.6% of men reported being in private practice, compared to only 74% of women. This is comparable to national statistics indicating that 70% of female lawyers are in private practice.31

**Partner, Associate, Solo Practitioner.** There was a significant difference in the proportion of women who had achieved partner status compared to men. Women were relatively more likely to be associates, whereas men were more likely to be partners. Men in private practice

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tended to hold the rank of partner (50.9%) or to be solo practitioners (28.7%) whereas women were considerably less likely to be partners (28.4%) or to maintain a solo practice (18.1%). Slightly more than 25% of women, compared to only 9.9% of men, responded that they were associates.

<table>
<thead>
<tr>
<th>Current Practice or Position</th>
<th>Overall</th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Private Practice</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Solo Practitioner</td>
<td>25.4%</td>
<td>18.1%</td>
<td>28.7%</td>
</tr>
<tr>
<td>Associate</td>
<td>14.8</td>
<td>25.6</td>
<td>9.9</td>
</tr>
<tr>
<td>Partner</td>
<td>43.9</td>
<td>28.4</td>
<td>50.9</td>
</tr>
<tr>
<td>Of Counsel</td>
<td>1.1</td>
<td>1.3</td>
<td>1.0</td>
</tr>
<tr>
<td>Contract Lawyer</td>
<td>0.3</td>
<td>0.6</td>
<td>0.1</td>
</tr>
<tr>
<td><strong>Government Attorney</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Federal PD or Asst PD</td>
<td>0.7%</td>
<td>0.9%</td>
<td>0.7%</td>
</tr>
<tr>
<td>USA or AUSA</td>
<td>3.5</td>
<td>4.0</td>
<td>3.2</td>
</tr>
<tr>
<td>Attny, other federal agency</td>
<td>2.5</td>
<td>5.4</td>
<td>1.2</td>
</tr>
<tr>
<td>Attny, state or local agency</td>
<td>4.7</td>
<td>9.8</td>
<td>2.5</td>
</tr>
<tr>
<td><strong>Public/Private Organization</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>In-house counsel, private corp.</td>
<td>1.4%</td>
<td>3.0%</td>
<td>0.7%</td>
</tr>
<tr>
<td>Legal services attorney</td>
<td>0.8</td>
<td>1.4</td>
<td>0.5</td>
</tr>
<tr>
<td>Non-profit public interest org.</td>
<td>0.2</td>
<td>0.3</td>
<td>0.2</td>
</tr>
<tr>
<td>Trade or professional org.</td>
<td>0.0</td>
<td>0.0</td>
<td>0.1</td>
</tr>
<tr>
<td>Other</td>
<td>0.6</td>
<td>1.2</td>
<td>0.3</td>
</tr>
</tbody>
</table>

We conducted further analyses to clarify the reasons for the differences in private-practice positions. A separate analysis of only partners and associates in law firms indicated that women were about evenly distributed between partner (52.5%) and associate (47.5%), whereas men were much more likely to be partners than associates (83.7% partners vs. 16.3% associates).

An additional analysis of the partnership status of men and women with comparable years of experience was performed. The gender discrepancy in partnership status is not due to seniority differences between male and female attorneys, but rather held true for every tenure group, except those who have practiced over 31 years. In other words, female attorneys were less likely than male attorneys with the same amount of experience to have achieved the rank of partner at every level of experience from 0-30 years.
These data indicate that proportionately twice as many men as women become partner within their first 5 years of practice. In years 6-10, the period in which we would expect that most attorneys would be eligible for partnership, the majority of women have still not made partner (52.5% of women compared to only 32.1% of men responded that they were still associates). By years 11-20, most women reported that they were partners; however, women were still twice as likely to be associates as men (11% of women compared to 4.4% of men).

**Percentage of Practice That is Federal.** Determining precisely what portion of an attorney's practice is in the federal courts is difficult, as most attorneys who appear in the Eighth Circuit federal courts also practice in state court and may practice in the federal courts of other circuits. The survey confirmed that most respondents (72%) practiced in the federal courts of the Eighth Circuit less than 25% of the time. This was true of both genders (64% of women, 75.6% of men).

| Proportion of Practice in the Federal Courts of the Eighth Circuit |
|-----------------------|---------------------|---------------------|---------------------|
| % of Practice         | Overall             | Women               | Men                 |
| 1-25%                 | 72.0%               | 64.0%               | 75.6%               |
| 26-50                 | 12.7                | 14.3                | 11.9                |
| 51-75                 | 7.0                 | 9.5                 | 5.9                 |
| 76-100                | 8.3                 | 12.1                | 6.6                 |

Among attorneys who work for the federal government, men tended to spend more of their time in federal court than women. Moreover, 43% of the women indicated they spend less than 25% of their time in federal court compared to 22.4% of men. The large majority of male federal government attorneys (70.5%) reported spending 75-100% of their time in federal court, compared to only 46.8% of female federal government attorneys. This substantial gender difference may be partially attributable to the additional gender difference in the kinds of position within the federal government.
Government Attorneys. The survey results suggest that women are more likely to be employed as government attorneys than their male counterparts. Slightly more than 20% of women responding were government attorneys, whereas only 7.6% of the male respondents work for the government. Nationally 12% of women are in government practice, whereas only 7% of male attorneys work for the government.\textsuperscript{32}

We found that of the government attorney respondents men were significantly more likely to be employed in United States Attorneys' Offices whereas women were significantly more likely to work for state, local, or "other federal" agencies. There was no statistically significant difference between the proportions of male and female government respondents who were employed in Federal Public Defender Offices.

<table>
<thead>
<tr>
<th>Government Attorneys by Agency</th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Defender</td>
<td>4.3%</td>
<td>8.6%</td>
</tr>
<tr>
<td>United States Attorney</td>
<td>20.1</td>
<td>42.7</td>
</tr>
<tr>
<td>Other Federal Agencies</td>
<td>26.9</td>
<td>16.4</td>
</tr>
<tr>
<td>State/Local Agencies</td>
<td>48.7</td>
<td>32.3</td>
</tr>
</tbody>
</table>

The survey results challenge the belief of some that government practice is in some way a "mommy track" for female attorneys. Analysis of the parental status of female attorneys indicated no statistical differences among the proportions of women with young children who work in private practice, in public/private agencies or government practice.

<table>
<thead>
<tr>
<th>Parental Status Of Female Attorneys</th>
<th>Women who do not have children under 18 living at home</th>
<th>Women with children under 18 living at home</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private Practice</td>
<td>44.2%</td>
<td>46.4%</td>
</tr>
<tr>
<td>Government Practice</td>
<td>47.6</td>
<td>44.9</td>
</tr>
<tr>
<td>Public/Private Entity</td>
<td>41.3</td>
<td>50</td>
</tr>
</tbody>
</table>

\textsuperscript{32} Source: Commission on Women in the Profession, ABA, Women in the Law: A Look at the Numbers (1995).
Trial Experience. The initial survey data concerning trial experience indicated that women were less likely to have personally appeared in federal court and somewhat less likely than men to have participated in either a bench or a jury trial during the five-year period. However, supplementary analyses showed that differences in jury-trial experience, lead counsel service and federal court appearances were not due to gender as such, but rather to number of years of practice. These data did reveal, however, that women with 6-10 years of legal practice experience were less likely to have participated in bench trials than their male counterparts. A similar difference was seen among attorneys with 11-20 years of experience.

| Number of Bench Trials for Attorneys With 6–10 Years of Experience |
|---------------------------------|-------|-------|
| Number of Trials | Women | Men |
| 0 | 60.3% | 48.9% |
| 1–5 | 34.4 | 43.4 |
| 6+ | 5.3 | 7.6 |

Number of Bench Trials for Attorneys With 11–20 Years of Experience

| Number of Trials | Women | Men |
| 0 | 53.2% | 44.7% |
| 1–5 | 35.7 | 43.6 |
| 6+ | 11.1 | 11.7 |

The survey results challenge another popularly held assumption: that women are less likely to be lead counsel on federal cases. Overall, women were indeed less likely to have been lead counsel in the past five years than their male counterparts. This difference, however, appears to be attributable to years of legal experience rather than to gender.

Practice in District Court v. Court of Appeals. The one-year docket study revealed interesting differences in the patterns of civil practice between lawyers appearing before the district and appellate courts. Women were slightly more likely to be the attorneys of record on appeal (20% civil and 15.5% criminal) than in the district courts (16.4% civil and 13.2% criminal) of the Eighth Circuit. Moreover, the docket study showed that female attorneys of record were more preva-
lent in some areas of litigation in the appellate court than in the district courts.

**Areas of Practice.** Some of the most striking data to emerge from the study concern the significant gender differences in areas of practice. In the district courts, the one-year docket study revealed that male attorneys predominate numerically as attorneys of record in every area of practice. We conducted a detailed analysis of the docket data, comparing the rates at which men and women practiced in particular cases to the rates at which they appear in the district courts on average. This analysis is referred to below as "nature of suit" data.

**Criminal Practice.** With respect to criminal law, the nature of suit data showed eight male attorneys of record for each female attorney. Men thus predominated at both the appellate and district levels in the criminal docket.

We examined the relative proportions of men and women practicing criminal prosecution and defense. Of survey respondents, 3.3% of men and 3.4% of women had practiced criminal prosecution in the last five years, while 21.8% of the men but only 10.8% of women had practiced criminal defense. Additional demographic information about attorneys practicing in the offices of the United States Attorneys and Federal Public Defenders is provided in Chapter 4, Criminal Practice.

**Civil Practice.** According to the nature of suit data, male attorneys of record outnumbered female attorneys of record in civil practice four to one. Women were found in almost every area of practice; however, male attorneys of record dominated proportionately in most areas of civil practice.

Examination of the survey results suggests that one of largest gender differences appears in the area of personal injury practice: 34.7% of the men indicated some involvement in this area, compared to only 17.3% of the women. Further, 20.7% of men, but only 7.1% of women, specialize in plaintiff's personal injury work.

**Nature of Suit Data.** The nature of suit data demonstrated that male attorneys in the district courts were more prevalent in securities, intellectual property, personal injury, product liability and contract cases (92.3% to 87.5%) than they were in district court practice overall (82.1%). Female attorneys on the other hand appeared in tax, social security, employment discrimination, prisoner rights and civil rights cases in higher proportions (30.66% to 21.96%) than they were found in district court practice in general (16.3%).

33. In instances where there were three or fewer cases of a particular nature in a jurisdiction, we excluded these data from the analysis on the ground that the sample was too small to draw reliable conclusions.
Male Attorneys of Record are Disproportionately Prevalent

<table>
<thead>
<tr>
<th></th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Securities</td>
<td>92.3%</td>
</tr>
<tr>
<td>Intellectual Property</td>
<td>88.45</td>
</tr>
<tr>
<td>Personal Injury</td>
<td>88.31</td>
</tr>
<tr>
<td>Product Liability</td>
<td>88.19</td>
</tr>
<tr>
<td>Contract</td>
<td>87.5</td>
</tr>
</tbody>
</table>

Female Attorneys of Record are Disproportionately Prevalent

<table>
<thead>
<tr>
<th></th>
<th>Women</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tax</td>
<td>30.66%</td>
</tr>
<tr>
<td>Social Security</td>
<td>26.48</td>
</tr>
<tr>
<td>Employment Discrimination</td>
<td>24.5</td>
</tr>
<tr>
<td>Prisoners' Rights</td>
<td>21.98</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>21.96</td>
</tr>
</tbody>
</table>

We conducted a similar analysis at the Court of Appeals level. Male attorneys were more prevalent in real property, products liability, personal injury, securities, contract and tax appeals (90.11% to 85.29%) than they were in appellate practice overall (80.2%). Female attorneys appeared in employment discrimination, social security, prisoner rights, civil rights and environmental appeals in higher proportions (30.6% to 23.36%) than they appear in the Court of Appeals on average (19.8%).
The nature of suit data also highlighted several areas of law in which women participate more often on appeal than at trial. These areas include intellectual property, environmental, labor and prisoners’ rights. Finally, female attorneys make up a much greater percentage of those listed as attorney of record in tax cases at the district rather than at the appellate level.

Specialization. We also analyzed the areas of practice in which male and female attorneys specialize. The results were consistent with the findings of the docket data studied. We asked respondents to select up to three areas in which they specialized. The tables below depict the areas in which male and female survey respondents were proportionately more likely to specialize:

<table>
<thead>
<tr>
<th>Areas of Legal Specialization in Which Male Survey Respondents Were Significantly More Likely to Practice</th>
<th>Overall</th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bankruptcy</td>
<td>36.3%</td>
<td>29.1%</td>
<td>39.6%</td>
</tr>
<tr>
<td>Commercial Litigation</td>
<td>22.9</td>
<td>18.0</td>
<td>25.2</td>
</tr>
<tr>
<td>Contract</td>
<td>9.3</td>
<td>6.3</td>
<td>10.7</td>
</tr>
<tr>
<td>Criminal Defense</td>
<td>18.4</td>
<td>10.8</td>
<td>21.8</td>
</tr>
<tr>
<td>Personal Injury, Defense</td>
<td>12.8</td>
<td>10.2</td>
<td>14.0</td>
</tr>
<tr>
<td>Personal Injury, Plaintiff</td>
<td>16.5</td>
<td>7.1</td>
<td>20.7</td>
</tr>
<tr>
<td>Product Liability</td>
<td>8.7</td>
<td>5.7</td>
<td>10.0</td>
</tr>
</tbody>
</table>
Areas of Legal Specialization in Which Female Survey Respondents Were Significantly More Likely to Practice

<table>
<thead>
<tr>
<th></th>
<th>Overall</th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative/Regulatory</td>
<td>4.9%</td>
<td>7.0%</td>
<td>3.9%</td>
</tr>
<tr>
<td>Appellate</td>
<td>7.7%</td>
<td>9.3%</td>
<td>7.0%</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>16.2%</td>
<td>23.1%</td>
<td>13.0%</td>
</tr>
<tr>
<td>Employment/Labor</td>
<td>18.4%</td>
<td>30.5%</td>
<td>12.9%</td>
</tr>
<tr>
<td>Environment</td>
<td>2.7%</td>
<td>3.8%</td>
<td>2.2%</td>
</tr>
<tr>
<td>Other</td>
<td>8.4%</td>
<td>10.6%</td>
<td>7.3%</td>
</tr>
</tbody>
</table>

C. WORK AND FAMILY LIFE

An important section of the attorney survey examined the interface between the demands of the court system and the responsibilities of family life. Below we examine these data in some detail.

Pregnancy. The Task Force surveys examined the issue of whether an attorney's pregnancy influenced her likelihood of practicing in federal court. Respondents were asked whether they had ever been told that it was unwise for a pregnant attorney to appear in federal court in the Eighth Circuit. Results indicated that very few respondents had ever been told this. Not surprisingly, women were considerably more likely than men to hear such an admonition. The sources of such admonitions were overwhelmingly fellow attorneys rather than judges or court staff.

| Percent and Count Identifying Individuals Cautioning Against Appearing Pregnant |
|-----------------------------------------------|--------|-------|-----|
| Source                                       | Percent| Count | Percent| Count |
| Federal judge                                | 0.4%   | 6     | .1%   | 4     |
| Federal court employee                       | 0.6%   | 8     | .2%   | 5     |
| Attorney                                     | 2.8%   | 40    | .4%   | 11    |

*Note: attorneys could choose more than one option.

Leaves of Absence. Attorneys who had taken a leave of absence for the purpose of birth, adoption or to care for a family member in poor health were asked the duration of their longest leave. The great majority of men who had taken leave reported that it lasted less than 6 weeks. The leaves of the women tended to be more variable, with most taking between 6 weeks and three months.
While 23% of women indicated that they had taken more than three months' leave for family responsibilities, only 5% of men had taken that much leave. The number of male respondents taking more than six weeks’ leave was insufficient to enable us to investigate the possible relationship between duration of leave and marital and parental status.

**Change in Work Schedules to Accommodate Family Responsibilities.** The Work-Family Interface Scale measured the frequency with which attorneys sought changes in work schedules for reasons related to family responsibilities: extensions or schedule accommodations; leaves of absence, either paid or unpaid; and position changes or hour reductions. Scores could range from 0 to 7, with higher scores indicating more frequent changes or attempts to change work schedules for family reasons. Scores averaged 0.69 overall, suggesting that such attempts at scheduling accommodations were relatively rare.

Female attorneys, however, reported significantly and substantially higher scores than male attorneys. Married women and women with children reported the highest scores. The significant gender difference remained even when effects of years of legal practice and age were taken into account.
The tables below demonstrate that substantially more women than men had requested scheduling accommodations for pregnancy or family reasons, had taken both paid and unpaid leaves of absence for birth or adoption or to care for ill family members, and had worked part-time, cut back hours, changed jobs, or left the profession of law for some period of time because of family responsibilities.

### Taken Leave of Absence for Birth/Adoption or to Care for Sick Family Member

<table>
<thead>
<tr>
<th></th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes, unpaid</td>
<td>10.1%</td>
<td>4.2%</td>
</tr>
<tr>
<td>Yes, partially paid</td>
<td>13.2</td>
<td>1.1</td>
</tr>
<tr>
<td>Yes, fully paid</td>
<td>17.9</td>
<td>5.5</td>
</tr>
<tr>
<td>No, never</td>
<td>60.9</td>
<td>89.6</td>
</tr>
</tbody>
</table>

### Since Entering Practice of Law, Due to Family Responsibilities, Have:

<table>
<thead>
<tr>
<th></th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Worked part-time</td>
<td>11.9%</td>
<td>2.3%</td>
</tr>
<tr>
<td>Otherwise reduced hours worked</td>
<td>26.0</td>
<td>18.4</td>
</tr>
<tr>
<td>Changed jobs/position</td>
<td>14.2</td>
<td>5.8</td>
</tr>
<tr>
<td>Left law practice for some time</td>
<td>5.1</td>
<td>1.0</td>
</tr>
</tbody>
</table>

### Sought Extension or Other Schedule Accommodation Due to Pregnancy or Family Responsibility of Self or Spouse

<table>
<thead>
<tr>
<th></th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Self</td>
<td>18.7%</td>
<td>11.5%</td>
</tr>
<tr>
<td>Spouse</td>
<td>2.3</td>
<td>6.4</td>
</tr>
</tbody>
</table>

*Note: attorneys could choose more than one option.

**Degree of Comfort Requesting Accommodation.** We asked attorneys to respond to the following question: "I feel comfortable requesting scheduling accommodations from the Court because of my own family responsibilities or those of my clients." Married women with children were much less comfortable requesting accommodation because of family responsibilities than were married men with children. There were no significant differences between men and women, when both sexes were unmarried and without children.
The results revealed that the group of attorneys most likely to need a variety of schedule and work accommodations due to family responsibilities was the least comfortable requesting them. Interestingly, the survey also revealed that attorneys who never made such requests (most of the men, as well as unmarried women and women without children) responded they would not be uncomfortable making such a request.

**Balancing Work and Family.** We asked attorneys the extent of their agreement with the statement: *"It has been difficult for me to balance the demands of legal practice with family responsibilities."* Women were more likely to agree with this statement than men. Gender differences remained after statistically controlling for the number of years of experience.

Responses also differed significantly by marital status. Attorneys who were married, divorced or separated reported greater difficulty balancing the demands of legal practice and family responsibilities compared to those who had never married. Moreover, women with children under age 18 living at home reported substantially more difficulty balancing work and family responsibilities than any other group of respondents. Thus the need for flexibility is not attributable to gender as such, but rather to the uneven distribution of family responsibilities and possibly the different expectations for women and men.

\[ egin{array}{c}
\text{Agree} \\
\text{Disagree}
\end{array} \]

- **Female Attorneys:**
  - Scale Mean: 3.5

- **Male Attorneys:**
  - Scale Mean: 2.5

"It has been difficult for me to balance the demands of legal practice with family responsibilities." Note: Values on this item can range from 1 ("strongly disagree") to 5 ("strongly agree").

The judges’ survey showed that 65% of the judges had received requests for scheduling accommodations due to family reasons either
“sometimes” or “often.” Overall, the judges tended to believe that conflicts due to illness or childbirth should receive more serious consideration for scheduling accommodations than other sorts of conflicts (e.g., with depositions or state trials). Almost all judges (91.8%) concurred that a pregnant attorney should be allowed a continuance to accommodate the baby's due date. There was less judicial agreement, however, about accommodating an expectant father's request for a continuance when trial conflicted with the baby's due date. A very high percentage (81.4%) of the judges would permit such a continuance, but 8.3% disagreed. Similarly, a long-standing family event, such as a wedding or graduation, would be accommodated by 74.2% of the judges, with 9.3% disagreeing with such an accommodation.

Beyond events of the proportion of serious emergencies, childbirth and weddings or graduations, the accommodation of family needs in court scheduling meets with greater disagreement. A much smaller percentage of judges (63.9%) would agree to seriously consider recessing trial at 4:30 p.m. to allow an attorney to pick up children at day care. Other judges either would not do so (15.5%) or were neutral on the subject (20.6%). Similarly, 19.6% were neutral regarding accommodation for an unexpected school cancellation, while 9.3% would refuse to consider such a continuance and 71.2% would seriously consider it.

The judges were less willing to consider the following non-family grounds for scheduling accommodations. Most judges (62.1%) would not consider continuing a sentencing hearing for a scheduled deposition. While 19.6% would not consider rescheduling a trial due to a state court conflict, 50.5% were neutral on the point. There were no gender differences in the judges' responses to these issues.

**Attorney and Judge Comments.** Several attorneys added written comments to their surveys concerning the issues of work and family life. For example, several noted that they were “extremely uncomfortable” or “had problems” asking for a matter to be continued in federal court for family reasons. At least three respondents recounted specific instances in which continuances requested due to the birth of a child were denied. This occurred at both the trial and appellate level even though opposing counsel had agreed to the request. One woman, whose request for a one-week continuance for trial was denied during an “extremely difficult pregnancy,” stated that “it was an experience I will not forget and that permanently colored my view of the Court.” Shortly thereafter, she decided to “get out of litigation” and become an in-house counsel at a corporation.

Fathers, too, commented on the difficulty of balancing federal litigation and family responsibilities: “My most frustrating experience
was when a district court judge refused to grant a continuance for trial when my wife gave birth to our first child six weeks premature even when the opposing counsel consented to a continuance.”

Although one attorney “wholeheartedly opposed modifying the justice system in any respect to accommodate family life, child care, family leave,” the theme of several comments was that the federal courts “should be more sensitive” to reasonable requests to reschedule hearings, trials, and arguments for legitimate family-related reasons: “A little more sensitivity to motions for extensions of time would be nice because of family balancing.”

Only a few judges added written comments to their surveys concerning the issue of scheduling accommodations. One judge strongly agreed that a continuance should be granted to a pregnant attorney due to a conflict with her expected date for childbirth “unless the case is one in which delay would do serious harm to the litigants.” Other judges indicated that they would consider requests for continuances because of a family emergency “but [the attorney] should try to get another attorney to step in” or “they should have backup.” On the issue of an advance request to adjourn court at 4:30 p.m. on two trial days to allow the attorney to pick up children at day care, one judge wrote that it would depend on the other parties and circumstances, but “if all others had been able to work out care arrangements, [it] may not be fair.”

IV. SUMMARY OF FINDINGS

Since 1980, the number of women judges has increased almost sevenfold in the Eighth Circuit. In 1997, there was one woman on the court of appeals, and there were seven female district court judges, four female bankruptcy judges and seven female magistrate judges. Nonetheless the national percentage of female federal judges collectively is 17.8%, but in the Eighth Circuit the percentage of women judges was below 13%. Thus, although the number of female judges in the Eighth Circuit has increased since 1980, the Circuit today has proportionately somewhat fewer women judges when compared to the national collective circuit average.

Over 90% of judges were married and had children. Only 28% of judges had children under the age of 18 living at home.

On average, women judges are younger, have fewer years-of-practice experience and fewer years on the bench than male judges. However, when female judges are compared to male judges of the same age, there are no significant differences in years-of-practice experience or years on the bench. Overall, more recent appointees are younger and have fewer years of legal practice.
J udges, both men and women, most frequently reported the following areas of specialization in legal practice: personal injury, commercial litigation, and criminal law. Nineteen judges reported specialties in civil rights or employment/labor. Over half of the judges reported prior judicial experience.

Judges, both men and women, most frequently cited private practice or government practice (state or local agency, United States Attorney's Office, or other federal agency) as past positions. None of the respondent judges had been an attorney in a Federal Public Defender's office.

Women constitute from 11.8% to 19.2% of the attorneys practicing in the federal courts of the Eighth Circuit, which is slightly less than the percentage of women practicing nationwide (23%).

Women attorneys in the Eighth Circuit are less likely to be married or to have minor children living at home than their male counterparts across all age groups, a statistic likely reflecting the difficulty women face in combining marriage and often-disproportionate child rearing responsibilities with a demanding professional career.

The overwhelming majority of attorneys practicing in the Eighth Circuit are engaged in private practice. The survey showed, however, that women are significantly less likely than men to achieve partner status across nearly all experience levels.

Consistent with national averages, women are proportionately more likely to be employed as government attorneys than are men. Among federal government attorneys, men were more likely to be U.S. Attorneys or Assistant U.S. Attorneys, whereas women were more likely to be attorneys for other federal, state and local government agencies.

Male government attorneys reported that they spent more time in the courtroom than did female government attorneys, perhaps because men were more likely to be Assistant U.S. Attorneys.

The survey results challenged the sometimes-heard assertion that government practice is a "mommy track" for female attorneys, as there was no significant difference in the proportion of mothers with children under the age of 18 living at home in private practice, government practice, or practice in private/public entities.

No significant difference was found between the frequency with which male and female attorneys report serving as "lead counsel" in federal cases. Analysis of attorney survey data suggests that differences in the frequency of court appearances and jury trials between men and women are not due to gender as such, but to differences in years-of-practice experience. Among attorneys with more than five
years' experience, women are less likely than men to appear in bench trials in federal court.

In the civil practice area, male attorneys outnumber female attorneys four to one. The docket study demonstrated that female attorneys were more prevalent in the district courts in the areas of tax, social security and civil rights/employment, whereas men were more prevalent in cases involving securities, intellectual property, and products liability/personal injury than they were in district court practice overall.

In the area of criminal law, the one-year docket study revealed that there are eight male attorneys practicing as attorneys of record for every one female attorney. Survey data reflected that twice as many men as women serve as criminal defense counsel.

Marital status, as well as gender, appears to affect the abilities of attorneys to balance work and family. Married, divorced and separated attorneys, both men and women, reported greater difficulty achieving a balance than did those who had never married. Women were significantly more likely to find it difficult to balance their work and family obligations.

According to the survey analysis, female attorneys were significantly more likely to have changed their work schedules or requested accommodations from the court for reasons of family responsibilities. Women with children under the age of 18 living at home reported substantially more difficulty balancing work and family than any other group of attorneys.

Nearly two-thirds of the judges reported that they received requests for scheduling or accommodations due to family responsibilities often or sometimes. The majority of judges were of the opinion that serious consideration should be given to such requests. A small minority of judges, however, expressed the view that such requests did not merit serious consideration. Some attorneys, male and female, described what they viewed as unfair denials of accommodations for childbirth and pregnancy.

Chapter 2
CIVIL PRACTICE IN THE EIGHTH CIRCUIT

In the summer and fall of 1994, we convened a variety of focus groups to assist us in understanding the gender fairness issues of concern in the civil practice area. The focus groups suggested a large number of topics from which were selected those we thought were the most important and most productive to study. We did not intend the study to be all inclusive. Certainly the exploration of gender fairness in the federal courts knows no bounds, but can and often does surface
in the most isolated areas of contact between judges, attorneys, court employees, jurors, litigants, court reporters, and indeed, members of the public who view the administration of justice in the courts.

We decided to look specifically at the following areas: (a) gender composition of attorneys in civil practice; (b) policies for appointment and gender composition of attorneys appointed in civil cases; (c) the conduct of civil litigation as seen by attorneys and judges; (d) the handling of sex discrimination cases; (e) jury selection and composition; and (f) civil jury instructions and local court rules.

As will be discussed below, some of our data in this area seems to run counter to common preconceptions. We did note, however, some important gender-based differences in a variety of areas, such as in both the incidence and effects of discovery disputes and uncivil behavior. We will discuss these and other findings in detail as we proceed.

I. CIVIL PRACTITIONERS OF RECORD

In order to form a picture of the attorneys practicing civil law within the Court of Appeals and the ten districts of the Eighth Circuit, the Task Force analyzed the computerized court records of attorneys of record on cases filed within the Circuit from July 1994 to June 1995.34

According to the data bases for the district courts and the court of appeals for July 1994 to July 1995, there were 14,783 attorneys involved in civil cases filed in the district courts, 82.0% male and 16.4% female. The gender of 1.6% could not be determined from the data we had. We also analyzed the data on appellate civil practitioners and of the 4,347 attorneys of record on civil cases appealed to the Eighth Circuit, 80.0% were male and 20.0% were female. The following table sets forth these data for each district and for the Court of Appeals.

34. "Civil attorneys of record" includes only those attorneys of record on civil cases in the district courts and in the Court of Appeals. Although an attorney's name could be on record more than once, the attorney is counted only once.
Civil Practice Attorneys of Record by Gender: July 1994 - June 1995

<table>
<thead>
<tr>
<th>District Courts</th>
<th>Total No. of Attorneys</th>
<th>No. of Male Attorneys</th>
<th>Males as % of Total</th>
<th>No. of Female Attorneys</th>
<th>Female as % of Total</th>
<th>No. of &quot;Gender Not Available&quot; Attorneys</th>
<th>&quot;Not Available&quot; as % of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>E.AR</td>
<td>1408</td>
<td>1170</td>
<td>79.7%</td>
<td>235</td>
<td>16.0%</td>
<td>3</td>
<td>.2%</td>
</tr>
<tr>
<td>W.AR</td>
<td>952</td>
<td>816</td>
<td>85.7%</td>
<td>135</td>
<td>14.2%</td>
<td>1</td>
<td>.1</td>
</tr>
<tr>
<td>N.IA</td>
<td>817</td>
<td>686</td>
<td>84.0%</td>
<td>120</td>
<td>14.6%</td>
<td>11</td>
<td>1.4</td>
</tr>
<tr>
<td>S.IA</td>
<td>1136</td>
<td>920</td>
<td>81.0%</td>
<td>200</td>
<td>17.6%</td>
<td>16</td>
<td>1.4</td>
</tr>
<tr>
<td>MN</td>
<td>3360</td>
<td>2681</td>
<td>79.8%</td>
<td>578</td>
<td>17.2%</td>
<td>101</td>
<td>3.0</td>
</tr>
<tr>
<td>E.MO</td>
<td>2584</td>
<td>2109</td>
<td>81.6%</td>
<td>450</td>
<td>17.4%</td>
<td>25</td>
<td>.4</td>
</tr>
<tr>
<td>W.MO</td>
<td>2298</td>
<td>1846</td>
<td>80.3%</td>
<td>413</td>
<td>18.0%</td>
<td>39</td>
<td>2.4</td>
</tr>
<tr>
<td>NE</td>
<td>1245</td>
<td>1029</td>
<td>82.7%</td>
<td>188</td>
<td>15.1%</td>
<td>28</td>
<td>2.3</td>
</tr>
<tr>
<td>ND</td>
<td>382</td>
<td>335</td>
<td>87.7%</td>
<td>42</td>
<td>11.0%</td>
<td>5</td>
<td>1.3</td>
</tr>
<tr>
<td>SD</td>
<td>601</td>
<td>524</td>
<td>87.2%</td>
<td>67</td>
<td>11.2%</td>
<td>10</td>
<td>3.1</td>
</tr>
<tr>
<td>Total Districts</td>
<td>14783</td>
<td>12116</td>
<td>82.0%</td>
<td>2428</td>
<td>16.4%</td>
<td>239</td>
<td>1.6</td>
</tr>
<tr>
<td>Court of Appeals</td>
<td>4347</td>
<td>3476</td>
<td>80</td>
<td>868</td>
<td>20</td>
<td>3</td>
<td>.1</td>
</tr>
</tbody>
</table>

II. ATTORNEY APPOINTMENTS IN CIVIL CASES

The Task Force utilized the statistical information provided by the respective clerks of district court to analyze the implementation of the policies for appointments and gender composition of attorneys appointed in civil cases. In the civil practice area, appointments are made in three types of cases: prisoner habeas cases, prisoner civil rights cases, and Title VII cases. Generally, the right to payment of attorney's fees is established by statute, and the amount of attorney's fees awarded is established by the court based on specific criteria. Only prevailing parties can recover attorneys fees in civil rights and Title VII cases.

As a part of a data request made to the district court clerks, the Task Force requested information about the policies and appointments of attorneys in civil cases. The responses revealed great variation in practices and in results. The written responses were followed up, in some cases, by interviews with court clerks and judges.

Three districts provided written appointment policies: Eastern Arkansas and Western Arkansas (joint plan) and Minnesota. In the Northern and Southern Districts of Iowa, the courts have contracted with two law firms to handle prisoner civil rights cases. In the other

five districts, the procedures for appointment of attorneys in civil cases are unwritten. Seven districts provided gender composition data for attorneys appointed in civil cases. However, three districts were unable to provide statistics on appointment or gender of appointed attorneys.

In the districts that provided data, the female proportion of attorneys appointed ranged from 5% (in a district with a written plan) to 26% (in a district with no written plan). Of the total 302 attorneys appointed in these districts, 17.9% were female and 82.1% were male. Of the total 312 civil cases for which we have data, 19.2% were handled by women and 80.8% were handled by men.

The plans and statistical data provided lead us to conclude that the existence of a written plan to appoint attorneys to civil cases does not guarantee gender fairness in appointments. We also note that, while there were small numbers of women appointed in some districts, the average proportion of female attorneys appointed to civil cases in the five districts that provided data is generally equivalent to the proportion of female attorneys of record practicing in the district courts (16.4%). The appointment data, however, were incomplete and the numbers are too small to support any reliable conclusions.

III. THE CONDUCT OF CIVIL LITIGATION

The Task Force attorney survey and judge survey addressed matters of particular concern in the area of civil litigation, such as attorney fee awards, settlement negotiations, discovery, and the litigation of sex discrimination cases. Our findings on these various topics are discussed below.

A. ATTORNEYS' FEES ISSUES

Thirty percent of the attorneys sampled (440 women; 921 men) indicated having participated in civil litigation in which they requested the award of attorneys' fees and answered questions regarding their most recent fee awards. No gender differences were found in the hourly rates requested by attorneys or in the hourly rates received by attorneys. However, the reduction of hours was significantly related to gender. Notably, female attorneys reported reductions in hours significantly more frequently than male attorneys (46.5% vs. 39.1%).

Holding the amount of fee requested constant, the gender difference in hour reduction disappeared. Holding experience constant, gender was significantly associated with a reduction in hours only for attorneys practicing fewer than 5 years, with more women in this tenure group having had their hours reduced. No gender difference was
noted in frequency of reduction of hours at any other tenure level when experience was held constant. Finally, no association was found between reduction in hours and area of civil practice specialization. Thus, among new professionals (those practicing less than 5 years), women were significantly more likely to have their hours reduced (potentially reducing their earnings) than their male counterparts.

B. NEGOTIATION/SETTLEMENT

In the area of settlement issues, we first asked attorneys how frequently they had reached successful settlements for their clients with the assistance of either a judge or an alternative dispute resolution professional. Both male and female attorneys reached successful settlements with the aid of judges more frequently than with the aid of an alternative dispute resolution professional ("ADRPs"), although women compared to men reported slightly more frequent successful settlements using an ADRP. Conversely, men found judges helpful more frequently than did women in achieving successful settlements. However, a majority of both male and female attorneys had not reached successful settlements with the assistance of either judges or ADRPs, which likely reflects the fact that many civil cases settle without the involvement of judges or ADRPs.

Second, we asked attorney respondents whether they had been pushed to settle a case that they preferred to try (or appeal) at the insistence of either a judge or an ADRP. Survey respondents reported that judges pushed settlements significantly more frequently than ADRPs, but described these behaviors as rare occurrences. Seventy-one percent of the women and 73.4% of men reported never being pushed to settle a case by a judge, and 87.3% of the women and 90.5% of the men reported never being pushed to settle a case by an ADRP.

Third, the survey questioned the attorneys about having accepted a less favorable settlement or plea bargain in a case because a judge demonstrated, by words or conduct, bias against an attorney, litigant, or witness of a particular gender. Almost all attorneys, male and female, reported that they had never accepted a less favorable outcome due to perceived bias on the part of the judge. Ninety-two percent of women and 98% of men reported they never accepted a less favorable outcome due to a perceived bias against a female attorney, litigant or witness by the judge; ninety-six percent of women and 94% of men reported they never accepted a less favorable outcome due to a perceived bias against a male attorney, litigant or witness by the judge. With respect to the remaining minority, female attorneys were more likely to report that a judge's demonstration of bias against women had influenced them to accept less favorable settlements more fre-
Finally, the majority of attorneys reported that gender of counsel made little difference in the likelihood of settlement of civil litigation. However, nearly 1 in 10 respondents felt that settlement is least likely when male and female counsel oppose each other.

The attorney survey examined opinions concerning the conduct of attorneys in settlement negotiations. Significant gender differences emerged for each part of this question. First, in response to questions about effectiveness in negotiation, male attorneys agreed considerably more strongly with the statement “male attorneys are effective negotiators” than with the statement “female attorneys are effective negotiators.” The reverse was true for female respondents, who rated women negotiators as more effective than male negotiators.

Attorney respondents also disclosed the extent to which they perceived female and male attorneys as frequent users of power tactics or emotional tactics during settlement negotiations. Men reported that male and female attorneys used power tactics with similar frequency; women, however, rated male attorneys as considerably more likely to use power tactics than female attorneys. Men reported that women used emotional tactics somewhat more frequently than male attorneys, whereas women reported the opposite.

Finally, men reported that male and female attorneys use annoying and unpleasant tactics with similar frequency during settlement negotiations. Women, however, perceived male attorneys as using such tactics much more frequently than female attorneys. The following table presents these findings and shows the proportions of attorneys agreeing or disagreeing with the various survey questions on attorney conduct in settlement negotiations:

<table>
<thead>
<tr>
<th>Conduct of Attorneys in Settlement Negotiations</th>
<th>Female Attorneys</th>
<th>Male Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Generally, Male Attorneys Are Effective Negotiators</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Agree or Strongly Agree</td>
<td>34.0%</td>
<td>40.2%</td>
</tr>
<tr>
<td>Disagree or Strongly Disagree</td>
<td>18.3</td>
<td>7.3</td>
</tr>
<tr>
<td>Neutral</td>
<td>47.8</td>
<td>52.6</td>
</tr>
<tr>
<td>Generally, Female Attorneys Are Effective Negotiators</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Agree or Strongly Agree</td>
<td>46.0%</td>
<td>34.2%</td>
</tr>
<tr>
<td>Disagree or Strongly Disagree</td>
<td>9.5</td>
<td>11.9</td>
</tr>
<tr>
<td>Neutral</td>
<td>44.5</td>
<td>53.8</td>
</tr>
</tbody>
</table>
Male Attorneys Often Use Power Tactics

<table>
<thead>
<tr>
<th></th>
<th>Agree or Strongly Agree</th>
<th>Disagree or Strongly Disagree</th>
<th>Neutral</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male Attorneys</td>
<td>74.5%</td>
<td>44.2%</td>
<td>3.4</td>
</tr>
<tr>
<td>Female Attorneys</td>
<td>32.5%</td>
<td>36.4%</td>
<td>29.8</td>
</tr>
</tbody>
</table>

Male Attorneys Often Use Emotional Tactics

<table>
<thead>
<tr>
<th></th>
<th>Agree or Strongly Agree</th>
<th>Disagree or Strongly Disagree</th>
<th>Neutral</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male Attorneys</td>
<td>29.9%</td>
<td>20.7%</td>
<td>44.3</td>
</tr>
<tr>
<td>Female Attorneys</td>
<td>25.3%</td>
<td>27.3%</td>
<td>47.5</td>
</tr>
</tbody>
</table>

Male Attorneys Use Annoying & Unpleasant Negotiation Styles

<table>
<thead>
<tr>
<th></th>
<th>Agree or Strongly Agree</th>
<th>Disagree or Strongly Disagree</th>
<th>Neutral</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male Attorneys</td>
<td>61.4%</td>
<td>35.0%</td>
<td>8.8</td>
</tr>
<tr>
<td>Female Attorneys</td>
<td>28.1%</td>
<td>29.4%</td>
<td>46.6</td>
</tr>
</tbody>
</table>

C. Discovery

Seventy-six percent of the attorney sample (2,420 men and 1,079 women) reported that they had participated in discovery in the federal courts during the last five years and thus were asked to respond to survey questions on discovery. Eighty-five percent of the responding judges (86 judges) answered that they had ruled on discovery matters within the previous five years and were screened into questions concerning attorney requests for intervention.

1. Hostile Discovery

We assessed observations of “unreasonably intrusive, offensive, or hostile” interrogatories, depositions, or document requests involving
female and male parties. Overall, approximately one-third of the sample indicated observing such situations over the previous five years. However, around 20% had witnessed this occurring to female parties “sometimes,” “often,” or “many times.” Fewer than 16% reported this occurring to male parties with similar frequency. Female attorneys reported observing hostile tactics considerably more frequently than male attorneys, regardless of the gender of the party involved. Attorneys of both genders reported observing hostile tactics involving female parties more frequently than with male parties. These findings did not change even when years of legal practice for attorneys were held constant.

2. Physical or Mental Examinations

Approximately 1 in 5 attorneys reported some experience with respect to physical or mental examinations conducted “in an unreasonably annoying, embarrassing or oppressive manner.” Female attorneys were more likely to report such inappropriate examinations occurred (regardless of the gender of the examinee). Additionally, attorneys (both male and female) reported more frequent inappropriate exams being conducted on female compared with male examinees. These findings did not change even when years of legal practice for attorneys were held constant.

<table>
<thead>
<tr>
<th>Attorneys Reporting Unreasonable Examinations</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Unreasonably annoying, embarrassing or oppressive physical or mental exams:</strong></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Never</td>
</tr>
<tr>
<td>Rarely</td>
</tr>
<tr>
<td>Sometimes</td>
</tr>
<tr>
<td>Often</td>
</tr>
<tr>
<td>Many Times</td>
</tr>
</tbody>
</table>

We analyzed the relationship between observations of unreasonably hostile mental or physical examinations and areas of specialization (holding years of experience constant). Attorneys specializing in sex discrimination, civil rights or employment law were more likely to

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38. These analyses excluded those attorneys who described having “no opportunity to observe” interrogatories, depositions, or document requests in the previous five years.

39. These analyses excluded attorneys reporting “no experience” with physical or mental examinations in the previous five years.
report frequent observations of hostile physical and mental examinations compared to those in other areas of civil practice. Additionally, the attorneys who specialized in sex discrimination, civil rights or employment law reported a higher frequency of unreasonably hostile physical and mental examinations of women than men. In contrast, attorneys specializing in other areas of civil practice reported no such difference.

Judges were also asked to indicate how frequently they received requests for intervention in connection with “physical or mental examinations in which the conduct of the doctor or psychologist was alleged to be unreasonably annoying, embarrassing, or oppressive” in the context of male and female examinees respectively. Requests for court intervention in connection with hostile physical or mental examinations were quite rare, with 78.8% of the judges responding that they had never been asked to intervene and 13.8% responding that such requests were made once or twice. In those instances where intervention was requested, the judges reported the examinees were as likely to be male as female.

3. Discovery Disputes

A separate section of our survey measured the frequency with which attorney respondents experienced serious disputes (i.e., lack of cooperation in scheduling depositions, unreasonable delays in responding to discovery requests) or uncivil behavior from opposing counsel during discovery. Overall, approximately half of the attorney sample described such behavior occurring “sometimes,” “often,” or “many times.” Female attorneys reported experiencing these incidents significantly more often than did male attorneys. Even when years of experience were held constant, female attorneys were still more likely than male attorneys to report lack of cooperation, unreasonable delays, and uncivil behavior from opposing counsel during discovery. These findings did not change even when years of experience were held constant.

Relationship to Satisfaction with the Profession. Not only were discovery disputes experienced more frequently by women than men, but such disputes also had a more negative impact on female participants than on their male counterparts. For both female and male attorneys, more frequent discovery disputes were associated with lower satisfaction with the profession. However, the effect of this lowered satisfaction was stronger for female attorneys than for male attorneys. Finally, as discovery disputes became more frequent, female and male attorneys’ job stress increased at similar rates.
Judicial Intervention with Discovery Disputes. Women were somewhat more likely than their male colleagues to report seeking judicial assistance to resolve hostile discovery disputes. Approximately three-quarters of the female respondents had sought assistance at some point over the previous five years, compared to two-thirds of the men.

<table>
<thead>
<tr>
<th>Attorneys Seeking Judicial Intervention</th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>25.7%</td>
<td>33.1%</td>
</tr>
<tr>
<td>Rarely</td>
<td>27.1</td>
<td>33.8</td>
</tr>
<tr>
<td>Sometimes</td>
<td>37.1</td>
<td>28.1</td>
</tr>
<tr>
<td>Often</td>
<td>7.1</td>
<td>4.0</td>
</tr>
<tr>
<td>Many Times</td>
<td>2.0</td>
<td>1.0</td>
</tr>
</tbody>
</table>

Of those attorneys who sought such assistance, more women (31%) than men (26%) reported that the judge did not intervene effectively.

<table>
<thead>
<tr>
<th>Attorneys Reporting Results of Judicial Intervention</th>
<th>Overall</th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge Intervened Effectively</td>
<td>72.0%</td>
<td>68.7%</td>
<td>74.2%</td>
</tr>
<tr>
<td>Judge Did Not Intervene Effectively</td>
<td>28.0</td>
<td>31.3</td>
<td>25.8</td>
</tr>
</tbody>
</table>

We asked attorneys the reasons they chose not to seek judicial assistance. Women were more likely than their male colleagues to believe that the judge would not intervene, or that such a request would not be in their client's or their own best interest.

<table>
<thead>
<tr>
<th>Reasons for Not Seeking Judicial Assistance</th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;I handled the issue myself&quot;</td>
<td>35.8%</td>
<td>37.8%</td>
</tr>
<tr>
<td>&quot;I believed the judge would not intervene&quot;</td>
<td>11.7</td>
<td>8.0</td>
</tr>
<tr>
<td>&quot;I believed such a request would not be in my client's best interest&quot;</td>
<td>13.1</td>
<td>8.5</td>
</tr>
<tr>
<td>&quot;I believed such a request would not be in my best interest&quot;</td>
<td>7.1</td>
<td>3.0</td>
</tr>
</tbody>
</table>

* Note: attorneys could choose more than one option

In order to assemble information on discovery issues from the court's perspective, we asked judges how often attorneys requested court intervention in connection with serious disputes, petty disputes,
and incivility during the process of litigation. Judges reported that intervention related to incivility was requested less often than intervention requests for serious or petty disputes.

<table>
<thead>
<tr>
<th>Judges Reporting Frequency of Attorney Requests for Court Intervention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Serious Disputes</td>
</tr>
<tr>
<td>------------------</td>
</tr>
<tr>
<td>Never</td>
</tr>
<tr>
<td>Once or Twice</td>
</tr>
<tr>
<td>Sometimes</td>
</tr>
<tr>
<td>Often</td>
</tr>
<tr>
<td>Many Times</td>
</tr>
</tbody>
</table>

Judges reported that intervention requests in connection with a deposition in which an attorney's conduct was alleged to be unreasonably hostile or intimidating were relatively infrequent. In such cases, judges reported the deponents were significantly more likely to be male.

Judges were asked whether their intervention had ever been sought in connection with other discovery requests that were “alleged to be unnecessarily personal, intrusive, or offensive.” Most judges reported that such requests for court intervention were made infrequently. When they were made, however, the litigant was equally likely to be male as to be female.

Responding judges were also asked a series of questions concerning whether and how often they had been asked by attorneys to intervene in discovery or court proceedings during the past five years to address conduct that was argued to be inappropriate gender bias. Most judges (73.1%) had never been asked to intervene to address inappropriate gender bias, and the remainder reported that this had occurred only once or twice. Thirty percent of responding judges indicated they intervened in court proceedings to address conduct that they considered to be inappropriate gender bias at the request of an attorney, and 39.6% indicated they intervened to address such conduct sua sponte.
### Judges Indicating Frequency of Requested or Actual Intervention to Address Inappropriate Gender Bias

<table>
<thead>
<tr>
<th>Intervention Requested by an Attorney</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>72.9%</td>
</tr>
<tr>
<td>Once or Twice</td>
<td>21.9</td>
</tr>
<tr>
<td>Sometimes</td>
<td>5.2</td>
</tr>
<tr>
<td>Often</td>
<td>0.0</td>
</tr>
<tr>
<td>Many Times</td>
<td>0.0</td>
</tr>
</tbody>
</table>

### Actual Intervention upon Request of an Attorney

<table>
<thead>
<tr>
<th></th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>69.9%</td>
</tr>
<tr>
<td>Once or Twice</td>
<td>19.4</td>
</tr>
<tr>
<td>Sometimes</td>
<td>10.8</td>
</tr>
<tr>
<td>Often</td>
<td>0.0</td>
</tr>
<tr>
<td>Many Times</td>
<td>0.0</td>
</tr>
</tbody>
</table>

### Actual Intervention Sua Sponte

<table>
<thead>
<tr>
<th></th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>60.6%</td>
</tr>
<tr>
<td>Once or Twice</td>
<td>26.6</td>
</tr>
<tr>
<td>Sometimes</td>
<td>9.6</td>
</tr>
<tr>
<td>Often</td>
<td>3.2</td>
</tr>
<tr>
<td>Many Times</td>
<td>0.0</td>
</tr>
</tbody>
</table>

The judges were further asked the status of the person(s) whose conduct in these situations manifested bias. Because each respondent could indicate more than one person, these values will not sum to 100%. The vast majority of judges reported that the gender bias was exhibited by attorneys.

### Status of the Person Whose Conduct Manifested Bias

<table>
<thead>
<tr>
<th>Person</th>
<th>Percent</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge</td>
<td>4.7%</td>
<td>2</td>
</tr>
<tr>
<td>Attorney</td>
<td>100.0</td>
<td>43</td>
</tr>
<tr>
<td>Bankruptcy Trustee</td>
<td>0.0</td>
<td>0</td>
</tr>
<tr>
<td>Juror</td>
<td>2.3</td>
<td>1</td>
</tr>
<tr>
<td>Litigant</td>
<td>18.6</td>
<td>8</td>
</tr>
<tr>
<td>Witness</td>
<td>22.7</td>
<td>10</td>
</tr>
<tr>
<td>Court Personnel</td>
<td>9.1</td>
<td>4</td>
</tr>
<tr>
<td>Other</td>
<td>0.0</td>
<td>0</td>
</tr>
</tbody>
</table>
IV. SEX DISCRIMINATION CASES IN THE EIGHTH CIRCUIT

Approximately 20% of the attorney sample (2663 men and 1004 women) had participated in sex discrimination litigation during the previous five years. There were no differences between men and women in their orientation toward plaintiff or defense work. Somewhat over 60% of the sample represented all or almost all defendants, whereas slightly fewer than 30% tended to represent mostly plaintiffs. Fewer than 10% reported representing relatively equal numbers of plaintiffs and defendants. As noted in Chapter 1, “Demographic Summary,” this area of practice has the highest concentration of female attorneys.

Judges were asked whether they had presided over or ruled upon matters in sex discrimination cases or appeals during the past five years in the Eighth Circuit. Seventy-seven respondents, or 75.5% of the sample, indicated that they had such experience. Only these 77 judges were included in subsequent analyses in this section.

It is well known that most claims of sex discrimination are made by women, but the court dockets did not permit us to determine the relative proportion of female and male plaintiffs. However, the St. Louis District of the U.S. Equal Employment Opportunity Commission provided statistical data concerning the filing of sex discrimination charges. These data cover eastern Missouri and 16 counties in Illinois. The statistics show that of the 551 persons filing sex discrimination charges with this EEOC office in calendar year 1995, 86% were women and 14% were men. These data provide a framework for analyzing the findings in this area of law.

A. DISCRIMINATION LITIGATION PROCESS

A number of single items were included in the attorney survey to assess the attorneys' observations of the process of sex discrimination litigation. In general, the effects of the type of practice (plaintiff or defense) were stronger and more numerous than the effects of the gender of the attorney. In other words, those attorneys representing plaintiffs (who more mostly women) in most cases viewed the process quite differently from those representing defendants. The only clear-cut gender difference was that men were more likely to report that discrimination cases are decided promptly and without undue delay.

One-third of plaintiffs' attorneys and one-quarter of defendants' attorneys reported that discrimination cases had been pushed through the courts without adequate time (sometimes/often/many times). Twenty-nine percent of plaintiffs' attorneys and 11% of defendants' attorneys reported judges indicated that such cases are frivolous, unimportant, or undeserving of federal court time (sometimes/often/many
times). When judges were asked whether they agreed that discrimination cases were undeserving of federal court time because “the issues are trivial,” a majority expressed disagreement or strong disagreement (53.4%). A substantial minority reported a neutral opinion on the issue (35.6%) and a small number (10.9%) suggested that they agreed or strongly agreed.

Judges were also asked whether plaintiffs often file pretrial motions that are undeserving of federal court time. Approximately half of the respondents (45.8%) indicated a neutral opinion on the issue whereas the other half (44.4%) expressed disagreement or strong disagreement. A very small number (4.7%) agreed or strongly agreed with the idea. When asked a similar question about defendants' filing pretrial motions, exactly half again expressed a neutral opinion (50.0%), whereas 33.8% indicated disagreement/strong disagreement and 16.3% indicated agreement/strong agreement. Although judge respondents in general believed that frivolous motions were rare, they were less likely to express this opinion concerning motions made by defendants as opposed to plaintiffs' motion.

B. DISCOVERY TACTICS

Attorneys and judges were surveyed about discovery tactics in sex discrimination cases. Plaintiffs' attorneys were more likely than defendants' attorneys to report that discovery was inappropriately intrusive into personal lives, sexual behavior or medical history of parties and/or witnesses. Plaintiffs' attorneys reported such discovery tactics occurred “sometimes” (29.7%), “often” (16.7%), or “many times” (6.1%) while defendants' attorneys reported such tactics occurred “rarely” (36.3%) or never (46.4%).

Judges were asked to indicate their agreement or disagreement with statements that discovery requests were often overly intrusive into the personal lives, sexual behavior, or medical history of male parties and/or witnesses and female parties and/or witnesses. Judges indicated that such discovery requests were rare, but were more likely to agree that such requests occur with female parties and/or witnesses (13.6% agreed/strongly agreed) than with male parties and/or witnesses (4.1% agreed/strongly agreed).

C. SUMMARY JUDGMENT

One-half of plaintiffs' attorneys and 10% of defendants' attorneys reported that summary judgment was granted too easily to defendants in discrimination cases with some frequency (sometimes/often/many times). The following table illustrates these responses:
Attorneys Reporting Summary Judgment Granted too Readily to Defendants

<table>
<thead>
<tr>
<th></th>
<th>Defense Attorneys</th>
<th>Plaintiff Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>77.1%</td>
<td>30.2%</td>
</tr>
<tr>
<td>Rarely</td>
<td>13.0</td>
<td>16.6</td>
</tr>
<tr>
<td>Sometimes</td>
<td>7.0</td>
<td>32.0</td>
</tr>
<tr>
<td>Often</td>
<td>2.7</td>
<td>11.8</td>
</tr>
<tr>
<td>Many Times</td>
<td>0.2</td>
<td>9.5</td>
</tr>
</tbody>
</table>

Judges reported that summary judgments were granted to defendants much more frequently than plaintiffs. Judges reported that summary judgment in sex discrimination cases was relatively rare for plaintiffs. A very large percentage (83.8%) of the judges indicated that this had occurred either "never" or only "once or twice." Furthermore, a gender difference was found such that female judges indicated that plaintiffs prevailed less frequently, in comparison with the responses of their male counterparts.

<table>
<thead>
<tr>
<th>Judges Reporting Summary Judgments in Sex Discrimination Cases</th>
<th>For Plaintiffs</th>
<th>For Defendants</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>64.9%</td>
<td>9.3%</td>
</tr>
<tr>
<td>Once or Twice</td>
<td>18.9</td>
<td>26.7</td>
</tr>
<tr>
<td>Sometimes</td>
<td>16.2</td>
<td>46.7</td>
</tr>
<tr>
<td>Often</td>
<td>0.0</td>
<td>12.0</td>
</tr>
<tr>
<td>Many Times</td>
<td>0.0</td>
<td>5.3</td>
</tr>
</tbody>
</table>

D. Damage and Fee Awards

Defense attorneys were significantly more likely than plaintiffs' attorneys to report that, when plaintiffs prevailed, compensatory damage awards were adequate, punitive damages were sufficient to punish the defendant and to deter employers from engaging in discriminatory conduct and attorneys' fee awards were high enough to encourage attorneys to take such cases. The greatest disagreement was with respect to punitive damages. Over 80% of defendants' attorneys reported that punitive damages awarded in these cases (sometimes/often/many times) were adequate. Plaintiffs' attorneys disagreed. Only 37% reported that punitive damage awards were adequate to punish defendants and only 20% reported awards were sufficient to deter discriminatory conduct. Finally, both groups of

40. Analyses on these questions excluded attorneys who indicated having "no experience" with these issues.
attorneys agreed that, in cases in which defendants prevailed, defendants were unlikely to be awarded attorneys' fees. The following tables show these responses:

### Attorneys Reporting Adequate Compensatory Damages

<table>
<thead>
<tr>
<th></th>
<th>Defense Attorneys</th>
<th>Plaintiff Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>2.1%</td>
<td>7.7%</td>
</tr>
<tr>
<td>Rarely</td>
<td>4.1</td>
<td>24.5</td>
</tr>
<tr>
<td>Sometimes</td>
<td>32.6</td>
<td>40.6</td>
</tr>
<tr>
<td>Often</td>
<td>38.9</td>
<td>23.8</td>
</tr>
<tr>
<td>Many Times</td>
<td>22.3</td>
<td>3.5</td>
</tr>
</tbody>
</table>

### Attorneys Reporting Punitive Damage Awards Sufficient to Punish Defendant

<table>
<thead>
<tr>
<th></th>
<th>Defense Attorneys</th>
<th>Plaintiff Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>7.5%</td>
<td>30.2%</td>
</tr>
<tr>
<td>Rarely</td>
<td>9.2</td>
<td>42.5</td>
</tr>
<tr>
<td>Sometimes</td>
<td>36.7</td>
<td>16.0</td>
</tr>
<tr>
<td>Often</td>
<td>26.7</td>
<td>9.4</td>
</tr>
<tr>
<td>Many Times</td>
<td>20.0</td>
<td>1.9</td>
</tr>
</tbody>
</table>

### Attorneys Reporting Punitive Damage Awards Adequate to Deter Discrimination

<table>
<thead>
<tr>
<th></th>
<th>Defense Attorneys</th>
<th>Plaintiff Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>7.1%</td>
<td>38.2%</td>
</tr>
<tr>
<td>Rarely</td>
<td>13.5</td>
<td>42.7</td>
</tr>
<tr>
<td>Sometimes</td>
<td>30.2</td>
<td>10.0</td>
</tr>
<tr>
<td>Often</td>
<td>29.4</td>
<td>7.3</td>
</tr>
<tr>
<td>Many Times</td>
<td>19.8</td>
<td>1.8</td>
</tr>
</tbody>
</table>

### Attorneys Reporting Fee Awards High Enough to Encourage Attorneys to Take Cases

<table>
<thead>
<tr>
<th></th>
<th>Defense Attorneys</th>
<th>Plaintiff Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>5.6%</td>
<td>20.0%</td>
</tr>
<tr>
<td>Rarely</td>
<td>8.2</td>
<td>35.4</td>
</tr>
<tr>
<td>Sometimes</td>
<td>26.7</td>
<td>28.5</td>
</tr>
<tr>
<td>Often</td>
<td>32.3</td>
<td>14.6</td>
</tr>
<tr>
<td>Many Times</td>
<td>27.2</td>
<td>1.5</td>
</tr>
</tbody>
</table>
The judges were asked whether they agreed that “plaintiffs often file lawsuits that are undeserving of federal court time, not as a matter of law, but because the maximum damages at issue are insufficient.” The majority of respondents (62.5%) disagreed or strongly disagreed with this statement; the remainder expressed a neutral opinion (29.2%) or agreement/strong agreement (8.4%). No gender differences were seen between the opinions of male and female judges.

E. Effects of New Federal Rules of Evidence

In 1995, Rule 412 of the Federal Rules of Evidence\(^\text{41}\) was extended to civil cases involving alleged sexual misconduct. Subject to due process and constitutional limitations, the rule restricts the admission of evidence of an alleged victim’s past sexual behavior. Approximately 62% of attorney respondents reported not knowing the effects of this rule; of the other 38%, no differences were found between women’s and men’s opinions.

In particular, responses from attorneys who had opinions on the effects of this rule\(^\text{42}\) suggest that by far the greatest effect has been judges’ restricting admission of evidence of a plaintiff’s past sexual history; overall, 72.2% of attorneys who described knowing effects of the rule responded affirmatively to this statement. Opinions were evenly divided (i.e., around half responded “yes” and half responded “no”) on whether discovery into claimants’ sexual histories had become less intrusive, and approximately two-thirds of these attorneys had noticed no difference in the likelihood of plaintiffs’ bringing suit or defendants’ resolving suits by settlement. Significant differences did emerge, however, between plaintiff and defense attorneys, with those representing mostly defendants describing greater pro-plaintiff effects of the new rule.

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42. These analyses excluded those attorneys who responded “don’t know” to these questions.
The judges were asked to indicate their agreement with the statement that, as a result of Rule 412: “Plaintiffs are more likely to bring suit.” Approximately half (43.1%) expressed a neutral opinion to the statement, whereas 37% disagreed or strongly disagreed and 20% agreed or strongly agreed. Similar percentages were seen for the statement: “Defendants are more likely to resolve suits by settlement” (45.3% expressed a neutral opinion, 37.6% indicated disagreement/strong disagreement, and 17.2% indicated agreement/strong agreement). Finally, when asked whether they agreed Rule 412 had “made little difference in the litigation of sex discrimination cases,” the majority (53.7%) expressed agreement/strong agreement and 22.4% disagreed or strongly disagreed.

With respect to Rule 415,43 which applies to civil cases in which a claim for damages is predicated on a party’s alleged commission of sexual assault and allows admission of evidence of commission of a previous similar offense, neither gender nor type of practice affected attorneys’ opinions about the consequences of this rule. Approximately 75% of the attorneys who had participated in sex discrimination litigation reported not knowing the rule’s effects. With respect to attorneys who did report knowing effects, opinions were again evenly divided on whether the rule had increased the likelihood of plaintiffs’ bringing suit, defendants’ settling, or discovery intruding further into defendants’ sexual histories.

Judges were also asked whether Rule 415 has had the effect of increasing the likelihood of plaintiffs’ bringing suit. Like the attorneys, the judges’ responses were fairly evenly distributed across the options (41.9% indicated disagreement/strong disagreement, 32.3% no opinion, and 25.8% agreement/strong agreement). In contrast, when asked whether defendants are more likely to resolve suits by settlement, most indicated either a neutral opinion (41.9%) or agreement (30.6%). Only 27.4% expressed disagreement or strong disagreement. Finally, judges generally tended to agree with the idea that Rule 415 “has made little difference in the litigation of sex discrimination suits.” A slight majority (55.5%) expressed agreement or strong agreement, 25.3% indicated disagreement/strong disagreement, and 19% reported no opinion.

F. EXPERT TESTIMONY IN SEX DISCRIMINATION CASES

The judges were questioned about the usefulness of expert testimony in bench and jury trials. First, they were asked whether expert psychological or medical testimony is useful when assessing credibil-
ity of the plaintiff, welcomeness of any sexual attention, and the nature and extent of damages. The responses indicated that the judges generally considered such testimony to be moderately useful. Expert testimony was perceived to be most useful when assessing "the nature and extent of damages" and least useful when assessing the "welcomeness of any sexual attention."

Additional comparisons examined whether the various types of expert testimony were seen as more useful in bench versus jury trials. In general, few differences were found; judges were likely to view expert testimony as equally useful in jury trials and bench trials.

V. JURY SELECTION, COMPOSITION AND INSTRUCTIONS

A. JURY SELECTION PROCESS

The Jury Selection and Service Act (JSSA), requires each federal district to devise and adopt a plan for the random selection of grand and petit jurors to ensure representation of "a fair cross section of the community in the district or division wherein the court convenes." The statute also requires that each county, parish, or political subdivision be "substantially proportionally represented" in each district's Master Jury Wheel. The key component of the Sixth Amendment "fair cross section" requirement is that "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."

The JSSA states that the names of prospective jurors shall be selected from voter registration lists or lists of actual voters. Other sources of names may be used to supplement the list if necessary to ensure representative jury wheels. In 1974, the Judicial Conference approved a resolution that required the judicial circuits to "review the sampling reports for their districts relating to jury representative data by race and sex," and to take such action as may be necessary to ensure the randomness and non-discrimination requirements of the JSSA are met. Form JS-12 was specially created to comply with this reporting requirement. The most recent modification of the form

47. U.S. Const. amend. VI.
50. Id.
51. JUD. CONF. REP. (Sept. 1974) at 55.
52. Form JS-12 (Rev. 4/91).
requires the district courts to compare statistical samples of the Master Jury Wheel (consisting of the names of all persons who returned juror qualification questionnaire forms) or Qualified Jury Wheel against general population data.\textsuperscript{53} The instructions state that the JS-12 should be maintained by the district court as part of its jury wheel records.\textsuperscript{54}

Juror qualification and grounds for exemption are statutory matters over which the courts have no discretion, with one exception.\textsuperscript{55} The JSSA allows the judges of each district to excuse groups of persons if the court finds and the jury plan states that jury service "would entail undue hardship or extreme inconvenience to the members."\textsuperscript{56} The judges also have broad discretion to excuse individuals from jury service upon a showing of undue hardship or extreme inconvenience.

Under the JSSA, in order to be "qualified" for jury service one must be a citizen of the United States, be 18 years of age or older, be a resident of the district for one year, be able to read, write, understand and speak English, have no mental or physical infirmity that would render a candidate incapable of service, and have no pending felony charges or convictions.\textsuperscript{57}

The following categories of persons are "exempt" from jury service and barred from serving: active members of the armed services, members of the fire or police department, and active public officers in the executive, legislative or judicial branches of the federal or state government.\textsuperscript{58}

\textit{Methodology}

In December 1995, we asked each district to provide a copy of the district’s Jury Plan, JS-12 Forms, Juror Questionnaire Forms, Summons and any other information or correspondence provided to prospective jurors. Selected districts, based on availability of data and type of source lists, were also questioned on the process of juror qualification.

We reviewed the materials provided, noting any part of the selection process and record keeping that was not in accord with the requirements above. We also examined the process to determine whether there were any steps that could have disparate impact on women or on men. With the assistance of the Task Force consultant and

\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Volunteer safety personnel must be excused from jury service upon individual request.
\textsuperscript{56} 28 U.S.C. § 1863(b)(5)(A).
\textsuperscript{57} 28 U.S.C. § 1865(b) (1994).
her research staff at the University of Illinois we compared the gender composition of the jury wheels reflected on JS-12 records to the gender composition of the district, as reflected by census data.

The Task Force did not have the resources to conduct an analysis of the numbers of men and women excused in each district under each excuse category. However, one district reviewing its jury plan did such an analysis of potential jurors excused over a one-year period and provided the information to the Task Force for review. The Task Force viewed the findings in this district as a sample which might suggest the results of a circuit-wide review.

B. JURY PLANS, SOURCE LISTS, AND EXCUSE CATEGORIES

The source list used can greatly affect the composition of the master jury wheel. If the source list is not representative of the actual district population, the resulting master jury wheel, and ultimately the juries drawn from it, may not reflect the demographics of the population.

Seven of ten districts in the Eighth Circuit utilized voter registration lists as the source from which jurors were selected. In two districts a narrower list, actual voters, was used as the source list. In one jurisdiction the court had broadened its source list to include registered voters, licensed drivers and holders of state identification cards. This approach reflects a trend in district courts nationwide. According to the Administrative Office of the Courts, at least nineteen districts supplement voter lists with driver's license lists and at least one uses computerized residence lists in lieu of voter lists.

A comparison of Master Jury Wheel Composition, as reflected by JS-12 data, and census data population in the Eighth Circuit districts revealed no absolute or comparative statistical disparity in the relative proportions of women and men.

The number of excuse categories used in the districts ranged from as few as three to as many as eleven. The most commonly used reasons for excusing jurors were that the potential jurors were over the age of 70, had served as a grand or petit juror in the last two years, or

59. Since these data were gathered several of the districts in the Eighth Circuit have revised their jury plans and broadened their source lists to include driver's license lists.


61. We were unable to conduct this analysis in one district, which stated that it did not maintain JS-12 data.
had active care/custody of a child (usually under the age of 10), whose
safety or health would be jeopardized. However, other districts also
excused some or all of the following persons: those essential to the
care of an aged or infirm person (9); those essential to the operation of
a business (7); professionals including doctors (9) dentists (9), lawyers
(9), registered nurses (9), osteopaths (1), chiropractors (1) and undertakers (1); members of the clergy or religious orders (7); teachers (3),
school administrators (1) and school bus drivers (2); students (1); and
those lacking transportation to and from the courthouse (1).

Most districts used one of several standardized juror questionnaire forms prepared by the Administrative Office of the Courts. Administrative staff responsible for the jury panels sort through returned forms to eliminate those who have indicated adequate reason to be excused. Most potential jurors who are removed from the jury wheel for reasons of disqualification, exemption or excuse are identified through this administrative process and never even appear in court.

A review of jury plans and the juror questionnaire forms used revealed some inconsistencies. In some districts, the jury plans specified categories of persons to be excused for hardship, but the questionnaires sent to potential jurors did not list those categories. In other districts, excuse categories not in the jury plans appeared on the questionnaires used. Also of concern was that the jury questionnaires are often formatted in a way that does not clearly indicate that a potential juror, by marking one of these categories, is requesting to be excused. Rather, the items appear more as demographic questions and may have the unintended effect of encouraging otherwise willing potential jurors to opt out of jury service by providing information about their age, occupation, or family status.

Finally, the statistical analysis of jurors excused in one district under each of ten excuse categories yielded the following results. Of 10,000 juror questionnaires reviewed, 1,546 or 15% of potential jurors were excused. Overall, females comprised 63% of excused jurors. Women formed a substantially larger proportion of excused persons who were over the age of 70, primary caretakers/custodians of a child under the age of 10, and full-time registered nurses. As a result of the analysis, the judges in the district decided to reduce the number of excuses to three, eliminating the second two above.
C. JURY STRIKES

In 1994, the Supreme Court declared it unconstitutional for attorneys to use peremptory jury strikes on the basis of gender.62 The judges were asked whether they have seen attorneys exercise their peremptory strikes in a manner that appeared to violate the holding of the Supreme Court in *JEB v. Alabama*,63 and, if so, whether the jurors struck in such instances were male or female. The majority of respondents (65.8%) reported never observing attorneys exercise peremptory strikes on the basis of gender. Of those who had, most reported that it only occurred once or twice (26%) and that the juror was equally likely to be male as to be female.

Respondents were next asked whether any peremptory strikes made in their courtrooms had been challenged as unconstitutional sex discrimination under *JEB v. Alabama* and whether the jurors in those cases were male or female. The majority of judges (77.5%) reported never having jury strikes challenged as unconstitutional under *JEB*. In those instances where such challenges had been made, however, the jurors were significantly more likely to be female than male. There were no differences in the judges' responses based on the gender of the judge.

D. JURY INSTRUCTIONS AND LOCAL AND CIRCUIT RULES

We examined the model civil jury instructions of the Eighth Circuit and the local rules of court as they appeared in the February 1996 *Federal Procedure Rules Service* for the Eighth Circuit64 to identify any inappropriately gendered language and to suggest revisions to make the rules gender neutral.

In this task we obtained the assistance of Professor Melody Daily and a group of law students from the University of Missouri-Columbia. We asked Professor Daily and the students to note any gender-specific language or references. No attempt was made to review the substance of the jury instructions to determine whether standards (such as reasonableness) or concepts (such as the valuation of future earnings) were inappropriately gendered.

In the jury instructions, students identified a number of instances where jury instructions referred to judges, attorneys, plaintiffs, defendants, witnesses and jurors as male. No feminine references to judges, attorneys, plaintiffs, defendants, witnesses or jurors were found.

64. The rules reviewed were those of the Eighth Circuit and each of the district courts in the Circuit.
The Local Rules for the Court of Appeals for the Eighth Circuit were drafted with care to use gender-neutral references. In most instances, the rules refer to people by titles (judge, counsel, appellant) or by gender-neutral phrases (his or her when referring to a judge). In 88 pages of rules, only 22 gendered references were identified. These references included male references to defendants, complainants, court-appointed counsel, chair of the judicial council, the clerk of court, and to the chief judge.

Two of the districts included no inappropriately gendered language. These two districts took different approaches in achieving this gender neutrality. One district used titles and avoided gendered pronouns wherever possible. The other district used titles and pronouns, but has opted to use inclusive alternate pronouns (he or she, his or her, himself or herself) where they are used to refer to judges, attorneys, receivers, probation officers, and others. Both approaches acknowledge both men and women as judges, lawyers, parties, jurors and other participants in the legal process.

Four other districts also demonstrated substantial gender neutrality in their local court rules. In each, fewer than 10 gender references were found in 50 to 100 pages of rules. The gendered language found referred (in the masculine) to the clerk of court, law school dean, judge, reporter, petitioner, student, and seaman. No references were found to persons assumed to be female. The remaining districts included inappropriately gendered language throughout their local rules. In one district, male pronouns were used over 80 times in reference to judges, attorneys, jurors, defendants, parties, pro se defendants, bondsmen, the clerk of court, the U. S. Attorney, and the chief judge of the Eighth Circuit.

Suggested revisions were provided. The respective district courts have been notified of the analysis and suggestions.

VI. SUMMARY OF FINDINGS

Women comprise, on average, 16.4% of civil practitioners of record in the courts of the Eighth Circuit, ranging from a low of 11% to a high of 20% (in the Court of Appeals).

The survey data on requests and awards of attorneys' fees in civil cases suggest that among attorneys who have practiced less than five years, women were significantly more likely to have their hours reduced than their male counterparts.

The experiences of attorneys regarding settlement negotiations were both similar and different in a variety of ways. First, very few attorneys reported either reaching settlement with the assistance of a judge or ADRP or having been pushed to settle by either authority.
Similarly, very few attorneys reported accepting a less favorable settlement because the judge exhibited bias against an attorney, litigant, or witness of a particular gender. However, women were more likely than men to report such bias against a female attorney, litigant, or witness. Respondents of each gender reported perceiving those of their own gender as more effective negotiators and attorneys of the other gender as more likely to use "emotional tactics" in the settlement process. Finally, while men suggested that male and female attorneys were equally likely to use "power tactics" as well as "annoying and unpleasant negotiation styles" during settlement, women saw male attorneys as significantly more likely than female attorneys to do so.

One-third of attorney survey respondents had observed unreasonably intrusive, offensive or hostile interrogatories, depositions or document requests in the last five years. Both male and female attorneys agreed that such hostile discovery occurred more often with female parties than with male parties.

Attorneys, whether male or female, agreed that female parties and witnesses were more frequently exposed to unreasonable physical and mental examinations than male parties and witnesses. Further, attorneys specializing in civil rights or employment law described a greater frequency of such exams than attorneys in other types of civil specialties. These findings did not change even when years of legal practice experience were held constant.

With regard to civil discovery, a majority of respondents reported serious disputes or uncivil behavior from opposing counsel. Female attorneys reported experiencing a somewhat greater incidence of disputes and uncivil behavior than did male attorneys. Attorneys specializing in civil practice reported the greatest frequency of such disputes, with women reporting higher frequencies of such disputes regardless of specialty. Thus, not only female attorneys but also female parties and witnesses appear to be more likely than their male counterparts to encounter hostility during the discovery process.

Female attorneys were also more likely than male attorneys to request judicial assistance to help resolve discovery disputes. At the same time, women were more likely to perceive that the judge would not intervene or that such a request would not be in their client's or their own best interest. Overall, about one-fourth of attorneys who had sought judicial assistance reported that the judge did not intervene effectively, with women reporting this more than men.

Judges reported that requests for intervention in hostile or intrusive discovery and in unreasonably hostile physical and mental examinations occurred infrequently and were as likely to come from counsel
for male litigants or examinees as from counsel for female litigants or examinees. However, judges reported that on the relatively infrequent occasions when they received requests for intervention in depositions conducted in an unnecessarily personal, intrusive or offensive manner, the deponents were more likely to be male.

Almost 75% of judges had never been asked to intervene or address inappropriate gender bias in federal litigation. However, 30% had intervened upon request of an attorney and almost 40% had intervened \textit{sua sponte} to address such bias. The vast majority of judges indicated that the person whose conduct manifested bias was an attorney.

Male and female attorneys' job stress increased at similar rates as discovery disputes became more frequent. However, female attorneys' job satisfaction was adversely affected to a greater extent than male attorneys' as the frequency of discovery disputes increased.

Experiences and opinions regarding sex discrimination litigation were relatively unaffected by respondent gender but were significantly influenced by type of practice (plaintiff vs. defense work) in that the attorneys representing plaintiffs (usually female litigants) reported experiences and opinions different from those reported by attorneys representing defendants.

One-third of plaintiffs' attorneys and one-quarter of defendants' attorneys reported that sex discrimination cases had been pushed through the courts without adequate time for discovery with some frequency. Plaintiffs' attorneys (29%) were more likely than defendants' attorneys (11%) to report that judges indicated such cases were frivolous, unimportant, or undeserving of federal court time (sometimes/often/many times). Plaintiffs' attorneys (52.5%) were considerably more likely than defendants' attorneys (17.3%) to report that discovery in sex discrimination cases was inappropriately intrusive into the lives of parties and witnesses (sometimes/often/many times). The great majority of judges expressed no opinion on this issue. However, 13.6% of judges agreed with the statement that discovery requests were often intrusive when the litigants/witnesses were female, while fewer (4.1%) agreed that such requests were often made when litigants/witnesses were male.

There was considerable disagreement over questions of summary judgment in sex discrimination cases. Over half of plaintiffs' attorneys reported that summary judgment was granted too readily to defendants, while only 10% of defendants' attorneys reported that this occurred sometimes/often/many times. Judges reported that summary judgments are granted to defendants relatively frequently (47% sometimes, 12% often and 5% many times) and that summary judg-
ment is infrequently granted to plaintiffs (19% once or twice and 16% sometimes).

Generally, defendants' attorneys were more likely than plaintiffs' attorneys to report that when plaintiffs prevailed in sex discrimination cases, compensatory damages were adequate (94% vs. 37% sometimes/often/many times), punitive damages were sufficient to punish the defendants (83% vs. 37% sometimes/often/many times) and to deter employers from engaging in discriminatory conduct (80% vs. 20% sometimes/often/many times) and that attorneys' fee awards were high enough to encourage attorneys to take such cases (86% vs. 45%).

Although the majority of attorney respondents did not report any known effects of Rules 412 and 415, the respondents who did perceive any consequences of the new rules agreed that the effect has been to restrict the admission of evidence regarding a plaintiff's past sexual history. Male and female judges did not respond differently to any of the items concerning Rules 412 or 415.

Judges viewed expert psychological or medical testimony as moderately useful in sex discrimination cases in both bench and jury trials. Judges found such testimony to be most useful for assessing the "nature and extent of damages" and least useful in assessing the "welcomeness of any sexual attention."

A review of the jury plans and selection procedures used within the circuit showed that seven of ten districts used voter registration lists as the source for potential jurors. However, two districts used a narrower list (actual voters) and one district, reflecting a national trend, used an expanded source list which included registered voters, licensed drivers, and state identification card holders.

An analysis of the gender composition of the Master Jury Wheels demonstrated that women and men are represented in proportions comparable to their presence in the district populations, as reflected by census data. An analysis of jurors in one district suggests that some discretionary excuse categories may operate to exclude disproportionate numbers of females from the jury pool.

The local rules of the Eighth Circuit Court of Appeals and the local rules of most of the district courts of the Eighth Circuit have gendered language which needs to be neutralized.

Chapter 3
GENDER FAIRNESS IN THE BANKRUPTCY COURTS

As a general matter the Task Force did not distinguish between litigation in the bankruptcy court and other civil litigation in the Eighth Circuit. For the most part, therefore, the survey questions re-
gendering attorneys' experiences in civil litigation discussed in Chapter 2 also include attorneys' experiences in the bankruptcy court.

Nonetheless, 53% of the respondent sample (1785 men and 589 women) acknowledged participation as an attorney, trustee, or examiner in a bankruptcy case during the past five years. These 2,374 respondents were asked further questions which form the basis for much of the analysis which follows. In addition, the two United States Trustees in the Eighth Circuit provided detailed information on the appointment and compensation of trustees in the Eighth Circuit.

I. BANKRUPTCY COURT AND TRUSTEE COMPOSITION AND COMPENSATION

For jurisdictional purposes the bankruptcy court is a unit of the district court. For most purposes, however, the bankruptcy court functions separately from the district court. With the exception of the Western District of Missouri, all of the bankruptcy courts in the Eighth Circuit have appointed their own clerks of court. The clerks of the various bankruptcy courts maintain freestanding offices, maintain the files of the bankruptcy court, and otherwise support the bankruptcy judges of their respective courts.

The bankruptcy court for the Western District of Missouri is one of a handful of districts throughout the country that have elected not to appoint their own clerks of court. The support for the bankruptcy court for the Western District of Missouri is provided by the clerk of the United States district court as part of what is commonly referred to as a consolidated clerk's office. The Eastern District of Arkansas and the Western District of Arkansas have a consolidated bankruptcy court served by the same three judges and the same clerk of court. As of January 1, 1997, five of the eight clerks of bankruptcy court were women and three were men.

A. APPOINTMENT OF BANKRUPTCY JUDGES

Prior to July of 1984, bankruptcy judges were appointed by the district court for their district. Since 1984, the appointment of bankruptcy judges has fallen to the appropriate courts of appeal. Thus, it is the responsibility of the United States Court of Appeals for the Eighth Circuit to appoint the 22 bankruptcy judges that Congress has authorized for the districts within the Eighth Circuit. (Since 1994, one judgeship has been intentionally left vacant.) The numbers of bankruptcy judges in the various districts in the Eighth Circuit are:
Bankruptcy judges are appointed for fourteen-year terms. After the Eighth Circuit became responsible for appointing bankruptcy judges, between 1986 and 1988 it reappointed eight incumbent judges (all of them men). The Court has also appointed fifteen judges to positions for which there were no incumbents. Eleven of those appointments went to men and four to women. As a result of one retirement and the appointment of one judge to the district court, there are currently seventeen male and four female bankruptcy judges in the Eighth Circuit.  

The process utilized by the Eighth Circuit to select bankruptcy judges starts with nation-wide advertising of the vacancy. Once the applications are received, a screening committee reviews the applications, interviews as many applicants as it deems necessary, and recommends three candidates to the full Court of Appeals for its consideration. The screening committee usually is comprised of the Bankruptcy Committee of the Judicial Council together with a circuit judge who resides in the district where the vacancy exists and the chief United States district judge for the district in which the vacancy exists. The Court of Appeals normally interviews all three candidates. The Court of Appeals then selects the successful applicant from the list of three names submitted by the screening panel. No statistics are available as to the gender composition of the applicant pools.

B. United States Trustees

There are twenty-one United States Trustees in the country, all appointed by the Attorney General. There are two United States Trustees in the Eighth Circuit, one for the districts of Minnesota, North Dakota, South Dakota, Northern Iowa, and Southern Iowa, and the other for the districts of Nebraska, Eastern Missouri, Western

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65. This does not include one retired judge who has been recalled by the Eighth Circuit but actually sits by designation only in the Second Circuit.
Missouri, Eastern Arkansas, and Western Arkansas. One is a man and one is a woman. At one time, bankruptcy trustees were appointed by the judges of the bankruptcy court. However, the court's responsibility for the appointment of trustees ended on October 1, 1979, for the courts in Minnesota, North Dakota, and South Dakota, and at various times from 1986 through 1988 in the other districts of the Eighth Circuit. Bankruptcy trustees are now appointed by the United States Trustee for the region in which their courts are located.

C. Bankruptcy Trustees, Cases and Amount of Fees

We asked the United States Trustees to provide information regarding the appointment, assignment of cases and compensation earned by bankruptcy trustees. The gender composition of Eighth Circuit bankruptcy trustees is shown on the following table.

<table>
<thead>
<tr>
<th>Eighth Circuit Bankruptcy Trustees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of Case</td>
</tr>
<tr>
<td>Chapter 7</td>
</tr>
<tr>
<td>Chapter 11</td>
</tr>
<tr>
<td>Chapter 12</td>
</tr>
<tr>
<td>Chapter 13</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

1. Chapter 7

Chapter 7 is the bankruptcy chapter most commonly used under the Bankruptcy Code. For the twelve months ending March 31, 1997, there were 54,515 Chapter 7 cases filed in the bankruptcy courts in the Eighth Circuit. To the extent that there are assets available for payment to unsecured creditors, the bankruptcy trustee liquidates those assets and makes a distribution pursuant to a statutory scheme contained within the Bankruptcy Code. Usually, however, there are no assets available for distribution to unsecured creditors because the assets are fully encumbered by the claims of secured creditors or the value of the assets does not exceed the amount the debtors may claim as exempt, or both. Individuals (including a husband and wife, who may file jointly), corporations and partnerships may be debtors under Chapter 7. The vast majority of cases involve individual debtors and consumer debt issues.

Chapter 7 trustees are appointed from a panel of private trustees that is established, maintained, and supervised by the United States

Trustee. Typically, the United States Trustee will create a panel for various geographic regions within a particular district so that meetings of creditors can be held by the trustee in a number of places, even if there is no court site nearby. In appointing trustees to the panel of trustees, the United States Trustee advertises, in the geographic area for which the trustee will serve, in newspapers of general circulation, in newspapers or other publications that target minority populations, and in legal publications. Most Chapter 7 trustees are attorneys, but that is not a requirement. When a case is filed the United States Trustee appoints a member of the panel to act as the trustee in that case. The appointment is made pursuant to a single random-assignment system within the geographic area served by a particular panel.

In a no-asset case, the bankruptcy trustee receives a flat fee of $60 from the debtor's filing fee. In those cases in which there are assets to liquidate and pay to unsecured creditors, the court may allow the Chapter 7 trustee reasonable compensation. The Bankruptcy Code contains a limitation on the amount that can be allowed. The maximum fee is based on a percentage of the monies that a trustee disburses or turns over to parties in interest, not including the debtor.68 Because the percentages tend to be somewhat conservative, in all but the rarest of cases the trustee applies for and is allowed the maximum amount that the statute allows. Since the trustee's compensation depends on the amount disbursed to parties in interest, the trustee's compensation depends on the value of nonexempt, unencumbered assets in the estate when the case is filed and the degree of success the trustee has in liquidating those assets and recovering property.

According to information provided by the United States Trustees, the following table represents compensation paid to Chapter 7 trustees for the year ending September 1995:

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68. The maximum fee is computed as follows: an amount not to exceed 25% on the first $5,000.00 or less, 10% on any amount in excess of $5,000.00 but not in excess of $50,000.00, 5% on any amount in excess of $50,000.00 but not in excess of $1,000,000.00, and reasonable compensation not to exceed 3% of monies in excess of $1,000,000.00.
This table indicates that the average female trustee earned approximately the same amount of fees during the year ending September 1995 as the average male trustee, but was assigned an average of 200 more cases that year.

2. Chapter 12

Chapter 12\(^{70}\) can be utilized only by family farmers. Under a Chapter 12 filing, the debtors prepare a plan that allows the debtors to restructure their secured debt and to write down all or part of their unsecured debt. Payments on secured debt can be made directly to the secured creditor or through the Chapter 12 trustee while payments on unsecured debt are paid through a Chapter 12 trustee. Chapter 12 is the least-used chapter in the Bankruptcy Code. For the year ending March 31, 1997, only 228 Chapter 12 cases were filed in the Eighth Circuit.

The statute provides that, if warranted by the caseload and approved by the Attorney General, a United States Trustee may appoint a standing trustee to serve as a trustee in Chapter 12 cases. As in the appointment of trustees to the panel of trustees, the United States Trustee advertises widely in the popular and legal press and in the minority press in an attempt to solicit applications for appointment as a standing trustee. Both United States Trustees in the Eighth Circuit have utilized their discretion to appoint standing trustees.

Because the major duty of a Chapter 12 trustee is to collect payments under a plan and distribute them to creditors, there is a certain economy to be gained by having a standing trustee to administer a large number of cases, typically using a computer. The compensation of standing trustees is set by the Attorney General, after consultation with the United States Trustee who appointed the standing trustee.

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69. The amounts in this table do not include the amount that a trustee receives from the filing fee in every case, currently $60.00.

The compensation is limited to 10% of payments under a plan in an aggregate amount not to exceed $450,000.00 and 3% of payments over $450,000.00. For trustees with large volumes, the compensation can be reduced considerably, thus increasing the amount of money that is available to pay creditors.\textsuperscript{71}

The following table represents compensation paid to Chapter 12 trustees in the Eighth Circuit:

<table>
<thead>
<tr>
<th>Chapter 12 Trustee Compensation</th>
<th>Male</th>
<th>Female</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Year Ending September 1995)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of Trustees</td>
<td>15</td>
<td>3</td>
<td>18</td>
</tr>
<tr>
<td>Total Cases Assigned</td>
<td>321</td>
<td>32</td>
<td>353</td>
</tr>
<tr>
<td>Average Number of Cases Per Trustee</td>
<td>21.4</td>
<td>10.7</td>
<td>19.6</td>
</tr>
<tr>
<td>Total Fees Earned</td>
<td>$395,526</td>
<td>$91,501</td>
<td>$487,027</td>
</tr>
<tr>
<td>Average Fees Per Trustee</td>
<td>$26,368</td>
<td>$30,500</td>
<td>$27,057</td>
</tr>
</tbody>
</table>

The table indicates that three of the Chapter 12 trustees in the Eighth Circuit in 1995 were women, that they were assigned, on average, half of the number of cases that the 15 male trustees were assigned, but actually earned more, on average, than male trustees.

3. Chapter 13

Chapter 13\textsuperscript{72} is very similar to Chapter 12, except that a typical Chapter 13 debtor is a wage earner who is restructuring consumer debt. Although a business can utilize Chapter 13 in very limited circumstances, the typical Chapter 13 case involves restructuring of mortgages, car loans, and other secured debt, and writing down of all or part of the unsecured debt. As in the Chapter 12 Plan, the secured payments may be made directly to the secured lender or through the Chapter 13 trustee with payments on the unsecured debt paid through the Chapter 13 trustee. Chapter 13 cases constitute the second-largest number of cases filed. In the twelve-month period ending

\textsuperscript{71} The Eighth Circuit recently ruled that this percentage fee for standing trustees is computed on the amount distributed by the trustees and not on any payments under a plan that are made by a debtor directly to the debtor's creditors. This has sharply curtailed the compensation for some trustees and, as a result, in some parts of the Eighth Circuit, standing trustees are being replaced by a trustee appointed in each individual Chapter 12, in which case a trustee is entitled to reasonable compensation, rather than the percentage fee set by the Attorney General. All of the fees during the period studied, however, were paid to standing trustees and thus were determined solely by the Attorney General and not by the court.

\textsuperscript{72} 11 U.S.C. §§ 1301 to 1330 (1994).
March 31, 1997, there were 19,507 Chapter 13 cases filed in the Eighth Circuit.

The process for appointment of a standing trustee and the trustee’s compensation is identical to that for Chapter 12 trustees. However, as can be seen from the following table on Chapter 13 trustee compensation, while payments under a Chapter 13 plan are often smaller than those under a Chapter 12 plan, the large volume of Chapter 13 cases results in higher compensation for standing Chapter 13 trustees than for standing Chapter 12 trustees:

<table>
<thead>
<tr>
<th>Chapter 13 Trustee Compensation</th>
<th>Male</th>
<th>Female</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Trustees</td>
<td>11</td>
<td>2</td>
<td>13</td>
</tr>
<tr>
<td>Total Cases Assigned</td>
<td>14,698</td>
<td>696</td>
<td>15,394</td>
</tr>
<tr>
<td>Average Number of Cases Per Trustee</td>
<td>1,336</td>
<td>348</td>
<td>1,184</td>
</tr>
<tr>
<td>Total Fees Earned</td>
<td>$690,826</td>
<td>$141,439</td>
<td>$832,265</td>
</tr>
<tr>
<td>Average Fees Per Trustee</td>
<td>$62,802</td>
<td>$70,860</td>
<td>$64,020</td>
</tr>
</tbody>
</table>

The table indicates that two of the thirteen Chapter 13 trustees in the Eighth Circuit in 1995 were women and that they were assigned, on average, one-quarter of the number of cases assigned to male trustees, but, on average, earned higher fees.

4. **Chapter 11**

Chapter 11 cases involve business reorganizations. Businesses can range in size from very small to some of the largest corporations in America. Normally the debtor remains in possession of its assets, proposes a plan of reorganization, and, if the plan is approved, makes distribution to creditors under the confirmed plan. For the twelve-month period ending March 31, 1997, there were 361 Chapter 11 cases filed in the Eighth Circuit.

In Chapter 11 cases, trustees are the exception rather than the rule. Under the Bankruptcy Code, a trustee is appointed in a Chapter 11 case only by court order or motion of a party in interest. It is then the responsibility of the United States Trustee to appoint a trustee with the approval of the court.

The following table reflects the number of Chapter 11 trustees appointed in the Eighth Circuit during 1995:

During fiscal year 1995, only five Chapter 11 trustees were appointed in the Eighth Circuit — all males. Because of the small number of cases with Chapter 11 trustees and the delay in collecting fees, no meaningful information regarding fees could be obtained.

5. Appointment of Trustees

The Task Force also asked the two United States Trustees to report the number of new trustees that had been appointed to the Chapter 7 panel of trustees or had been appointed as standing Chapter 12 or 13 trustees or had been appointed as a Chapter 11 trustee in the last five years. The following table summarizes their responses:

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Male</th>
<th>Female</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>18 (90%)</td>
<td>2 (10%)</td>
<td>20</td>
</tr>
<tr>
<td>11</td>
<td>8 (89%)</td>
<td>1 (11%)</td>
<td>9</td>
</tr>
<tr>
<td>12</td>
<td>0 (0%)</td>
<td>1 (100%)</td>
<td>1</td>
</tr>
<tr>
<td>13</td>
<td>3 (100%)</td>
<td>0 (0%)</td>
<td>3</td>
</tr>
<tr>
<td>Total</td>
<td>29 (88%)</td>
<td>4 (12%)</td>
<td>33</td>
</tr>
</tbody>
</table>

II. EXPERIENCES OF BANKRUPTCY COURT ATTORNEYS

In the bankruptcy practice section of the attorney survey, we examined participants’ experiences with bankruptcy cases: 52% of the sample (1785 males and 589 females) responded that they had participated as an attorney, trustee, or examiner in a bankruptcy case in the Eighth Circuit courts during the previous five years.

A. CLIENTS AND CLIENT CONTACTS

We asked attorneys to indicate who their clients or the primary contacts for their clients had been in the previous five years. The following table presents proportions of female and male attorneys representing different types of debtors or creditors:
Male and female attorneys generally reported similar experiences with bankruptcy practice, including types of: (1) clients they represent, (2) cases they handle, and (3) appointments they seek and receive. Among the few gender differences observed were the findings that men were significantly more likely than women to represent joint debtors (husband and wife), individual creditors, and corporate creditors.

B. TYPES OF CASES

We asked attorneys what proportion of their practice in the previous five years had been spent working on different types of cases. Men were significantly more likely than women to have worked on business cases under Chapter 7 as well as on Chapter 12 cases. No other significant gender differences were noted. The following table depicts proportions of female and male bankruptcy attorneys describing particular types of cases as comprising different proportions of their practice:

<table>
<thead>
<tr>
<th>Types of Cases as Comprising Proportions of Practice</th>
<th>0–25%</th>
<th>26–50%</th>
<th>51–75%</th>
<th>76–100%</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>W M</td>
<td>W M</td>
<td>W M</td>
<td>W M</td>
</tr>
<tr>
<td>Consumer Cases Under Chapter 7</td>
<td>48.9</td>
<td>43.9</td>
<td>15.2</td>
<td>14.0</td>
</tr>
<tr>
<td>Business Cases Under Chapter 7</td>
<td>89.1</td>
<td>86.3</td>
<td>8.9</td>
<td>9.5</td>
</tr>
<tr>
<td>Chapter 11 Cases</td>
<td>75.9</td>
<td>79.5</td>
<td>11.6</td>
<td>11.8</td>
</tr>
<tr>
<td>Chapter 12 Cases</td>
<td>96.4</td>
<td>93.3</td>
<td>2.6</td>
<td>4.5</td>
</tr>
<tr>
<td>Consumer Cases Under Chapter 13</td>
<td>79.2</td>
<td>82.9</td>
<td>13.9</td>
<td>12.5</td>
</tr>
<tr>
<td>Business Cases Under Chapter 13</td>
<td>96.3</td>
<td>96.8</td>
<td>2.5</td>
<td>2.5</td>
</tr>
</tbody>
</table>
III. DEBTORS, DIVORCE PROCEEDINGS AND OBLIGATIONS

We surveyed attorneys and judges about their observations of debtors and the handling of divorce-related bankruptcy issues in the Circuit.

Attorneys overall reported that it is rare for debtors to file for bankruptcy to avoid or delay financial obligations imposed in divorce proceedings. Female attorneys reported this as occurring more frequently than male attorneys (irrespective of the gender of the debtor). The majority of bankruptcy judges, however, report that debtors take such action often. Male and female attorneys, as well as judges, agreed that male debtors pursued this action more frequently than female debtors. This is most likely due, at least in part, to the fact that it is less common for women to have divorce-imposed financial obligations. Finally, an interaction was found between attorney gender and debtor gender: female attorneys reported that male debtors engaged in these behaviors much more frequently than female debtors; male attorneys reported this as well, but the discrepancy between their observations of female and male debtors was substantially smaller.

For most of the period covered by the survey, the Bankruptcy Code provided that debts in the nature of alimony, support or maintenance were not dischargeable, but other kinds of marital debts were. Thus, when a divorced debtor seeks to discharge financial obligations to the former spouse that were imposed by divorce decree or settlement, the bankruptcy court has the discretion either to decide the dischargeability of the indebtedness or to abstain and allow the state court that granted the divorce decree to determine the issue. In fact, one female attorney who practices bankruptcy on a limited basis commented:

My deepest concern continues to be allowing debtors to bankrupt out of obligations to ex-spouses who have no ability to represent themselves and protect their interests and the expense of relitigating their support issues in another court.

Judges were asked how often debtors sought to discharge financial obligations to the former spouse that were imposed as a result of divorce. Respondents reported that male debtors more often than female debtors seek bankruptcy protection from such debts. Three-quarters of the respondents observed this of male debtors often, but observed it of female debtors considerably less frequently.

74. As of October 22, 1994, other kinds of marital debts can be excepted from discharge under certain circumstances. Because there was so little experience with the amendments, no questions were asked about them.
Attorneys observed the following actions taken by the court at the same rate between genders and across districts: discharging obligations, denying the discharge of the divorce obligations, and abstaining from deciding the issue of dischargeability. Overall, attorneys described the court as abstaining from deciding the issue much more rarely than they determined the dischargeability of the indebtedness. The following tables represent these numbers:

<table>
<thead>
<tr>
<th>Attorneys Observing Obligations Discharged</th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>40.9%</td>
<td>41.7%</td>
</tr>
<tr>
<td>Rarely</td>
<td>13.2</td>
<td>17.3</td>
</tr>
<tr>
<td>Sometimes</td>
<td>28.7</td>
<td>28.4</td>
</tr>
<tr>
<td>Often</td>
<td>12.0</td>
<td>8.4</td>
</tr>
<tr>
<td>Many Times</td>
<td>5.2</td>
<td>4.2</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Attorneys Observing Obligations Excepted From Discharge</th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>42.2%</td>
<td>40.0%</td>
</tr>
<tr>
<td>Rarely</td>
<td>11.8</td>
<td>13.6</td>
</tr>
<tr>
<td>Sometimes</td>
<td>28.6</td>
<td>28.8</td>
</tr>
<tr>
<td>Often</td>
<td>10.7</td>
<td>11.9</td>
</tr>
<tr>
<td>Many Times</td>
<td>6.7</td>
<td>5.7</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Attorneys Observing Court Abstain From Deciding Issue of Dischargeability</th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>81.7%</td>
<td>76.8%</td>
</tr>
<tr>
<td>Rarely</td>
<td>9.3</td>
<td>12.1</td>
</tr>
<tr>
<td>Sometimes</td>
<td>8.3</td>
<td>9.5</td>
</tr>
<tr>
<td>Often</td>
<td>0.4</td>
<td>1.1</td>
</tr>
<tr>
<td>Many Times</td>
<td>0.2</td>
<td>0.5</td>
</tr>
</tbody>
</table>

IV. TREATMENT OF WOMEN BANKRUPTCY ATTORNEYS AND RESPECT FOR TRUSTEES

The surveys asked attorneys and judges about their perceptions of the treatment of female attorneys by bankruptcy judges and trustees. While a substantial majority of attorneys either strongly disagreed with or were neutral about statements of negative treatment by trustees and judges, there was a significant difference between the responses of men and women.
Overall, attorneys and judges disagreed with the statement that “female attorneys are often ignored or discounted in bankruptcy cases by trustees.” The following summarizes the responses of attorneys.

<table>
<thead>
<tr>
<th></th>
<th>Female Attorneys</th>
<th>Male Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agree/Strongly Agree</td>
<td>9.3%</td>
<td>0.9%</td>
</tr>
<tr>
<td>Disagree/Strongly Disagree</td>
<td>66.3</td>
<td>79.4</td>
</tr>
<tr>
<td>Neutral</td>
<td>24.4</td>
<td>19.7</td>
</tr>
</tbody>
</table>

Male attorneys (60.2%) and bankruptcy judges (93.3%) disagreed with the statement that “female attorneys are discouraged from Chapter 11 bankruptcy practice by trustees.” The following summarizes the responses of attorneys.

<table>
<thead>
<tr>
<th></th>
<th>Female Attorneys</th>
<th>Male Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agree/Strongly Agree</td>
<td>3.6%</td>
<td>1.4%</td>
</tr>
<tr>
<td>Disagree/Strongly Disagree</td>
<td>37.1</td>
<td>60.2</td>
</tr>
<tr>
<td>Neutral</td>
<td>59.5</td>
<td>38.4</td>
</tr>
</tbody>
</table>

Attorneys were asked to agree or disagree with the statement that “female attorneys are often ignored or discounted in bankruptcy cases by judges.” The following summarizes their responses.

<table>
<thead>
<tr>
<th></th>
<th>Female Attorneys</th>
<th>Male Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agree/Strongly Agree</td>
<td>6.4%</td>
<td>1.0%</td>
</tr>
<tr>
<td>Disagree/Strongly Disagree</td>
<td>67.0</td>
<td>79.5</td>
</tr>
<tr>
<td>Neutral</td>
<td>26.6</td>
<td>19.5</td>
</tr>
</tbody>
</table>

Attorneys were asked to agree or disagree with the statement that “female attorneys are discouraged from Chapter 11 bankruptcy practice by judges.” The following summarizes their responses.

<table>
<thead>
<tr>
<th></th>
<th>Female Attorneys</th>
<th>Male Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agree/Strongly Agree</td>
<td>3.1%</td>
<td>1.3%</td>
</tr>
<tr>
<td>Disagree/Strongly Disagree</td>
<td>38.1</td>
<td>60.9</td>
</tr>
<tr>
<td>Neutral</td>
<td>58.7</td>
<td>37.7</td>
</tr>
</tbody>
</table>
A male attorney who spends almost all of his time in bankruptcy court commented: "Instances of gender discrimination are extremely rare, and non-existent among the judges." A female attorney who practices primarily in bankruptcy court said: "All the judges and a vast majority of the attorneys are civil to all, regardless of [their] sex." These comments were representative of most attorneys responding to the survey.

The surveys also sought information about whether judges exclude female attorneys from court committees and informal meetings on bankruptcy court issues and procedures. A large percentage of both women and men reported that they never observed the exclusion of women from court committees or meetings. Female attorneys, however, reported greater exclusion of women. These differences appear in the following table.

<table>
<thead>
<tr>
<th>Attorneys Observing Judges Exclude Women From Court Committee/Meetings</th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>86.4%</td>
<td>98.0%</td>
</tr>
<tr>
<td>Rarely</td>
<td>7.6</td>
<td>1.4</td>
</tr>
<tr>
<td>Sometimes</td>
<td>3.6</td>
<td>0.3</td>
</tr>
<tr>
<td>Often</td>
<td>2.2</td>
<td>0.1</td>
</tr>
<tr>
<td>Many Times</td>
<td>0.2</td>
<td>0.1</td>
</tr>
</tbody>
</table>

Judges were asked a different question: "how often female attorneys participate in bankruptcy committees and meetings." Judges were unanimous in their observations that female attorneys participate often or many times.

We found differences in opinions concerning levels of attorney respect for bankruptcy trustees. A main effect for attorney gender was again found, with female attorneys observing lower respect for bankruptcy trustees overall. An effect for trustee gender also emerged, in that attorneys (regardless of their gender) perceived significantly more respect for male trustees than for female trustees. Judges agreed with the large majority of attorneys that both male and female trustees were held in high esteem by the judges.

V. SUMMARY OF FINDINGS

The percentage of female bankruptcy judges in the Eighth Circuit (19%) is higher than the national average of 16.8%. There have been fifteen vacant judgeships since the Eighth Circuit started appointing
bankruptcy judges in 1984. Four of the fifteen vacancies or 26.7% were filled by women.

Only 7.4% of the total number of Chapter 7 trustees are female, but 17% of Chapter 12 trustees and 15% of Chapter 13 trustees are women. Four out of thirty-three (12%) of the trustees appointed during the five-year period ending September 30, 1995, were women.\(^7\)

While male and female Chapter 7 trustees earned approximately the same amount of average compensation, female trustees were being assigned more cases than male trustees (495 as opposed to 295). Chapter 12 and Chapter 13 standing trustees show similarly interesting differences. The three female Chapter 12 trustees were assigned, on average, one-tenth the number of cases that the fifteen male Chapter 12 trustees were assigned during 1995, but on average, earned slightly more than their male counterparts. Similarly, during 1995 the two female Chapter 13 trustees were assigned approximately one-fourth of the number of cases that the eleven male Chapter 13 trustees were assigned, but, on average, they earned slightly more than their male counterparts. We are unable to draw any conclusions as to why this disparity exists.

Bankruptcy judges and attorneys agree that male debtors, more often than female debtors, use bankruptcy courts to try to avoid financial obligations to former spouses and to third parties. Male and female attorneys indicated that debts to former spouses were as likely to be discharged as to be excepted from discharge. Attorneys also agreed that bankruptcy courts rarely abstain from deciding the issue of the dischargeability of such debts. Attorneys and judges agreed that attorneys infrequently represent both husband and wife in joint bankruptcy while a divorce is pending.

Although a large majority of bankruptcy attorneys and judges report that men and women are treated similarly in bankruptcy court, women are more likely than men to perceive that women receive more negative treatment. Male attorneys agree that female trustees receive less respect than their male counterparts. This treatment affects women in their role as litigators, trustees, and debtors and may result in their exclusion from court committees and informal meetings on bankruptcy court issues and procedures.

\(^7\) The two U.S. Trustees for the two regions comprising the Eighth Circuit have informed us that 9 out of the 18 trustees appointed (50%) since September 30, 1995, were women.
Chapter 4
GENDER FAIRNESS IN THE CRIMINAL JUSTICE SYSTEM

Because of the issues with which it deals, the criminal justice system must address demands for fairness from varied, and sometimes conflicting, perspectives. Gender fairness — whether from the point of view of victims, witnesses, the accused defendants, those in federal incarceration, or the judges, lawyers and court services officers who work in the system — is an important piece of the complex fairness mosaic. We subdivided our consideration of gender fairness in the criminal justice area into the following topics: the demographics of criminal practice; composition of grand juries and grand jury forepersons; appointment of counsel in criminal cases; criminal cases involving violence against female victims; and jury instructions and sentencing.

As in other areas of our Report, we note both successes and problems. We found that in many areas, most notably the selection and functioning of grand juries and the content of jury instructions, issues of gender fairness have been successfully addressed in the Eighth Circuit. Additionally, those with the most experience involving crimes of violence against women generally viewed the system as successfully addressing the needs of victims.

We observe, however, that the failure of the Federal Sentencing Guidelines to take family responsibilities into account is both a matter that disparately impacts female offenders and is in the end a question of child welfare which should be addressed in the federal system.

I. CRIMINAL PRACTICE IN THE EIGHTH CIRCUIT

First, it is helpful to examine the players in the criminal justice arena within the circuit - the prosecutors, defense attorneys and defendants. Accordingly, we gathered data for this purpose from the Administrative Office of the Courts, attorney and employee survey results, the United States Sentencing Commission, Clerks of Court throughout the Circuit and the Department of Justice.

A. CRIMINAL PRACTICE ATTORNEYS

Demographic information for criminal practice attorneys received from court computer databases is shown on the table which follows this paragraph. The table reflects there were 1,631 male criminal practice attorneys of record and 251 female criminal practice attorn-
neys of record in the district courts of the Eighth Circuit for the period of July 1994 to June 1995. Thus, men constitute 85.7% of the attorneys and women constitute 13.2% of the attorneys of record in criminal practice, leaving 1.1% unknown by gender.

Criminal Practice Attorneys of Record by Gender: July 1994 - June 1995

<table>
<thead>
<tr>
<th>District Courts</th>
<th>Total No. Of Attorneys</th>
<th>No. of Male Attorneys</th>
<th>Males as % of Total</th>
<th>No. of Female Attorneys</th>
<th>Females as % of Total</th>
<th>No. of &quot;Gender Unknown&quot; Attorneys</th>
<th>Unknown % of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>E. AR</td>
<td>212</td>
<td>190</td>
<td>89.6%</td>
<td>22</td>
<td>10.4%</td>
<td>0</td>
<td>0.0%</td>
</tr>
<tr>
<td>W. AR</td>
<td>96</td>
<td>88</td>
<td>91.7%</td>
<td>8</td>
<td>8.3%</td>
<td>0</td>
<td>0.0%</td>
</tr>
<tr>
<td>N. IA</td>
<td>100</td>
<td>83</td>
<td>83.0%</td>
<td>17</td>
<td>17.0%</td>
<td>0</td>
<td>0.0%</td>
</tr>
<tr>
<td>S. IA</td>
<td>115</td>
<td>107</td>
<td>93.0%</td>
<td>7</td>
<td>6.1%</td>
<td>1</td>
<td>.9</td>
</tr>
<tr>
<td>MN</td>
<td>214</td>
<td>178</td>
<td>83.2%</td>
<td>28</td>
<td>13.1%</td>
<td>8</td>
<td>3.7%</td>
</tr>
<tr>
<td>E. MO</td>
<td>355</td>
<td>305</td>
<td>85.9%</td>
<td>49</td>
<td>13.8%</td>
<td>1</td>
<td>.3</td>
</tr>
<tr>
<td>W. MO</td>
<td>283</td>
<td>234</td>
<td>82.7%</td>
<td>42</td>
<td>14.8%</td>
<td>7</td>
<td>2.5%</td>
</tr>
<tr>
<td>NE</td>
<td>178</td>
<td>147</td>
<td>82.6%</td>
<td>30</td>
<td>16.9%</td>
<td>1</td>
<td>.6</td>
</tr>
<tr>
<td>ND</td>
<td>127</td>
<td>110</td>
<td>86.6%</td>
<td>14</td>
<td>11.0%</td>
<td>3</td>
<td>.8</td>
</tr>
<tr>
<td>SD</td>
<td>223</td>
<td>189</td>
<td>84.8%</td>
<td>34</td>
<td>15.2%</td>
<td>0</td>
<td>0.0%</td>
</tr>
<tr>
<td>Total District</td>
<td>1903</td>
<td>1631</td>
<td>85.7%</td>
<td>251</td>
<td>13.2%</td>
<td>21</td>
<td>1.1%</td>
</tr>
<tr>
<td>Court of Appeals</td>
<td>634</td>
<td>534</td>
<td>84.2%</td>
<td>98</td>
<td>15.5%</td>
<td>2</td>
<td>.2</td>
</tr>
</tbody>
</table>

In the ten districts making up the Eighth Circuit, there are eight male and two female United States Attorneys appointed by the President. According to current Department of Justice statistics there are 126 male Assistant United States Attorneys and 50 female Assistant United States Attorneys in the Eighth Circuit who prosecute criminal cases. Hence, 28.4% of the Assistant United States Attorney prosecutors in the Eighth Circuit are female.

In those same ten districts, there is one female Federal Public Defender (for the Eastern and Western District of Arkansas) and five male Federal Public Defenders. (One Federal Public Defender has jurisdiction in the Northern and Southern Districts of Iowa. There are no Federal Public Defenders in the Districts of North Dakota and South Dakota.) According to the Federal Public Defender's offices, 30.8% of the Assistant Federal Public Defenders in the Eighth Circuit are female.

77. In reviewing the chart it should be noted that if an attorney had multiple cases, he or she would be counted once in the criminal category. In addition, an attorney is not included in this count if he or she worked on a case but is not listed as the attorney of record. As a result, this data does not necessarily reflect whether women or men are over or under represented in the criminal practice.
<table>
<thead>
<tr>
<th>District</th>
<th>Female Prosecutors</th>
<th>Male Prosecutors</th>
<th>Female Defenders</th>
<th>Male Defenders</th>
</tr>
</thead>
<tbody>
<tr>
<td>E. AR</td>
<td>7</td>
<td>10</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>W. AR</td>
<td>0</td>
<td>7</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N. IA</td>
<td>5</td>
<td>10</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>S. IA</td>
<td>2</td>
<td>10</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MN</td>
<td>12</td>
<td>20</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>E. MO</td>
<td>8</td>
<td>26</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>W. MO</td>
<td>10</td>
<td>21</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>NE</td>
<td>4</td>
<td>11</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>ND</td>
<td>0</td>
<td>10</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>SD</td>
<td>4</td>
<td>9</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>52</td>
<td>134</td>
<td>12</td>
<td>27</td>
</tr>
</tbody>
</table>

* Includes United States Attorneys and Federal Public Defenders

B. CRIMINAL DEFENDANTS

We obtained substantial data on defendants in the Circuit from the United States Sentencing Commission. These data, which reflect only those defendants who were convicted, provide certain demographic information such as nature of offenses, sentences received, and number of dependents.

During the 1995 fiscal year, 2,279 sentencings were recorded by the Commission for the Eighth Circuit. Of these sentencings, 13.6% involved women. This seems to be slightly below the nationwide percentage of 14.9% women convicted of federal crimes. Women constitute a greater percentage of first time offenders.
FY 1995 Eighth Circuit Convictions by Gender

<table>
<thead>
<tr>
<th>District</th>
<th>Total</th>
<th>Male</th>
<th>Female</th>
</tr>
</thead>
<tbody>
<tr>
<td>E. AR</td>
<td>248</td>
<td>206 (83.1%)</td>
<td>42 (16.9%)</td>
</tr>
<tr>
<td>W. AR</td>
<td>99</td>
<td>88 (88.9%)</td>
<td>11 (11.1%)</td>
</tr>
<tr>
<td>N. IA</td>
<td>104</td>
<td>91 (87.5%)</td>
<td>13 (12.5%)</td>
</tr>
<tr>
<td>S. IA</td>
<td>144</td>
<td>129 (89.6%)</td>
<td>15 (10.4%)</td>
</tr>
<tr>
<td>MN</td>
<td>384</td>
<td>335 (87.2%)</td>
<td>49 (12.8%)</td>
</tr>
<tr>
<td>E. MO</td>
<td>385</td>
<td>340 (88.3%)</td>
<td>45 (11.7%)</td>
</tr>
<tr>
<td>W. MO</td>
<td>391</td>
<td>327 (83.6%)</td>
<td>64 (16.4%)</td>
</tr>
<tr>
<td>NE</td>
<td>174</td>
<td>147 (84.5%)</td>
<td>27 (15.5%)</td>
</tr>
<tr>
<td>ND</td>
<td>158</td>
<td>143 (90.5%)</td>
<td>15 (9.5%)</td>
</tr>
<tr>
<td>SD</td>
<td>192</td>
<td>163 (84.9%)</td>
<td>29 (15.1%)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>2279</td>
<td>1969</td>
<td>310</td>
</tr>
</tbody>
</table>

The Sentencing Commission's data show that, while defendants nationwide were predominately male, the five primary offense categories showing the least dramatic differences in ratio of male to female defendants were embezzlement (57.2% female), larceny (31.5% female), administration of justice offenses (25.9% female), use of a communication facility in a drug offense (22.9% female), and fraud (22.3% female). Women had low representation in three of the five most frequent offense categories (other than fraud and larceny): drug trafficking (11.5%), immigration (6.5%), and firearms (3.7%).

The Commissions' Eighth Circuit data for the year 1994 reflect that a greater percentage of male defendants than female defendants were under thirty years of age, and had not finished high school. Nonetheless male defendants had higher median and average incomes than female defendants despite the fact that a greater number of male defendants had no income. Family status could not be determined from the data other than the number of dependents, but the limited data reflected that more men than women had no dependents and women had a higher percentage of two dependents. When asked how often in their experience defendants were parents of minor children, the responses of criminal practice attorneys overall ranged across the spectrum from "never" to "many times" with no gender differences noted.

In July of 1995, the Bureau of Prisons reported that 7.3% of all federal inmates were women. A relatively small number of women defendants entering the prison system each year are pregnant. Indeed, over seventy percent of the criminal practice attorneys surveyed report never having worked with a pregnant defendant.
II. THE GRAND JURY PROCESS IN THE DISTRICT COURTS OF THE EIGHTH CIRCUIT — ANALYSIS OF DISTRICT COURT RECORDS OF THE COMPOSITION OF GRAND JURIES AND GRAND JURY FOREPERSONS

We reviewed the data identifying the gender of grand juries and grand jury forepersons and the procedures for choosing forepersons to determine whether male and female grand jurors were granted the same opportunity to serve, an issue which was mentioned often in the reports of the various focus groups.

A grand jury is a body of citizens whose duties consist of determining whether probable cause exists that a crime has been committed and whether an indictment should be returned against the accused for such a crime. The grand jury consists of not fewer than 16 (a quorum) and not more than 23 persons.\(^7\) To accommodate the selection of alternates and the possibility of a few excusals for cause, the panel summoned to the courtroom for grand jury selection purposes should consist of approximately 30 to 35 persons.\(^8\) A regular grand jury may serve up to 18 months followed by one extension of up to six months if necessary in the public interest.\(^9\) The length of the usual term varies from district to district.

The voir dire examination of the panel involves the chief district judge, or a designated district judge, asking each person's name, occupation and employment.\(^8\) This information is also relevant to the judge in choosing and designating a foreperson and deputy foreperson pursuant to Fed. R. Crim. P. 6(c). The panel members are asked additionally if they have had or are presently having an experience with a grand jury or other aspects of the criminal justice system - as a witness, a victim, or an indicted person - which might make it difficult for them to serve. Finally, in rare instances the district judge may tell the members some of the specific allegations that will be presented to them and ask them if there is any other reason why they could not serve on the grand jury. The judge excuses members of the panel whose responses to the voir dire questions dictate they should be excused for cause.

\(^7\) FED. R. CRIM. P. 6(a)(1). Each district uses the same source list for the selection of grand juries and petit juries. For a detailed discussion on the jury wheel composition, see Chapter Two, Civil Practice, at pages 46-48.

\(^8\) In some districts as many as 50 to 70 grand jurors may be summoned due to heavy caseloads and frequent grand jury meetings.

\(^9\) FED. R. CRIM. P. 6(g).

\(^8\) The district judge may allow proposed voir dire questions to be submitted by the United States Attorney or an Assistant United States Attorney. In one district, the district judge also allows proposed questions from the Public Defender or an Assistant Public Defender.
After the voir dire, the clerk of the court either calls the names of 23 to 29 persons from the remaining members of the panel at random or the district judge selects 23 persons from the panel taking into account their gender and race in an attempt to achieve a balance. The 23, randomly drawn or chosen by the district judge, constitute the regular members of the grand jury. In some districts, the remaining one to six jurors constitute the alternates. In these districts, after the grand jury and alternates have been chosen, the remaining members of the panel are excused. In other districts, all remaining members of the panel constitute the alternates. District judges typically select several members of the panel to interview for the foreperson position. Relevant factors in choosing a foreperson include the member's occupation, job experience, ability to be articulate and conduct meetings, and willingness to serve in that capacity. The district judge designates and appoints a foreperson and deputy foreperson under Fed. R. Crim. P. 6(c).

The foreperson has the power to administer oaths and affirmations and signs all indictments. The foreperson or another juror designated by the foreperson keeps a record of the number of jurors concurring in the finding of every indictment and files the record with the clerk of the court, but the record is not to be made public except on order of the court. During the absence of the foreperson, the deputy foreperson acts as foreperson pursuant to Fed. R. Crim. P. Rule 6(c).

In Hobby v. United States, the Supreme Court held that, "assuming discrimination entered into the selection of federal grand jury foremen, such discrimination does not warrant the reversal of the conviction of, and dismissal of the indictment against, a white male bringing a claim under the Due Process Clause." The Court noted:

Discrimination in the selection of grand jury foremen — as distinguished from discrimination in the selection of the grand jury itself — does not in any sense threaten the interests of the defendant protected by the Due Process Clause. Unlike the grand jury itself, the office of grand jury foreman is not a creature of the Constitution; instead, the post of fore-

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82. Some district judges consult the United States Attorney or an Assistant United States Attorney in arriving at a choice of foreperson. In at least one district, the judge also consults additionally with the Public Defender or an Assistant Public Defender.
84. This decision was written before the amendment to Rule 6(c) changing the term "foreman" to "foreperson." The Court noted that the then-current Rule 6(c), "has some what ancient roots, cast as it is in what are now obsolete terms: foreman and deputy foreman." Hobby v. United States, 468 U.S. 339, 344 (1984).
85. Hobby, 468 U.S. at 350.
man was originally instituted by statute for the convenience of the court.\textsuperscript{86}

The Court further explained that:

The impact of a federal grand jury foreman upon the criminal justice system and the rights of persons charged with [criminal offenses] is "minimal and incidental at best." Given the ministerial nature of the position, discrimination in the selection of one person from among the members of a properly constituted grand jury can have little, if indeed any, appreciable effect upon the defendant's due process right to fundamental fairness. Simply stated, the role of the foreman of a federal grand jury is not so significant to the administration of justice that discrimination in the appointment of that office impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment. . . . So long as the composition of the federal grand jury \textit{as a whole} serves the representational due process values expressed in Peters, discrimination in the appointment of one member of the grand jury to serve as its foreman does not conflict with those interests.\textsuperscript{87}

Nonetheless, the Court concluded that, "[i]n no sense do we countenance a purposeful exclusion of minorities or women from appointment as foremen of federal grand juries. We are fully satisfied that the district judges charged with the appointment of federal grand jury foremen will see to it that no citizen is excluded from consideration for service in that position on account of race, color, religion, sex, national origin, or economic status."\textsuperscript{88}

With this directive in mind, how are the courts in the Eighth Circuit doing?

We mailed the clerks of the district courts a questionnaire requesting data relevant to the gender composition of grand juries and grand jury forepersons. Of the jurors summoned, over 50\% were female in four districts, over 47\% were female in 3 districts, and over 45\% were female in the remaining 2 districts. With respect to jurors actually impaneled, over 50\% were female in three districts, over 47\% were female in three districts and over 39\% were female in the remaining three districts. While the percentage of females impaneled was less than the percentage of females summoned in five districts, in four of these five districts the selection of jurors is a random draw so no adverse inference can be drawn from these raw numbers.

\begin{flushright}
\textsuperscript{86} \textit{Id.} at 344.
\textsuperscript{87} \textit{Id.} 345-46 (citations omitted).
\textsuperscript{88} \textit{Id.} at 349-50.
\end{flushright}
With respect to the gender of forepersons and deputy forepersons appointed during the year 1995, there were a total of 17 male forepersons appointed and 12 female forepersons appointed. Of the deputy forepersons, 15 were male and 14 were female. That is, females were appointed forepersons and deputy forepersons 44.8% of the time and males were appointed 55% of the time.

The composition of grand juries and grand jury forepersons in these districts was as follows:\footnote{Data for the year 1995 were not available in the Western District of Missouri.}

\begin{center}
\begin{tabular}{|l|c|c|c|c|c|}
\hline
 & Grand Jurors & Females & Grand Jurors & Females & Foreperson/ \\
 & Summoned & as % of & Summoned & as % of & Deputy \\
 & & Jurors & & Jurors & Foreperson/Appointed \\
& & & & & \\
\hline
E. AR & 235 & 47.7\% & 69 & 47.8\% & 3M/1M and 2F \\
W. AR & 120 & 51.7 & 62 & 48.3 & 2M/2F \\
N. IA & 260 & 56.5 & 92 & 64.1 & 2M and 2F/1M and 3F \\
S. IA & 200 & 49.5 & 94 & 50.0 & 2M and 2F/4M \\
MN & 300 & 56.3 & 71 & 43.7 & 1M and 2F/1M and 2F \\
E.MO & 628 & 54.0 & 133 & 49.6 & 3M and 3F/4M and 2F \\
NE & 100 & 49.0 & 23 & 39.0 & 1F/1M \\
ND & 61 & 45.9 & 46 & 41.3 & 1M and 1F/1M and 1F \\
SD & 141 & 45.4 & 92 & 52.0 & 2M and 2F/2M and 2F \\
\hline
\end{tabular}
\end{center}

The statistics from the reporting year 1995 reveal no significant difference in the number of appointments of forepersons according to gender. If the year 1995 is representative of the appointments of grand jury forepersons and deputy forepersons, the district judges have fulfilled their tasks of seeing to it that “no citizen is excluded from consideration for service in that position on account of . . .
Clearly, the district judges in the Eighth Circuit have been successful in reaching gender equality with respect to the grand jurors and the grand jury forepersons and deputy forepersons.

III. APPOINTMENT OF COUNSEL IN CRIMINAL CASES

The Sixth Amendment to the United States Constitution provides that a criminal defendant is entitled to counsel. The Sixth Amendment is implemented in a number of ways in order to provide for appointment of counsel to represent the indigent. An important part of the representation of the indigent is grounded upon 18 U.S.C. § 3006A,91 which provides for one of two organizations, that is, a Federal Public Defender Organization or a Community Defender Organization, to provide representation. In addition, the Judicial Conference of the United States through the Guidelines for the Administration of the Criminal Justice Act ("CJA") provides that private attorneys shall play a substantial role in indigent representation. In fact, the model plan for the composition, administration, and management of the CJA Panel suggests that a "substantial role" would mean at least 25% of the appointments would go to attorneys in private practice.

In the Eighth Circuit, the district courts have chosen the Federal Public Defender Organization for indigent criminal representation in the Eastern and Western Districts of Arkansas, the Eastern and Western Districts of Missouri, the District of Minnesota, the District of Nebraska, and the Southern and Northern Districts of Iowa. There is no defender presence in the District of North Dakota or the District of South Dakota and these two districts rely solely on private practitioners for representation of the indigent.

To obtain information on the gender composition of criminal appointments we sent detailed questionnaires to the clerk in each district requesting copies of CJA Plans and data showing the number and gender of attorneys appointed in criminal cases for the fiscal year 1995. In addition, we contacted Federal Public Defenders personally for information with respect to the plan for the appointment of panel attorneys in each district.

In every district the appointment is made by the court, through the magistrate judges or the clerk of the court. There is some variance in the appointment process in each district. In Minnesota, Nebraska and Iowa, the local court plan provides for a selection committee to determine who will be on a panel of attorneys available to accept criminal appointments. These selection committees have included the

Federal Public Defender. In the District of Minnesota, the Federal Public Defender assigns attorneys in private practice to the particular case, provides training, and processes the paperwork to insure that all documents are properly prepared and ready to be submitted to the court for payment from CJA funds.

In the following districts there are no panels per se, and the magistrate judges make the appointments from members of the bar in good standing: Eastern Arkansas, Western Arkansas, Eastern Missouri, Western Missouri, North Dakota and South Dakota. In the Eastern District of Missouri, Western District of Missouri, Eastern District of Arkansas and Western District of Arkansas, the court determines who is eligible for appointment in criminal cases and assigns the case to the particular panel attorney or to the office of the Federal Public Defender. If the case is assigned to the Federal Public Defender, the Federal Public Defender designates the assistant in the office who will actually represent the client in the criminal proceedings. In all districts where there are Federal Public Defenders, that office provides training, books, other written material, advice, forms for motions, voir dire, and jury instructions to private attorneys who receive criminal appointments.

The courts sometimes have difficulty identifying attorneys to represent individuals charged in criminal cases. Some attorneys have little or no criminal practice experience. Others decline to accept criminal cases because of the unique problems associated with criminal practice. In many districts, qualified attorneys are needed to accept criminal defense appointments. Criminal appointments are paid positions, although the attorneys fees paid are modest. However, several attorneys responding to the attorney survey suggested that women were not appointed in criminal cases because of gender. Comments included: "I have observed what I believe to be gender based favoritism in appointments . . ." and "I find that female attorneys do not receive as many appointments as male attorneys. . . ."

Data received from the district courts with respect to attorneys appointed in criminal cases in fiscal year 1995 were compiled in the chart below. The female proportion of private attorneys appointed in criminal cases ranged from 8% to 21%. However, some attorneys were appointed in more than one case. Therefore the chart also provides the proportion of cases that were handled by female appointed counsel. The districts varied from 8% of cases handled by women to 17% of cases handled by women, as shown by the following table:
We were unable to assemble information on the number or percentage of women in the pool of those attorneys interested in criminal appointments. Thus, the above actual appointments data do not enable us to reach any conclusions on whether or not criminal appointments are being made fairly.

IV. MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT

The Model Criminal Jury Instructions, the accompanying notes and committee comments drafted by individual members of the Criminal Jury Instruction Subcommittee were reviewed to determine if they included inappropriately gendered language. It should be noted that these instructions are not mandatory; rather they are model instructions and are to be modified as deemed appropriate at the discretion of the trial judge. In fact, the Court of Appeals can not give prior approval to the instructions. As a result, the instructions are available for the judges and litigants to use as is deemed appropriate in the particular case.

Professor Julie Cheslik of the University of Missouri, Kansas City Law School, provided the instructions to five students for a review of the instructions’ language. The students reviewed the instructions in-
dividually making notes in the margins and then met again under the direction of Professor Cheslik for additional commentary. Thereafter, Professor Cheslik submitted a report summarizing by instruction number the instructions in which she and the participating students found areas of concern. Professor Cheslik concluded: “Generally the instructions do not evidence any gender bias.”

V. CASES INVOLVING VIOLENCE AGAINST FEMALE VICTIMS

Violence currently poses a significant threat to women’s rights, health and safety. The Senate Judiciary Committee, after reviewing a wide array of studies on violence against women in the United States, reported that “violence is the leading cause of injuries to women ages 15 to 44, more common than automobile accidents, muggings, and cancer deaths, combined.”92 A recent Department of Justice survey reported that, in total, women ages twelve and older annually sustain almost five million violent victimizations.93 According to the National Crime Victimization Survey, “violent victimizations” include homicide, rape/sexual assault, robbery, aggravated assault, and simple assault.

Until recently, most of the federal cases involving violence against women have been prosecuted under the Assimilated Crimes Act.94 The Assimilated Crimes Act authorizes federal prosecutions for crimes not contained in the United States Code where a criminal offense under state law is committed within a federal enclave or in an area under the exclusive jurisdiction of the United States. Under the Act, state substantive law is incorporated into the federal prosecution and the federal prosecutor “steps into the shoes” of the state prosecutor for purposes of the charged offense.95 Cases involving criminal racketeering also incorporate state law crimes of violence, including murder and kidnapping.96

A. VIOLENCE AGAINST WOMEN ACT

In September 1994, Congress passed the Violence Against Women Act (VAWA).97 The Act is a comprehensive statute containing a wide range of provisions designed to address the noted problem of violence

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95. United States v. Kearney, 750 F.2d 787 (9th Cir. 1984).
against women. For example, to improve overall safety for women, the VAWA increases penalties for federal rape convictions and provides state grants to support law enforcement and educational efforts aimed at reducing violent crime against women.98 With respect to domestic violence, the Act criminalizes interstate domestic violence,99 and ensures that a protective order issued in one state is given "full faith and credit" in all other states.100 In an effort to achieve equal justice for women in the courts, the Act authorizes grants to improve the training of judges who deal with issues involving domestic violence and also encourages circuit judicial councils to conduct gender bias studies.101

A somewhat controversial provision of the VAWA is the section entitled "Civil Rights for Women." This provision establishes a federal civil rights cause of action for victims of violent crimes "motivated by gender."102 The Civil Rights Remedy defines a violent crime as any act that would be a federal or state felony, whether or not the offense has actually resulted in criminal charges, prosecution, or conviction.103 Under the statute, a person who commits a crime of gender-motivated violence, whether a public or private actor, is liable to the injured party and subject to compensatory and punitive damages, as well as injunctive and declaratory relief.104 The federal and state courts have concurrent jurisdiction over actions brought pursuant to that section.

Undoubtedly, with the enactment of the Violence Against Women Act, there will be an increase in the number of cases involving violence against women in the federal courts. As of the date of this report, there have been no reported appellate cases decided under the Act in the Eighth Circuit.

B. EVIDENCE RULES IN VIOLENCE CASES

The Violence Against Women Act extended the protection of the Federal Rules of Evidence. Rule 412 now applies to all criminal and civil proceedings involving alleged sexual misconduct. In general, evidence offered to prove the alleged victim's past sexual behavior or sex-

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102. 42 U.S.C. § 13981(d)(1) (1994). According to the statute, a gender-motivated crime is "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." Id.
ual predisposition is not admissible. Furthermore, under Rule 413, in criminal cases in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible. In a criminal case in which the defendant is accused of an offense of child molesta-
tion, Rule 414 allows evidence of the defendant’s commission of another offense or offenses of child molestation. In a civil case, Rule 415 allows evidence of similar acts in civil cases concerning sexual assault or child molestation.

The attorney survey assessed the experiences and opinions of criminal practitioners. The effects of the type of practice (prosecution vs. defense) as well as the gender of the attorney were examined.

Although the majority of attorney respondents had no opinion, those who did were almost twice as likely to think that trial practice conformed to the spirit and letter of the evidence rules in this area. With regard to the inquiry whether attorneys believe that evidentiary rules are construed to protect the alleged victim, over 30% agreed or strongly agreed while approximately 15% of the sample overall disagreed or strongly disagreed. Men were slightly more likely to agree with this idea than women.

Attorneys overall tended to disagree/strongly disagree (35%) more than agree/strongly agree (10%) with the statement that “evidence of an alleged victim’s past sexual history is likely to be admitted.” Attorneys reporting experience with cases of violence against women were moderately more likely to disagree, and men were slightly more likely to disagree than women. More than half of the criminal attorneys had no opinion on this issue. The judges surveyed disagreed/strongly disagreed (63%) that evidence of a victim’s sexual history should be admitted, with female judges much more likely to reject this idea.

Finally, many more attorneys agreed/strongly agreed (33%) than disagreed/strongly disagreed (10%) with the statement that “evidence of a defendant’s commission of a past sexual assault is likely to be admitted.” No gender differences were noted. The judges agreed/

105. The following exceptions to the rule are allowed if the evidence is otherwise admissible:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence, the exclusion of which would violate the constitutional rights of the defendant.

106. Fed. R. Evid. 413.

strongly agreed (38%) that evidence of a defendant's commission of a past sexual assault should be admitted, while 20% disagreed/strongly disagreed. Over half of the attorneys and almost half of the judges took a neutral stance on the issue.

C. Treatment of Domestic Violence Issues

Many women accused of criminal conduct have argued battered woman syndrome evidence in the context of self-defense. The Eighth Circuit has allowed expert testimony relating to the battered woman syndrome in a case where the woman was the complainant witness and/or victim and her abuser was the criminal defendant,108 citing a number of state court cases that allowed such evidence in cases where the syndrome was relied upon to support the defense that the battered woman killed her husband or partner in self-defense. The Eighth Circuit has also approved of the use of expert testimony on the battered woman syndrome in a case in which the defendant victim argued self-defense.109

Women are also raising the battered woman syndrome in the context of a duress defense. The use of the battered woman syndrome in the duress context is relatively new.110 The Eighth Circuit has not decided a case alleging this theory. Even if the defense of self-defense or duress is not successful at trial as a complete defense to the charge, the defendant may still move for a downward departure in sentencing on that ground.111

In light of the undeveloped state of the law in this area, we asked attorneys and judges for their views of what the law should be. We asked attorneys whether they agreed with the idea that "[d]omestic violence should be a duress defense to a criminal prosecution." More than 34% agreed or strongly agreed with the statement, compared to 21% who disagreed or strongly disagreed. Women were somewhat more likely to agree with this notion than were men. Further, criminal defense attorneys were considerably more likely to agree than were prosecutors. Judges responding to this same inquiry were rather evenly divided on the issue of domestic violence being allowed as a duress defense, with 30% disagreeing and 22.5% agreeing with the proposition.

111. See infra, Part VI., Sentencing in the Eighth Circuit, Part C, Departures Based on Battering, Coercion or Duress.
The judges also were almost evenly divided in their opinions on whether expert testimony was useful in bench trials to understand the effects of both sexual assault and domestic violence with 38% disagreeing and 36% agreeing with its usefulness. There was a similar lack of agreement on the usefulness of expert testimony in jury trials. When the combined items were examined for expert testimony in both bench and jury trial, a parallel gender difference emerged. That is, female judges were more likely to believe that expert testimony is useful in both bench and jury trial to understand the effect of violence against women.

Criminal practitioners generally viewed the courts in the Eighth Circuit to be successfully addressing the needs of female victims of violence against women.\textsuperscript{112} This was especially true among attorneys with experience handling such cases.\textsuperscript{113} With respect to prosecutions, 38% of attorneys disagreed or strongly disagreed with the statement that “federal prosecutors inappropriately decline to prosecute when they could exercise jurisdiction.” On average, a greater percentage of attorneys agreed, rather than disagreed, that federal prosecutors (30%) and federal judges (38%) adequately understand the behavior and emotional reactions of victims, with women holding these views almost as strongly as men. Attorneys with experience working with such cases involving violence against women were considerably more likely than others to agree with the idea. In general, the judges’ responses also suggest they believe that federal prosecutors understand the behavior and responses of victims with male judges being much more likely to adopt this notion than their female counterparts.

In considering the statement that “defense attorneys appeal to common misperceptions and prejudice toward victims,” more than 50% of the attorneys took a neutral stance, whereas the rest were nearly evenly divided between agreement/strong agreement (23%) and disa-

\textsuperscript{112} Anecdotal information from a focus group in Minnesota revealed some concerns of Native American women in sexual assault cases. Members of a focus group reported that Native American women feel jurors are inexperienced in Native American culture which could result in differences in interpretation of demeanor and increased stress levels of victims in describing highly sensitive experiences to non-Indians. The group noted a representative of the United States Attorney’s Office was appointed to provide services to victims of and witnesses to federal crimes on the reservations.

\textsuperscript{113} Three hundred twenty-four (26%) of the 1,256 attorneys involved in criminal litigation reported having worked on a case involving sexual assault, stalking, kidnapping, or other violence against a female victim. Of the respondents, a total of 233 (19%) of the sample had worked with a case involving violence against a female victim on Native American or federal lands. Only 104 (8%) reported working with a criminal case involving domestic violence as a defense. Finally, 187 (15%) attorneys in the sample reported working with a case involving domestic violence as grounds to revoke bail or probation of a criminal defendant. No gender differences were noted in any of these responses.
agreement/strong disagreement (24%). Prosecutors and female attorneys were more likely to agree than were defense attorneys and male attorneys. The judges surveyed disagreed (38%) more than agreed (28%) with this proposition.

Again, the results generally suggest that attorneys and judges perceive the Eighth Circuit as being hospitable to women victims of violence. Furthermore, recent legislation, including new evidentiary rules, and Eighth Circuit decisions are likely to provide increased protection for female victims of violence in the courts comprising the Eighth Circuit.

VI. SENTENCING IN THE EIGHTH CIRCUIT

Prior to enactment of the United States Sentencing Guidelines, district courts were free to exercise wide discretion within the penalty provisions of the criminal statutes to impose a sentence commensurate with the crime committed and the circumstances of each wrongdoer. In 1984, Congress created the United States Sentencing Commission to establish sentencing policies and practices for the federal criminal justice system.

The Commission was directed to create categories of offense behavior and offender characteristics and to establish guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristics. Subject to only certain narrowly prescribed exceptions, the sentencing court must select a sentence from within the predetermined guideline range. Congress directed the Commission to develop guidelines which were “entirely neutral as to sex” and, accordingly, the Guidelines specifically provide that gender is not relevant in the determination of a sentence.

Since promulgation, the neutrality of the Guidelines as applied according to these directives has come under increasing question. The

114. With the enactment of the Guideline provisions, courts are now required to determine the appropriate sentence by allotting points for the nature of the offense, the defendant’s role in the criminal activity, and the amount of the loss, the total of which is then cross-referenced with the defendant’s criminal history to determine a sentence from a sentencing table. For example, to determine a sentence for a defendant convicted of mail fraud, the court calculates the number of points to be awarded based on the amount of the fraud, whether the fraud scheme required more than minimal planning, whether the defendant managed others in the commission of the crime, whether the defendant held a mitigating role, and what if any criminal history for the defendant exists. With these computations completed, the court then consults the sentencing table for a sentencing range provided for the total number of points calculated. The court then exercises its discretion to find an appropriate sentence within the range of months provided, with only minimal opportunity for departures from the range. Both the government and the defense can appeal the court's application of the Guidelines.

concern is not whether the courts are subjecting women to disparate and unequal treatment in the application of the Guidelines. Rather, the issue is whether the Guidelines as promulgated, while facially neutral, operate to disadvantage women; or, stated differently, whether neutrality is achieved through the erroneous simplification that men and women are the "same".116

The question, whether men and women are the "same" for sentencing purposes, or whether departures are warranted for certain gender specific circumstances, has not been resolved by the federal courts in general.117 However, as we noted above, the Eighth Circuit has answered the question in part by permitting downward departures in instances where domestic violence in the form of coercion or duress is causally related to the crime.

The difficulty in finding the answer to the question of "sameness" lies in the issues of social policy, gender stereotyping, and equal treatment which the question raises. What some might consider the "neutrality" sought by Congress, others characterize as unequal treatment for certain other offenders without childcare responsibilities, usually but not always male, and/or criticize as reinforcing notions of women's (or men's) proper place.118

A. FAMILY TIES AND RESPONSIBILITIES

The policy of the Commission is that family ties and responsibilities are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.119 A sentencing court may depart, however, from the guideline range if it finds that "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."120 This Circuit has determined

116. In its Statement of Position to the United States Sentencing Commission on March 7, 1995, the National Association of Women Judges took the position that "policies that are truly gender neutral require more than the application of non-gender specific pronouns to a structure that reflects the experience of only males." Statement of Position, National Ass'n of Women Judges, 8 FD. SENT. REP. 176 (1995). The Association, although recognizing the Congressional mandate that the guidelines be gender neutral, asked the Commission to consider the special circumstances of female offenders in its departure provisions and sentencing alternatives.
that such departures were intended to be allowed by the Commission only in rare cases.121

While some circuits explicitly prohibit the inclusion of family responsibility as a sentencing factor when based on the mere existence of dependent children, others, including the Eighth Circuit, have demonstrated reluctance to adopt such a prohibition.122 Nonetheless, courts in the Eighth Circuit and elsewhere have observed that "a sole custodial parent is not a rarity in today's society, and imprisoning such a parent will by definition separate the parent from the children... [This] situation, though unfortunate, is simply not out of the ordinary."123 Thus, in many cases the issue becomes when does the ordinary become extraordinary?124

In one instance, the Eighth Circuit Court affirmed a refusal to grant a downward departure to a defendant with two small children, one of whom had a speech disorder and the other severe attention deficit and hyperactivity disorder, when they could live with her husband and ample financial resources were available.126 In another, denial of a downward departure was upheld where a defendant whose wife was disabled from depression and panic attacks was the sole support of three young sons.126 But, in at least two instances, the court concluded that the unusual mitigating circumstances of life on an Indian reservation were extraordinary enough to justify departure.127

Despite criticism leveled against the guidelines for failure to take family responsibility into account, the Commission believes that to do so would give advantage to white, middle class, employed defendants

123. United States v. Brand, 907 F.2d 31, 33 (4th Cir. 1990); see also United States v. Harrison, 970 F.2d 444, 447 (8th Cir. 1992) (citing Brand, 907 F.2d at 33).
124. To determine whether the circumstances relied upon by the sentencing court are sufficiently "unusual" to warrant departure from the Guidelines, the Eighth Circuit has adopted a standard which requires the court to determine whether circumstances relied upon are "of a kind or degree that they may appropriately be relied upon to justify departure" and are supported by the record. Once these factors are satisfied, the decision to depart is determined by a standard of reasonableness. United States v. Lang, 898 F.2d 1378, 1379 (8th Cir. 1990).
125. United States v. Scoggins, 992 F.2d 164 (8th Cir.1993).
126. United States v. Goff, 20 F.3d. 918, 921 (8th Cir. 1994).
127. United States v. One Star, 9 F.3d 60 (8th Cir.1993); United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990) in which the court observes:

"Commentators note, however, that the 'legislative history suggests that the use of the phrase 'are not relevant' may be too sweeping because the Senate Judiciary Committee's report states that 'the requirement of neutrality . . . is not a requirement of blindness.' Big Crow, 898 F.2d at 1332, n.3 (citations omitted).
with intact families. Nonetheless, since defendant parents are distributed widely across the prison population, a more rational way for the Commission and the courts to address the problem is to view it as one of child welfare rather than simply one of gender.

Admittedly, the burdens associated with family responsibilities, particularly for the single parent, impact more often on the female defendant. These problems for women are frequently exacerbated since female inmates make up such a small portion of the prison population, and therefore are often confined in institutions far from home and family. However, the burden of a single parent inmate is no less severe for the male defendant who has sole custody and responsibility for a minor child.

To explore these issues we asked respondents to the judge survey whether the Sentencing Guidelines made adequate provisions for the consideration of certain factors and whether the Guidelines should allow their consideration. In general, respondents suggested that the Guidelines do not make adequate provisions for factors involving caretaking and financial responsibilities for children. However, a large percentage of respondents indicated no opinion on the issue. With respect to whether or not the Guidelines should allow consideration of the various factors, the largest percentage agreed that the Guidelines should allow consideration of the defendant's responsibilities for child caretaking or financial support. Again, a substantial percentage of judges indicated in each case that they had no opinion.

B. PREGNANT OFFENDERS

A small but significant number of women entering prison are pregnant. Until 1988, the Bureau of Prisons provided parenting classes but there was no provision for checkups and prenatal medical care. Birthing facilities were seldom provided in federal prisons and women were required to obtain child placement outside the facility after birth. Typically, pregnant inmates stayed in a federal correctional institution until they were ready to deliver, at which time they were moved to a contract hospital where they would deliver, after which, within 24 to 48 hours, if there were no medical problems, they

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129. Of the federal correctional institutions in the country which house female inmates, none is in the Eighth Circuit, although the FCI camp at Pekin, Illinois, is in close proximity.
were returned to the institution, and the child was placed elsewhere.\textsuperscript{130}

The Bureau of Prisons has now initiated substantial reform with its development of \textit{Mothers and Infants Together} or the MINT program, an alternate resident program for pregnant women in federal prison. The MINT program permits the pregnant inmate to enter a community correction center two months prior to giving birth and remain there with her child for up to three months before returning for completion of her sentence.\textsuperscript{131}

A pregnant inmate can also participate in prenatal and post-natal programs and services such as childbirth, parenting and coping skills classes. In addition to the parenting services, MINT sites also offer services particularly related to chemical dependency, physical and sexual abuse issues, self esteem, budgeting, and vocational/educational programs.\textsuperscript{132}

At first the policy was not generally implemented, due in part to the very small number of community facilities available to accept inmates with infants. However, now every offender pregnant at the time of sentencing can enjoy the benefits of the program if the sentencing judge so designates, provided that the inmate is otherwise eligible for confinement in community facilities.\textsuperscript{133}

Limitations on eligibility only bar inmates who are classified as deportable aliens, who have unresolved pending charges, who pose a significant threat to the community, or who for some other reason would be ineligible for community custody or placement in a halfway house.

Thus the Courts now have the sentencing options necessary to address the needs of the pregnant offender and child through the MINT program.

\textsuperscript{130} Nat'l Ass'n of Women Judges, 8 \textit{Fed. Sentencing Rep.} at 177.  
\textsuperscript{131} The Bureau of Prisons estimates that between 20 and 30 pregnant inmates are designated in the MINT program nationwide at any point in time.  
\textsuperscript{132} Community correction centers, commonly referred to as "halfway houses", provide suitable residence, structured programs, and job placement counseling, while the inmates' activities are closely monitored. Such facilities offer drug testing and counseling for drug and alcohol-related problems as well. The MINT program is available in seven such centers in Sioux Falls, South Dakota; Phoenix, Arizona; Fort Worth, Texas; Springfield, Illinois; Alderson, West Virginia; near San Francisco, California and Danbury, Connecticut. (Thus all MINT facilities but the one in Sioux Falls, South Dakota, are located near a federal correctional facility which houses women.).  
\textsuperscript{133} When attorneys surveyed were asked whether they agreed with the statement that "federal judges are sensitive to the physical and medical needs of pregnant offenders," 22\% of respondents overall agreed or strongly agreed with the statement and a substantial majority (71\%) took a neutral stance.
C. Departures Based on Battering, Coercion or Duress

The Guidelines permit a downward departure in sentencing when a defendant commits an offense "because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense." The policy provides:

The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party.

Thus, the subjective mental state and personal characteristics of a female offender are factors which the sentencing court may take into consideration in determining whether she was susceptible to coercion or duress in the commission of the crime. The Eighth Circuit has adopted this subjective standard, recognizing that the ground for downward departure under the Guidelines based on coercion or duress is "thus broader than the defense of duress, as it does not require immediacy of harm or inability to escape and allows the District Court to consider the subjective mental state and personal characteristics of the defendant. . . ."

In one case, the district court granted a downward departure because the defendant's boyfriend, a man 15 years her senior, had manipulated her into involvement with narcotics. In another, a downward departure for victim misconduct as provided by section 5K2.10 was granted where the victim pushed the defendant, verbally abused her, and attempted to publicly humiliate her when she refused his request for sexual intercourse, thereby provoking her assault on him. It has denied a downward departure due to a past abusive relationship when the abuse was too attenuated from the crime to justify departure.

135. Id.
140. United States v. Yellow Earrings, 891 F.2d 650, 653 (8th Cir. 1989).
141. United States v. Desormeaux, 952 F.2d 182, 185 (8th Cir. 1991).
Thus, the Guidelines as interpreted by the Eighth Circuit permit departures downward in instances where abuse, coercion, blackmail, and duress, even when not constituting a complete defense, are causally linked with the crime for which a woman is being sentenced. This approach appears to be in accord with the criminal practitioners and judges in the Circuit who agreed by a substantial percentage that domestic violence should be a mitigating factor in sentencing.\textsuperscript{142}

VII. SUMMARY OF FINDINGS

Women constitute 13\% of attorneys and men constitute 86\% of the attorneys of record in criminal cases in the district courts of the Eighth Circuit. Women are employed as almost one-third of Assistant United States Attorney prosecutors and Assistant Federal Public Defenders. That proportion exceeds the percentage of female attorneys practicing in the Circuit.

In 1995, 13\% of criminal sentencings in this Circuit involved female defendants, compared to 15\% of sentencings nationwide. Eighth Circuit sentencing data reflect that female defendants were older, more educated, and more likely to have dependents than were male defendants.

We found some district variation in the process by which private counsel were appointed in indigent criminal cases and in the numbers of men and women appointed. The female proportion of private attorneys appointed ranged from 8\% to 21\%. Some attorneys expressed the view that criminal appointments are not made on a gender-fair basis; however, the lack of information on the pool of attorneys interested in such appointments did not permit us to reach conclusions in this area.

Grand jury data reflect that approximately half of all summoned grand jurors and impaneled grand jurors were female. Judges in the districts examined, appointed women to nearly half of foreperson and deputy foreperson positions.

The Eighth Circuit Model Criminal Jury Instructions were reviewed for inappropriately gendered language and were generally found not to evince gender bias.

Many attorneys and judges took a neutral position about the effects of Rules of Evidence 412, 413, and 415, suggesting that the rules may be too new to have yet affected the practice. Among those who expressed their views, however, attorneys were more likely to report that evidentiary rules are construed to protect the alleged victim. Attorneys and judges were of the opinion that generally evidence of a

\textsuperscript{142} 47.2\% of respondents indicated their agreement while 59.4\% took a neutral position.
defendant's commission of a past sexual assault should be admitted and that evidence of an alleged victim's past sexual history should not be admitted.

Judges and attorneys were divided in their opinions about a number of criminal issues. Attorneys (34% agreed vs. 21% disagreed) felt more strongly than judges (30% vs. 23%) that domestic violence should be a duress defense to a criminal prosecution. Nearly equal numbers of attorneys agreed (23%) as disagreed (24%) with the proposition that defense attorneys appeal to common misperceptions of prejudice toward victims. More judges disagreed (38%) than agreed (28%) with this proposition.

With respect to the treatment of female victims of violent crime, criminal practitioners were in accord in their views that prosecutors do not inappropriately decline to prosecute (38% agreed vs. 3% disagreed), and that prosecutors (30% vs. 10%) and judges (38% vs. 10%) understand the behavior and emotional reactions of victims. Female attorneys were less likely than male attorneys to find the courts hospitable to female victims of violent crime.

Unlike some other circuits, the Eighth Circuit has not explicitly prohibited the inclusion of family responsibility as a sentencing factor when based on the mere existence of dependent children. The majority of judge survey respondents agreed that the Sentencing Guidelines do not make adequate provisions for consideration of caretaking and financial responsibilities for children and also agreed that the Guidelines should allow consideration of these factors.

The Eighth Circuit Court of Appeals has adopted a subjective standard which permits downward sentencing departure in instances where abuse, coercion, blackmail, and duress are causally linked with the crime for which a defendant (such as a battered woman) is being sentenced. The majority of judges and criminal attorneys surveyed agreed that domestic violence should be a mitigating factor in sentencing.

Chapter 5
COURTROOM INTERACTION

It is critical that the courts treat all persons fairly and that all who come within their walls believe that bias has not interfered with justice. The judicial system acts in its most visible form within the courthouse itself. Daily interactions there speak most clearly to the fairness of the institution. In this chapter, we examine courtroom interactions to determine whether they may provide evidence or perceptions of lack of fairness and, if so, to suggest ways in which such problems might be remedied.
To gather information about courtroom interactions, one would ideally collect data from all who are present there — judges, attorneys, court employees, parties, witnesses, and jurors. We surveyed the first three groups about their personal interactions in litigation, within the courtroom, and in chambers, and those surveys are the source of the information provided here. Unfortunately, temporal, financial and logistical barriers precluded us from obtaining information from parties, witnesses and jurors.\footnote{See Judith Resnik, *Asking about Gender in Courts*, 21 Signs 952, 970-973 (1996). Professor Resnik notes that such limitations have been characteristic of the studies of gender effects in the courts. She is concerned that exploring the experiences of such privileged women as lawyers and judges may obscure critical information about the injuries of women without authority. One may argue, however, that if the courts are inhospitable to women of power, they will be significantly less hospitable to other women, such as witnesses, parties, and, particularly, criminal defendants. Resnik contends that exploring the experiences of privileged women is itself important because it is they who will be in the best position to effect social change within the institution.}

In examining our results, it is important to note some respects in which the Eighth Circuit attorney and judge surveys differ significantly from those developed for similar studies in state court systems and in other federal circuits. For example, Eighth Circuit surveys sought information separately about personal experiences and observations, rather than collapsing the two.\footnote{The attorney survey instructions explained the terms as follows: "Experiences refer to what has happened to you. Observations refer to what you have observed happen to others, including to judges, attorneys, clients, litigants, witnesses, jurors, court employees, and the public." Similar definitions were used in the judge and court employee survey instructions.} Further, the questions were limited solely to interactions occurring while in litigation in the federal courts of the Eighth Circuit. The surveys, therefore, most certainly yielded a more conservative estimate of problematic behavior within the courts than prior studies, and the figures should be considered an absolute lower bound on the frequency of situations of this type. In particular, the decision to limit our focus solely to the context of litigation undoubtedly produced a considerable underestimate of the extent to which these incidents occur, as the data do not include, for example, incidents between co-workers in law firms. Readers should keep this in mind when examining this chapter.

I. CIVILITY AND PROFESSIONALISM

Civility in courtroom interaction is important to the judicial system for a number of reasons. General incivility, even if not overtly gendered, may constitute disparate treatment if it is experienced more by persons of one gender than the other. Such conduct may also result in disparate impact, if it more adversely affects those of a particular group. If participants in the legal process find that they are treated
inhospitably within the courts of the Eighth Circuit, they may believe that the positions they advocate are not being given a fair hearing; and, such incivility may represent evidence that such beliefs are indeed based in fact. Further, to the extent that incivility causes participants in the process to feel unwelcome and thus to withdraw from participation, the system will lose its contribution to the promotion of justice.

Attorneys, court employees and judges responded to questions concerning their experiences and their observations of general incivility, gender-based incivility, and unwanted sexual attention in the context of litigation during the five years preceding the survey. Respondents were asked about a number of specific behaviors and their responses analyzed by summing responses to similar items to yield scales for each of the three areas of inquiry. Such scales give a considerably more reliable assessment of the extent of problematic behavior than analyses of single items. Respondents were also invited to provide narrative descriptions of situations they had found particularly problematic, as well as to comment generally about gender issues in the Eighth Circuit.

A. Incivility

1. Toward Attorneys

The scale assessing general incivility included experiences such as being inappropriately interrupted, treated condescendingly, ignored, or excluded from professional camaraderie. Fully 63.7% of female attorneys and 47.9% of male attorneys had experienced one or more incidents in the context of litigation in the Eighth Circuit within the past five years. On each of the individual questions that comprised the general incivility scale, however, women were significantly more likely than men to have experienced each of the situations described. Percentages of respondents who had experienced each situation are displayed in the table below:
Attorneys Experiencing General Incivility in Federal Litigation During the Past Five Years

<table>
<thead>
<tr>
<th>Behavior</th>
<th>Women %</th>
<th>Men %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inappropriately Interrupted</td>
<td>46.7</td>
<td>33.4</td>
</tr>
<tr>
<td>Paid Little Attention To Statements or Opinions</td>
<td>46.2</td>
<td>37.5</td>
</tr>
<tr>
<td>Condescending</td>
<td>44.7</td>
<td>27.6</td>
</tr>
<tr>
<td>Demeaning or Derogatory Remarks About You</td>
<td>14.9</td>
<td>9.5</td>
</tr>
<tr>
<td>Ignored Or Excluded From Professional Camaraderie</td>
<td>38.3</td>
<td>9.5</td>
</tr>
<tr>
<td>Disrespectful or Discourteous Treatment</td>
<td>32.1</td>
<td>20.5</td>
</tr>
</tbody>
</table>

Despite the gender difference in incidence rates a number of both male and female attorneys expressed (via written comments on the survey) the view that their ill-treatment was not gender-based. For example, one woman wrote:

The judges sometimes are curt, rude or condescending. However in most cases they are equally patronizing to female and male attorneys.

As can be seen, the area of general incivility in which the experience of men and women most differed was that of being ignored or excluded from professional camaraderie. This experience was reported by 38.3% of women, but only 9.5% of men. Far from being an isolated event, such exclusion was not uncommon; 13.8% of the women reported that this happened at least “sometimes” and nearly 7% said it occurred “often or many times.”

Professional exclusion was also a topic of frequent comments by female attorneys, many of whom not only found it discomforting, but also feared that it results in, or is symptomatic of, actual gender bias in decision making. One female attorney wrote:

My experience has been that federal judges rarely (in my district) make any inappropriate comments from a gender perspective, but it is the subtle distinction in the treatment of litigants that gives one litigant an edge over the other. In chambers, much casual conversation occurs between the male judge and the male attorney on issues a female may have little interest in (the military, sports). The female litigant never participates on equal footing. In the court room, deference is given (often subtly) to the male attorney or the judge and male attorney carry on extensive dialogue as if the female attorney were not present. No one needed to comment about her sexuality or her appearance, but nonetheless her significance was substantially diminished by the culture of
the circumstance. As a result, the female [attorney’s] client may not get the justice that client deserves. . . .

Another wrote:

[T]he repeated familiarity exhibited in the court room and chambers between male counsel and male judges demonstrates to me that many of the male judges are more receptive to the arguments of male attorneys than female attorneys. I strongly believe that in a recent case in which my credibility and the credibility of my male opposing counsel were the key issues in the district court’s decision . . . the district judge’s familiarity with opposing counsel and formality with me revealed a gender bias as to credibility of statements which bore itself out in the outcome.

Although far less pervasive, there may be a similar sense of exclusion when a man appears before a woman judge. As one male attorney wrote:

My personal observation is that female attorneys communicate with female judges far better than do male attorneys — and consequently are much more successful when practicing in front of them. . . . The simplest example is small talk in chambers.

Some respondents believe that there are male attorneys who use social exclusion of female counsel as an intentional tactic to make the men’s position more credible in the eyes of the judge. As one woman wrote:

Men tend to try the “good old boy we’re all buddies” approach with judges which has the effect of making the woman attorney feel like an outsider. A few judges recognize this and diffuse it, a few go along with or engage in it and the rest ignore it.

The survey also asked attorneys about the persons responsible for incidents of incivility they had experienced, with the following results:¹⁴⁵

¹⁴⁵. Percentages are of respondents who had experienced general incivility, not respondents as a whole.
Women were considerably more likely to report other attorneys as the source of uncivil behavior, whereas men were slightly more likely to identify judges as the source; nevertheless, a majority of women who had experienced incivility also identified judges as a source.

We also asked attorneys where incidents of incivility had been experienced. Men were somewhat more likely to identify incidents during public proceedings; women were more likely to report incidents in five of the six locations as set forth below: \[146\]

<table>
<thead>
<tr>
<th>Attorneys Identifying Sources of Incivility Experienced*</th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge</td>
<td>55.7%</td>
<td>66.4%</td>
</tr>
<tr>
<td>Attorney</td>
<td>74.7%</td>
<td>43.9%</td>
</tr>
<tr>
<td>Bankruptcy Trustee</td>
<td>8.2%</td>
<td>7.9%</td>
</tr>
<tr>
<td>Marshal or Court Security Officer</td>
<td>6.8%</td>
<td>5.7%</td>
</tr>
<tr>
<td>Court Personnel</td>
<td>15.5%</td>
<td>10.4%</td>
</tr>
</tbody>
</table>

*Note: Attorneys could choose more than one option.

Court employees were asked about the extent to which they had observed incivility towards male and female attorneys in the courtroom or judges' chambers. Their responses provide an inexact measure of the experiences of attorneys for a number of reasons. First, court employees, as observers, may be less likely to perceive uncivil behavior than the person to whom it is directed. Also, some who responded may have had only infrequent opportunity to observe courtroom and chambers behavior. Each of these conditions would tend to

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146. With the exception of incidents at bankruptcy creditor's meetings, attorney gender was significantly related to incident location for all locations. The table includes reported locations for all items on the general incivility, gender-related incivility and unwanted sexual attention scales.
lower the frequency with which such situations were reported. The observations of court employees reporting one or more instance of uncivil behavior within the courthouse appear below:

<table>
<thead>
<tr>
<th>Court Employees Observing Incivility Toward Attorneys</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>A Female Attorney</td>
<td>35.1</td>
</tr>
<tr>
<td>A Male Attorney</td>
<td>33.0</td>
</tr>
</tbody>
</table>

When asked who were the perpetrators of incivility, both male and female court employees identified judges (noted by about 60%) and attorneys (noted by about 40%) most frequently.

2. Observations of Incivility Toward Parties, Litigants and Witnesses

Although we did not survey litigants and witnesses directly concerning their experiences in the courts of the Eighth Circuit, court employees were asked about the extent of certain behaviors toward parties, litigants and witnesses. Their responses provide an inexact measure of the experiences of parties, litigants and witnesses for the reasons noted above. The observation of court employees reporting incivility toward parties appear below:

<table>
<thead>
<tr>
<th>Court Employees Observing Incivility Toward Parties</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>A Female Party</td>
<td>38.7</td>
</tr>
<tr>
<td>A Male Party</td>
<td>38.6</td>
</tr>
</tbody>
</table>

Female court employees observed incivility more frequently directed toward women than toward men; male employees, on the other hand, reported incivility toward men and women at similar rates. The following table indicates the extent to which those court employees

147. The term "incivility" includes such behaviors as being ignored, interrupted, spoken to in a condescending manner, and being subjected to derogatory and gender-related comments. Among court employees, male observers saw similar amounts of incivility directed toward males and females; female court employees reported greater offensive behavior toward women. The responses of court employees to questions regarding incivility cannot be directly compared to those of attorneys because the inquiry answered by court employees asked about observations of incidents in courtrooms or chambers, whereas attorneys were asked about experiences in federal litigation, which might include interactions outside the courthouse, such as in depositions.

148. "Parties" means both litigants and witnesses.
who reported incivility toward litigants and witnesses observed specific behaviors:

| Court Employees Observing Uncivil Behaviors Directed Toward Litigants and Witnesses |
|---------------------------------|--------|--------|
| Behavior                        | Women  | Men    |
| Ignoring, failing to listen or interrupting a female litigant or witness | 28.2%  | 21.3%  |
| Ignoring, failing to listen or interrupting a male litigant or witness     | 27.8   | 21.8   |
| Speaking in a condescending or patronizing manner to a female litigant or witness | 23.1   | 17.6   |
| Speaking in a condescending or patronizing manner to a male litigant or witness | 21.0   | 19.6   |
| Making a derogatory, gender-related comment to a female party or witness    | 7.2    | 5.1    |
| Making a derogatory, gender-related comment to a male party or witness      | 4.1    | 3.7    |

To provide an additional dimension—and independent corroboration—of the attorney and employee reports, we asked judges whether they had observed a series of uncivil behaviors directed toward male or female attorneys or witnesses in the course of litigation. Both male and female judges observed such conduct directed more often toward women than toward men. Female judges observed greater disparity in the treatment of men and women.

3. Incivility Toward Judges

It might be expected that, because of the powerful role they play in the federal courts, judges would be immune from the sorts of incivility experienced by attorneys. In fact, 75.6% of male and 69.2% of female judges reported experiencing one or more incidents of incivility in the course of litigation in the last five years. There were no significant gender differences between male and female judges with regard to the frequency with which they experienced incivility. Male judges were in fact significantly more likely than male attorneys to report experiencing uncivil behavior.149

149. The general incivility scale derived from judges’ responses to individual items included such personal experiences as being inappropriately interrupted, having little interest paid to one’s opinion, being subject to condescension, being the subject of demeaning remarks, professional exclusion and being treated disrespectfully. As compared to 75.6% of male judges, 47.9% of male attorneys had experienced at least one incident included on the scale of general incivility.
Male judges identified attorneys as the principal source of incivility directed at them, whereas female judges identified both judges and attorneys as significant sources of incivility.

<table>
<thead>
<tr>
<th>Judges Experiencing Incidents of General Incivility</th>
</tr>
</thead>
<tbody>
<tr>
<td>Men</td>
</tr>
<tr>
<td>Women</td>
</tr>
</tbody>
</table>

Both male and female judges identified informal proceedings in chambers as the most common location where they experienced incivility. Female judges were far more likely than male judges to experience incivility in informal settings (100% vs. 61%), public trial proceedings (62.5% vs. 44.6%) and in meetings of judges, court staff or committees (88.9% vs. 39.6%).

B. GENDER-BASED INCIVILITY

The Task Force also sought to assess the extent of directly gender-related incivility occurring in Eighth Circuit litigation proceedings. We constructed a scale for gender-related incivility grouping situations that are clearly gender-related, either because their content is gender-based or their targets are typically women. These items included questions about offensive remarks or jokes about women, offensive or embarrassing comments about attire or appearance, or being mistaken for a non-lawyer.

1. Toward Lawyers

Overall, 60.3% of female attorneys versus 16.2% of male attorneys experienced one or more of the situations included in the scale. The percentages are summarized below:
Ths through such gender-based incivilities, participants in the judicial process signal to women that their presence is, at best, unexpected and, at worst, unwelcome. Certain types of comments also tend to focus on the woman's physical appearance, suggesting to female attorneys that they are viewed as sexual objects, rather than legal professionals.

The numbers also indicate how substantially different women's experience is from that of men in being accepted in the role of an attorney. A majority of women lawyers, but less than 7% of men, have been assumed by others to be a non-lawyer. Comments on the survey illustrate the personal experiences behind the numbers.

One woman lawyer said that, even after eighteen years of practice, she was still frequently mistaken for the court reporter. Other women found themselves assumed to be secretaries, paralegals, parties in civil litigation, or even criminal defendants. Another said that she was not only asked in open court if she was an attorney, but also asked to produce her license to practice. In another instance, even after the woman provided identification, a court employee called the attorney's office to verify that she really was an attorney. Another was told, when she sought to use the telephone at a courthouse, that it was only for attorneys; when she said she was an attorney, the court employee replied, "Sorry, honey." When another female attorney arrived in chambers for an appearance, she found the others telling inappropriate jokes and assuming that she was not the lawyer there to argue the case. When she said that she was, one replied, "Come on in and join the fun, honey." Other women, although recognized as attorneys, reported that when they appeared with substantially junior male attorneys, communications were directed at the male associate and they were ignored. Women commented upon differential forms of address, such as men being addressed as "Mr." or "counsel" and wo-
men by their first names. For example, female attorneys acting in their professional roles in litigation, were addressed by such terms as “honey,” “hon,” “dear,” “doll,” “sweetie,” “little lady,” “missy,” and “little girl.”

Other women described offensive or embarrassing comments about their physical appearance or attire. One woman reported that, when a case was called, she and a male attorney approached the bench. The judge opened remarks with a compliment about her physical appearance rather than the matter at the bar. Another woman lawyer described an incident in a courthouse hallway where, with a group of attorneys present, one told a joke about a prostitute and then commented that she reminded him of the “hooker.” In another courtroom, opposing counsel told a male partner, who had brought a female associate, that he was glad the partner had brought “something pretty to look at.” In another case, while counsel were inspecting a property in the course of litigation, a male attorney asked a female opposing counsel to go up the stairs first because she was “better to look at.”

Significantly, judges and attorneys believe that such comments have a substantive effect on litigation. Fifty-two percent of judges and approximately 75% of attorneys agreed or strongly agreed with the statement: Comments about attorneys’ dress or appearance diminish the attorney’s credibility.

Asked about the primary source of gender-related incivility that they had experienced, both men and women pointed most often to lawyers and court personnel. However, nearly a quarter of male and female attorneys who reported such behavior identified a federal judge as the source of gender-related incivility.

<table>
<thead>
<tr>
<th>Attorneys Identifying Sources of Gender-Related Incivility Experienced*</th>
<th>Women%</th>
<th>Men%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge</td>
<td>24.0%</td>
<td>22.1%</td>
</tr>
<tr>
<td>Attorney</td>
<td>65.5</td>
<td>52.7</td>
</tr>
<tr>
<td>Bankruptcy Trustee</td>
<td>7.5</td>
<td>4.9</td>
</tr>
<tr>
<td>Marshal or Court Security Officer</td>
<td>29.5</td>
<td>28.6</td>
</tr>
<tr>
<td>Court Personnel</td>
<td>53.4</td>
<td>35.1</td>
</tr>
</tbody>
</table>

*Note: Attorneys could choose more than one option.

Numerical and narrative responses to questions about gender-related incivility demonstrate that in the past five years a majority of women lawyers litigating in the Eighth Circuit have encountered a situation in which others present—lawyers, judges and court employ-
ees—have signaled to her that gender makes them inappropriate or unequal participant in the process.

However, many respondents to the attorney survey commented that they found such problems in the Eighth Circuit less significant than those they had experienced in state courts. For example, a woman attorney wrote: “The state courts are the big problem; rarely are federal courts a problem.” Others, whose federal practice spanned several circuits, commented favorably on this Circuit. One with a multi-circuit appellate practice wrote:

There are circuit courts which badly need this questionnaire and which would be dismayed at the responses they’d get. The Eighth Circuit Court of Appeals is not one of them. It’s a pleasant, cordial, professional place to practice law, filled with helpful staff and good judges.

Another with experience in district courts, both within and outside the Circuit, said: “I have been treated as or more professionally here than in other federal courts where I practice.”

Comments of both men and women suggested that incidence of gender-based incivility is declining in the Eighth Circuit. One woman attorney wrote: “If the questions had asked for situations in the past ten years, as opposed to the past five years, I would have had more to report.”

2. Toward Judges

Judges, too, reported experiencing the type of behaviors discussed as gender-related incivility. Over one-quarter of judges, both men and women, reported they were publicly addressed in unprofessional terms. Significantly more female judges than male judges had been mistaken for a non-judge (69.2% vs. 38.6%), and heard offensive remarks about women (64.3% vs. 47.6%). However, significantly more male judges (42.9%) than female judges (30.8%) had heard offensive remarks about men.

C. Unwanted Sexual Attention

The attorney survey asked a variety of questions about unwanted sexual attention. Inquiries ranged from whether respondents had heard or been the subject of sexually suggestive comments to whether they had experienced subtle threats of retaliation for sexual refusal. Among attorneys, approximately 8% of women and almost 1% of men experienced sexually inappropriate behavior in the course of litigation within the last five years. The frequency of incidents decreased in parallel with the seriousness of the conduct, with 6.7% of women (91) reporting being subjected to sexually suggestive comments but only
0.4% of women reporting sexual threats (5). Of those who had experienced unwanted sexual attention, both male and female attorneys identified other attorneys (79.6%), rather than judges (11.5%), or court personnel (8.0%), as the primary source. A small percentage of judges also experienced unwanted sexual attention in the context of federal litigation. Fourteen per cent of women and 9.5% of men reported that they had been the object of unwanted sexual attention. Court personnel were the most common source of this behavior. Although the number of women who reported that they were subjected to unwanted sexual attention is relatively small, it is nevertheless highly disturbing if such events have occurred at all in the course of federal litigation, and if, in a few instances, federal judges and court personnel were the source.

II. THE IMPACT OF INCIVILITY: CONSEQUENCES OF AND RESPONSES TO UNCIVIL BEHAVIOR AND UNWANTED SEXUAL ATTENTION

Issues of incivility are often dismissed as “legitimate advocacy” or just “part of the game” and female attorneys admonished that they are “overly sensitive” or “too thin-skinned” for the practice of law. In contrast, we found that incivility takes a real and serious toll on attorneys and the judicial system more generally.

We asked attorneys various questions about job satisfaction, job stress and desire to leave federal practice. We then examined the relationship between these job variables and attorneys’ experiences with uncivil behavior. We found moderate, but consistent, effects in that the more attorneys experience general incivility, the lower their job satisfaction, the higher their levels of job stress and the greater their desire to leave practice in the federal courts. For both men and women, job stress was most strongly associated with general incivility. For women, more intensely than for men, job stress was also associated with gender-related incivility. No correlation between job-related effects and unwanted sexual attention was found, most likely because the frequencies of unwanted sexual attention were so small in the context of federal litigation.

Attorneys were also asked how they had responded to the incident that had made the most serious impression upon them. Despite the number of attorneys who had experienced general incivility, gender-related incivility, or unwanted sexual attention, only 1.5% of women and 1.4% of men reported that they had formally complained. The most common response, of both men and women, was that they tried to ignore or forget about the situation. The next most frequent response was to attempt to avoid the person or to seek support from
someone, a friend or family member. The absence of complaints has suggested to some that no such conduct occurs in this Circuit.

Unfortunately, such a conclusion is not justified. We asked attorneys who had not reported the incident why they had not done so. Some thought their experiences were not sufficiently serious to be the subject of a complaint; others expressed frustration that nothing would happen because their own experience was consistent with the way in which that person regularly behaved; many feared retaliation that would affect themselves or their clients; others were concerned about being labeled as a whiner. One wrote of a court employee: “I found out he is always rude, curt, unpleasant, etc. and I didn’t think my complaining would make a difference.” Another said: “The judge uses profanity all the time and I didn’t want to jeopardize my future client’s interests in front of the judge.” One wrote: “To whom do you report any problem? All are part of the same protective federal family in the same [court] house.” Another simply said: “The person is a judge.” One respondent wrote: “Do you really think a trial lawyer can register a personal complaint with a federal judge appointed for life and still survive in the federal practice? Don’t be naive.” Another said: “Complaints are not productive in most instances and people do not treat you the same afterwards.” One responded: “Complaining perpetuates the stereotype of weakness in women.”

Attorneys who said that they had complained about an incident were asked the outcome. Some reported that the offending party had been admonished, but most said that they were told just to ignore the behavior or that they never heard anything further.

Judges concurred with attorneys in reporting that judicial intervention to correct gender-biased behavior is infrequent in federal court. Most judges (73%) had never been requested to intervene to address inappropriate gender bias, and about a quarter indicated that this had occurred only once or twice. The majority of judges reported never actually intervening to address inappropriate gender bias, either upon the request of an attorney (70%) or sua sponte (60.6%). Most of those who indicated having intervened said this had happened only once or twice.

This situation of rare complaints and infrequent judicial intervention is in strong contrast not only with the extent of the problem, but also with judges’ expressed opinions about the appropriateness of such intervention. For example, 63.8% of judges said that it would be appropriate to intervene if an attorney were addressing a witness or attorney in an unprofessional manner and 61.7% said that this would be appropriate if an attorney were making a derogatory, gender-related comment to a witness or attorney. The discrepancy may arise because
judges, focusing their attention on the substance of the proceedings before them, fail to observe the incivility, or are uncertain about when and how to intervene. As one judge commented:

I think judges need assistance/training/advice/mentoring on how and when to intervene, as well as how to be more alert for general fairness issues. Sometimes I hesitate to intervene because I think the lawyer is appearing to be a jerk in front of the jury and he should be left to make a fool of himself; plus I hesitate to "rescue" someone who might not want to be "saved" because he or she might like the jury to see what a dip the other attorney is. So in "mild" cases I stay out; but will jump in *sua sponte*. I need help knowing when!

III. SUMMARY OF FINDINGS

Almost two-thirds of female attorneys and half of male attorneys have experienced general incivility in the course of federal litigation in the Eighth Circuit within the last five years.

Women were considerably more likely to report other attorneys as the source of uncivil behavior, whereas men were slightly more likely to identify judges as the source. Nevertheless, a majority of women who experienced incivility also identified judges as a source.

The greatest difference in the general incivility experiences of male and female attorneys is the extent to which women are excluded from professional camaraderie in the course of federal litigation, an experience encountered by more than a third of women, but only 10% of men in the last five years. Women are most likely to identify other attorneys and judges, while men are more likely to identify judges, as the principal source of general incivility.

Sixty percent of female attorneys have experienced some form of gender-based incivility within litigation in the Eighth Circuit during the past five years. Such behaviors include unprofessional forms of address, offensive comments, about appearance, offensive jokes and comments, and, most commonly, being mistaken for a non-lawyer.

A substantial number of judges, too, experienced incivility; three-quarters of male judges and two-thirds of female judges reported experiencing incivility in the context of federal litigation. Male judges identified attorneys, and female judges identified other judges and attorneys, as the primary sources of such behavior.

Unwanted sexual attention is rarely experienced in the actual course of federal litigation. It is most likely to take the form of sexually suggestive comments, rather than sexual threats or promises. That at least 132 female attorneys have been subjected to unwanted sexual attention in the actual course of federal litigation is a matter of
serious concern. Because Eighth Circuit survey questions were limited in scope to conduct in the context of federal litigation, one should not conclude that sexual harassment of female attorneys is less frequent than in other jurisdictions in which task force studies addressed conduct in broader contexts.

A small percentage of judges also experienced unwanted sexual attention in the context of federal litigation. Fourteen per cent of women and 9.5% of men reported that they had been the object of unwanted sexual attention. Court personnel were the most common source of behavior.

Women are more likely than men to have experienced every category of general incivility, gender-related incivility and unwanted sexual attention.

General incivility and gender-based incivility experienced in the course of litigation were associated with increased job stress, decreased job satisfaction and an increased desire to limit one's involvement in federal litigation.

Attorneys who experience general incivility, gender-related incivility and unwanted sexual attention were extremely unlikely to make it the subject of a formal (or informal) complaint often because they thought it would be useless or unwise to complain. The infrequency of formal complaints in the Eighth Circuit does not establish the absence of gender-related problems in court interactions.

Chapter 6
THE COURT AS EMPLOYER

The constituents of the Eighth Circuit include the federal judiciary, attorneys, litigants, the public and all those employed in the courts of the Circuit. Gender fairness issues are present in the composition of the work force and in the employment policies and practices of the judicial system. Moreover, especially since courts are called upon to adjudicate employment matters and other gender issues, courts should be concerned with how they act in their own role as employer. Therefore the Task Force examined these aspects of the Eighth Circuit.

We learned that the Eighth Circuit courts have a predominately female work force in terms of numbers, and also have gender-stratified positions and offices in that a number of positions and most units tend to be predominately female, while a few positions, including judge, unit head, public defender, and specialist, tend to be predominantly male. Employees are generally satisfied with their work and committed to their jobs. However, approximately 70% of employees responding to the survey reported experiencing general incivility, over
40% had experienced gender-related incivility, and over 30% had experienced unwanted sexual attention in the context of their employment in the previous five years.

Women reported significantly more frequent experiences of these behaviors than men, especially experiences of unwanted sexual attention. Employees, women more than men, perceived their workplaces as moderately tolerant of both gender-related and generally uncivil behavior and some were skeptical that complaints would be taken seriously.

I. DEMOGRAPHICS

Demographic data identifying the gender composition of judges and court employees were obtained from the computerized database of the Administrative Office of the United States Courts as of November 1995. The Task Force completed the database by obtaining missing gender and race information. The resulting computerized database was organized and analyzed, and is summarized below.

The following table shows the composition of the Eighth Circuit work force, including judges, as of November 30, 1995. Of the Eighth Circuit work force of 1,771 employees, 1,138 or 64% were women. Women dominated numerically throughout the Eighth Circuit, with total female employment ranging from a low of 58% in North Dakota to a high of 75% in the Eastern District of Arkansas. Overall, women were well represented in the work force.

<table>
<thead>
<tr>
<th>Offices</th>
<th>Total</th>
<th>Male</th>
<th>Female</th>
<th>% Male</th>
<th>% Female</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court of Appeals &amp; Circuit Executive</td>
<td>217</td>
<td>73</td>
<td>144</td>
<td>33.64%</td>
<td>66.36%</td>
</tr>
<tr>
<td>E. AR</td>
<td>178</td>
<td>45</td>
<td>133</td>
<td>25.28</td>
<td>74.72</td>
</tr>
<tr>
<td>W. AR</td>
<td>70</td>
<td>26</td>
<td>44</td>
<td>37.14</td>
<td>62.86</td>
</tr>
<tr>
<td>N. IA.</td>
<td>82</td>
<td>32</td>
<td>50</td>
<td>39.02</td>
<td>60.98</td>
</tr>
<tr>
<td>S. IA</td>
<td>112</td>
<td>35</td>
<td>77</td>
<td>31.25</td>
<td>68.75</td>
</tr>
<tr>
<td>MN</td>
<td>274</td>
<td>88</td>
<td>186</td>
<td>32.12</td>
<td>67.88</td>
</tr>
<tr>
<td>E. MO</td>
<td>283</td>
<td>96</td>
<td>187</td>
<td>33.92</td>
<td>66.08</td>
</tr>
<tr>
<td>W. MO</td>
<td>246</td>
<td>79</td>
<td>167</td>
<td>32.11</td>
<td>67.89</td>
</tr>
<tr>
<td>NE</td>
<td>142</td>
<td>51</td>
<td>91</td>
<td>35.92</td>
<td>64.08</td>
</tr>
<tr>
<td>ND</td>
<td>73</td>
<td>31</td>
<td>42</td>
<td>42.47</td>
<td>57.53</td>
</tr>
<tr>
<td>SD</td>
<td>94</td>
<td>36</td>
<td>58</td>
<td>38.30</td>
<td>61.70</td>
</tr>
<tr>
<td>Total</td>
<td>1,771</td>
<td>633</td>
<td>1,138</td>
<td>35.74</td>
<td>64.26</td>
</tr>
</tbody>
</table>
Of 140 active and senior-status judges in the Eighth Circuit in November 1995, only eighteen or 13% were women. Detailed and updated information about the gender composition of the judiciary can be found in Chapter 1, Demographics.

In November 1995, there were 48 attorney positions within the Eighth Circuit, of which 42% were held by women. These data include attorneys in the offices of the Federal Public Defenders and in the Staff Attorneys' office, as shown in the following table:

<table>
<thead>
<tr>
<th>Attorney Positions in the Eighth Circuit in 1995</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attorney Positions</td>
</tr>
<tr>
<td>Federal and Assistant Public Defenders</td>
</tr>
<tr>
<td>Supervisory and Staff Attorneys</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

Women held 777 (73%) of the 1,068 staff positions within the Eighth Circuit. Women held from 56% to 100% of staff positions in the various offices.

<table>
<thead>
<tr>
<th>Staff Positions in the Eighth Circuit in 1995</th>
</tr>
</thead>
<tbody>
<tr>
<td>Office</td>
</tr>
<tr>
<td>Court of Appeals &amp; Circuit Executive</td>
</tr>
<tr>
<td>Circuit Clerk</td>
</tr>
<tr>
<td>Staff Attorneys</td>
</tr>
<tr>
<td>Circuit Libraries</td>
</tr>
<tr>
<td>Settlement Director</td>
</tr>
<tr>
<td>District Court Clerks</td>
</tr>
<tr>
<td>Bankruptcy Court Clerks</td>
</tr>
<tr>
<td>Probation</td>
</tr>
<tr>
<td>Pretrial Services</td>
</tr>
<tr>
<td>Federal Public Defenders</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

150. The 1997 data on the composition of attorneys in the offices of the Federal Public Defender can be found in Chapter 4.
151. We considered staff positions to be positions other than judges, attorneys, and unit heads and their chief deputies and assistants.
Only 35% (27 of 78) nonjudicial management positions within the Eighth Circuit were held by women. Female representation varied from none of the five chief and deputy chief pretrial services officers to all of the three senior and supervisory staff attorneys.

<table>
<thead>
<tr>
<th>Management in the Eighth Circuit in 1995</th>
<th>Total</th>
<th>Male</th>
<th>Female</th>
<th>% Male</th>
<th>% Female</th>
</tr>
</thead>
<tbody>
<tr>
<td>Circuit Executive¹</td>
<td>5</td>
<td>2</td>
<td>3</td>
<td>40.00</td>
<td>60.00</td>
</tr>
<tr>
<td>Court of Appeals Clerk²</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>33.33</td>
<td>66.67</td>
</tr>
<tr>
<td>Staff Attorneys³</td>
<td>3</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>100.00</td>
</tr>
<tr>
<td>Circuit Library⁴</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>50.00</td>
<td>50.00</td>
</tr>
<tr>
<td>Settlement Director</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>100.00</td>
<td>0</td>
</tr>
<tr>
<td>District Court Clerks⁵</td>
<td>19</td>
<td>15</td>
<td>4</td>
<td>78.95</td>
<td>21.05</td>
</tr>
<tr>
<td>Bankruptcy Court Clerks⁵</td>
<td>14</td>
<td>2</td>
<td>12</td>
<td>14.29</td>
<td>85.71</td>
</tr>
<tr>
<td>Probation⁶</td>
<td>19</td>
<td>18</td>
<td>1</td>
<td>94.74</td>
<td>5.26</td>
</tr>
<tr>
<td>Pretrial Services⁶</td>
<td>5</td>
<td>5</td>
<td>0</td>
<td>100.00</td>
<td>0</td>
</tr>
<tr>
<td>Federal Public Defenders⁷</td>
<td>7</td>
<td>6</td>
<td>1</td>
<td>85.71</td>
<td>14.29</td>
</tr>
<tr>
<td>Total/Average</td>
<td>78</td>
<td>51</td>
<td>27</td>
<td>65.38</td>
<td>34.62</td>
</tr>
</tbody>
</table>

¹ Includes circuit executive and assistant circuit executives.
² Includes clerk, chief deputy clerk, and deputy-in-charge.
³ Includes senior staff attorney and supervisory attorneys.
⁴ Includes circuit librarian and deputy circuit librarian.
⁵ Includes clerk and chief deputy clerks. One position was vacant.
⁶ Includes chief probation officers/chief pretrial services officers and their deputy chiefs.
⁷ Includes federal public defenders and supervisory-level assistant federal public defenders. One position was vacant.

A more unbalanced picture emerges if one looks at the gender composition of top management positions or “unit heads.” At the highest level of management, only 27% of the positions were held by women. Moreover, female unit heads were concentrated in the bankruptcy court clerk positions and in circuit and court of appeals administrative offices: the circuit executive, circuit librarian, and senior staff attorney were women. However, women held few other unit head positions, such as chief probation officer (one of ten) and federal public defender (one of five). There were no female district court clerks or chief pretrial services officers.

¹⁵² These positions included unit heads and their chief deputies and assistants.
 Judges of the Eighth Circuit Court of Appeals appoint the Eighth Circuit clerk, senior staff attorney, circuit librarian, settlement director, and federal public defenders. The court of appeals judges appointed women to three of those nine positions (33%).

District judges appoint the district court clerk, chief probation officer, and chief pretrial services officer. District judges appointed one woman as chief probation officer (10%) and no women as court clerks or chief pretrial services officers. Bankruptcy court judges are responsible for bankruptcy court clerk appointments and 86% of those appointments went to women. The Judicial Council appoints the circuit executive, who is a woman.

We found a sharp contrast between the relative scarcity of women as unit heads and the preponderance of women in staff positions within the various Eighth Circuit units, as shown in the following table. Women were notably absent from management positions in the district clerks' offices, pretrial services offices, and probation offices, despite their numerical domination of the staff positions in those offices. Women were also substantially underrepresented in management-level positions in the federal public defenders' offices, despite their 29% representation as attorneys. Conversely, male staff and

<table>
<thead>
<tr>
<th>Positions</th>
<th>Total</th>
<th>Male</th>
<th>Female</th>
<th>% Male</th>
<th>% Female</th>
</tr>
</thead>
<tbody>
<tr>
<td>Circuit Executive</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>100.00</td>
</tr>
<tr>
<td>Circuit Clerk</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>100.00</td>
<td>0</td>
</tr>
<tr>
<td>Staff Attorneys</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>100.00</td>
</tr>
<tr>
<td>Circuit Library</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>100.00</td>
</tr>
<tr>
<td>Settlement Director</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>100.00</td>
<td>0</td>
</tr>
<tr>
<td>District Court Clerks</td>
<td>10</td>
<td>10</td>
<td>0</td>
<td>100.00</td>
<td>0</td>
</tr>
<tr>
<td>Bankruptcy Court Clerks1</td>
<td>7</td>
<td>1</td>
<td>6</td>
<td>14.29</td>
<td>85.71</td>
</tr>
<tr>
<td>Chief Probation Officers</td>
<td>10</td>
<td>9</td>
<td>1</td>
<td>90.00</td>
<td>10.00</td>
</tr>
<tr>
<td>Chief Pretrial Services Officers</td>
<td>4</td>
<td>4</td>
<td>0</td>
<td>100.00</td>
<td>0</td>
</tr>
<tr>
<td>Federal Public Defenders2</td>
<td>5</td>
<td>4</td>
<td>1</td>
<td>80.00</td>
<td>20.00</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>41</td>
<td>30</td>
<td>11</td>
<td>73.17</td>
<td>26.83</td>
</tr>
</tbody>
</table>

1 One bankruptcy clerk serves as clerk for the Eastern and Western Districts of Arkansas. The district clerk for the Western District of Missouri also serves as the clerk of the bankruptcy court. One bankruptcy clerk position was vacant.

2 One public defender position was vacant.
managers were scarce in the bankruptcy courts and male management was absent in the staff attorneys' office.

<table>
<thead>
<tr>
<th>Office</th>
<th>Staff % Female</th>
<th>Administration % Female</th>
<th>Unit Heads % Female</th>
</tr>
</thead>
<tbody>
<tr>
<td>Circuit Executive</td>
<td>55.56</td>
<td>60.00%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Circuit Clerk</td>
<td>87.18</td>
<td>66.67</td>
<td>0</td>
</tr>
<tr>
<td>Staff Attorneys</td>
<td>83.33</td>
<td>100.00</td>
<td>100.00</td>
</tr>
<tr>
<td>Circuit Library</td>
<td>95.24</td>
<td>50.00</td>
<td>100.00</td>
</tr>
<tr>
<td>Settlement Director</td>
<td>100.00</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>District Court Clerks</td>
<td>77.34</td>
<td>21.05</td>
<td>0</td>
</tr>
<tr>
<td>Bankruptcy Court Clerks</td>
<td>82.89</td>
<td>85.71</td>
<td>85.71</td>
</tr>
<tr>
<td>Probation</td>
<td>59.01</td>
<td>5.26</td>
<td>10.00</td>
</tr>
<tr>
<td>Pretrial Services</td>
<td>64.86</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Federal Public Defenders</td>
<td>69.23</td>
<td>14.29</td>
<td>20.00</td>
</tr>
<tr>
<td>Total</td>
<td>72.75</td>
<td>34.62</td>
<td>26.8</td>
</tr>
</tbody>
</table>

A more appropriate comparison for the staff attorneys' office is to note that 57% of attorneys were female and 100% of the office administration was female. In the probation offices, 33% of probation officers were female, while 5% of administration were female. In pretrial offices, 41% of pretrial officers were female; however, none of the office administrators was female.

In addition to the vast majority of employees in the court system who are located in the clerks' offices and other units and are hired and supervised by nonjudicial management, there are also a small number of employees who are hired and supervised by the judges directly. These employees include law clerks, court reporters, and judges' secretaries or administrative assistants.

The secretaries and court reporters were predominantly female. All 124 judges' secretaries were women, hired by the individual judges. Thirty of the 42 court reporters were women, most selected by the individual judge to work with that judge.

In November 1995, over half (58%) of the law clerks in the Eighth Circuit were women. Female representation among law clerks varied from 53% at the district court level to 70% at the bankruptcy court level.
Law Clerks in the Eighth Circuit in 1995

<table>
<thead>
<tr>
<th>Court of Appeals Judges</th>
<th>Total</th>
<th>Male</th>
<th>Female</th>
<th>% Male</th>
<th>% Female</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>55</td>
<td>24</td>
<td>31</td>
<td>43.64</td>
<td>56.36</td>
</tr>
<tr>
<td>District Judges</td>
<td>119</td>
<td>56</td>
<td>63</td>
<td>47.06</td>
<td>52.94</td>
</tr>
<tr>
<td>Bankruptcy Judges</td>
<td>23</td>
<td>7</td>
<td>16</td>
<td>30.43</td>
<td>69.57</td>
</tr>
<tr>
<td>Magistrate Judges</td>
<td>34</td>
<td>11</td>
<td>23</td>
<td>32.35</td>
<td>67.65</td>
</tr>
<tr>
<td>Total</td>
<td>231</td>
<td>98</td>
<td>133</td>
<td>42.42</td>
<td>57.58</td>
</tr>
</tbody>
</table>

On average, district judges employed law clerks in roughly equal proportions (53% female and 47% male). In eight of ten districts, women represented 50% to 67% of law clerks employed by district judges. In two districts, women represented a considerably smaller proportion of law clerks: 14% and 29% respectively.153

Bankruptcy judges employed more female than male law clerks (58% female and 42% male). More women than men were employed by bankruptcy judges in nine of ten districts. In the remaining district, the lone law clerk was male.

Magistrate judges also employed more women than men as law clerks on average (68% female and 32% male). In only two districts were fewer than half of the law clerks female (43% and 33% respectively). Conversely, in one district the proportion of male law clerks was only 25%.

Our court employee survey gave us some additional demographic data beyond what we obtained from the Administrative Office of the United States Courts. Based on our survey, the Eighth Circuit workforce has the following characteristics:

- The average age of respondents was 40 years; women were on average two years older than men. Further analysis, however, showed that age was not a significant factor in any of the gender analyses described in the report.
- The great majority of respondents (88%) were European-American/White. Nine percent (100) of the sample were minority females and 3% (37) were minority males. Most

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153. Most law clerks employed in the courts of the Eighth Circuit serve one or two years. As of December 1994, however, almost 25% of law clerks (56) were classified as "career" law clerks and had been employed substantially longer. Law clerks in career positions were disproportionately (80%) female. Only eleven career law clerks in the circuit (20%) were male.

On September 20, 1994, the Judicial Conference of the United States adopted rules limiting the number and capping the salary of career law clerks. In the employee focus groups, concern was expressed regarding possible disparate impact of these rules on women. Our court employee survey (see Section III below) indicated that approximately 45% of the career law clerks were planning on seeking other employment due to the salary cap, although results did not vary significantly by gender.
employees (69%) were married, and almost half (44%) had children under the age of eighteen living at home.

- Men in the sample tended to be more highly educated than women. Overall, 52% of the sample had college degrees or post-graduate education. However, 85% of men but only 39% of women had attained that level of education.

- Overall, proportionally more employees were supervised by men. This finding is consistent with the finding that greater proportions of supervisors within the sample and judges within the circuit were male. Even so, an interesting relationship emerged when comparing the actual and statistically expected numbers of employees who were supervised by men and women. Men supervised more male employees than would be expected on the basis of chance, whereas women supervised more female employees than would be expected. These differences lend additional support to a finding that the workplaces were moderately gender-differentiated.

II. COURT POLICIES

The federal courts are not covered by most federal labor and civil rights laws, including Title VII of the Civil Rights Act of 1964.\textsuperscript{154} Congress applied eleven such laws to the legislative branch of the federal government through the Congressional Accountability Act of 1995.\textsuperscript{155} Congress delayed the question of whether to enact similar legislation to make the judicial branch subject to federal labor and discrimination laws. The judiciary was asked to review its policies and report to Congress by December 1996. At that time, the Judicial Conference reported that it was developing a dispute resolution process similar to that available to legislative branch employees. The Model Employment Dispute Resolution Plan that resulted will be discussed below.

Against this background, we examined gender-related concerns of the Eighth Circuit's predominantly female work force, such as the need for and availability of day care, parental leave, and flexible scheduling. We also reviewed court policies and practices to determine how well the courts protect employees from discrimination and how the courts' policies and practices compare to the requirements placed by federal labor law on private business and other branches of government.

In general, the courts are a decentralized employer and the policies of each of the separate offices or "units" throughout the Eighth Circuit are determined locally by judges or "unit heads." Requirements for leave, salary and health benefits, however, apply to all courts. With respect to employment discrimination claims, a model equal employment opportunity (EEO) plan has been adopted by the Eighth Circuit Judicial Council and is available for local adoption or adaptation.

Because of the decentralized nature of the court system, we were required to collect data from a total of 43 unit heads. We also inquired into the issues of court policies in our surveys of employees and judges. The results of these inquiries are set forth below.

A. Parental Leave Policies

Few federal laws and regulations regarding personnel matters apply to federal courts. Among them are the Family and Medical Leave Act of 1993 (FMLA), and the Federal Employees Family Friendly Leave Act (FEFFLA). These laws apply to all employees of the Eighth Circuit except for judges, law clerks specifically exempted by their appointing judge, court reporters not assigned to a regular tour of duty by their court, and judges' secretaries hired before September 30, 1983, and not covered by the Leave Act.

The FMLA requires that employees be allowed up to twelve weeks of leave in a twelve-month period for a serious health condition of the employee, or for adoption or care of newborn child (within the first year), or for care of a spouse, parent or child with a serious health condition. FMLA leave is unpaid leave unless and to the extent that the employee elects to substitute paid leave in the form of annual leave or sick leave to which the employee is entitled.

The FEFFLA does not address parental leave directly, but does expand the use of sick leave to allow an employee to use up to 104 hours in a leave year to attend or make arrangements for the funeral of a family member, or to care for a family member for any reason that would justify use of sick leave by the employee. Sick leave can be taken for personal illness, or to adopt a child, or to care for sick family members.

1. Unit Heads’ Responses

Our information request asked whether each unit had a policy or practice allowing employees to take parental leave for “childbirth or adoption.” Thus, our inquiry addressed a policy that is a narrower concept than FMLA leave or sick leave.

Despite the requirements of the FMLA, only 32 units reported having parental leave policies; 11 units reported that they had no policy allowing an employee to take parental leave for the purpose of childbirth or adoption. Twenty units reported that no employees took parental leave during FY 1995. However, in 21 of the 32 units with parental leave policies, and in two units with no policy, unit heads reported that parental leave was taken. In these offices, leave was taken by 64 employees, of whom 52 or 81% were women and 19% were men. Unit heads reported no instances of denial of parental leave or of the length of leave requested by the employee.

Thirteen of 32 parental leave policies (41%) were outdated. In general, these policies did not reference or appropriately implement the FMLA or provide employees with the leave required by the FMLA. Some examples of noncompliance with FMLA requirements were:

- Three policies contained inappropriate restrictions on the amount of maternity leave available after delivery.
- One unit’s maternity leave policy provided no information about the time period for such leave.
- Seven policies provided that maternity leave periods (from eight weeks to six months after the incapacitation period) were subject to the unit head’s determination.
- One unit reported that it followed the FEFFLA, which is legislation regarding sick leave, not parental leave.

Notably, some policies failed to follow the FMLA’s gender-neutral approach. One policy provided for maternity leave but not paternity leave. Seven units had a one-line paternity leave policy similar to the following: “A male employee may request only annual leave or leave without pay for the purpose of caring for his minor children or the mother of his newborn child.” One policy stated that it was in the clerk’s discretion to grant maternity leave of less than three months, but that all paternity leave would depend upon “office responsibilities and the requirements of the court.”

2. Survey Responses on Parental Leave

We asked judges whether their chambers staff or other court employees were covered by a policy or practice that allows leave for birth or adoption of a child.
Most judges responding to the survey (61%) stated that their chambers staff were covered by parental leave policies; seven judges (8%) said that they did not know. Only 15 judges had written parental leave policies. It should be recalled that chambers staffs are usually small and could include secretaries, law clerks and court reporters who may not be covered by the Family and Medical Leave Act of 1993.

One-third of judges were not aware whether other court employees were covered by parental leave policies. Over half of the judges (60%) reported that other employees were covered by such policies and that most of the policies were written.

Our court employee survey asked employees whether they had taken leave for the purpose of the birth or adoption of a child, or to take care of a sick family member, in the past five years while employed by the Eighth Circuit courts. Approximately one-third of all male and female respondents had taken such leave. Nearly one in five employees, women more often than men, indicated that they had decided against taking leave for family reasons due to concerns about the reactions of supervisors or co-workers. The following comment is reflective of the views of those who expressed concerns about using family leave:

I think that we still see inappropriate attitudes relative to use of family leave when a woman is gone due to birth of a child. When I came back from leave I felt that some, including my manager, resented that I had taken three months off. I was treated differently for awhile, my supervisor was “short” with me, more critical than usual, etc. This same attitude has prevailed when others have been gone for the same reason.

Related to parental leave is the issue of day care. Fifteen percent of the survey sample had become parents in the previous five years while employed in the Eighth Circuit. Twenty-eight percent indicated that they had needed day care during the previous five years. Thus, there appears to be substantial need for such services among employees in the Eighth Circuit.

B. POLICIES ON FLEXIBLE SCHEDULING

In response to our surveys, judges, as well as employees, agreed that flexible schedules were beneficial to employee morale and performance. Not surprisingly, employees who had children under the age of 18 living at home expressed a greater need for schedule flexibility than other groups.

Over half of the respondent employees indicated that at some time they had requested more flexible scheduling, namely flex-time
(42%), compressed-time (25%), part-time (4%), or job-sharing (3%). Men and women sought flexible scheduling in similar proportions. Of employees who made such requests, 27% were denied flex-time, 43% were denied compressed time, 23% were denied a part-time schedule, and 35% were denied their request for job-sharing. Some employees expressed their concerns about flex-time issues:

Wish that the 8th Circuit would take more active role in supporting job sharing in the Circuit. This support would assist employees in requesting such a job set up.

Flex time is an issue at this office at this time. Flex time has been taken away. Effective . . . , all employees at a particular location . . . must work M-F 8AM-5PM no exceptions. However, employees . . . [in other units] have flex time to meet their family and day care needs. I personally do not want to move my child to another day care to meet my hours. I lost my last day care provider due to this same issue. I did discuss this with our operations manager. He told me: “That’s the trade-off — when you have a job and a family.”

We describe below what we learned about the availability of various scheduling options:

1. Flex-time

There is no requirement that the Eighth Circuit courts provide flex-time, but a number of unit heads have developed policies or practices that accommodate employee needs for flexibility. A flexible work schedule allows an employee to vary daily arrival and departure times (or the time of the daily lunch period) without changing the length of the workday. Policies may be more complex and specific, providing core hours of required work each day, and stating limitations on daily arrival and departure times, the number of hours of work to be scheduled in one day, and the hours of work to be scheduled without a lunch break.

In response to our inquiry, 27 of 43 units (63%) reported having flex-time policies of some kind. In one additional office (without a policy) one employee was, nonetheless, on a flex-time schedule.

In 25 units there was reported usage of flex-time schedules. Some units reported simply that flex-time was used by “all” or is “available to all.” Other units specifically reported that flex-time schedules were used by 251 employees, of whom 193 or 77% were women and 58 or 23% were men.

2. Compressed Schedules

A compressed work schedule is one in which the employee works more than eight hours on at least some days in order to obtain at least
one day off, while working at least eighty reportable hours during the pay period. Typical examples are working eight nine-hour days and one eight-hour day, with one day off, each pay period, or working eight ten-hour days, with two days off, each pay period. Other variations are used. Compressed work schedule policies may include requirements such as those outlined above for flex-time policies.

Nine units (21%) reported a compressed schedule policy or practice pursuant to which 110 employees are working a compressed schedule (85% were women and 14.5% were men). Thirty-four units reported no such policy or practice.

3. Part-time

Part-time employment is generally understood to mean working fewer than eighty hours a pay period. Many employers in government and private business offer part-time employment opportunities to meet a variety of employer and employee needs. There is no requirement that the Eighth Circuit court units offer part-time employment opportunities.

In response to the Task Force inquiry, 18 of 43 units (42%) reported having a policy or practice of part-time work. Part-time employees were reported by 15 units. Units reported 42 part-time employees, of whom 31 or 74% were women and 11 or 26% were men.

4. Job-sharing

Job-sharing is a type of part-time employment in which two employees share the work and the salary of one permanent, full-time position. The degree to which duties are actually shared may depend on the nature of the position. Job sharing has been used in various business and other government employment settings, especially to accommodate the short-term or long-term needs of employees. There is no requirement that job-sharing opportunities be provided in the federal judiciary.

Eight units in the Eighth Circuit reported a policy or practice of job-sharing in which 11 female employees participated. Thirty-five units reported no such policy.

C. Discrimination and Harassment Policies and Procedures within Eighth Circuit Courts

The federal courts are not covered by Title VII of the Civil Rights Act of 1964; the Age Discrimination in Employment Act of 1967;160

the Rehabilitation Act of 1973;161 or the Americans with Disabilities Act of 1990.162 These laws prohibit discrimination in employment and provide an administrative process and legal cause of action for persons who believe they have been denied employment opportunities because of illegal discrimination. While not covered by these laws, the courts have adopted policies and procedures to address employment discrimination and harassment. We describe those of the Eighth Circuit below.


Even though federal and state employment discrimination statutes do not apply to the courts, the U.S. Judicial Conference adopted an equal employment opportunity (EEO) policy in 1966, and since 1979 has required that each court adopt such a policy. In 1980, the U.S. Judicial Conference adopted a Model EEO Plan that was amended in 1986 and promulgated in 1987. Each court was required to adopt an EEO plan based on the Model Plan; such plans may provide greater, but not lesser, protections to employees than the Model EEO Plan.

The Model EEO Plan includes the following features:

- Applies to all nonjudicial court employees.
- Promotes equal employment opportunity regardless of race, sex, color, national origin, religion, age (at least 40), or handicap. Covers conditions of employment including recruitment, hiring, promotion, advancement, and discrimination.
- An EEO coordinator is designated to prepare an annual report and to receive, investigate and report on complaints. Appeal is allowed to the chief judge or designee, whose decision is final.
- Deadlines include fifteen days within which to file a complaint.
- If a court modifies the Model EEO Plan, it must be submitted to the judicial council for approval.

Although it provides a mechanism by which complaints can be filed, the Model EEO Plan offers employees fewer protections than those usually available in the private sector:

- It includes no policy statement declaring discrimination to be prohibited conduct.
- It includes no explicit statement that sexual harassment is covered.

The filing period of fifteen calendar days is far shorter than the filing period under Title VII (180 days) or state laws (up to 300 days under some state discrimination laws).

It does not expressly cover judges.

There is some difference of opinion regarding whether the Model EEO Plan provides a remedy for discriminatory conduct by a judge. At least one court in the Eighth Circuit has recently extended coverage of its EEO Plan to judges. For employees in most courts, however, there are currently only two ways to pursue a claim of discriminatory conduct by a judge. The first is to file a *Bivens* action under the due process clause of the Fifth Amendment, alleging a constitutional claim of discrimination based on race, color, religion, national origin, or sex, including sexual harassment.  

The only other mechanism for pursuit of an EEO claim against a judge is the procedure under 28 U.S.C. § 372(c) and the accompanying Rules for Processing Complaints Against Judges of the Eighth Circuit. Rule 1 states that the purpose of the complaint procedure is to improve the administration of justice by taking action “when judges have engaged in conduct that does not meet the standards expected of federal judicial officers or are physically or mentally unable to perform their duties.” This procedure does not specifically address discrimination or gender fairness, and some judges take the position that this procedure does not encompass employment discrimination complaints.

Although every court unit is required to adopt the Model EEO Plan or to request Judicial Council approval of a modified EEO Plan, three of forty-three units in the Eighth Circuit reported that they had no written EEO complaint procedure. Despite the requirement that all EEO plans provide at least fifteen days within which to file a complaint, four units provided shorter filing periods (five to ten working days). Although forty units reported that they had a written plan, twenty-three units reported that they had made no efforts to make employees aware of the plan within the last year. Despite the Circuit-wide requirement for an EEO plan, therefore, some unit heads do not have policies that provide the minimum protections, and employees in many units have not been informed of the protections that do exist.

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Most of the EEO coordinators (67%) in the Eighth Circuit's predominately female work force were men. Men were also the coordinators for the largest offices in the circuit. Even in the bankruptcy courts, where the clerks were predominately female (six women, one man, one vacancy), the EEO coordinators were male — they were the district court clerks or, in the one bankruptcy court headed by a male clerk, the male clerk. Additionally, a significant proportion of the units (37%) designated the unit head as the EEO coordinator.

The designation of unit heads as EEO coordinators in their own units, in combination with the gender composition of most units, is problematic. For example, for employees of the district clerks' offices (77% of whom are female), complaints of sex discrimination regarding administrators (79% of whom are male) are made to the district clerks (100% of whom are male and are the EEO coordinators). Although the Model EEO Plan provides for an alternate EEO coordinator when the coordinator is the subject of a complaint, the plans as adopted are unclear as to who the alternate coordinator is, how the alternate designation will be determined, and who will make that decision.

Unit heads reported that in the last five years nine EEO complaints were filed in the Eighth Circuit, only two of which were gender-related. None of the complaints resulted in a finding of discrimination; one was still pending.

2. Sexual Harassment Policies

Sexual harassment has long been interpreted to violate Title VII of the Civil Rights Act of 1964, a conclusion finally affirmed by the Supreme Court in Meritor Savings Bank, FSB v. Vinson. In 1980, the Equal Employment Opportunity Commission issued guidelines that define sexual harassment. Nonetheless, the Model EEO Policy does not include the term sexual harassment and provides no definition of sex discrimination. The Judicial Conference has not adopted any model sexual harassment policy; nor has the Eighth Circuit adopted any sexual harassment policy; nor is there any requirement that any court adopt such a policy or furnish it to the judicial council for approval.

In response to our inquiry regarding whether the Eighth Circuit units had policies prohibiting sexual harassment, 12 units reported having a sexual harassment policy; 31 units reported that they had no policy; and six units stated that they used the Model EEO Plan.

166. Since these data were collected, one district has designated a male magistrate judge as its EEO coordinator.
Neither the circuit executive's office nor the four court of appeals offices have a written sexual harassment policy. Except for providing one employee with relevant court decisions, no efforts were made in FY 1995 to make employees aware of any office policy or practice regarding sexual harassment.

Of the ten district court clerks' offices in the Eighth Circuit, only two have written policies on sexual harassment; both define it in the language of the EEOC's guidelines. Both policies direct employees to file complaints under the Model EEO Plan.¹⁶⁹

Four of eight bankruptcy clerks' offices have written sexual harassment policies and provided them for review. Two policies define sexual harassment in the language of the EEOC's guidelines and direct employees to file timely EEO complaints. A third policy defines sexual harassment by adopting a different policy statement issued by the Office of Personnel Management. The fourth policy broadly prohibits harassment, including harassment based on gender; complaints are to be filed under this policy, not under the EEO plan, and only after unsuccessfully confronting the harasser. Three units have given training on their policies.

Of six federal public defenders' offices, three have identical written sexual harassment policies that are provided to employees, without training. Noting that federal and state laws prohibit sexual harassment, the policies also provide examples of prohibited conduct. Complaints are to be filed with a designated office official.

Three of ten probation offices have written sexual harassment policies that are given or explained to employees. Two policies define sexual harassment in terms of the EEOC's guidelines; the third policy contains no definition. One policy directs employees to file timely EEO complaints. Another policy directs employees to discuss concerns with an appropriate employee. The third policy requires an immediate verbal complaint to the chief, followed by a written complaint within twenty-four hours. One office with a written policy provided sexual harassment training to employees. Three offices without written policies have discussed the issue at staff meetings.

None of the four pretrial services offices has a written policy or has conducted training, but in one office employees have been told to direct any such complaint to the chief.

Perhaps in keeping with the wide variation among units in terms of EEO and sexual harassment policies, most respondents to our court employee survey of both genders (60%) did not know whether their units had policies prohibiting discrimination or sexual harassment.

¹⁶⁹ The District of Minnesota adopted a comprehensive sexual harassment policy in FY 1996, after these data were collected.
Moreover, many did not know whether information regarding any such policies had been provided to employees or whether training on these issues had been provided either to employees or to unit heads, managers and supervisors. Further, only 37% indicated having of EEO training in the previous five years. We note that in FY 1996 and FY 1997 (in some cases after completion of the employee survey), the Federal Judicial Center sponsored sexual harassment awareness training that was provided to 1,002 employees, including 103 managers and 899 line staff in the Eighth Circuit.

We asked judges whether their chambers staff or other court employees were covered by a policy or practice that prohibits sex discrimination or sexual harassment or specifies procedures to address such conduct. Most judges responding to the survey stated that their chambers staff were covered by policies prohibiting sex discrimination (74%), policies prohibiting sexual harassment (72%), and procedures for addressing sex discrimination or sexual harassment (55%). About half of these policies, however, were unwritten.

About one-fifth of the judges reported that they had no policy on sex discrimination (19%) or sexual harassment (22%). A small number said that they did know whether there was a chambers policy on sex discrimination (7%) or sexual harassment (6%). Only one-third of the judges had written sexual discrimination and sexual harassment policies and procedures for chambers staff.

Some judges (13% to 14%) were not aware whether other court employees were covered by sex discrimination or sexual harassment policies or procedures. The majority of judges, approximately 80%, reported that other employees were covered by such policies and procedures, and that most such policies were written.

D. Resolution of Employment Disputes

In its December 1996 report to Congress under the Congressional Accountability Act, the Judicial Conference stated that it was developing a dispute resolution process similar to that available under the Act for legislative branch employees. In March 1997, the Judicial Conference issued a Model Employment Dispute Resolution (EDR) Plan. The Model Plan states minimum requirements which plans by the courts must meet or exceed. By December 1997, all courts are to adopt the Model EDR Plan or submit modified plans to their circuit's judicial council for approval. By January 1999, all such plans are to take effect. Our employee survey was completed before the Judicial Conference's report and thus does not reflect any data on the Model EDR Plan as proposed or as implemented.
The National Judicial Conference's Model EDR Plan includes the following provisions:

- Forbids discrimination against employees based on race, color, religion, sex (including sexual harassment), national origin, age (at least 40), and disability. States that employees shall have the rights and protections of the Model EEO Plan.

- Applies to judges as well as all court employees.

- Provides a deadline of thirty days within which to initiate a complaint by filing a request for counseling.

- Creates an EDR process that includes counseling, mediation, a written complaint, a hearing before the chief judge or designee, and a review of that decision by the circuit judicial council.

- Includes an EDR coordinator designated to prepare an annual report, receive written requests for and provide employee counseling, and keep related records.


III. WORKPLACE CLIMATE AND EXPERIENCES

We found that employees in the Eighth Circuit were generally satisfied with their employment and committed to their jobs. They were relatively satisfied with their work, coworkers, supervisors, pay and benefits. Further, they regularly engaged in pro-organizational activities (e.g., initiating voluntary efforts to make the court a better place to work). Notably, respondents reported low levels of job and work withdrawal (expressing a desire to leave one's job or engaging in behaviors that keep one from working, e.g., long coffee or lunch breaks).

In general, those responding to our survey perceived their jobs as only moderately stressful, their court units as treating employees fairly, and themselves as committed to their jobs for reasons other than receipt of tangible rewards. Employees reported moderate to high levels of emotional well-being and satisfaction with life and health. We report below our survey findings in specific areas:

A. Personnel Administration

1. Hiring

Survey results provide some insights into the Eighth Circuit's hiring practices. Almost half of employees learned of their first position by word of mouth from a friend, family member, judge or court supervisor. Almost one-third heard about their first position through a newspaper ad. Word of mouth was also the prime source of information about promotional opportunities, with over one-third hearing about vacancies from a judge or court supervisor. The Model EEO Plan requires each unit to "publicize all vacancies," but only one-fourth of employees learned of their current jobs through a newsletter or the posting of vacancies.

We asked respondents whether their job interviews included questions about their age, health, plans to have a child, marital status or plans, family or child-care responsibilities, etc. Such inquiries would be considered improper in job interviews by private business or other government employers covered by laws that prohibit discrimination based upon sex, race, age and disability. The courts, however, are not covered by these laws.

Although most employees were not asked such questions, a significant minority were asked, for example, about age (9%), health (9%), marital status or plans (10%), and family or child-care responsibilities (14%). Men were asked about their age more frequently than women (15% versus 6%), whereas women were asked more frequently about family and child-care responsibilities (10% versus 6%).

2. Promotion

Employees were asked whether information about job vacancies was easily available in the workplace and how often vacancies had been filled without being publicized. Nearly one-third of employees indicated that vacancy information was not easily available, and almost half reported that vacancies in their units had been filled without publicity at least "once or twice" in the previous five years. These data suggest that a problem exists, due at least in part to insufficient publicity, in making job vacancies accessible to employees.

3. Job Descriptions

Survey respondents were asked whether they had a written, accurate job description, whether they had been given criteria for job performance evaluation, and how often they had received a thorough oral or written performance evaluation. Approximately 41% of respondents lacked written, accurate job descriptions; 46% lacked criteria
upon which their job performance is evaluated; and 32% had not received a thorough performance evaluation in the previous five years.

4. Training

The most frequent avenues through which employees had become aware of training opportunities were notices posted or sent by supervisors to all employees. Over half of the employees responding to the survey were unaware of training opportunities available to them. Moreover, about one in four employees had been denied training that they had requested. The most frequent reason given was that the training was too expensive.

B. Employee Experiences

1. Employees' Experiences of Uncivil Behavior

Our survey inquired about the experience of Eighth Circuit employees with behaviors in four major categories:

- **General incivility** included rude, disrespectful, or condescending behavior.
- **Gender-related incivility** included inappropriate, uncivil or offensive behaviors that are gender-related, such as stereotypical remarks or use of sexually suggestive materials.
- **Unwanted sexual attention** included sexually inappropriate behaviors such as sexually suggestive comments, unwanted touching, or repeated requests for dates.
- **Sexual coercion** included explicit or implicit demands for sexual behavior in return for rewards or avoidance of negative consequences.

Important findings emerged from the federal workplace experiences of employees in the Eighth Circuit. First, women reported somewhat more frequent experiences of these behaviors (general incivility, gender-related incivility, unwanted sexual attention, and sexual coercion) than men (76% versus 69%). Second, women and men described similar patterns in the types of behaviors experienced.

Approximately 70% of respondents reported experiencing one or more incidents of general incivility. Many employees (41%) reported experiences of gender-related incivility. Over 30% of respondents had experienced unwanted sexual attention from co-workers or supervisors in the past five years. Approximately 1% of employees reported some form of sexual coercion. Both men and women identified the most frequent instigators as co-workers (69%) and supervisors (57%).

In order to gain a better understanding of the nature of such incidents and their effect on the employee, our survey asked employees to describe the negative federal workplace experience that made the
most impression on them in the last five years. Five hundred sixty-seven employees responded. The most common pattern was for respondents to have experienced a combination of general incivility, gender-related incivility, and unwanted sexual attention.

Approximately 70% of both male and female targets indicated that their most memorable experience involved general incivility. The survey included numerous comments regarding a negative work environment such as the following:

There are other issues in the workplace other than sexual harassment and gender issues. Managers can create a hostile work environment by their condescending attitudes towards employees and their lack of respect for their employees as professionals.

Approximately 20% of respondents on this topic reported gender-related incivility, and 27% had experienced unwanted sexual attention. Women were significantly more likely than men to report unwanted sexual attention or sexual coercion as experiences that made the most impression on them, even though equal proportions of women and men reported experiencing these behaviors.

Over 55% of targets reported that their most memorable offensive experience was instigated by a male individual, 38% reported a female instigator, and 7% reported that the experience involved both men and women. Men as well as women were more likely to report that the instigator was male.

Most employees (80%) thought that sexual harassment incidents were not reported. The survey responses included numerous incidents of unwanted sexual attention, which were often coupled with a statement that it was not reported because no action would have resulted from a complaint:

On three separate occasions the person made strong sexual advances. The first time was in a government vehicle wherein he placed his hand on my leg and attempted to move it up my leg. The second time was in the hallway of the courthouse outside my office. . . . On another occasion, he came into my office with his fellow coworkers and asked me to stand up so he could see how short my skirt was. I reported to my supervisor and he verbally warned the person to “back off” but no further action has taken place.

Overall, 19% of targets named judges as the offender, 11% named attorneys, 55% named other employees, and 29% identified offenders falling in the category of “other.” Of persons identifying a judge as the offender, women reported gender-related incivility and unwanted sexual attention or sexual coercion more frequently than men, whereas
men reported general incivility most often. The following table sets forth the responses in detail:

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<th>Offensive Behavior and Offender Gender (by Respondent Gender)</th>
<th>Women</th>
<th>Men</th>
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<tr>
<td></td>
<td>%</td>
<td>Count</td>
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<tr>
<td><strong>General Incivility</strong></td>
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<td>Judge</td>
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<tr>
<td>Attorney</td>
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Unwanted Sexual Attention or Sexual Coercion

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<tr>
<td>Attorney</td>
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<td>Court Employee</td>
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<tr>
<td>Other</td>
<td>40.0</td>
</tr>
</tbody>
</table>

Note: Responses do not total to the “N” number and percentages may exceed 100% because respondents could select more than one option.

2. Workplace Climate for Uncivil Behavior

We asked respondents their opinions regarding what would happen if a number of hypothetical scenarios depicting uncivil or sexually-offensive situations were to occur in their workplaces. Employees were asked to rate: the likelihood the target would be taken seriously; the degree of risk to a target who complained; and the probability of corrective action. These ratings constitute an estimate of organizational tolerance of offensive behavior, which research has shown to be highly predictive of both the frequency of harassing behavior and the seriousness of its consequences.

The survey results suggest that employees perceived their workplaces as moderately tolerant of uncivil and offensive behavior, both sex-related and in general. Overall, male and female employees had similar perceptions, female respondents having slightly more negative perceptions than men.

We learned that women perceived substantially greater tolerance of abusive behavior than men. Men were also more likely than women to deny, tolerate, or rationalize sexual harassment.

We also found a significant interaction between respondent gender and type of behavior portrayed in the scenarios. Women perceived their workplace environments as the most tolerant of unwanted sexual attention and gender-related incivility, whereas men perceived it to be the most intolerant of such behaviors. Women perceived their workplaces to be much less tolerant if the instigator was a female and the target male. Conversely, men perceived their organizations to be less tolerant if the instigator was male and the target female.

Moreover, as women’s perceptions of tolerance increased, their satisfaction with their life, coworkers, supervisors, and promotional
opportunities declined, whereas their perceived stress, psychological distress, intentions to quit their jobs, and perceptions of unfair organizational practices rose. For men, however, level of perceived tolerance was not associated with such significant differences.

The toll these offensive behaviors exact from both employees and the court system appears to be substantial. Even relatively low frequencies of these behaviors are associated with substantial negative consequences for both men and women. With greater frequencies of uncivil behavior on the job, employees' satisfaction with their jobs, pay, benefits, co-workers, supervisors, and promotional opportunities declined, whereas their job stress, attempts to withdraw from their work duties, and intentions to quit their jobs rose. Moreover employees targeted with general incivility were less satisfied with their lives in general, and women with such experiences were also less satisfied with their health. These employees experienced greater psychological distress and lowered feelings of well-being. This pattern was strong and quite similar for women and men.

The consequences from experiencing general incivility alone are very similar to the results of experiencing any combination of behaviors, including gender-related incivility, unwanted sexual attention, or sexual coercion. As these behaviors increased in frequency, employees experienced more job stress, organizational withdrawal, and psychological distress, and less psychological well-being and satisfaction with their job, life, and health. These results were more numerous for women, but when men did experience them, the effects were more pronounced.

IV. SUMMARY OF FINDINGS

The work force in the Eighth Circuit courts is predominantly female, but is gender divided and stratified with respect to both position and level. For example, although 73% of the staff positions are filled by women, 65% of management employees are men. In particular, judges and unit heads tend to be male.

Personnel practices are relatively unsystematic. Many employees lack written job descriptions or evaluations or both. The courts maintain a word-of-mouth recruiting system and largely informal practices regarding notices of vacancies and job interviews.

Over three-fourths of the units lacked a written parental leave policy that is in compliance with the Family and Medical Leave Act of 1993. Although most judges reported having such policies for their chambers staff, these policies were usually unwritten. One-third of employees had taken some form of family leave; however, a number of employees reported not requesting such leaves because they feared
the negative reactions of others. This was particularly true for those with young children who might be expected to be most in need of such leave.

There is a substantial need for day care among court employees. Almost half of court employees responding to the survey had children under the age of 18 living at home. Almost 15% of employees had become parents and more than 25% of respondents had needed day care services in the five years before the survey. The majority of employees indicated that no government-sponsored day services were available at or near their court sites.

The availability of schedule flexibility varies greatly across the Eighth Circuit. The majority of unit heads reported that some kind of flexible scheduling is available in their units; however, one-fourth of employees who had requested flexible scheduling had been refused.

At least seven court units had no written EEO plan or lacked the minimum standards of the Model EEO Plan. Over half of the units had made no effort to publicize the EEO plan to employees. Despite the predominately female work force, 67% of the EEO coordinators were men.

The Model EDR Plan is superior to the Model EEO Plan in that it covers judges, references sexual harassment, and extends the period of time for filing complaints to thirty days. However, the EDR Plan still provides no definition of sexual harassment, and its 30-day filing period is considerably shorter than that available under state or federal law.

Only one-third of judges had written discrimination and sexual harassment policies and procedures for chambers staff, and 75% of unit heads reported they had no sexual harassment policy at all. At the time of our survey, the majority of employees did not know whether their units had such policies or had provided training on them.

Court employees in general are satisfied with their work and committed to their jobs. In the previous five years, however, approximately 70% had experienced some form of incivility, 40% had experienced gender-related incivility, and over 30% had been the target of unwanted sexual attention at work. Women reported significantly more such experiences than men (76% to 69%), especially unwanted sexual attention. Although most offenders were coworkers, some female employees experiencing unwanted sexual attention reported that the offender was a judge.

Women saw their workplace as significantly more tolerant of sexually harassing behavior than men, i.e., they were more likely to believe that it was risky to complain, that complaints would not be taken
seriously, and that there were few meaningful sanctions for perpetrators.

One hundred thirty-one employees who complained or refused to cooperate with uncivil or offensive behavior indicated that they had experienced adverse consequences. Of those few employees (118) who had complained, either formally or informally, almost half were dissatisfied with how their complaints were handled.

Uncivil and offensive behavior and its tolerance by the organization appear to take a substantial toll on employees and the court system itself. Both offensive behavior itself and perceptions that the organization tolerated such behavior were related to lower job satisfaction, increased job stress, work withdrawal, and intentions to leave the federal workplace. Women who reported such experiences also reported lower satisfaction with their health. Overall, targeted employees experienced greater psychological distress and lowered feelings of well-being; this pattern was strong and similar for both women and men.

CONCLUSION

As we consider what to conclude from the data we have assembled, we think it is appropriate to put our study in context. Our charge was to examine issues of gender fairness — not in a casual social setting or in private business — but in the administration of justice. We do not believe that it is possible to overestimate the importance of the courts' doing that job well, and the courts themselves have set the standard. As Rule 1 of the Federal Rules of Civil Procedure tells us, the resolution must be "just, speedy and inexpensive."174

What we have learned through this process is that we have some serious hurdles to overcome in achieving that objective. In some ways, the numbers tell it all. By any measure, and despite some real progress, the Eighth Circuit remains an institution in which the judges, lawyers and court administrators are predominately male. Add to the Circuit's history and composition the facts that most federal judges are appointed for life, and that the federal courts are exempt from important federal employment protections (such as Title VII) that are commonplace in the rest of the working world. Under these circumstances, it is not surprising to find an institution that has evolved to be more in tune with the needs and interests of the men who form its majority and managers.

That matters, for to deny that there are profound differences in the experiences of women and men is to ignore both the profound and

the subtle. It should go without saying that we are seeing history rather than intent at work; yet, the effects are real and wide-ranging. Recall that the Eighth Circuit courts are the forum in which substantial numbers of female litigants, witnesses, jurors and attorneys participate in the resolution of legal disputes. They are the workplace of a great many female employees. It is critical that the courts treat all fairly and that all who come within their walls believe that bias has not interfered with justice.

In that regard, consider the following of our findings:

- We found a litigation process with far too much incivility, both gender-related and more generally. In all contexts — as judges, attorneys and employees — women experienced more incivility than their male counterparts and women were more seriously affected by that incivility both in their job satisfaction and in their health.
- We found jury plans that may not result in juries that fairly represent the communities from which they are drawn because too many women are excused, not by design, but as the result of years of inattention.
- We found word-of-mouth recruiting, decentralized personnel policies and unstructured human resource functions in a workforce that is predominantly female yet tends to be gender-divided and stratified by both positions and levels.
- We found an inadequate EEO complaint process of which most employees and some judges were unaware and a judicial complaint process that virtually no one dares to use.
- We found relatively infrequent, but nonetheless troubling, incidents of unwanted sexual attention and sexual coercion in the context of work and litigation in the federal courts.

Such failings can only impair the credibility of the courts, diminish the sense in participants and observers that justice is being done and make any result that is achieved more prolonged and expensive than it should have been. We found that many of the problems identified in the Eighth Circuit are the inevitable consequences of its history and structure and that much of the objectionable conduct reported was clearly not intended to offend or disadvantage women. In a few areas, however, such as civil discovery, our results suggest that belittling, hostile or offensive conduct is sometimes directed toward female litigants, witnesses and attorneys in a manner that is difficult to interpret as unintentional.

Citing these problems is not meant to diminish the considerable successes that our report recounts. The progress we have documented gives us confidence that the issues we raise can also be successfully
addressed. In fact, during the period of our study we observed real progress in some areas, such as the methods for selecting potential jurors. Those who have experienced unfair treatment, however, are little comforted by the fact that others were spared their fate. The problems must be confronted and surmounted, a process of organizational change that begins with the leaders of the Eighth Circuit: the Circuit's judges. Judges set the standards of conduct; they make and enforce the rules; they are the employers in a system largely exempt from the protections and laws that others enjoy.

But the courts cannot achieve change alone: there simply can never be enough judges to ensure that abusive discovery or uncivil behaviors cease to be commonplace in some quarters. The practicing bar, as well, must address the issues of gender fairness raised by our report.

RECOMMENDATIONS

A. IMPLEMENTATION

1. The Judicial Council should appoint a committee to oversee the implementation of the Gender Fairness Task Force recommendations that are accepted and to monitor the issues of gender fairness in the courts of the Eighth Circuit on an ongoing basis. The committee should provide leadership toward forming court policies and practices to improve the fairness of the courts and to assure the public confidence in the judicial system.

2. It is recommended that such committee be small enough to permit it to meet as needed at minimal expense and yet be representative of the judiciary and its constituent groups.

3. In establishing this implementation committee, the Judicial Council should be prepared to allocate sufficient staff and financial support to permit the implementation committee to effectively meet its responsibilities.

B. DATA GATHERING & DISSEMINATION

1. The Judicial Council should widely distribute the Final Report of the Eighth Circuit Gender Fairness Task Force within the courts in the Eighth Circuit, including distribution to those responsible for selection and hiring for the courts in the Eighth Circuit, and to the American Bar Association and other bar and attorney organizations within the states in the Circuit. The Task Force suggests that the Final Report be accompanied by a letter from the Chief Judge of the Circuit noting that issues of gender fairness and the demographic
makeup of those who work in the courts of the Circuit are important to
the administration of justice.

2. The Final Report should be made available electronically in
the Circuit, with notice to all employees of its availability.

3. The Implementation Committee should consider what demo-
graphic and other gender data should be gathered on an ongoing basis
by the courts in the Circuit, and compiled for publication in the Cir-
cuit's annual reports.

4. The Implementation Committee should undertake a review of
the courts' recordkeeping practices in the Circuit and make recom-
mendations to ensure consistent maintenance of gender data.

C. GENDER FAIRNESS IN THE COURTS & IN THE LITIGATION PROCESS

1. The courts in the Circuit should prohibit gender bias and sex-
ual harassment in the conduct of federal court litigation, and adopt
procedures for receiving and resolving complaints about such conduct.
The procedures should be disseminated during the new attorney ad-
mission process and at Rule 16 conferences conducted by the court.
Each district court should adopt those portions of the relevant state
Code of Professional Responsibility which prohibit biased conduct and
sexual harassment by attorneys.

2. The judges in the Circuit and their courtroom employees
should be encouraged to employ in their day-to-day judicial activities
appropriate gender-neutral behavior, such as the use of appropriate
forms of address, avoidance of inappropriate comments on appear-
ance, and avoidance of informal or chambers discussions which tend to
exclude members of one gender.

3. The courts in the Circuit should develop guidelines or policies
defining reasonable accommodations for attorneys with family respon-
sibilities who appear in federal court litigation, including considera-
tion during the Rule 16 conference of attorneys' family needs for
scheduling purposes. Courts should encourage attorneys to come for-
ward with needs for accommodations for family emergencies and re-
sponsibilities, and should be sensitive as well to such needs of all court
participants, including jurors, witnesses, and litigants.

4. The courts in the Circuit should periodically review their local
rules and model jury instructions to ensure that they employ gender
neutral language.

5. The Implementation Committee should prepare model poli-
cies and procedures, including a "Guide to the Conduct of Gender Fair
Court Proceedings" and make them available to any court desiring to
consider them.
D. APPOINTMENTS ISSUES

1. The courts in the Circuit should adopt and widely publicize procedures for attorney appointments in both civil and criminal cases. Both the procedures and their implementation should encourage equal opportunities for both men and women to receive attorney appointments by the courts in the Circuit. The courts in the Circuit should consider equal opportunity as well in terms of the nature of the appointment being made, for example the role of lead counsel in a multi-defendent criminal case.

2. The courts in the Circuit should encourage women to apply for, and should increase the number of women appointed to, the various court committees and advisory groups. In making such appointments, the courts should consider equal opportunity in terms of the nature of the appointment being made, for example leadership positions on such committees and advisory groups.

3. The district courts in the Circuit should review their juror questionnaire forms to ensure that discretionary excuse categories do not exclude potential jurors of either gender disproportionately. The Implementation Committee should prepare and disseminate a model juror questionnaire form for any district court wishing to consider it.

E. EDUCATIONAL EFFORTS

1. The courts in the Circuit should work with the organized bar and legal education providers in each district to develop and deliver seminars, workshops and continuing legal education programs dealing with gender fairness and increasing civility in the litigation process.

2. Law schools in the Circuit should be encouraged to include gender and civility issues in their curricula and other programs.

3. The Implementation Committee should work with the Federal Judicial Center to incorporate material regarding gender fairness and civility in judicial education programs.

F. THE COURT AS EMPLOYER

1. The Judicial Council should direct the Implementation Committee to draft model personnel policies regarding family leave, flex-time, part-time, job sharing, and sexual harassment for use by all courts in the Circuit. All court units should be encouraged to consider such policies, and adopt and disseminate those which they choose to adopt to all court employees.

2. The Implementation Committee should work with the Personnel Committee of the Judicial Council to develop appropriate proce-
dures, implementation and training regarding the new Model Employment Dispute Resolution Plan adopted by the Council. The Implementation Committee should encourage consistency and elimination of confusion or overlap in personnel policies, and should make recommendations regarding fair filing periods, use of reporting channels which minimize intimidation or fear of reporting by court employees, effective dissemination of such policies to all employees, and means of ensuring understanding on the part of employees of the appropriate means to make complaints regarding conduct of judicial officers.

3. Courts in the Circuit should be encouraged to post all vacancies and promotional opportunities in their offices, and to make the posting information available to the Circuit Executive, who should disseminate such postings and promotional opportunities to court units throughout the Circuit.

4. Court employment units should take identifiable steps to ensure equal opportunity for advancement by women into management and supervisory positions within the court units.

5. The Judicial Council should direct the Circuit Executive to make available to court units in the Circuit training programs for court managers and court employees on subjects such as sexual harassment, employee dispute resolution procedures, hiring and promotional practices, and interpersonal skills and civility.
INTRODUCTION TO METHODOLOGY

To give the most complete and accurate picture possible of life in the courts of the Eighth Circuit, we employed multiple methods and examined each issue from a number of perspectives, striving to achieve the most reliable and valid body of evidence available. Much of our report derives from archival data. We also conducted a number of focus groups, including separate groups of male and female judges, attorneys, and court employees conducted at the 1995 Judicial Conference held in Des Moines, Iowa.

Finally, we constructed and distributed surveys to all judges, all court employees, and a large, scientifically-selected sample of all attorneys of record in the Circuit, District, and Bankruptcy Courts of the Eighth Circuit over a 2-year period. Assisted by a team of scientists at the University of Illinois, we employed state-of-the-art techniques of sampling and survey construction specifically designed to provide the most reliable and valid information possible. Each issue addressed in the survey was examined from multiple perspectives, using sophisticated statistical analyses specifically designed to ensure that any reported findings are thoroughly reliable and generalizable.

These data sources, procedures, and techniques are described more fully below; more detailed technical information is available in several technical reports produced during the course of the study. We emphasize here that these multiple sources and multiple methods (known in the scientific community as “triangulation” of data) produce the most complete, reliable, and valid body of evidence available bearing on these complex topics and issues, thus allowing considerable confidence in the findings reported below.

EIGHTH CIRCUIT COURT RECORDS

A variety of data was gathered from the records of the Eighth Circuit Courts. The historical data, as well as the June 1997 data, on the composition of judges was obtained by reviewing the internal records maintained by the Office of the Circuit Executive. The names and other pertinent information about attorneys of record in the court of appeals, district courts and bankruptcy courts for a one-year period (July 1, 1994 - June 30, 1995) were obtained from the AIMS, ICMS, and BANCAP computerized case management systems with the assistance of a program designed by John Elser, E.D. MO. These data were used to determine the composition of attorneys practicing in the
courts and formed the pool from which the attorney survey sample was drawn. The data also were analyzed to determine the areas in which male and female attorneys practice, the "nature of suit" data. Although many attorneys appeared as attorneys of record on multiple cases, care was taken to eliminate duplicate names so that the attorneys were counted only once for each purpose for which the data were used. To determine how many male and female attorneys practice criminal law, for example, each attorney of record was counted once if he/she was attorney of record on one or more criminal cases.

Eighth Circuit Unit Heads Data Requests

In December of 1995, a written request for data was sent to each of the 43 non-judicial unit heads in the Eighth Circuit. Each unit head was asked to provide information about and copies of the office's personnel policies and a variety of other information relevant to the particular office. These data included: scheduling policies, EEO policies, sexual harassment policies, jury plans, composition of JS-12 Master Jury Wheel samples, selection process for Bankruptcy Judges, Magistrate Judges and Federal Public Defenders, and the composition of court committees. These data are the source of the discussion of personnel policies in the Court As Employer Chapter. The data on criminal appointment plans are summarized in the Criminal Practice Chapter. The data on jury plans and civil appointment policies are summarized in the Civil Practice Chapter. District Court Clerks also cooperated with a November 1996 request for grand jury composition data.

Administrative Office of the Courts

The Administrative Office of the Courts provided a database including the names and other pertinent information about all employees of the court in the Eighth Circuit as of November 1995. These data were analyzed using the EXCEL computer software, and formed the basis of the workforce composition analysis in the Court As Employer Chapter. In October of 1996 an updated database was provided including the names and business addresses of employees (except judges and attorneys in the offices of Federal Public Defenders). This data base was used to generate mailing labels for the Court Employee Survey.

Federal Judicial Center

In order to provide some context for the Eighth Circuit Judicial composition data, we obtained nationwide judicial composition data from the Federal Judicial Center as of September 1996, the most re-
The FJC also provided up to date information as to the numbers of Eighth Circuit employees who received Sexual Harassment Awareness Training during FY 1996 and during FY 1997.

United States Sentencing Commission

The Sentencing Commission provided a database about criminal defendants sentenced in the Eighth Circuit during FY 1993 and FY 1994, as well as valuable guidance on our use of that data. The data were compiled and analyzed for the Task Force by Dr. Kimberly Kempf Leonard of the University of Missouri-St. Louis. The Sentencing commission’s national data reported in the 1995 Annual Report was also in our Criminal Practice Chapter.

United States Department of Justice

The Department of Justice provided June 1997 data on the composition of United States Attorneys and Assistant United States Attorneys in the seven state region that comprises the Eighth Circuit. Phone calls to local offices allowed Task Force members to determine the numbers of male and female attorneys in the offices who practice criminal prosecution. These data are provided in the Criminal Practice Chapter.

Offices of Federal Public Defenders

The Offices of the Federal Public Defenders in the Eighth Circuit provided June 1997 data on the composition of attorneys practicing criminal defense in their offices. These data are reported in the Criminal Practice Chapter.

Offices of the United States Trustees

In 1996, the two United States Trustees in the Eighth Circuit provided detailed information about the composition and appointment of bankruptcy trustees and the fees earned by those trustees during FY 1995.

Surveys

Survey Instruments. The Judge, Attorney and Court Employee Surveys were developed by our senior research consultant, Prof. Louise Fitzgerald, the research team at the University of Illinois, and the Executive Director, based on (1) input from Task Force members, consultants, and focus groups of employees, attorneys and judges conducted in the fall of 1994 and during the 1995 U.S. Eighth Circuit
Judicial Conference; (2) items modified from surveys conducted by other Circuit and State Task Forces; and (3) items and scales drawn from widely used, reliable, and valid instruments available in the social science literature. The attorney survey was piloted on a sample of attorneys who practiced in the federal courts of the Seventh Circuit, and clarified and modified based on their input. The Court Employee Survey was piloted on a sample of Eighth Circuit court employees and modified based on their input. The Judge Survey was modified based on the input of Task Force member judges. Finally, all surveys were reviewed and approved by the Task Force.

**Procedures.** The final attorney and court employee surveys were printed on computer-scannable forms to facilitate data entry and mailed to participants via first class mail. The final judge survey was printed with color and professional format and mailed to participants via first class mail. Each survey was accompanied by a cover letter from Chief Judge Richard Arnold, emphasizing the importance of the study and encouraging respondents to participate. Written instructions appeared on the first page of the survey, describing the purpose of the study, assuring confidentiality, and offering information on how study results could be obtained. A postage-paid envelope was included, addressed to the research team at the University of Illinois at Champaign-Urbana. Attorney Surveys were mailed in September 1996, Court Employee Surveys were mailed in January 1997, and Judge Surveys were mailed in May 1997.

To maximize return rate, we employed standard procedures developed and recommended by survey experts (e.g., Dillman, 1978). Thus, we used first-class mail, postage-paid return envelopes, and follow-up procedures. Surveys were mailed to the sample with a deadline of approximately three weeks for returning surveys. The entire sample of attorneys and court employees received a reminder postcard. Finally, those attorneys and employees who had not yet responded 10 days following the mailing of the postcard were sent a second survey. A follow-up letter was sent by the Task Force Chair, Judge Lyle E. Strom, to the Chief Judge in each district, reminding them of the deadline and encouraging their participation and the participation of other judges in the district.

**Judge Survey Return Rate.** Surveys were sent to all of the 149 judges in the Eighth Circuit, including: 18 Appellate Judges (17 men and 1 woman), 65 District Judges (58 men and 7 women), 21 Bankruptcy Judges (17 men and 4 women), and 45 Magistrate Judges (38 men and 7 women). Of the total number of surveys sent out, 102 (68.46%) were returned; 85 judge respondents were men, 14 were women, and 3 provided no gender information. This rate of return
should be considered excellent, being well above rates reported in studies of other professional samples using surveys of comparable length.

Court Employee Survey Return Rate. All Eighth Circuit employees (1662), excluding judges, received a Court Employee Survey. Our overall response rate was 71%, extremely high for a survey of this length. Our respondents include 840 women, 330 men, and 10 individuals who chose not to identify their gender. Due to extensive missing data, 13 individuals were not included in the analyses. The final sample contained 833 women (71%), 325 men (28%), and 9 individuals who did not identify their gender (1%).

Attorney Survey Sampling and Return Rate. The attorney sample contained 9227 names, distributed equally (to the degree possible) across gender, district, and type of practice; see Table 1 for a description. Four names were later dropped from this sample due to insufficient address information. Thus, surveys were mailed to a total of 9223 attorneys. Of the total number of surveys sent out, 4880 (53%) were returned. The return rate for attorneys who not only practiced but also resided in the Eighth Circuit was slightly higher at 56%. This rate of return should be considered excellent, being well above rates reported in studies of other professional samples using surveys of comparable length. Of these returned surveys, 4605 were used in the statistical analyses. Approximately 275 surveys were unusable for the following reasons: the survey was returned “undeliverable” due to an incorrect address or deceased addressee; the name was duplicated in the original sample; the respondent reported insufficient experience with the Eighth Circuit federal courts; or the respondent returned the survey mostly blank.

To identify the best pool of possible participants, the Clerk’s office from each district provided names of all attorneys who filed cases in the U.S. Eighth Circuit federal courts during the period beginning June 1994 and ending July 1995. The original goal was to identify 300 male and 300 female attorneys from each district (as well as from the Appellate Court), balanced to the degree possible between criminal and civil practitioners, who had appeared in the District Courts during the target period. In addition, we attempted to identify 300 male and 300 female attorneys from each of the Bankruptcy Courts. Because, however, sufficient numbers of female attorneys were available in only three of the Districts Court lists (and in none of the bankruptcy lists), we were forced to modify this strategy.

To obtain the female sample, we began by selecting all names of female attorneys from lists (in both District and Bankruptcy Court) with fewer than 300 women. For those District Court lists in which
300 female attorneys could be identified, however, we first selected all names that appeared in association with criminal cases (a figure ranging from 2 in West Arkansas to 30 in South Dakota); we then sampled randomly from the larger list of civil practitioners.

To obtain the sample of male bankruptcy practitioners, we first selected all male names from the bankruptcy lists containing fewer than 300 such men. For those lists containing more than 300 names, we sampled randomly until 300 men were identified. For the male sample of District Court practitioners, we first selected all male names that were associated with criminal cases in the seven districts yielding fewer than 150 such participants; we then sampled randomly from the list of civil practitioners until the requisite 300 names were identified. For the three District Court lists with sufficient numbers of male attorneys, we simply sampled randomly to obtain 150 criminal and 150 civil male practitioners.

Each of the lists used for sampling contained attorney names whose gender could not be readily identified (either from the given names or from Task Force members or court employees in their areas). These "gender unknown" names were used to supplement both the District and Bankruptcy Court samples for districts containing fewer than 300 men or 300 women. Finally, 300 male names and 300 female names were randomly selected from the list of those who had practiced in the Eighth Circuit Court of Appeals during the target period.

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<td><strong>Men</strong></td>
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Survey Construction. Survey construction recognized the necessity of using psychometrically-based research instruments designed specifically to examine constructs of interest. One requirement of scientifically-sound research is the utilization of research scales, i.e., multiple items examining one overarching construct. This concept is discussed more fully in the Technical Note below. Although the specific items of these scales may appear somewhat redundant, it is only with such redundancy that the construct can be measured with any certainty. Thus, whenever possible, scales with known psychometric properties were utilized in the construction of this survey. Suggestions from Task Force members and consultants also aided scale construction.

Additionally, the research team focused on minimizing response bias. For example, questions intended to measure the effects of possible gender-related bias were placed prior to the assessment of said bias. In this manner, the measurement of these effects are unbiased with respect to the respondent's experiences. Further, specific attitudinal questions were placed toward the end of the survey, to ensure that inquiring into attitudes about a particular subject matter would not affect reports of experiences.

The Surveys were designed with three primary issues in mind: documenting the presence/absence of gender-related bias in respondents' experiences; obtaining details of gender issues identified by the respondents as important in their working life; and providing evidence for the effects of any gender-related bias. Although the first two goals parallel those of previous task force surveys, the third represents an innovation. Specifically, the survey analysis addresses a question often asked by social science researchers, namely, “So what?” In this
case, what are the consequences of experiencing gender-related bias in one's work?

Observations and Experiences. One of the innovations of the present effort was the care that was taken to separate respondents' actual experiences of various issues from their observations and opinions about these issues. We emphasized this distinction to respondents and, when at all possible, relied on actual experiences. When we did ask about observations, only those respondents with personal experiences with the issue were given the opportunity to respond. Thus, we are able to state with confidence that the data reported are accurate reflections of the respondents' experiences, observations and opinions in the federal courts of the Eighth Circuit. Finally, when we asked about opinions they were clearly labeled as such and our analysis noted that these questions dealt with respondents' opinions.

Data Input and Analysis. Attorney and Court Employee Surveys were submitted to computer scanning. Data from the Judge surveys were entered and checked manually into the SPSS computer program. The data from the surveys were analyzed using SPSS data analytic software by Prof. Louise Fitzgerald and the research team at the University of Illinois. The researchers provided the Task Force with extensive written reports of the analysis.175 All written comments were manually input in a word processing program, and transcribed and made available for the Task Force members to review.

Technical Note

To provide the most scientifically reliable and defensible analyses possible, we have incorporated a number of methodological procedures that depart in some ways from those utilized in previous state and federal Gender Fairness surveys. These are described below. Also, several statistical terms and concepts that may not be familiar to the non-technical reader are defined.

Scales versus single items. Probably the most notable departure from previous surveys is that, wherever possible, we have constructed multi-item scales to assess the various areas of interest, rather than simply reporting the results item by item. Single items are notoriously unreliable, despite being widely used in public opinion polls and other surveys; there are a variety of reasons for this (e.g., no item is ever perfectly worded; many concepts are too complex to be addressed in a single question). Although there are some exceptions to this rule (e.g., simple fact-based demographics), in general one can have consid-

175. These technical reports are available to those wishing a more in depth description of the methodology and analysis.
erably more confidence in a multi-item scale that aggregates across a number of questions, because each item takes a slightly different approach to the topic of interest.

This principle can be observed in a number of everyday situations; for example, most of us would agree that a baseball player's seasonal batting average (computed over a large number of games) is a better estimate of his true ability than performance in any one game. Similarly, the Judge Survey contained a number of questions asking about the desirability of having both male and female attorneys appointed to a variety of positions, including court committees, criminal cases, law clerks, and so forth. Rather than reporting simple percentages of judges who endorsed each of these items, we have combined them into a 7-item scale labeled Gender Balance to provide a more reliable, multifaceted view of the degree to which judges view proportionate gender representation as important across a variety of domains. We have taken this approach wherever possible. A list of scales and their constituent items is provided in Appendix B.

Statistical Significance. All statistical tests of the attorney and court employee data employed a criterion of .01; that is, statistical significance indicates that the probability is less than 1% that a finding is due to chance. Note that this is considerably more conservative than the conventional criterion of .05 (i.e., 5%, or 1 in 20, chance of error); thus, we can have considerable confidence that any significant results are meaningful.

For the data from the judges, we employed the traditional significance level of $p < .05$; this is due to the considerably smaller size of the judge sample. We were concerned that the more conservative level of .01 might unduly sacrifice sensitivity (i.e., the ability to identify significant effects) as the decreased sample size results in a subsequent loss of statistical power. It is important to note that this .05 level is, however, the conventional level used in standard scientific research.

Mean. The most common measure of central tendency is the "mean," or average of all scores for a particular item. That is, the mean for a particular question is computed by summing all of the individual scores for that question, and then dividing this figure by the number of individuals who responded. Analyses of all continuous variables (i.e., variables with a range of responses, such as 1 = "strongly disagree" to 5 = "strongly agree") are conducted via a comparison of means.

Standard Deviation. The standard deviation is a measure of "scatter" or dispersion of scores around the mean. Thus, larger standard deviations indicate a greater "spread" of scores; smaller standard deviations suggest that scores cluster more tightly around the mean.
Standard deviations are computed such that approximately two-thirds of all scores fall within one standard deviation from the mean; about 95% fall within two standard deviations of the mean. All analyses of continuous variables take into account the standard deviation - along with the mean - to determine whether scores for a particular item are significantly different, because a smaller difference in means can often be more meaningful when scores for each group are tightly clustered together. In contrast, even a large mean difference could be statistically nonsignificant if a large standard deviation indicates that there is more overlap than divergence in scores.

Effect Sizes. In the technical reports, we reported effect sizes, using Cohen's (1977) formula. Effect sizes give information concerning the relative magnitude of the various differences — information that cannot be determined from significance tests alone. In other words, after we know that a difference in scores is statistically significant, an effect size can answer the question of "how big is the difference?"

Effect sizes can range from .01 to greater than 1.00; larger numbers indicate a bigger difference or more meaningful effect. Generally speaking, effect sizes of less than 0.20 suggest relatively modest differences; 0.40 suggests a moderate effect; and effect sizes of 0.60 and greater are quite large. For simplicity's sake, we have eliminated the effect sizes from the present report, while retaining the appropriate relevance to small, medium or large differences.

Interactions. In analyses testing the effects of two (predictor) variables on a third (outcome) variable, the predictor variables can interact in affecting the outcome variable. In other words, the effect of one predictor variable can differ depending on the level of the other predictor, and vice versa.

For example, in the report you will see respondent gender and target gender interacting to affect the level of observed general incivility toward witnesses and attorneys. Here the effect of respondent gender varies, depending on whether the target is male or female; likewise, the effect of target gender differs as a function of whether the respondent is male or female. To facilitate understanding and interpretation of such findings, all interactions are depicted in figures; these can be found near the end of the technical reports, after the appendices and before the open-ended responses.

Statistically Controlling for a Variable. This technique was used to follow-up a number of analyses in which significant differences were found. Essentially, comparisons among two or more predictor variables were re-examined while "controlling for" (i.e., removing, holding constant, partialling out) the effects of a third variable. This technique thus provides a clearer test of differences among the original
predictor variables. For example, in a number of cases, gender differences were re-examined statistically controlling for the age or experience level of respondents, testing whether gender predicts differences in responses *above and beyond* the effects of those variables.

**Correlation Coefficients.** The correlation coefficient measures the strength of relationship between two variables and can range from -1 to 1. A value of 0 suggests *no linear relationship* at all between variables, such that an increase in one variable is not associated with any systematic change in the second variable. In contrast, values of 1 or -1 suggest a *perfect relationship* between the two variables, where an incremental change in one is perfectly related to an incremental change in the other. A positive correlation indicates that as values for one variable increase, so do values for the other variable (and, alternatively, as values for one decrease, so do values for the other). A negative correlation shows an inverse relationship; as values for one variable increase, values for the other decrease (and vice versa).

**Insufficient Sample Size.** Throughout this report, you will notice that a number of analyses were not conducted, as the number of female respondents was simply too small. Such a small sample size can produce considerable distortion in the analysis, yielding results that are both unreliable and scientifically indefensible. Moreover, such analyses might have unduly compromised the anonymity of individual respondents; for both of these reasons such comparisons have not been conducted.

**Reliability.** Reliability, in the measurement sense, refers to the accuracy or precision of measurement. It also reflects how "dependable" scores are — in other words, the degree to which they would be consistent if repeated measurements were made of the same group.

**Validity.** Again, in a measurement sense, validity refers to the extent that the content of a test or item is representative of the construct it is intended to measure. In other words, are we measuring what we think we are measuring?

**Principal Component Analysis.** This is a statistical technique that is used with multiple items to identify sub-scales that are conceptually similar. In other words, the analysis provides an estimate of which survey items "group" together conceptually, leading to the creation of scales. Scales assessing general incivility, gender-related *incivility* and unwanted *sexual attention* were developed via this method.

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176. Note that although "perfect" correlations of 1 or -1 are theoretically possible, they virtually *never* occur in social science research; most correlation coefficients fall somewhere between the two extremes.