Summer 1993

Report of the Missouri Task Force on Gender and Justice

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Part of the Law Commons

Recommended Citation

Available at: https://scholarship.law.missouri.edu/mlr/vol58/iss3/1

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.
Report of the Missouri
Task Force
on Gender and Justice

* The Task Force would like to thank the Editorial Board of the Missouri Law Review and Professor Karen Tokarz, Washington University School of Law, for their assistance in the republishing of the Task Force Report in the Missouri Law Review.

The original printing and distribution of the Task Force Report were made possible by a grant from the Missouri Lawyers Trust Accounts Foundation and with the assistance and generosity of The Missouri Bar.

The Task Force Report is dedicated in memory of Pam Kline, former Associate Circuit Judge, 17th Judicial Circuit, a member of the Missouri Task Force on Gender and Justice, who died in 1990.
TABLE OF CONTENTS

INTRODUCTION .......................................................... 489

I. DOMESTIC VIOLENCE .................................................... 491
   A. Missouri's Statutory Response To Family Violence: the Adult Abuse Act .............................................. 493
   B. Administration of the Adult Abuse Act: Understanding Cycles of Abuse and the Psychological Makeup of Victims of Domestic Violence .......................................................... 496
   C. The Issue of System Abuse .......................................... 519
   D. Recommendations ...................................................... 522

II. FAMILY LAW ............................................................ 527
   A. Impediments to Court Access ........................................ 528
   B. Courts' Determination of Economic Rights ...................... 542
   C. Child Support .......................................................... 558
   D. Child Custody .......................................................... 560
   E. Enforcement of Court Orders ......................................... 573
   F. Need for a Family Court .............................................. 576
   G. Recommendations ...................................................... 577

1. The original report of the Task Force was released in June 1993. The version reproduced herein has been edited to preserve the emphasis on gender bias and to conform with the stylistic requirements for law reviews. A copy of the complete report may be obtained by contacting The Missouri Bar, P.O. Box 119, Jefferson City, Missouri 65102.
III. CRIMINAL JUSTICE ........................................ 581
   A. Gender and the Criminal Justice System ............... 581
   B. Arrest, Bond, Prosecution, and Sentencing .......... 585
   C. Incarceration, Probation, and Parole ................. 598
   D. Sexual Assault and Rape ................................ 612
   E. Recommendations ....................................... 620

IV. TREATMENT OF JURORS, LITIGANTS, WITNESSES,
   ATTORNEYS, AND JUDGES IN THE COURTROOM .......... 627
   A. Selection of Jurors and Forepersons ................. 628
   B. Inappropriate, Demeaning Conduct and Sexual Harassment .. 632
   C. Credibility ........................................... 640
   D. Courtroom Experience for Jurors, Litigants, and Witnesses .. 645
   E. Fee Awards and Fee-Generating Court Appointments for
      Attorneys ............................................. 647
   F. Supreme Court, Circuit Bar, and Other Committees .... 649
   G. Language in the Courts ................................ 650
   H. Recommendations ..................................... 655

V. TREATMENT OF COURT PERSONNEL ..................... 660
   A. Job Opportunities and Compensation .................. 662
   B. Inappropriate, Demeaning Conduct and Sexual Harassment .. 664
   C. Family and Medical Leave ............................. 668
   D. Child Care in the Courthouse ......................... 671
E. Recommendations .............................. 672

VI. JUDICIAL SELECTION ............................... 678
   A. How Judges Are Selected in Missouri .......... 679
   B. Gender Diversity on the Courts ............... 682
   C. Gender and the Election of Judges .......... 686
   D. Gender and the Appointment of Judges ....... 689
   E. Recommendations .............................. 704

VII. INSTITUTIONALIZING REFORM: IMPLEMENTING THE TASK
     FORCE RECOMMENDATIONS ....................... 711
   A. Education and Leadership: The Role of the Organized Bar . 711
   B. Creation of a Family Court ................... 712
   C. Legal Services for the Indigent ............. 713
   D. Increased Diversity in the Judiciary ......... 713
   E. Ethical Rules and Guides to Conduct .......... 714
   F. Task Force for Implementation of the Task Force
      Recommendations .............................. 714
   G. Task Force on Race and Justice .............. 714
INTRODUCTION

The Missouri Task Force on Gender and Justice was created by Resolution of the Executive Council of the Missouri Judicial Conference. Its members were appointed by the Chief Justice of the Missouri Supreme Court in February 1990. The Resolution charged the Task Force with studying "the organization, rules, methods of procedure, and practice of the judicial system of the State of Missouri to determine whether gender bias exists." The Task Force was instructed to issue "a report containing [its] findings and recommendations and provide a plan for the education of the bench, bar, and public with respect to its findings and recommendations."

Missouri's Task Force is one of thirty-three established in other states, the District of Columbia, Puerto Rico, and the Ninth Circuit of the United States Court of Appeals. The Task Force examined reports issued by some of the other task forces for suggested areas of concern and methodology for its study. Members of the Task Force were diverse and included judges, attorneys and educators from all parts of the state.

The Task Force studied six areas: domestic violence, family law, criminal justice, treatment of persons in the courtroom, treatment of court personnel, and judicial selection. Under the supervision of a statistical expert, the Task Force conducted a state-wide survey of attorneys, judges, and court personnel. Its objective with respect to the survey was to assess the perceptions and recent experiences of the respondents concerning possible gender bias in areas of the court system with which the respondents were most familiar. Recipients were asked to complete only those sections of the questionnaire about which they had knowledge or experience within the last five years. The response rate was 17% for attorneys, 42% for judges, and 20% for court personnel.

The survey results enabled the Task Force to draw conclusions about the attitudes, observations, and experiences of participants in the legal process and to contrast the views of judges and male attorneys with those of female attorneys. A statistical analysis of the data received was performed by a statistical expert who is an assistant professor and a fellow of the Public Policy Research Center at the University of Missouri-St. Louis. An external review of the expert's survey methodology and report was conducted by the director of the Office of Social and Economic Data Analysis at the University of Missouri-Columbia.

The Task Force also conducted public hearings in St. Louis, Kansas City, Springfield, Columbia, Cape Girardeau, and Kirksville. Approximately 150 judges, attorneys, litigants, and representatives of organizations associated with the court system testified at these public hearings. The anecdotal material received by the Task Force at the public hearings and in survey comments provided a human perspective to complement the empirical, quantitative
findings. From these sources the Task Force was able to pinpoint many of the ways bias manifests itself in Missouri's judicial system.

In addition, the members of the Task Force committees read current literature pertaining to the subjects being investigated, and reviewed relevant appellate decisions. A separate questionnaire regarding court rules, policies, and procedures was sent to the forty-four circuit courts and three appellate court districts. Members of the Missouri Nonpartisan Court Plan appellate and circuit judicial nominating commissions also received a separate questionnaire.

Through this fact gathering process, the Task Force discovered that in virtually every area identified in other states as presenting gender-related obstacles to the administration of justice, substantial gains have been made in Missouri. For instance, Missouri has adopted an impressively comprehensive Adult Abuse statute; courts are increasingly recognizing the economic contribution of the homemaker spouse when distributing marital assets; and judges, attorneys and court personnel reported a marked decrease in improper sexist conduct in the courts.

Although encouraged by these gains, the Task Force concludes that improvement is still needed in the areas of domestic violence, dissolution of marriage, child custody, sentencing, court access, conduct in the courtroom environment, treatment of court personnel, and judicial selection. The Task Force Report emphasizes the areas where improvement is needed in order to raise the consciousness of the readers. The many recommendations for change, further study, and continued monitoring contained in the Task Force Report will provide the opportunity for attorneys and judges to demonstrate their commitment to eliminating gender bias from the administration of justice in Missouri.

Although the Task Force was charged only with examining gender bias in the court system, as the study progressed, it became evident that the effects of gender and race on the administration of justice are often intertwined. The Task Force decided to address the effect of racial bias when it was raised and to record and report any evidence of racial bias produced by the study. Testimony of racial bias was not solicited at the public hearings, but the survey included a limited number of questions on the subject of racial bias. From the information the Task Force received, it concludes that there is significant evidence to support the establishment of a separate task force to study race and justice issues and to work to eliminate racial bias in the administration of justice in Missouri.3


3. The original Task Force report contained an addendum reporting some of the
I. DOMESTIC VIOLENCE

Under Missouri law, domestic violence is defined in terms of acts of "abuse"—including assault, battery, coercion, sexual abuse, unlawful imprisonment, and harassment—by one family or household member against another.\textsuperscript{4} Domestic violence is found at all socio-economic levels, in all racial and age groups, and among people with all degrees of education. National statistics show that three million to four million American women are battered each year by their husbands or partners. In Missouri alone, 19,442 adult abuse petitions were filed in 1991, an increase of nearly 65% when

issues surrounding racial bias that had been raised during the Task Force's investigations. The racial bias addendum has been omitted from this edited version of the Report because the scope of this Report is limited to how gender bias affects the administration of justice in Missouri.

4. Missouri's Adult Abuse law defines acts that constitute actionable "abuse" as follows:

(a) "Assault," purposely or knowingly placing or attempting to place another in fear of physical harm;

(b) "Battery," purposely or knowingly causing physical harm to another with or without a deadly weapon;

(c) "Coercion," compelling another by force or threat of force to engage in conduct from which the latter has a right to abstain or to abstain from conduct in which the person has a right to engage;

(d) "Harassment," engaging in a purposeful or knowing course of conduct involving more than one incident that alarms or causes distress to another person and serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress and must actually cause substantial emotional distress to the petitioner. Such conduct might include but is not limited to following another about in a public place or places and peering in the window or lingering outside the residence of another; such conduct does not include constitutionally protected activity;

(e) "Sexual Assault," causing or attempting to cause another to engage involuntarily in any sexual act by force, threat of force, or duress;

(f) "Unlawful Imprisonment," holding, confining, detaining, or abducting another person against that person's will.

\textsuperscript{4} Missouris Adult Abuse law defines acts that constitute actionable "abuse" as follows:

(a) "Assault," purposely or knowingly placing or attempting to place another in fear of physical harm;

(b) "Battery," purposely or knowingly causing physical harm to another with or without a deadly weapon;

(c) "Coercion," compelling another by force or threat of force to engage in conduct from which the latter has a right to abstain or to abstain from conduct in which the person has a right to engage;

(d) "Harassment," engaging in a purposeful or knowing course of conduct involving more than one incident that alarms or causes distress to another person and serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress and must actually cause substantial emotional distress to the petitioner. Such conduct might include but is not limited to following another about in a public place or places and peering in the window or lingering outside the residence of another; such conduct does not include constitutionally protected activity;

(e) "Sexual Assault," causing or attempting to cause another to engage involuntarily in any sexual act by force, threat of force, or duress;

(f) "Unlawful Imprisonment," holding, confining, detaining, or abducting another person against that person's will.

\textsuperscript{5} MO. REV. STAT. § 455.010 (Supp. 1992)
compared to the filings in 1988.\textsuperscript{5} In the vast majority of adult abuse cases, the abused party is a woman.\textsuperscript{6}

The nature of domestic violence and the important role the courts have been called upon to play in relief was well articulated when the Missouri Supreme Court, in its 1982 ruling upholding the constitutionality of Missouri's Adult Abuse statutes, observed:

Studies have shown that the victim of adult abuse is usually a woman. In a large percentage of families children have been present when adult abuse occurred. In one study, fifty-four percent of the battered women interviewed reported that their husbands had committed acts of violence against their children as well as against them. Even if the child is not physically injured, he [or she] likely will suffer emotional trauma from witnessing violence between his [or her] parents. Abuse appears to be perpetuated through the generations; an individual who grows up in a home where violence occurs is more likely to abuse others as an adult or to be a victim of abuse. Adult abuse, therefore, is a problem affecting not only the adult members of a household but also the children. The most compelling reason for an abused woman to remain in the home subject to more abuse is her financial dependency; this is particularly true for the women with children.\textsuperscript{7}

The Missouri Task Force heard testimony on the courts' administration of domestic violence laws from witnesses throughout Missouri, including law

\textsuperscript{5} Statistics from the Office of Courts Administrators concerning filings of adult abuse actions during fiscal years 1988, 1990, and 1991 reveal the following:

\begin{center}
\begin{tabular}{lccc}
Filed & 11,819 & 17,862 & 19,442 \\
Disposed & 10,621 & 16,165 & 18,355 \\
(Dismissed) & 5325 & 8756 & 10,493 \\
Pending Year End & N/A & 2,873 & 3960 \\
\end{tabular}
\end{center}

\textsuperscript{6} According to the Greene County Prosecuting Attorney's Office, during 1990 approximately 92\% of cases involving violations of orders of protection concerned cases where the protected party was a woman. Transcript of Task Force Hearing in Springfield, Missouri at 27 (hereinafter Springfield Hearing). The testimony and reports offered at these local hearings were compiled only for Task Force use and have not been published. Copies of the hearing transcripts and filings are on file at The Missouri Bar, Jefferson City, Missouri.

\textsuperscript{7} State ex rel. Williams v. Marsh, 626 S.W.2d 223, 229 (Mo. 1982) (citations omitted).
enforcement officials, prosecuting attorneys, legal aid attorneys, and representatives of battered women's shelters. The Task Force found that, through enactment and subsequent amendments of the Adult Abuse laws, Missouri has made an impressive and comprehensive statutory response to domestic violence. The Adult Abuse laws are intended and designed to provide victims of family violence with access to court-ordered protection while ensuring that an alleged batterer’s due process rights are preserved through a prompt hearing. Moreover, judges, attorneys, law enforcement officials, and court personnel appear to have a genuine desire to ensure that victims of domestic violence are afforded full protection of the law.

Nevertheless, the Task Force also found the effectiveness of the administration of the Adult Abuse laws was the subject of mixed reviews. Officials working in the system view the shortfalls in effectiveness as the result of victims' perplexing and self-perpetuating unwillingness to pursue criminal prosecution and court-ordered protection. In contrast, the perception among victims is that their claims are assigned a low priority by the judicial system and that their credibility is subject to undue scrutiny. The result of this dichotomy of viewpoints can be frustrating for both litigants and court personnel.

It is the Task Force's view that solutions principally lie in increased understanding and awareness by providing information to judges, prosecutors, court personnel, court administrators, and law enforcement officials of the emotional and situational disabilities that confront victims of domestic violence and reinforcing the Adult Abuse laws' sweeping remedial intent. While recognizing the complex, frustrating, and often disturbing elements of prosecuting and adjudicating claims of domestic violence, the Task Force believes that, because of the extraordinarily high stakes involved, it is incumbent on the professional legal community to assume a heightened level of responsibility for discerning the special needs of domestic violence victims.

A. Missouri's Statutory Response to Family Violence: The Adult Abuse Act

A policy implicit in the Missouri Adult Abuse Act is that the safety of Missouri's citizenry is promoted by providing prompt access to court-ordered protection from domestic violence and by strict arrest policies employed by law enforcement officials. As described infra in more detail, a person subject to "abuse" as defined in the Adult Abuse laws may file a petition in court seeking relief from the abuse. Once a petition has been filed, the law vests the trial court with broad discretion to fashion comprehensive relief, including not only protection from the batterer, but also a provision for financial support and custody of the children. Finally, when responding to complaints of domestic violence, law enforcement officials are guided by strict statutory requirements concerning when arrests should be made.
1. Commencement of Proceedings

Missouri’s Adult Abuse laws recognize that victims of domestic violence often do not have sufficient resources available to them to retain counsel or to pay filing fees. As a consequence, clerks under the supervision of the circuit clerk are required to explain court procedures to litigants who are not represented by counsel and to assist them in preparing forms and pleadings necessary to present their claim to the court.8

No advance filing fee or bond is required to commence a proceeding under the Adult Abuse Act, and the law provides that if relief is sought after business hours or on holidays or weekends, a petition may be filed before any available circuit or associate circuit court judge in the jurisdiction.9 Petitioners seeking an order of protection are not required to reveal their current address or place of residence except to the judge in camera.10

2. Grounds for Relief and Available Remedies

A petition for relief under the Adult Abuse law must be made under oath and allege that the petitioner has been subject to abuse by a present or former adult family or household member. The court may immediately issue a temporary order of protection ex parte upon a showing of an immediate and present danger of abuse to the petitioner. The temporary order of protection may restrain the respondent from "abusing, threatening to abuse, molesting or disturbing the peace of the petitioner," restrain the respondent from entering the petitioner’s home, and grant temporary custody of children.11

The due process rights of the alleged batterer are preserved by the requirement that a hearing shall be conducted within fifteen days of the date of the filing of the petition, unless good cause can be shown why the hearing date should be continued to a later date.12 At the hearing, the petitioner has the burden of proving abuse by a preponderance of the evidence. If such an evidentiary showing is made, the court may issue a full order of protection for a period of up to 180 days, and that period can be renewed for an additional

---

8. The statute provides that "[n]otice of the fact that clerks will provide such assistance shall be conspicuously posted in the clerks’ offices [and that] the location of the office where a petition can be filed shall be conspicuously posted in the court building." Mo. Rev. Stat. § 455.025 (Supp. 1992).
10. Id. § 455.030.3. The petitioner may be required to disclose a mailing address, unless the petitioner alleges that he or she or a family member would be endangered by such a disclosure. Id.
11. Id. § 455.045.
12. Id. § 455.040.1.
180 days upon rehearing. The full order of protection can provide not only for the relief available under the temporary order, but also for maintenance and child support.

Once abuse is found, the statute creates a presumption that the best interest of a child is served by placing the child in the care and custody of the non-abusive parent. The noncustodial parent is entitled to visitation rights unless the court finds that such visitation would endanger the child’s health or otherwise conflict with the best interests of the child. Visitation can be denied if no arrangements can be made that would sufficiently protect the custodial parent from further abuse. Once issued, the full order of protection is enforceable throughout Missouri and is referred to local law enforcement agencies.

3. Enforcement of Orders of Protection

The Adult Abuse Act also establishes comprehensive guidelines for police response to domestic violence complaints. Law enforcement agencies are required to apply the same standard to incidents of domestic abuse as are applied to like offenses involving strangers. In other words, law enforcement agencies are expressly instructed that they shall not apply a lower priority to calls involving claimed domestic abuse.

Under the Adult Abuse law, calls for assistance arising out of domestic violence incidents require an immediate police response when the complainant indicates (a) that violence is imminent or in progress; (b) that an order of protection is in effect; or (c) that incidents of violence have occurred previously. Once on the scene, the officer may arrest the offending party if the enforcement officer has probable cause to believe that party has committed abuse irrespective of whether the violation occurred in the officer’s presence or whether the victim signs an official complaint against the violator.

Officers who decline to make an arrest are required to prepare an incident report describing why no arrest was made, and, if a second call is received

13. Id.
14. Id. § 455.050.3.
15. Id. § 455.050.5.
16. Id. § 455.050.6.
17. Id. § 455.080.2.
18. Id. The Adult Abuse Act suggests that law enforcement agencies may establish procedures to ensure that dispatchers and officers at the scene are informed of recorded prior incidents of abuse and may establish domestic crisis teams to respond to domestic violence calls. Id. § 455.080.
19. Id. § 455.085.1.
within a twelve hour period, arrest becomes mandatory. Arrest is also mandatory when the officer has probable cause to believe that the offending party violated the terms of an order of protection, irrespective of whether the violation occurred in the presence of the officer or whether the victim agrees to sign a complaint.\(^{20}\) The Act requires an officer at the scene of an alleged incident of abuse to inform the abused party of available judicial remedies and relief and of available shelters for victims of domestic violence. The officer is also required to provide or arrange transportation for abused parties to medical facilities for treatment of injuries or to a place of shelter or safety.\(^{21}\)

Violations of orders of protection are Class A misdemeanors punishable by up to one year in prison and a subsequent violation is a Class D felony punishable by up to five years in prison.\(^{22}\)

B. Administration of the Adult Abuse Act: Understanding Cycles of Abuse and the Psychological Makeup of Victims of Domestic Violence

In 1991, slightly more than one-half of all petitions for orders of protection filed under Missouri’s Adult Abuse law were dismissed.\(^{23}\) One prosecutor appearing at the Task Force’s public hearings testified that many criminal prosecutions result in dismissals due to the fact that some victims of domestic violence fail to pursue their rights.\(^{24}\) This creates the perception among court personnel that victims will not pursue their rights.

On the other hand, witnesses who worked with domestic violence victims expressed the view that the legal system and the courthouse itself can be very intimidating for some victims of domestic violence, sometimes as intimidating as their abusers.\(^{25}\) Some women’s experiences with the system have caused

\(^{20}\) Id. § 455.085.2. When both parties claim to have been abused or assaulted, the arresting officer is charged with determining who was the "primary physical aggressor," which determination is based on who was the first aggressor but who was the most significant aggressor. In making that determination, the officer must consider: (1) the intent of the law to protect victims of domestic violence from continuing abuse; (2) the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (3) the history of domestic violence between the persons involved. Id. § 455.085.3.

\(^{21}\) Id. § 455.080.4, .080.5.

\(^{22}\) Id. § 455.085.7, .080.8.

\(^{23}\) See supra note 5.

\(^{24}\) Springfield Hearing at 28.

\(^{25}\) Transcript of the Task Force Hearing in Kirksville, Missouri Vol. II at 42 (hereinafter Kirksville Hearing); Transcript of the Task Force Hearing in Columbia, Missouri Vol. I at 114 (hereinafter Columbia Hearing); Transcript of the Task Force Hearing in Cape Girardeau, Missouri Vol. I at 120 (hereinafter Cape Girardeau
them to feel shamed and harassed.\textsuperscript{26} A victim testified that women often become discouraged by the process and quit.\textsuperscript{27} In short, witnesses suggested that victims' reluctance to pursue relief is inherent to the psychological disability that victims suffer. The judicial system's inability to recognize it as such and to 'take appropriate steps further discourages victims from pursuing their rights and perpetuates victims' unwillingness or inability to follow through with the petitions.

1. The Psychology of Domestic Violence Victims

The victim's inability to leave the batterer is a peculiar consequence of domestic violence. The victim often will assume blame for the abuse and will focus her energies on attempting to avoid further violence.\textsuperscript{28} She often is unsure of her ability to provide for her children and will stay with the abusive partner for what she perceives to be the benefit of the family. As the Missouri Supreme Court has observed, "[t]he most compelling reason for an abused woman to remain in the home subject to more abuse is her financial dependency; this is particularly true for the women with children."\textsuperscript{29}

Victim advocates in Missouri report that an abused woman will return to her partner an average of six times before she leaves permanently.\textsuperscript{30} The Missouri Advocacy Council in Texas County, Missouri, confirmed this view when it reported that, on average, victims will remain in a battering situation for twelve years.\textsuperscript{31} Social isolation and a loss of contact with extended family are consequences of family violence that frequently result in increased economic and emotional dependency of the victim on the batterer.\textsuperscript{32}

\begin{itemize}
  \item 26. Cape Girardeau Hearing Vol. I at 90, 96.
  \item 27. Springfield Hearing at 159.
  \item 29. State ex rel. Williams v. Marsh, 626 S.W.2d 223, 229 (Mo. 1982) (citations omitted).
  \item 30. Kirksville Hearing Vol. II at 42.
  \item 31. Springfield Hearing at 123.
  \item 32. Batterers typically have poor impulse control and explosive tempers. More than 50% have a history of family violence. They are characterized by low self esteem and an inability to express their feelings in non-violent ways. Often they do not perceive that they are violating others' personal boundaries or accept blame for failures or violence that occurs; indeed, some believe that forcible behavior is good for the family. Batterers may be incapable of intimate relations and, when faced with a close relationship, can become irrationally jealous and fearful of abandonment or infidelity. As a result, they often try to contain or control their partner through violence and alternately are demanding and assaultive in sexual activities or punish
\end{itemize}
Psychologist Lenore Walker describes the state of abused women as "learned helplessness," a condition that results in women being unable to recognize or to seek alternatives to a battering relationship.33

Because a woman may be powerless to solve her battering, the violence may escalate to the death of the spouse or batterer. In 1987, the Missouri General Assembly adopted legislation which allows testimony that the victim was suffering from battered spouse syndrome as evidence on the issue of whether the victim lawfully acted in self-defense or defense of another.34 The Task Force did not investigate whether gender bias exists in the enforcement or application of this statute nor the circumstances of women currently serving sentences in Missouri’s prison system convicted prior to the adoption of the statute for the murder of a battering spouse or boyfriend.

A battered spouse may have no awareness of the availability of community resources. She is often isolated, having few friends or sources of support. The more isolated she is, the more dependent on her spouse she becomes for input about her value as a person and her options in life. Acquaintances may exhibit an attitude that family problems are private, and the victim may feel that she has no one to whom she can turn. Moreover, the abused woman may be threatened with grave reprisals to herself or her children if she leaves or refuses to return. Past violence has taught her that threats often translate into action.35

Studies of abused individuals reveal that an abusive relationship is characterized by a cycle of violence containing three phases. During Stage One, tension builds; although the victim is compliant and on good behavior, the batterer exercises increased tension, threats, and control. When the tension reaches a plateau, the relationship enters Stage Two. The batterer becomes unapologetic, highly abusive, and claims a loss of control. The victim feels helpless and trapped and is highly traumatized. After an acute episode of battering comes the remorsefulness of Stage Three, when the batter is apologetic and attentive, promises to change, and manipulates the victim, causing her to feel guilty and responsible for the behavior of the batterer, yet

their spouse with abstinence. Batterers can exhibit qualities that suggest great potential for change and improvement, but such improvement is often unrealized. DAVIDSON, supra note 28, at 27, 31, 34.

33. Professor Walker characterized the process of "learned helplessness" evolving in three steps: (1) repeated batterings that diminish the woman’s motivation to respond; (2) belief that any response that she may undertake will not result in a favorable outcome, irrespective of whether it may; and (3) having generalized her helplessness, she does not believe that anything she does will alter any outcome. LENORE A. WALKER, THE BATTERED WOMAN 49-50 (1979).


35. DAVIDSON, supra note 28, at 51.

https://scholarship.law.missouri.edu/mlr/vol58/iss3/1
making her want to believe his insistence that he will change. When tension begins again, the relationship reenters Stage One. Over time, the tension building stages occur more frequently, the battering becomes more acute, and the contrition stage shortens.\textsuperscript{36}

2. Promoting the Domestic Violence Victim’s Ability to Initiate and Follow Through with Court-Ordered Protection

There is a disparity in the viewpoints of attorneys and judges, on the one hand, and victim advocates, on the other, concerning the principal reasons underlying problems in enforcement of the Adult Abuse laws. Victim advocates perceive that domestic violence cases are not given the priority they deserve,\textsuperscript{37} that women who go back to abusers are penalized by the system,\textsuperscript{38} and that male assaults against other males are treated as more serious than male assaults against females.\textsuperscript{39}

The failure of complainants to initiate the follow through with requests for relief under the Adult Abuse Act and in pressing charges were cited by judges, prosecutors, and law enforcement personnel as a substantial impediment to providing victims of domestic violence with effective court-ordered protection. Judges responding to the Task Force’s survey remarked:

> The biggest problem is that the victim is adamant about filing assault charges in these situations and is later equally adamant about refusing to prosecute. Most cases are dismissed out of lack of cooperation by the victim. The prosecutor’s attitude is

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|}
\hline
 & Always & Usually & Sometimes & Seldom & Never \\
\hline
Female Attorneys & 6\% & 34\% & 25\% & 24\% & 10\% \\
Male Attorneys & 9\% & 52\% & 21\% & 17\% & 1\% \\
Judges & 5\% & 55\% & 22\% & 19\% & 0\% \\
\hline
\end{tabular}
\end{table}

\textsuperscript{36} See generally Lenore E. Walker, \textit{Victimology and the Psychological Perspectives of Battered Women}, 8 \textit{VICTIMOLOGY} 82 (1983).

\textsuperscript{37} Cape Girardeau Hearing Vol. I at 109; Springfield Hearing at 109, 119; Survey Report at 158, Question No. F31 Attorneys Survey, Question No. F31 Judges Survey. Attorney Survey respondents (67\%\!/307\%) and Judge Survey respondents (29\%\!/63\%) reported that prosecutorial offices commit adequate resources to the prosecution of domestic assault cases:

\textsuperscript{38} Springfield Hearing at 111, 121, 123.

\textsuperscript{39} \textit{Id.} Springfield Hearing at 139.
influenced when he has had the same people many previous times and the victim has a history of failure to cooperate.\(^{40}\)

As a rule, female spouses in approximately fifty percent of cases choose not to proceed with prosecution or are reluctant witnesses at trial. Though rationally understandable, it is nevertheless very frustrating to see violators free to abuse again.\(^{41}\)

Similarly, a police officer testifying before the Task Force indicated that (before the statute was amended to provide for probable cause arrests if the victim would not sign the complaint) there was no point in making an arrest because the prosecution was then not practical.\(^{42}\)

While it was difficult for the Task Force to measure with any precision the degree to which or the frequency with which these conditions occur, it did receive instructive examples and constructive suggestions concerning what conditions tend to discourage complainants from pursuing their legitimate claims and what steps can be taken to promote enforcement of the Adult Abuse laws.

\(a.\) \textit{Training and Education}

Training and education of court clerks, prosecutors, law enforcement personnel, and judges concerning the requirements of the Adult Abuse law, the nature and consequences of domestic violence, and the psychology of battered spouses were uniformly suggested as an effective and practical means of encouraging follow-through in adult abuse proceedings.\(^{43}\)

\(1\) Law Enforcement Personnel

Representatives of battered women’s shelters agreed that there has been considerable improvement in recent years in law enforcement personnel’s training and understanding of domestic violence and the requirements of the Adult Abuse law.\(^{44}\) While this enhanced understanding led survey respondents generally to conclude that police officers make arrests based on

\(^{40}\) Survey Comments by Judges at 9, Respondent No. 18.

\(^{41}\) \textit{Id.} Respondent No. 13.

\(^{42}\) Transcript of the Task Force Hearing in Kansas City, Missouri at 46-47 (hereinafter Kansas City Hearing).

\(^{43}\) Springfield Hearing at 128, 138; Cape Girardeau Hearing Vol. I at 92, 93; Columbia Hearing Vol. I at 105, 119-122, 125.

\(^{44}\) Springfield Hearing at 125, 127-128; Kansas City Hearing at 93.

https://scholarship.law.missouri.edu/mlr/vol58/iss3/1
the complainant's statements\textsuperscript{45} and that officers tend not to discourage complainants from cooperating in domestic violence cases,\textsuperscript{46} there were reports that effective training and understanding of the Adult Abuse law was not uniform and that enforcement was uneven.\textsuperscript{47}

There was testimony that law enforcement officers in urban areas or larger towns are more familiar with implementation of the Adult Abuse Act than those in some rural areas.\textsuperscript{48}

What I have seen some are women who come from surrounding smaller towns who have small police departments or sheriff's departments. I am afraid [law enforcement personnel] are not understanding the law and what it is that is required of them to do because I have had women come into the shelter and tell me some pretty wild tales about what they were told in smaller communities from the sheriff's departments and deputies and different things. So I think maybe in the smaller towns is where I am seeing the law not getting understood or carried out,

\textsuperscript{45} Survey Report at 158, Question No. F27 Attorneys Survey, Question No. F26 Judges Survey. Attorney Survey respondents (74/338) and Judge Survey respondents (29/663) reported that police find probable cause to arrest based on the victim's statement:

<table>
<thead>
<tr>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>19%</td>
<td>45%</td>
<td>27%</td>
<td>10%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>16%</td>
<td>52%</td>
<td>29%</td>
<td>3%</td>
</tr>
<tr>
<td>Judges</td>
<td>3%</td>
<td>56%</td>
<td>36%</td>
<td>5%</td>
</tr>
</tbody>
</table>

\textsuperscript{46} Survey Report at 158, Question No. F27 Attorneys Survey, Question No. F27 Judges Survey. Attorney Survey respondents (74/321) and Judge Survey respondents (29/563) reported that police discourage cooperation in domestic assault cases:

<table>
<thead>
<tr>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>2%</td>
<td>7%</td>
<td>27%</td>
<td>34%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>1%</td>
<td>7%</td>
<td>29%</td>
<td>49%</td>
</tr>
<tr>
<td>Judges</td>
<td>0%</td>
<td>5%</td>
<td>31%</td>
<td>47%</td>
</tr>
</tbody>
</table>

\textsuperscript{47} According to witnesses, out of 120 hours of academy training for a law enforcement officer, usually only one hour of training is received on the subject of domestic violence. Cape Girardeau Hearing Vol. I at 94; Springfield Hearing at 97.

\textsuperscript{48} Kirksville Hearing Vol. II at 5-6, 18; Springfield Hearing at 111; Kansas City Hearing at 93, 96, 107; Cape Girardeau Hearing Vol. I at 96, 107; Columbia Hearing Vol. I at 119.
whether it's for money purposes or not understanding the full extent or needing more training on it.\textsuperscript{49}

Other negative comments regarding law enforcement personnel in various areas of the state, both rural and urban, included:

Enforcement of orders when you get into the aspects of the Adult Abuse Act is spotty, at best. It is often dependent upon the individual officer.\textsuperscript{50}

We see law enforcement officers still saying to a woman in answering a domestic call, "I'm sorry, but we can't do anything unless you're going to press charges."\textsuperscript{51}

Police give legal advice or give victims wrong information.\textsuperscript{52}

Several witnesses stressed the need for training in the psychology of the battered spouse and the batterer.\textsuperscript{53}

I would have to stress again... education and training... I think, to help everybody understand just exactly what happens to a woman from Point A to Point B in terms of psychological breakdown in the cycle of violence. Judges, lawyers, police and women, I think they could all benefit from some long term training.\textsuperscript{54}

(2) Court Clerks

Court clerks often are at the threshold of victims' efforts for relief. Witnesses testified in Kansas City that the clerks in Jackson County provide good assistance to domestic violence victims.\textsuperscript{55} The surveys substantiated the view that generally victims and respondents receive adequate assistance from court personnel.\textsuperscript{56} Although judges and attorneys differed in their views of

\textsuperscript{49} Cape Girardeau Hearing Vol. I at 96.
\textsuperscript{50} Columbia Hearing Vol. I at 128.
\textsuperscript{51} Id. at 105.
\textsuperscript{52} Id. at 66.
\textsuperscript{53} Springfield Hearing at 116, 157; Kirksville Hearing Vol. II at 19-20; Transcript of the Task Force Hearing in St. Louis, Missouri Vol. III at 40 (hereinafter St. Louis Hearing).
\textsuperscript{54} Cape Girardeau Hearing Vol. I at 94.
\textsuperscript{55} Kansas City Hearing at 82.
\textsuperscript{56} Survey Report at 154, Question No. F11 Attorneys Survey, Question No. F11
the sufficiency of the assistance, both groups believed that petitioners receive more assistance than respondents.

Several witnesses from support entities such as Legal Services, suggested that court clerks need more training in how to deal with domestic violence victims. They reported encountering bad attitudes among court clerks and said that clerks can be rude. According to one witness, some court clerks appear to have an attitude of "why fill out the paperwork when you will just go back." A male attorney survey respondent stated that court clerks complain about adult abuse orders on a regular basis because they are too much work and because people drop them. A female attorney responding to the survey stated:

Those women courageous enough to seek a temporary restraining order for spousal abuse are treated rudely in most instances upon their court appearances. Attorneys and court clerks have undertaken the role of warning them in advance what is to be expected, discouraging many in need of protection, but saving them public embarrassment before the judge in question.

Judges Survey. Attorney Survey respondents (152♀/734♂) and Judge Survey respondents (4♀/93♂) reported that petitioners receive adequate assistance from court personnel in understanding how to seek an Order of Protection:

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>20%</td>
<td>58%</td>
<td>16%</td>
<td>5%</td>
<td>1%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>32%</td>
<td>56%</td>
<td>11%</td>
<td>2%</td>
<td>0%</td>
</tr>
<tr>
<td>Judges</td>
<td>63%</td>
<td>36%</td>
<td>1%</td>
<td>0%</td>
<td>0%</td>
</tr>
</tbody>
</table>

Survey Reports at 154, Question No. F12, Attorneys Survey, Question No. F12 Judges Survey. Attorney Survey respondents (124♀/676♂) and Judge Survey respondents (4♀/90♂) also reported that respondents receive assistance from court personnel in understanding the nature of the proceedings against them:

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>7%</td>
<td>23%</td>
<td>32%</td>
<td>36%</td>
<td>4%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>5%</td>
<td>22%</td>
<td>32%</td>
<td>35%</td>
<td>8%</td>
</tr>
<tr>
<td>Judges</td>
<td>27%</td>
<td>34%</td>
<td>31%</td>
<td>31%</td>
<td>3%</td>
</tr>
</tbody>
</table>

57. Cape Girardeau Hearing Vol. I at 105; Springfield Hearing at 138.
59. Kansas City Hearing at 103.
60. Id.
Some clerks were reported to be misinformed about the Adult Abuse Act's requirement of no filing fee for an \textit{ex parte} order.\footnote{Springfield Hearing at 138; Columbia Hearing Vol. I at 121.}

(3) Judges

A competent understanding not only of the Adult Abuse Act but also of the nature of domestic violence is particularly critical for judges. Judges generally were considered by attorney and judge survey respondents to effectively conduct Adult Abuse proceedings, although judges and attorneys differed somewhat in their perceptions of the treatment of represented versus unrepresented petitioners.\footnote{Survey Report at 156, Question No. F19 Attorneys Survey, Question No. F19 Judges Survey. Attorney Survey respondents (158\%\slash 751\%) and Judge Survey respondents (42\%\slash 893) reported that judges grant full orders of protection when petitioners are in fear of serious bodily harm, without requiring evidence of physical harm:}

The Task Force received some reports of judges failing to give consideration to the merits of the particular claim at hand and conducting inquiries into irrelevant matters. For example, an attorney from Columbia reported that judges sometimes deny protective orders or refuse to waive the filing fee because previous requests have been dropped.\footnote{Survey Report at 156, Question No. F18 Attorneys Survey, Question No. F18 Judges Survey. Attorney Survey respondents (146\%\slash 729\%) and Judge Survey respondents (4\%\slash 90\%) reported that judges give equal consideration of the testimony of unrepresented petitioners and represented petitioners in order of protection hearings:}

Another witness testified as follows regarding one judge:

\footnote{Columbia Hearing Vol. I at 13, 123.}
In past incidents the perpetrator had broken this woman's ribs, a knuckle, and inflicted numerous smaller injuries. Because she fled from another county and was in a safe house, she didn't seek an order of protection for two weeks. The judge said she had waited too long and needed a more recent incident for her to have a good case.65

A Columbia Legal Aid attorney testified that judges in most of the counties with which he was familiar dismissed petitions for protection orders based on abuse that occurred more than thirty to sixty days in the past.66 An attorney from a rural area also said that a judge in that area had "told women that incidents that are a few weeks past don't justify an order."67 A Columbia witness said that judges have told petitioners that the order would not remain in effect if they telephoned the respondent.68 The witness pointed out that this can create problems when petitioners need to call respondents to arrange for money or to arrange visitation.69

A number of witnesses at the public hearings criticized judges' attitudes and the way they handle domestic violence issues. The director of the Missouri Coalition Against Domestic Violence said, "There are often inappropriate comments and belittling behaviors that occur within the courtroom from the bench."70 A witness said one judge sometimes asks women in court if they like being beaten.71 Witnesses asserted that judges ask why the victim does not leave if the abuse is so bad. A witness said one judge told a victim her case was weak and that she should "call her perpetrator and see if he wouldn't make new threats."72 Others reported judges asking the victims what they had done to provoke their partners to hit them.73 A male practitioner stated in response to the survey that:

There is one associate circuit judge who does not take these proceedings seriously. He consistently lectures the female victims, implying that their behavior was the cause of the defendants' violence.74

65. Kansas City Hearing at 103.
68. Columbia Hearing Vol. I at 129.
69. Id.
70. Columbia Hearing Vol. I at 128.
71. Kansas City Hearing at 63.
72. Id. at 102.
73. St. Louis Hearing Vol. III at 3.
74. Survey Comments by Attorneys at 66, Respondent No. 265.
Another male practitioner said:

At least two associate judges in Kansas City have made inappropriate statements to female petitioners to the effect, "What did you do to cause respondent to hit you?"\(^75\)

A witness asserted that, instead of focusing on whether abuse has occurred, judges sometimes ask questions such as the following: "How long have you lived together?" "Do you love this man?" "Are you pregnant?" "Do you have children together?"\(^76\). The spokeswoman for the St. Louis Women's Self Help Center explained why she thought these questions were inappropriate:

Particularly when the questions come from someone with the clout of a judge . . . it reinforces a woman's self blame and assumes that under certain circumstances it is acceptable for a man to hit his partner. The message that couples need consistently to receive is not that violence is sometimes legitimate . . . .\(^77\)

(4) Prosecutors

Prosecutors agreed that there is a need for continuing training on the issue of domestic violence. Some public hearing witnesses perceived that prosecutors assign a low priority to domestic violence cases, in part because they lack understanding, sensitivity, and training.\(^78\) It was suggested that some prosecutors may not believe female victims because they have not received training about the cycle of violence and what to expect from a victim.\(^79\) The need for training was one of the recommendations made most often during the public hearings.\(^80\) A male prosecutor from a rural area made the following statement in response to the survey:

I believe many of us would welcome training in dealing with victims of domestic violence.\(^81\)

---

75. Survey Comments by Attorneys at 61, Respondent No. 208.
76. Kansas City Hearing at 63.
77. St. Louis Hearing Vol. III at 3-4.
80. Id. at 125, Cape Girardeau Hearing at 93.
81. Survey Comments by Attorneys at 66, Respondent No. 253. Although prosecutors hold annual statewide training sessions, it was asserted at the Columbia hearing that the annual session had never focused on domestic violence. Columbia
A prosecuting attorney testified in Cape Girardeau that:

[E]ach year the Missouri office of Prosecution Services puts on a training seminar both in March and in August... and I would definitely recommend that specific guidelines on how to handle domestic violence cases be made a part of that curriculum each year because there is a high turnover in prosecutors' offices and you might train this batch this year but two years from now it's a whole new group of people.  

\[b. \quad \text{Strict Criminal Enforcement}\]

Strict criminal enforcement of the Adult Abuse Act was considered by battered women's advocates to be one of the most effective means of securing protection for women in jeopardy and for encouraging complainants to follow through with their complaints. According to victim advocates, the prosecutors in Kansas City seemed to be more willing than in the past to file state charges as opposed to bringing the charges in municipal court and to charge violators with a substantive offense rather than for violation of the order of protection when abuse follows entry of an order. Conversely, the failure to aggressively prosecute crimes was cited by victim advocates as a leading cause of complainants' unwillingness to remain involved. It was reported that, although the police have established a

---


83. Kansas City Hearing at 53.

84. \(\text{Id.}\) at 156. Contrary to the Adult Abuse laws' requirements concerning strict enforcement, some prosecutors may have a different view. A Kirksville prosecutor remarked:

[A]re we trying to ensure this couple breaks up? Are we doing things to divide the family?... I know we need to do some intervention if we're ever going to deal with the problem, but I think when we deal with it, we need to try to deal with it in a fair way giving some ideas that this is very often a couple that has children and we try to preserve the family unit as best we can throughout the law....

Kirksville Hearing Vol. II at 51-52.

85. Survey Report at 158; Question No. F30 Attorneys Survey; Question No. F30 Judges Survey. Survey respondents suggested, however, that as a general matter prosecutors do not discourage victim cooperation. Attorney Survey respondents (67♀/311♂) and Judge Survey respondents (2♀/57♂) reported that prosecutors discourage victim cooperation in domestic assault cases:
mandatory arrest policy, prosecutors in the St. Louis area do not follow through on arrests by filing charges and only 7 to 10% of the warrant applications made are actually issued by the circuit attorney's office in St. Louis. Witnesses complained that prosecutors often delay prosecution by asking for further investigation and that this delay increased the danger to victims and decreased the willingness of victims to testify.

According to witnesses at the public hearings, a lack of follow-up by the prosecution also was shown, specifically with respect to enforcement of orders of protection. Victim advocates testified that they have had to urge prosecutors to file charges to enforce orders of protection, and that some prosecutors perceive violations of the orders as "technical" violations, not worthy of filing charges. In addition, these simple "technical" violations are filed in municipal court, not in state court, which, according to those witnesses, shows a lack of priority and follow through on the charges.

Prosecutors, on the other hand, cited victims' failure to follow through with complaints as a cause of foundered prosecutions. It was suggested that prosecutors should adopt a policy of not dismissing domestic violence charges. The Greene County prosecutor's office reported that dismissals

<table>
<thead>
<tr>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>2%</td>
<td>0%</td>
<td>25%</td>
<td>34%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>2%</td>
<td>3%</td>
<td>11%</td>
<td>53%</td>
</tr>
<tr>
<td>Judges</td>
<td>0%</td>
<td>0%</td>
<td>22%</td>
<td>49%</td>
</tr>
</tbody>
</table>

86. St. Louis Hearing Vol. III at 43.
87. Springfield Hearing at 174-175.
89. Kansas City Hearing at 49.
90. Id. at 77-78. It was reported that law enforcement personnel were often frustrated by the lack of prosecution once an arrest had been made. Columbia Hearing Vol. I at 108-109.
91. Kansas City Hearing at 87.
92. Id.
93. Springfield Hearing at 42; Survey Report at 158, Question No. F28 Attorneys Survey, Question No. F28 Judges Survey. Attorney survey respondents (66% of 301) and Judge survey respondents (20% of 67) reported that Judges require a statement of reasons by the prosecutor for dismissal of a domestic assault charge prior to trial:

<table>
<thead>
<tr>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>0%</td>
<td>14%</td>
<td>30%</td>
<td>29%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>2%</td>
<td>14%</td>
<td>19%</td>
<td>34%</td>
</tr>
<tr>
<td>Judges</td>
<td>6%</td>
<td>22%</td>
<td>9%</td>
<td>33%</td>
</tr>
</tbody>
</table>
were made on 48 of 354 adult abuse cases in 1990 "because the plaintiff refused to prosecute." 94 That office also reported that it is no longer allowing victims to drop the charges in Springfield. However, that is not the policy in many places throughout the state. 95 The prosecuting attorney for Cape Girardeau County testified as follows:

In Cape Girardeau County, our policy is once we file an abuse case, we don't dismiss it. We proceed with it to plea or trial. We would rather lose the case than dismiss it because I feel if we have forced it to trial, the man has had to go through the experience of having the trial. Even if he gets acquitted, that is going to be something he might remember when he is pulling his fist back to hit her the next time, that he is going to be arrested and he is going to have to go through the system and be prosecuted. So I think all prosecutors should have the same policy of not dismissing one of these cases once you file it. 96

Another witness testified:

I think you would get more pleas and more opportunities to demand probation and counseling if there was not an opportunity and an avenue out of the system. If she had no control, then you would be in a better position to say, "Well, I understand that

94. Springfield Hearing at 28.
95. Id. at 44-45. A prosecutor who testified in Columbia was concerned with obtaining the testimony of the victim once a trial ensued. The prosecutor cited the use of spousal privilege as the main reason for allowing a victim to refuse to testify. Columbia Hearing Vol. I at 110, 244. A prosecutor from Kirksville called for the abolition of spousal privilege in Missouri. Kirksville Hearing Vol. II at 7-8. Currently, Missouri Revised Statute section 546.260.1 (1986), provides that "[n]o person shall be incompetent to testify as a witness in any criminal case by reason of . . . being the husband or wife of the accused . . . ." However, the wife or husband may not be required to testify but may testify at his or her option either on behalf of or against the defendant, provided the testimony is not related to confidential communications. Id. In addition, where one spouse is charged with a crime against the other, the spouse exposed to bodily harm may testify. State v. Pennington, 27 S.W. 1106, 1106 (Mo. 1894). As the law now stands, the victim of abuse must shoulder the responsibility of coming forward against her abuser with her testimony. Without the privilege, the victim would be relieved of some of the pressure of being the impetus behind the charges. Witnesses asserted that abolition of spousal privilege would make it more likely that prosecutors obtain the testimony of the abused victim. Kirksville Hearing Vol. II at 49-50.
you don't want to, but we're going to proceed anyway." And she would be off the hook, so to speak, with the husband because she does not have the power to stop the prosecution. As long as the power to stop the prosecution is squarely in her hands, the pressure's going to be on her to [stop] it.  

There were allegations that the sentences imposed by judges demonstrate that they do not assign a high priority to domestic violence cases. A female attorney asserted that judges are liberal in granting protection orders but that they "rarely enforce them by fine or imprisonment." Attorney survey respondents reported an apparent reluctance on the part of judges to impose criminal sanctions as a remedy for domestic violence.

c. Awarding Complete Relief

The Adult Abuse law authorizes judges to provide domestic violence victims with a full range of relief, including child support, maintenance, supervised visitation, and possession of the family home. Notwithstanding this authority and the authority to issue orders requiring payments to shelters for housing and services provided to the petitioner, a director of a shelter for abused persons testified that:

It is rare that a client is awarded any of the monetary provisions under the ex partes or the full orders. I have yet to ever be compensated for sheltering a woman . . . .

97. Kirksville Hearing Vol. II at 50.
98. For example, a judge was said to have fined a woman $500 and put her on probation for two years for shoplifting a pack of cigarettes and in the next case fined a man only $35 for shattering his wife's nose by kicking her in the face. Kansas City Hearing at 87.
99. Survey Report at 160, Question No. 37, Attorneys Survey, Question No. F37 Judges Survey. Attorney survey respondents (68% /320o) and Judge survey respondents (22/70o) reported that judges are reluctant to use criminal sanctions as a remedy for domestic violence:

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>6%</td>
<td>37%</td>
<td>25%</td>
<td>25%</td>
<td>7%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>1%</td>
<td>25%</td>
<td>38%</td>
<td>27%</td>
<td>8%</td>
</tr>
<tr>
<td>Judges</td>
<td>1%</td>
<td>11%</td>
<td>28%</td>
<td>43%</td>
<td>17%</td>
</tr>
</tbody>
</table>

101. Kansas City Hearing at 106.
An attorney with Advocate Services for Abused Women testified that:

Several judges will say that "I'm not going to deal with child support, maintenance or any monetary issues." This can be very damaging. This can force a woman and her children into poverty, and often force them to get aid from the state, or many times forces her to return to the violent situation in order that she can provide for her children and herself.¹⁰²

Another victim advocate said she had never seen a respondent ordered to pay the costs of sheltering the victim. When asked why she thought this never happened, she replied:

I think part of it is low priority. I think part of it is lack of education, and part of it is lack of an organized group to approach judges as a whole and say this should be part of the procedure in dealing with these orders.¹⁰³

The views of survey recipients were solicited on this subject. Judges and attorneys, males and females, differed markedly in their perceptions of relief granted:

<table>
<thead>
<tr>
<th>JUDGES AWARD THE FOLLOWING WHEN WARRANTED:</th>
<th>% OF ALL JUDGES RESPONDING</th>
<th>% OF MALE ATTORNEYS RESPONDING</th>
<th>% OF FEMALE ATTORNEY’S RESPONDING</th>
</tr>
</thead>
<tbody>
<tr>
<td>Child Support</td>
<td>93</td>
<td>62</td>
<td>47</td>
</tr>
<tr>
<td>Maintenance</td>
<td>71</td>
<td>38</td>
<td>22</td>
</tr>
<tr>
<td>Supervised Visitation</td>
<td>87</td>
<td>54</td>
<td>37</td>
</tr>
<tr>
<td>Treatment and/or Educational Programs</td>
<td>50</td>
<td>18</td>
<td>11</td>
</tr>
<tr>
<td>The Family Home to Petitioner</td>
<td>93</td>
<td>59</td>
<td>46</td>
</tr>
</tbody>
</table>

¹⁰³. Columbia Hearing Vol. I at 127. Judges have found that violent behavior has occurred but issued protection orders that allowed both parties to stay in the house. Id.
Domestic violence has been found to have a profound effect on children. Research reveals that children raised where violence is prevalent exhibit a combination of aggression, limited tolerance, and poor impulse control. Such children frequently are emotionally dependent, suffer much stress, and have low self esteem. They are insecure in their definition of themselves due to immature parental models. They often experience loneliness, fear, and a mixture of hope and depression.

According to studies, children reared in abusive situations often have a tendency for high risk of alcohol and drug abuse, running away, psychosomatic illness, and absences from school. Often, these children blame themselves and suffer internal conflict for what they witness. They have poor sexual identities due to confused model identification. They develop poor definitions of their personal boundaries and often violate the boundaries of others. Children have little or no understanding of the dynamics of violence, assuming it is the norm and using it as a problem-solving technique. They might participate in "pecking order" battering and continue the pattern of family violence in their own adulthood. Often, the children have suicidal and homicidal thoughts toward parents and are prone to negligence and carelessness.

There is evidence that between 85% to 95% of all prison inmates have been raised in abusive or violent homes. The risk of child abuse increases 1500% in a household where the father abuses the mother. Fifty percent of spouse abusers also abuse their children. Abused women are eight times more likely to abuse their own children.

There was criticism of the way judges deal with custody and visitation in adult abuse cases. A witness alleged that there is little understanding of the danger of abuse occurring when physical custody of children changes hands at visitation. Judges and attorneys, especially female attorneys, differed in their perceptions of whether judges take into account one spouse’s violence toward the other in awarding custody.

104. DAVIDSON, supra note 28, at 118.
106. Id.
107. Id. at 111.
108. Kansas City Hearing at 103.
110. Survey Report at 135, Question No. E30 Attorneys Survey, Question No. E27 Judges Survey. Attorney Survey respondents (201/764) and Judge Survey respondents (52/111) reported that, in awarding custody, judges take into account one spouse’s violence against the other spouse:
One witness asserted that joint custody or visitation arrangements often put women in danger of further physical abuse.\textsuperscript{111} A shelter director testified that:

\begin{quotation}
[I]t is . . . unfair to ask a battered wife to take her children to her abuser so he can have visitation. I have even been aware of a case where the battered wife was to supervise the visitation with her abuser and her children. At the end of the last visitation she was raped and beaten by the abuser.\textsuperscript{112}
\end{quotation}

One judge was said to have attempted to arrange visitation within sight of a shelter for the sake of convenience in spite of the danger this created for shelter staff and other clients.\textsuperscript{113} Although there is evidence that a high percentage of abusers also physically abuse their children,\textsuperscript{114} it was said that it is difficult to get an order for supervised visitation.\textsuperscript{115} A witness also asserted that judges often exclude evidence of violence in deciding on custody in spite of the probability that an abuser of women often beats children as well.\textsuperscript{116}

e. Mutual Orders of Protection

Even if a court determines that each party to a marital dispute has been subject to abuse as defined under the Adult Abuse law, it may issue a mutual order of protection only if both parties have filed a petition. Nevertheless, the Task Force received evidence that mutual orders of protection are entered even when only one party has petitioned. An attorney testified as follows:

\begin{center}
\begin{tabular}{lccccc}
 & Always & Usually & Sometimes & Seldom & Never \\
Female Attorneys & 11\% & 36\% & 38\% & 14\% & 1\% \\
Male Attorneys & 12\% & 50\% & 30\% & 7\% & 1\% \\
Judges & 20\% & 54\% & 22\% & 3\% & 0\% \\
\end{tabular}
\end{center}

\textsuperscript{111} Kansas City Hearing at 77.
\textsuperscript{112} Id. at 99.
\textsuperscript{113} Columbia Hearing Vol. I at 111.
\textsuperscript{114} Id. at 111; Kansas City Hearing at 67.
\textsuperscript{115} Columbia Hearing Vol. I at 111.
\textsuperscript{116} Kansas City Hearing at 67. It was said that unsupervised visitation was allowed in a case where children in a shelter "have had knife tracings from their throats to their navel, from one ear to the other, on to the inside of arms . . . ." Columbia Hearing Vol. I at 111.
I'm afraid to say that lots of times the message that abusers are getting is just not real clear, that their abuse is wrong, and they are the ones at fault. Many judges are saying that the order is designed to keep peace between the two parties, or designed so nobody abuses each other . . . . I have also seen judges and attorneys who represent respondents try to get the woman to agree to a mutual order of protection, when that is clearly something the judge cannot order after the hearing, because no petition was filed on the other side. 117

This practice is in direct violation of a 1989 amendment to the Adult Abuse Act that provides "Mutual orders of protection are prohibited unless both parties have properly filed written petitions and proper service has been made." 118

f. Promoting Access to Court and Social Services

The Task Force received numerous suggestions of steps that could be taken to promote access to court and social services and, hence, more effective administration of the Adult Abuse law.

(1) Representation by Counsel and Victim Advocates

Judges who hear proceedings under the Adult Abuse law or in criminal proceedings for violations of orders of protection and in assault cases often are faced with frustrating and emotional situations. In protection-order hearings, the litigants frequently appear pro se 119 and frequently are unable to present

117. St. Louis Hearing Vol. III at 9. Survey Report at 154, Question No. F13 Attorneys Survey, Question No. F13, Judges Survey. Attorney Survey respondents (135♀/557♂) and Judge Survey respondents (49♀/91♂) reported that mutual orders of protection are ordered even when only one party has petitioned for the order:

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>1%</td>
<td>20%</td>
<td>44%</td>
<td>22%</td>
<td>13%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>1%</td>
<td>14%</td>
<td>34%</td>
<td>35%</td>
<td>15%</td>
</tr>
<tr>
<td>Judges</td>
<td>0%</td>
<td>4%</td>
<td>26%</td>
<td>32%</td>
<td>39%</td>
</tr>
</tbody>
</table>


119. Survey Report at 153, Question No. F9 Attorneys Survey, Question No. F11 Judges Survey. Attorney Survey respondents (157♀/606♂) and Judge Survey respondents (49♀/92♂) reported that Petitioners are represented by counsel in proceedings for Orders of Protection:
relevant evidence in an orderly and efficient manner. Often, abused women concentrate on the verbal or emotional abuse that they have suffered, instead of on the physical abuse, because that is what is most damaging and that is what they remember most clearly. Unless judges speak with the petitioner, they may not find the necessary elements that must be present to issue an order. Full consideration of testimony of both respondent and petitioner is important to assure a fair hearing.

A Legal Aid attorney from Columbia expressed concern that once women who experience abuse finally go to court no resources are available to provide them with representation.

I guess the concern that I have always had is whether these individuals are able to provide the information that is needed by the court to protect themselves. They are also going up against their husband or their paramour, who is basically dominating. . . [T]here is no means right now . . . to provide any services to the poor. Usually they are poor ladies going into court on abuse matters. The judge, I assume, takes a position of being both the attorney and judge in these cases and will ask questions to obtain information.120

Witnesses suggested that special lay advocates have been found to provide constructive assistance to domestic violence victims.121 Witnesses also recommended that victim advocacy programs be strengthened and

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>1%</td>
<td>13%</td>
<td>61%</td>
<td>26%</td>
<td>0%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>2%</td>
<td>17%</td>
<td>49%</td>
<td>32%</td>
<td>1%</td>
</tr>
<tr>
<td>Judges</td>
<td>1%</td>
<td>1%</td>
<td>49%</td>
<td>46%</td>
<td>3%</td>
</tr>
</tbody>
</table>

Survey Report at 154, Question No. F10 Attorneys Survey, Question No. F12 Judges Survey. Attorney Survey respondents (159Q/610S) and Judge Survey respondents (4Q/92S) reported that Respondents are represented by counsel in proceedings for Orders of Protection:

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>2%</td>
<td>9%</td>
<td>65%</td>
<td>24%</td>
<td>0%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>1%</td>
<td>11%</td>
<td>59%</td>
<td>29%</td>
<td>0%</td>
</tr>
<tr>
<td>Judges</td>
<td>0%</td>
<td>1%</td>
<td>47%</td>
<td>50%</td>
<td>2%</td>
</tr>
</tbody>
</table>

121. Cape Girardeau Hearing Vol. I at 100; Columbia Hearing Vol. I at 134; Springfield Hearing at 33.
increased. Testimony from Greene County indicated that there was understaffing in the victims’ administration office in that county. At the time of the public hearings, only 10 out of 115 Missouri counties were served by victim advocate programs.

(2) Physical Facilities

Several statements made at the public hearings indicated that the physical facilities and court processes in some areas create significant problems for victims of adult abuse. The victim advocate for Greene County testified that there are often inadequate waiting areas in many courthouses, areas where victims and abusers must wait together for their cases to be heard. In some instances, the courtrooms where the proceedings for orders of protection are heard have no bailiff, so the victims are exposed to the threat of their attackers. Women have been assaulted while waiting for their hearings.

Witnesses also complained that requests for orders of protection are heard on the same docket as divorces and other cases and that the cases with lawyers representing the parties are heard first. Incidents were cited where abusers had threatened their victims with concealed weapons, leading some to suggest that people entering the courthouse be searched for weapons.

122. Kansas City Hearing at 164. Survey Report at 159, Question No. F32 Attorneys Survey, Question No. F32 Judges Survey. Attorney Survey respondents (559/242d) and Judge Survey respondents (20/44d) reported that victim advocacy programs, such as Domestic Abuse Intervention, increase the rate of domestic assault prosecutions:

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>4%</td>
<td>42%</td>
<td>36%</td>
<td>15%</td>
<td>4%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>18%</td>
<td>38%</td>
<td>29%</td>
<td>10%</td>
<td>5%</td>
</tr>
<tr>
<td>Judges</td>
<td>9%</td>
<td>47%</td>
<td>36%</td>
<td>9%</td>
<td>0%</td>
</tr>
</tbody>
</table>

123. Springfield Hearing at 54.
124. Id. at 50.
125. Id. at 41. A witness from an abuse program in Dunklin County felt that the clerk’s offices are usually busy, crowded places where the woman has difficulty discussing personal and emotional problems. Cape Girardeau Hearing Vol. I at 120. This is humiliating and intimidating to the person seeking assistance. Id. at 120-21.
126. Kansas City Hearing at 104, 111.
128. Kansas City Hearing at 104.
129. Id. at 111.
Testimony suggested that the best environment for hearing abuse cases is a separate docket in a single courtroom. This system is in use in the Kansas City area and has proved to be effective for victims, advocates, volunteer attorneys representing victims, and the judiciary.

(3) Social Services

The Task Force investigated the availability of counseling and support services for batterers and their victims throughout the state. Several witnesses testified at the state-wide hearings that there was a lack of adequate services for both victims and abusers throughout most of the state. A female attorney survey respondent suggested that because counseling for women is not widely available, some women refuse to testify, making prosecution difficult. As one prosecutor stated in his survey response:

Prosecutors are in a position to steer the victims of domestic violence to various resources; however, even when services exist, we often do not have sufficient information or training to serve even marginally as a clearinghouse, let alone do much for them on our own. I think we could do a great deal more with a minimal amount of coordinating with local social services, which I have tried. I believe many of us would welcome training in dealing with the victims of domestic violence.

An abuse program director stated that little counseling for victims is available for rehabilitating their lives and preparing them to live in the world on their own. In rural areas there was a perceived need of transportation and advocates for victims. Services such as job training, vocational rehabilitation, day care, housing, and counseling that had been available to combat adult and child abuse in the late 1970’s are drying up due to budget cuts, according to one witness from Columbia.

A state-wide network called the Missouri Coalition Against Domestic Violence (MCADV)coordinates domestic violence services throughout Missouri. This organization consists of thirty-three programs across the state. The MCADV Director testified that only 18 of Missouri’s 115

130. Id. at 75, 124.
131. Id. at 164; Columbia Hearing Vol. I at 106, 110.
133. Springfield Hearing at 127.
135. Id. at 118-19.
136. Id. at 117.
counties have organized support services for victims. A witness in St. Louis pointed out that 5300 women filed for orders of protection in 1990 in St. Louis City and County, yet only 49 shelter beds exist in the City and only 20 safe homes exist in the County. The MCADV witness stated that there is "no state funding for domestic violence services" for support of and assistance to the thirty-three state-wide programs, which currently are totally funded by donations.

There was testimony that there is not enough medical care available for victims who leave their abusers. Government programs such as Medicaid, AFDC, and food stamps are not available for thirty days. In the meantime the victim must depend entirely on shelters or relatives for assistance, when often these are not available.

Victim advocates testified that counseling for abusers is in great need and that it is highly effective, but that few resources are available. Research has shown that 50% of the batterers who completed an intervention program were free from violence two years later, testified a witness from Columbia. Most abusers do not seek help independently, and the small number who do seek help find it hard to obtain appropriate counseling.

137. Id. at 118.
139. Columbia Hearing Vol. I at 118. As of August 1992, forty-eight programs existed in Missouri that gave services to abused women. Thirty-two programs were actually operating, and sixteen were in the organizational stage. Twenty-four shelters were in operation state-wide, and eight organizations that provided safe homes or hotel rooms for emergency stays of up to three nights were supplying services. Twenty of Missouri’s fifty-one counties received direct services. If the facilities were used to capacity, 500 beds were available across the state. One-third of the beds were located in the Kansas City area. The City of St. Louis had only two shelters with a total of forty-nine beds; St. Louis County had no shelters, just safe homes. Source: Coleen Coble, MCADV.
141. Id.
142. Springfield Hearing at 93-94; Columbia Hearing Vol. I at 110.
143. Columbia Hearing Vol. I at 111.
144. Springfield Hearing at 114.
C. The Issue of System Abuse

Some witnesses at the public hearings suggested that women may allege abuse in order to harass men or to obtain an advantage in domestic relations proceedings. Written responses to the survey indicated a strong opinion among some attorneys and judges that abuse is widespread. Some comments were directed at the lack of follow-through by petitioners once an *ex parte* order had been granted or the criminal action had been filed. A private practitioner asserted in response to the survey that:

I was involved in two cases where wives precipitated prosecution of their husbands for Class C felony assault in order to obtain custody, visitation, and child support goals in divorce actions which were pending. After favorable marital settlements were achieved, both wives signed affidavits of non-prosecution.

Other comments included:

This is a terrible law. Most (60-70%) of female petitioners don’t even show up for the full order hearing. The law is used to gain advantage in pending domestic litigation.

Most of the complaints expressed by attorneys and judges were directed to the use of the Adult Abuse law by *pro se* litigants and attorneys in dissolution proceedings to gain an advantage in custody and support situations and as replacements for *pendente lite* (PDL) orders. As is discussed in the Family Law section of this Task Force Report, *infra*, the failure of judges to grant PDL orders was one of the main concerns of family law practitioners. Representative comments are:

Female petitioners are almost always believed. The process can be used and abused to gain advantage in custody cases or get the spouse to move out of the house. The marital rape law will also be abused.

I’m shocked at the lack of attempts to include and protect due process in these proceedings. They have become litigation.

146. *Id.* at 105.
147. Survey Comments by Attorneys at 64, Respondent No. 187.
148. Survey Comments by Judges at 7, Respondent No. 3.
149. Survey Comments by Attorneys at 63, Respondent No. 154.
strategy rather than protection for those truly abused and in need of serious protection.\footnote{Survey Comments by Attorneys at 65, Respondent No. 217.}

Other criticisms by judges and attorneys were directed to the summary nature of the proceedings. One male attorney felt that everyone who wants an order of protection gets one, and another believed that, when in doubt, orders of protection are made permanent. A female attorney felt the criminal law regarding domestic violence was a farce and stated, "[J]udges let women use the law for revenge but won't find guilt in the face of physical abuse." A judge from a rural community in the eastern part of the state responded:

One judge who handled adult abuse cases in our circuit required only that the name be signed and ignored statutory requirements. The judge has been known to apply this technique to settle dissolution and custody matters.\footnote{Survey Comments by Judges at 8, Respondent No. 12.}

A witness from Kirksville said that \textit{ex parte} orders of protection are almost always too easy to obtain.\footnote{Kirksville Hearing Vol. II at 28.} A majority of judges and attorneys responding to the surveys cited misuse of orders of protection, although judges and attorneys differed somewhat in their views. In response to the survey question, "[h]ave you personally been involved in an adult abuse proceeding when an order of protection has been used for a purpose other than that stated in the statute," 73\% of the judges who responded answered yes; 62\% of the male attorneys who responded answered yes; and 47\% of the female attorneys who responded answered yes.

1. Perceptions of Bias Against Men

A number of attorneys and judges expressed their perceptions that gender bias against men is prevalent in the area of domestic violence. The following were among the survey comments:

There is automatic prejudice against males. Even if the statute doesn't apply, judges will issue orders of protection.\footnote{Survey Comments by Attorneys at 61, Respondent No. 220.}
A judge is less likely to believe that a male is the subject of domestic violence than is a female. Prosecutors also seem to be less sympathetic to these claims.\textsuperscript{154}

There are judges who issue orders even if there are no facts of abuse out of fear of bad press coverage.\textsuperscript{155}

My experience shows that males, especially black males, are generally presumed guilty in domestic violence cases. Sympathy is generally heaped on the female, and the male’s testimony and evidence is usually ignored.\textsuperscript{156}

2. Perceptions of Intimidation for Women

A number of other witnesses believed that the legal system is intimidating to the victims of abuse. One witness who works with abused women explained:

The entire process of filling out the forms is quite overwhelming. It’s six or seven pages of quite specific information. And at the point that they are coming into our office, an incident may have occurred in the last twenty-four hours, and they’re likely to be overwhelmed and unable to really complete the \textit{ex parte} forms by themselves.\textsuperscript{157}

Further, the fear of retaliation from the abuser was said to discourage large numbers of victims from filing complaints. One witness summarized the situation:

Abused women read newspaper accounts of men who kill their wives and girlfriends, usually when the women try to leave. They cannot find a shelter. Friends and family tend to not want to be involved in what they see as a private problem and are not anxious to take on a violent man. If the abused woman calls the police, she will face someone from an occupation that is among the highest in wife abuse.\textsuperscript{158}

\textsuperscript{154} Survey Comments by Attorneys at 63, Respondent No. 134.
\textsuperscript{155} Survey Comments by Judges at 8, Respondent No. 14.
\textsuperscript{156} Survey Comments by Judges at 9, Respondent No. 12.
\textsuperscript{157} St. Louis Hearing Vol. III at 31.
\textsuperscript{158} Id. at 27-28.
Advocates for victims argue that there is greater chance that valid claims are not filed than that the process is used to harass innocent men. The Maryland Task Force Report concurs: "[F]ar from overusing, abusing and manipulating the court system, women are, by and large, intimidated by the system and are under utilizing it in vast numbers."159

CONCLUSION

There are a number of differing perceptions about the enforcement and adequacy of the Adult Abuse laws. There is a view among victims’ advocates and attorneys that a full judicial hearing is not always afforded in domestic violence cases, although this view is not shared by the judges conducting such hearings. The effect is that neither side feels it has had its day in court; some feel the order was inappropriately denied, while others believe the respondent was railroaded into an order or conviction. Despite understandable time constraints and frustrations with the cases, the answer appears to lie in better education and more resources devoted to domestic violence cases.

D. Recommendations

1. For the Missouri Supreme Court

a. The Missouri Supreme Court should encourage judges, prosecutors, court personnel, and law enforcement officers to give a higher priority to civil actions and criminal prosecutions involving domestic violence.

There is disagreement about the adequacy of Missouri officials’ response to domestic violence. Victims and their advocates are critical of the response of many of the officials in the system. The survey of Missouri attorneys produced similar criticism by those who have handled adult abuse cases. It is difficult to ascertain from the evidence considered by the Task Force whether the numerous complaints voiced at the public hearings and in the survey are directed at a majority or a minority of those who deal with domestic violence issues in Missouri.

The Task Force assumes that many judges, prosecutors, court personnel, and law enforcement officers are dealing appropriately with these issues. Taking the evidence as a whole, however, it appears that some are not. In many cases, the Task Force believes that the main problem is that responsible officials view domestic violence cases as frustrating and too much trouble. In

some cases, there may be an assumption that the petition is brought for an improper purpose. Judges, prosecutors, court personnel, and law enforcement officers throughout the state have trouble keeping up with their case loads. The difficulty and frustration of domestic violence cases may cause some officials to conclude that their scarce time can be put to better use on other kinds of cases. The Task Force believes this is a mistake.

Missouri's Adult Abuse law is clear. It establishes a strong policy against adult abuse. Strong, consistent enforcement of the statutes can make a difference. The Task Force urges all responsible officials to devote more time and attention to domestic violence cases. Missouri has strong and progressive statutes, but these statutes need to be implemented more effectively.

b. The Missouri Supreme Court should encourage the Attorney General and the organized bar to provide more frequent and more effective training on all aspects of domestic violence and its prevention for judges, prosecutors, court personnel, and law enforcement officers.

Our reading of the evidence is that some judges, prosecutors, court personnel, and law enforcement officers are not adequately informed of the various aspects of domestic violence and its prevention, nor are they sufficiently sensitive to the problems of victims of domestic violence. This clearly is not true of all the officials with responsibility in this area. Witnesses at the hearings gave praise as well as criticism and pointed to successes as well as shortcomings. Some communities are doing a much better job than others. For example, significant improvements have occurred in Kansas City. But the gains that can be made with good training are so substantial that regular, in-depth training for all responsible officials is one of the most significant steps that can be taken. Regular training on all aspects of domestic violence should be a standard component of the training of judges, prosecutors, court personnel, and law enforcement officials. Considering the conflicting views of judges, prosecutors, and victims' advocates, the Task Force believes it would be helpful to hold training sessions to bring these groups together for discussion.

c. The Missouri Supreme Court should educate judges that the law does not permit the issuance of mutual orders of protection in cases where only one person has requested an order even if there is evidence of mutual abuse.

Mutual orders of protection are specifically prohibited by statute when only one person has filed a petition. There was testimony that some judges apparently are not aware of or ignore the existence of Missouri Revised Statute section 455.050.2.
The Missouri Supreme Court should provide mandatory educational programs for judges devoted to problems regarding Adult Abuse Act enforcement and domestic violence prosecution, including the importance of requiring counseling for offenders. The court also should provide assistance to the lower courts in making appropriate services available.

The evidence indicates that counseling can be effective in many cases. The RAVEN (Rape and Violence End Now) program in St. Louis was praised by several witnesses. The Adult Abuse Act specifically authorizes orders requiring counseling. However, counseling should not be viewed as a substitute for firm, consistent enforcement of the Adult Abuse laws. Although there have been assertions that effective counseling for abusers is not always available, there is some indication that professionals in the field respond if judges require counseling.

e. The Missouri Supreme Court should provide mandatory educational programs for judges regarding criminal sentencing of domestic violence offenders and the range of remedies provided in the Adult Abuse Act.

The evidence reveals that some judges are reluctant to order imprisonment or substantial fines for violation of protection orders and domestic assaults. Violence in a domestic context is at least as serious as violence directed against strangers. The harm to the victim and the cost to society are fully as great as when violence is directed against strangers. Sentencing for domestic violence offenses should reflect this recognition.

The evidence also reveals that some judges are reluctant to order child support, maintenance, supervised visitation, payment to shelters for housing and services to petitioners, and other remedies authorized by Missouri Revised Statute section 455.050. The Task Force recognizes the necessity of giving judges discretion to adapt remedies to the particular facts of each case. However, the goals of the Adult Abuse Act cannot be achieved in many cases without a more aggressive use of available remedies by judges, especially those concerning monetary relief such as child support, maintenance, and compensation to shelters for housing victims.

f. The Missouri Supreme Court should educate judges and court personnel regarding possible misuse of adult abuse proceedings, especially when divorce proceedings are in process. Judges should be made aware of their ability to impose sanctions under Missouri Supreme Court Rule

55.03 against attorneys who encourage the filing of groundless petitions for protection orders to gain an advantage in divorce proceedings.

The survey of Missouri judges, attorneys, and court personnel produced numerous assertions by attorneys throughout the state that protection orders are used to influence or gain tactical advantage in domestic relations proceedings. Although such abuse does not justify a relaxation of enforcement of the Adult Abuse laws, it does demonstrate the need for more careful examination of petitions, more time for hearings, and more willingness to impose sanctions when appropriate. Concern for system abuse should not cause judges to overlook the fact that, in a violent relationship, the filing of a divorce action can trigger additional violence.

g. The Missouri Supreme Court should initiate studies by each circuit court of physical facilities and practices to determine whether physical changes or changes in court procedures are needed to assure the safety and dignity of parties involved in domestic violence proceedings.

The evidence reveals that victims of abuse may be demeaned, intimidated, or even assaulted while waiting in courthouses for their cases to be heard. The Missouri Supreme Court should aid courts in exploring ways to improve safety in the courthouses.

2. For the organized bar

a. The organized bar should work with the Attorney General, law schools, prosecuting attorneys, and civic organizations to encourage the creation of victim assistance programs that provide indigents access to judicial remedies they are otherwise denied and to develop counseling programs for offenders.

b. The organized bar should provide educational programs on adult abuse for judges, prosecutors, court personnel, and law enforcement officials, emphasizing the role of each of these parties in the elimination of adult abuse.

c. The organized bar should advocate educational programs for prosecuting attorneys devoted to problems of domestic violence prosecution, including consideration of a policy that charges not be dismissed solely because the victim requests that charges be dismissed. Prosecutors also should be encouraged to proceed with as few continuances as possible.
d. The organized bar should promote legislation to address incidents of abusers subject to orders of protection who "stalk" victims of adult abuse.161

Survey results and testimony at the public hearings reveal that victim assistance programs increase the rate of prosecutions for domestic violence, as well as to ensure judicial fairness to the victims. However, the results indicate that victims, almost all of whom are female, are rarely represented by counsel in these matters. The victims' safety is often disregarded because judges do not require the prosecutors to state reasons for dismissing domestic violence cases and victims are not always notified of dismissals. Steps need to be taken to provide adequate support and representation for the vulnerable victims of domestic violence and to ensure a higher degree of safety. The state of Missouri should allocate funding to programs that help achieve these goals. The evidence also shows that counseling programs for offenders can be effective. The state of Missouri should allocate funding for programs that help achieve these goals.

All segments of the legal system must acknowledge the impact of what they say and do on abusers' future behavior. They should strive to convey at all times, by what they say and by what they do, a clear, strong message that violence is never appropriate. The Task Force believes that time pressures, a lack of sensitivity or understanding, and a failure to recognize the seriousness of certain conduct may result in officials acting or speaking in ways that trivialize violent acts or send mixed messages to abusers. This is a problem that should be addressed in training sessions, but it is so fundamental to an effective approach to this problem that the Task Force has made it a separate recommendation.

The Task Force recognizes that problems are created for prosecutors when victims refuse to cooperate. While persons may testify in a criminal proceeding against their spouse, they may not be required to do so under Missouri Revised Statute section 546.260.162 Nevertheless, experience in other jurisdictions suggests that abuse can be combated more effectively if the power to stop the prosecution is taken away from the victim. If victims are given the power to stop prosecutions, they often will be pressured by their abusers, family, and friends not to prosecute.

Domestic violence is not just an issue for the abuser and the abused. Society at large has an interest in deterring domestic violence. Domestic violence can lead to murder or injuries that require medical treatment.

161. An anti-stalking law was enacted by House Bill No. 476 as amended, 87th Legislative Assembly, First Regular Session 1993. Governor Mel Carnahan signed the amended bill on June 29, 1993.

Children of families where violence is prevalent are more likely to suffer from alcohol or drug abuse and other problems. A higher percentage of prison inmates come from violent homes. Thus, societal interests in prosecuting domestic violence cases justify not allowing the victims to foreclose prosecution.

No-dismissal policies have been successfully implemented in many communities in the United States, including some in Missouri. Abusers sometimes can be prosecuted successfully without the testimony of the victim. The biannual training for prosecuting attorneys organized by the Missouri Office of Prosecution Services should include consideration of how to implement a no-dismissal policy.

Prosecutors should be encouraged to accelerate the hearings. Delays in a proceeding expose victims to heightened danger and heightened pressure by abusers to drop charges. Victims are less likely to testify if there are long delays between violent incidents and court proceedings.

II. FAMILY LAW

Missouri courts are charged with the responsibility of sorting out the economic pieces and the future composition of the disintegrated family. It is by order of the court that a marriage is dissolved and the husband’s and wife’s prospective obligations to one another and to their children are defined. The areas of dissolution and child custody are those in which our citizenry is most likely to have intimate contact with the judicial system and, hence, the greatest opportunity to observe and judge the fairness of our courts’ operations. For these reasons, the courts have an institutional obligation to ensure litigants fair and effective access to the courts and to render decisions grounded in economic and psychological realities of the family unit and its component parts, unaffected by gender-based stereotypes. The courts’ determinations of family law issues are not only of basic human importance to the women, men, and children who seek to enforce their rights, but also critical to the public’s perception of the courts.

The Task Force invited family law practitioners to comment at the six public hearings held across the state. Because the hearings were publicized, a number of litigants who had been through dissolution proceedings and had experience in Missouri’s courts gave testimony. The Task Force survey sent to all of Missouri’s attorneys and judges contained an extensive section dealing with family law. A large number of attorneys and judges provided written comments to the questionnaire.

In seeking to determine whether gender bias exists in Missouri’s courts in regard to family law matters, the Task Force examined the parties’ access to the courts, including the litigants’ ability to finance the proceedings, and the courts’ administration of post-dissolution economic rights such as maintenance for the economically dependent spouse and division of marital property. The
committee also examined issues surrounding the parties' future relationships with their children, including custody, support, visitation arrangements, and awards.

A. Impediments to Court Access

The Task Force identified lack of financial resources as a serious problem in access to the courts in family law matters. Attorneys and judges perceive that litigants, regardless of gender, yield on promising claims in family law cases due to lack of financial resources. In many cases, however, there is a disparity between the abilities of men and women to retain counsel and adopt effective litigation strategies, and more often the party with insufficient funds to finance litigation is the wife. Courts have broad discretion to balance the parties' access to counsel by requiring the economically dominant spouse to apply family resources to both parties' litigation costs.

163. Survey Report at 124, Question Nos. E43 Attorney Survey, Question Nos. E43 Judges Survey. Wives yield on promising claims in family law cases due to lack of financial resources:

<table>
<thead>
<tr>
<th>% All Judges</th>
<th>% Female Attorneys</th>
<th>% Male Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Usually</td>
<td>4</td>
<td>39</td>
</tr>
<tr>
<td>Sometimes</td>
<td>70</td>
<td>55</td>
</tr>
<tr>
<td>Seldom</td>
<td>24</td>
<td>4</td>
</tr>
<tr>
<td>Never</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>(# analyzed)</td>
<td>(80)</td>
<td>(209)</td>
</tr>
</tbody>
</table>

Husbands yield on promising claims in family law cases due to lack of financial resources:

<table>
<thead>
<tr>
<th>% All Judges</th>
<th>% Female Attorneys</th>
<th>% Male Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Usually</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>Sometimes</td>
<td>64</td>
<td>54</td>
</tr>
<tr>
<td>Seldom</td>
<td>31</td>
<td>38</td>
</tr>
<tr>
<td>Never</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>(# analyzed)</td>
<td>(80)</td>
<td>(199)</td>
</tr>
</tbody>
</table>

A second institutional barrier to access is the perception (and reality upon which it is based) that family law matters are relegated to "second-class" status in the courts. Given the high societal stakes to the fair and prompt administration of family law matters, it is imperative that adequate judicial resources and attention be allocated to the administration of family law. To the extent that courts fail to accord family law matters the attention they require, a greater impediment is placed on the party who is less financially able to litigate, but who requires judicial intervention for the enforcement of rights. Again, that party is most often the wife.

1. Financial Disparity Between Litigants

Experienced Missouri practitioners in family law matters appeared at the Task Force's public hearings and observed that a disparity exists between the ability of men and women to retain counsel and effectively finance litigation. According to 56% of female attorneys, 50% of judges, and 32% of male attorneys, female litigants are less likely to be able to pay a retainer fee than male litigants.165 Those who believe that gender has an impact perceive that the husband usually has ready access to the family's liquid assets and a higher income that can be applied to the retention of counsel and enforcement of rights. The wife, on the other hand, usually has fewer financial resources with which to retain counsel and mount an effective litigation strategy.

A lawyer in St. Louis who is a past chairman of The Missouri Bar's Family Law Section and a past president of the Bar Association of Metropolitan St. Louis described the effect of this disparity as follows:

Economic control plays a large factor in determining how well the litigation will proceed in domestic relations matters. If the lawyer is representing the parent who has the control of the finances, the cash, the income stream, then that parent can do great violence to the other in denying certain rights . . . . 166

165. Survey Report at 43, Question No. C1 Attorney Survey, Question No. C1 Judges Survey. Attorney Survey respondents (309♀/1210♂) and Judge Survey respondents (59♀/112♂) reported that Litigants are less likely to be able to pay a retainer fee if they are:

<table>
<thead>
<tr>
<th></th>
<th>Male</th>
<th>Female</th>
<th>No Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>2%</td>
<td>56%</td>
<td>42%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>2%</td>
<td>32%</td>
<td>66%</td>
</tr>
<tr>
<td>Judges</td>
<td>1%</td>
<td>50%</td>
<td>49%</td>
</tr>
</tbody>
</table>

166. St. Louis Hearing Vol. I at 19.
This view was shared by a Fellow of the American Academy of Matrimonial Lawyers and whose practice for the past seven years has been devoted exclusively to family law matters:

[T]he inability of the economically dependent spouse to participate on equal footing in litigation in the areas of domestic relations ... creates bias in my opinion in favor of men and against women and runs to all areas, all issues in domestic relations. The party with the control of the finances literally has such a significant advantage in my opinion that they cannot only control the litigation but also wind up with a great advantage on every issue and I think if played right can succeed in almost every issue. We see this more and more.167

a. Adequacy of Fee Awards

The courts have at their disposal broad statutory authority to put the parties on substantially equal footing in the early stages of litigation by requiring the spouse with control over the family's resources to apply these funds to both parties' litigation expenses.168 The vast majority of male and female attorney survey respondents perceive that the courts only "sometimes," "seldom," or "never" make awards of adequate fees during the course of litigation, known as awards pendente lite (PDL); the vast majority of judge respondents disagreed.169 One family law practitioner observed:

Typically in our society the woman is the one with the lower income. She has less available resources. So in the area of litigation, that can be very detrimental to her ability to adequately litigate the issues she needs to present in the proceeding. I observed that there is . . . a definite reluctance to

167. Id. at 24.
169. Survey Report at 125, Question No. E48 Attorneys Survey, Question No. E45 Judges Survey. Attorney Survey respondents (193♀/743♂) and Judge Survey respondents (5♀/104♂) reported that judges give fair and individualized consideration to motions for PDL or temporary attorneys' fees and litigation costs in family law cases:

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>0%</td>
<td>11%</td>
<td>42%</td>
<td>40%</td>
<td>7%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>1%</td>
<td>25%</td>
<td>37%</td>
<td>34%</td>
<td>3%</td>
</tr>
<tr>
<td>Judges</td>
<td>7%</td>
<td>66%</td>
<td>22%</td>
<td>5%</td>
<td>0%</td>
</tr>
</tbody>
</table>
GENDER AND JUSTICE

[award] temporary suit money during the proceeding. We must wait until the end of the litigation in order to have the court consider my request for attorneys' fees.\textsuperscript{170}

Another attorney survey respondent commented:

\begin{quote}
Often, economic problems due to the female's limited or non-existent income and the judge's refusal to award PDL attorneys' fees result in limited discovery procedures. This also enables the husband to delay proceedings or to cause the wife to incur substantial legal expenses.\textsuperscript{171}
\end{quote}

Attorneys noted the disparity between the handling of PDL motions in the two urban areas of the state, Jackson County and St. Louis County. Interestingly, attorneys found some fault with both systems. One attorney reported that:

\begin{quote}
In St. Louis County we're probably looking at anywhere from eighteen months to two years between the time a case gets filed to the time it actually gets tried...\textsuperscript{172}
\end{quote}

On the whole, St. Louis is considered to be more liberal in setting and awarding PDL fees, but, according to one attorney, PDL motions are not always heard quickly.\textsuperscript{173}

In contrast, judges in Jackson County routinely do not set PDL matters for hearing.\textsuperscript{174} One attorney commented:

\begin{quote}
Judges in Jackson County will not allow PDL motions to even be put on the docket—they don't want to be bothered. I have been instructed to just set the whole case for trial, rather than set a PDL hearing.\textsuperscript{175}
\end{quote}

Some Jackson County judges disagree with this assessment based on their perception that PDL hearings are available on an emergency basis. They believe PDL hearings generally are unnecessary if the final hearing on the petition for dissolution can be held within two months of filing. They also view PDL hearings as duplicative and significantly increasing litigation costs.

\textsuperscript{170} Kansas City Hearing at 194.
\textsuperscript{171} Survey Comments by Attorneys at 48, Respondent No. 136.
\textsuperscript{172} St. Louis Hearing Vol. I at 19.
\textsuperscript{173} St. Louis Hearing Vol. II at 71.
\textsuperscript{174} Kansas City Hearing at 208.
\textsuperscript{175} Survey Comments by Attorneys at 49, Respondent No. 151.
Some judges also think the litigation is prolonged when PDL attorneys' fees are awarded.

Many attorneys and some judges perceive that the courts' perceived unwillingness to award attorneys' fees precludes attorneys from taking family law cases\(^{176}\) and thus renders legal representation less available to economically dependent spouses. A staff attorney for Mid-Missouri Legal Services confirmed this situation. The attorney testified that private attorneys are not accepting women's cases where they have to collect a fee from the husband because it is too much of a problem to collect a fee.\(^{177}\) Another lawyer remarked, "[T]here is an increasing reluctance on the part of the bar to become involved in the representation of women who are so situated."\(^{178}\) Another attorney stated:

I represent as many men as I do women so this really is not a lawyer issue for me, but I've been involved representing women in financially significant cases and have found myself incapable as litigation went on of continuing to participate, incapable when the case is resolved of getting paid, and as a consequence I think long and hard before I represent women in those cases anymore.\(^{179}\)

Even when the economically dependent spouse is able to find counsel, the advantage to the well-financed spouse can be overwhelming. One lawyer testified:

\(^{176}\) Survey Report at 45, Question No. C5 Attorneys Survey. Attorney Survey respondents (299\(\%\)/1009\(\%\)) reported that the reluctance of courts to award attorneys' fees in family law cases precludes attorneys from taking family law cases:

<table>
<thead>
<tr>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>3%</td>
<td>20%</td>
<td>66%</td>
<td>10%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>1%</td>
<td>14%</td>
<td>53%</td>
<td>24%</td>
</tr>
</tbody>
</table>

\(^{177}\) Columbia Hearing Vol. I at 6-7.
\(^{178}\) St. Louis Hearing Vol. I at 31.
\(^{179}\) Id. at 24-25.
GENDER AND JUSTICE

There is a substantial problem when you take on the representation of a person in a substantial marital estate and that person is not the person in control of the assets, that person is generally the wife who’s not acquainted with the assets and all of the business implications that may be involved.\(^\text{180}\)

Attorneys and judges responding to the surveys differed widely in their views of whether orders for PDL’s or temporary attorneys’ fees and litigation expenses are sufficient to allow the economically dependent spouse to pursue litigation.\(^\text{181}\)

The vast majority of male and female attorneys perceive that when awards for PDL or temporary attorneys’ fees and litigation expenses are insufficient, the court "seldom" or only "sometimes" grants such expenses in adequate amounts in the final judgment.\(^\text{182}\) Although some judges recognized that lawyers are not always fully compensated in some instances, the survey results reflect a substantial divergence of opinion between attorney and judge respondents concerning the adequacy of fee awards.\(^\text{183}\)

One St. Louis lawyer observed:

\begin{verbatim}
180. Id. at 31.
181. Survey Report at 125, Question No. E49 Attorneys Survey, Question No. E46 Judges Survey. Attorney Survey respondents (188/739\%) and Judge Survey respondents (50/108\%) reported orders for PDL or temporary attorneys’ fees and litigation expenses are sufficient to allow the economically dependent spouse to pursue litigation:

<table>
<thead>
<tr>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>0%</td>
<td>7%</td>
<td>29%</td>
<td>55%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>1%</td>
<td>17%</td>
<td>37%</td>
<td>41%</td>
</tr>
<tr>
<td>Judges</td>
<td>1%</td>
<td>46%</td>
<td>44%</td>
<td>9%</td>
</tr>
</tbody>
</table>

182. Survey Report at 125, Question No. E50 Attorneys Survey, Question No. E47 Judges Survey. Attorney Survey respondents (193/743\%) and Judge Survey respondents reported that, when awards for PDL or temporary attorneys’ fees and litigation expenses are insufficient, courts grant such expenses in adequate amounts in the final judgment:

<table>
<thead>
<tr>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>0%</td>
<td>2%</td>
<td>43%</td>
<td>51%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>1%</td>
<td>15%</td>
<td>46%</td>
<td>36%</td>
</tr>
<tr>
<td>Judges</td>
<td>1%</td>
<td>48%</td>
<td>46%</td>
<td>4%</td>
</tr>
</tbody>
</table>

183. Id.
\end{verbatim}
The idea that the judge will take care of all this . . . when the case is over never materializes in my opinion. Very often we don’t have the same judge who tries the case, the PDL, the motions. There is no way effectively to get enough money in PDL to carry the litigation on.  

A lawyer from Kansas City testified that "rarely is the client awarded an amount that has adequately compensated the work needed to represent her." A Columbia lawyer stated:

The practice here is essentially, no matter how meritorious, the judge will seldom give you all of the legal fees that you present . . . . But just routinely they will cut them down and it will be maybe a third, maybe half.

Similarly, an attorney from Kirksville testified that in "Ninty-nine percent of the cases, adequate attorneys’ fees are not awarded."

b. Fairness and Efficiency Through Parity

The courts’ failure to award adequate attorneys’ fees PDL or in final judgment can create an impediment to meaningful access to courts for the economically dependent spouse. Virtually all of the Legal Aid attorneys and persons who provide social services to the poor testified that, except when physical abuse is an issue, a significant number of poor women are denied access to the courts because of limited staff and resources. The Executive Director of Legal Aid of Southwest Missouri referred to the "feminization of poverty," and stated that "it’s gender bias against women not to have the right to counsel." Other comments included:

Many women are hurt by the courts’ refusal to hear temporary motions for child support and legal fees, pendente lite. Also, the courts usually refuse to award legal fees to the wife’s attorney even when she is unemployed or employed at a low-paying job at the final hearing. I am usually never paid by these women and can only afford to work for free on a limited number of cases each year. I am frequently told by judges, ‘you should

185. Kansas City Hearing at 194.
186. Columbia Hearing Vol. I at 32.
188. Springfield Hearing at 132.
189. Id. at 139.
have made adequate financial arrangements up front with your client.' This insensitivity on the part of many judges denies many women access to the courts and contributes to many financial problems of young attorneys.\textsuperscript{190}

An attorney from St. Louis suggested that the ultimate irony of this problem is that, if the courts took steps to promote fairness in this way, an increased incentive would be created for the economically dominant spouse to promptly resolve all outstanding issues in an equitable manner, thereby decreasing litigation expenses and the family law dockets:

"Until that happens I think we're going to see protracted litigation in these areas, we're going to see women who do not have the ability to hire competent counsel, there are going to be fewer lawyers who are going to be willing to represent women in these cases and I see it happening already.\textsuperscript{191}

c. Litigation by Attrition

The result of disparity in financial resources can lead to a litigation strategy of attrition in which the well-financed spouse has the wherewithal to apply procedural advantages with a view toward gaining concessions from the economically dependent spouse through settlement. One lawyer testified that "[o]ften times clients are in a position of having to perhaps concede positions because they do not have the resources that their better financed spouses have to pursue the litigation."\textsuperscript{192} Another remarked:

"So what happens—we all know what happens—frequently the wife at some stage of the game consciously caves in, or her counsel subconsciously caves in. That is an incredibly complex process.\textsuperscript{193}

Even when the economically dependent spouse eventually proceeds to the merits of their case, the mere fact that they have done without adequate maintenance for a protracted period of time may be reason in and of itself for them to receive less relief in the end. A Kansas City attorney observed:

"If you represent the woman, you're in a situation where she's essentially been starved out. So you're showing what her

\textsuperscript{190} Survey Comments by Attorneys at 11, Respondent No. 108.
\textsuperscript{191} St. Louis Hearing Vol. I at 25-26.
\textsuperscript{192} Kansas City Hearing at 194-95.
\textsuperscript{193} Id. at 247-48.
expenses have been and by the time you get to court, the other side says: "Well you haven't had those expenses." And, in fact, [the economically dependent spouse has] been able to get by on far less. So, then they reduce [the] amount that you're requesting right there. They say: "Well, you've been able to live on this," and it perpetuates the whole system that way. 194

The underfinancing of the economically dependent spouse can also give rise to trade-offs of economic rights for non-economic rights. One attorney from St. Louis testified:

[W]e often get into the issue of the parent who does not have the money may have the children so you get into the issue 'I'm going to deny custody unless I receive certain economic benefits or unless I see the children I will not give you certain economic benefits.' I think if the courts took better control over that it would at least make the non-economic parent more competitive . . . or at least better financed so that in most cases she will be able to carry litigation at an equal level. I think we could find cases perhaps resolving themselves much quicker. 195

Another attorney explained the irony of the courts' reluctance to place family law litigants on substantially the same litigation footing when she described how the economically dominant spouse is able to finance their end of the litigation with "marital property," the very property in which both spouses have an interest and that is to be the subject of equitable distribution:

Typically, when you litigate a case, if you represent the man . . . I'm going to tell my client to pay me my fees up front and I'll get a large retainer, because by doing so, his spouse has paid for half my fees. That's marital funds. I also know from experience that the judges . . . are not going to award [the wife] all of the attorneys' fees. So let's assume that the judge awards her half of her attorneys' fees and my client has to pay it. One-half of the fees he's paying her is her money. It's marital funds. Where is she going to come up with the other monies to pay her attorneys? Either from assets that have been awarded her, her half of the marital funds—he's still sitting on his—or she has to borrow the money and incur greater debt, and I don't think our judges are sensitive to that. 196

194. Id. at 215.
196. Kansas City Hearing at 207.
2. The Status of Family Law

The domestic divisions of the state's circuit and associate circuit courts are perceived by many as "women's" courts. It is there that women, in numbers far exceeding men, seek protection from domestic violence, seek enforcement of child support, and seek enforcement of their economic rights upon dissolution, often under circumstances in which the husband is the economically dominant spouse with no incentive to alter the status quo.

a. Undesirable Judicial Assignment

Many judges reported that family law is regarded as lower-status work; very few judges cited family law as a desirable judicial assignment. Only juvenile law matters were identified by judge respondents as a less preferred judicial assignment than family law matters; but, among the judge respondents, 50% reported that they had received no assignment to juvenile law matters over the preceding five years, with only 16% reporting that they had received no family law assignments during that same period. These negative attitudes for the work are clearly evident to attorneys who specialize in family law.

197. Survey Report at 16, Question No. A10 Judges Survey. Judge Survey respondents (59/101) reported that Family law is regarded as lower status work:

<table>
<thead>
<tr>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judges</td>
<td>6%</td>
<td>28%</td>
<td>34%</td>
<td>25%</td>
</tr>
</tbody>
</table>

198. Survey Report at 17, Question No. A11 Judges Survey. Judge Survey respondents responded to the question, "In which of the following areas do you prefer to work:"

<table>
<thead>
<tr>
<th>% Criminal Law</th>
<th>% Civil Law</th>
<th>% Probate Law</th>
<th>% Family Law</th>
<th>% Juvenile Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Most</td>
<td>54</td>
<td>33</td>
<td>14</td>
<td>10</td>
</tr>
<tr>
<td>Second</td>
<td>23</td>
<td>43</td>
<td>17</td>
<td>10</td>
</tr>
<tr>
<td>Third</td>
<td>13</td>
<td>20</td>
<td>14</td>
<td>27</td>
</tr>
<tr>
<td>Fourth</td>
<td>8</td>
<td>2</td>
<td>21</td>
<td>40</td>
</tr>
<tr>
<td>Least</td>
<td>2</td>
<td>3</td>
<td>33</td>
<td>13</td>
</tr>
</tbody>
</table>

199. Survey Report at 126, Question No. E52 Judges Survey. Attorney Survey respondents (204/759) reported that judges have negative attitudes toward family law:
A professor from the University of Missouri-Columbia School of Law testified, "Domestic relations law traditionally has been regarded as kind of a second class area to practice in, a second class area to be a judge in."\(^{200}\) A Kansas City attorney suggested:

I think the overriding situation is that, at least in the metropolitan areas of the state, it is a very macho thing to do for a judge to always publicly declare their distaste for family law matters. That’s a very significant thing to do in order to be one of the team players. ... I think that there are a slim minority of judges who really don’t mind handling family law matters, but they still feel a lot of peer pressure to object to it.\(^{201}\)

Another Kansas City attorney commented on the perceived unwillingness of the courts to recognize the critical economic importance of a dissolution case:

Take a very simple medium-income family situation, certainly not professional people, certainly not people who own their own business: two children age four years—a set of twins—let’s award $600 child support, 3 times 12, times 18 years. This case is now a $146,000 case. Let’s throw in $65,000 equity in a home, $35,000 worth of retirement plans, and $20,000 worth of miscellaneous savings, furniture, furnishings, cars, life insurance cash value, etc., for another $120,000. We now have a case worth $265,000. I would suggest to you that if a jury in Jackson County, Missouri, or any of the outlying counties came in with a verdict of $265,000 this morning it would be written up in the paper tomorrow morning in the Kansas City paper. That would be a significant event. To ask a Court to spend four days hearing the case that I just described, which is a very small, small case, and is one which would need a four-day trial, you’d have real difficulty getting a Court to give you four days. But I suggest to you that same court would feel totally relaxed and comfortable hearing a rear-end car accident with a whiplash injury with $950 of chiropractic bills and would thoroughly enjoy the experience.\(^{202}\)

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>16%</td>
<td>38%</td>
<td>42%</td>
<td>3%</td>
<td>0%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>8%</td>
<td>36%</td>
<td>41%</td>
<td>14%</td>
<td>3%</td>
</tr>
</tbody>
</table>

\(^{200}\) Columbia Hearing Vol. 1 at 91.
\(^{201}\) Kansas City Hearing at 230-31.
\(^{202}\) Id. at 244-45.
Some judges attribute their negative attitudes toward family law to the emotionally charged nature of family law cases. The decisions in contested child custody matters, for example, can be difficult because there may be no clear legal solution. Some judges may be uncomfortable deciding issues that are ordinarily private family matters. These judges may also find that the intense emotional investment of some litigants contributes to unnecessarily prolonged proceedings.

The effect of this morale problem may have adverse consequences on the economically dependent spouse, who in most cases is the wife. The economically dominant spouse frequently is disinclined to alter the status quo. The economically dependent spouse, faced with a recalcitrant litigation adversary who, for example, fails to comply with discovery requests, may have little alternative other than to seek the intervention of the court on even routine matters. This not only increases the costs of litigation by requiring counsel to prepare motions to enforce their clients' rights, but places counsel in what can become the awkward position of repeatedly appearing before the judge on the case who, in turn, may not only find the assignment distasteful, but may be particularly impatient with a party who is regularly before the court.

b. Limitations of Appellate Review

Judges and attorneys responding to the survey acknowledged that if a party wishes to seek appellate review of a decision, the costs create a great impediment, particularly for the economically dependent spouse. Female attorneys perceive that wives "usually" do not appeal promising claims due to lack of financial resources. One attorney asked rhetorically: "How many

203. A law professor mused that this is a gender issue because family law matters involve direct conflict between men and women and is not given the importance of typical conflicts between men. Columbia Hearing at 93.

204. Survey Report at 126, Question No. E51 Attorneys Survey, Question No. E48 Judges Survey. Attorney Survey respondents (185♀/701♂) and Judge Survey respondents (3♀/77♂) reported that wives do not appeal promising claims due to lack of financial resources:  

<table>
<thead>
<tr>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>3%</td>
<td>52%</td>
<td>42%</td>
<td>2%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>1%</td>
<td>28%</td>
<td>56%</td>
<td>14%</td>
</tr>
<tr>
<td>Judges</td>
<td>0%</td>
<td>18%</td>
<td>63%</td>
<td>19%</td>
</tr>
</tbody>
</table>

Survey Report at 126, Question No. E52 Attorneys Survey, Question No. E49 Judges Survey. Similarly, Attorney Survey respondents (180♀/701♂) and Judge Survey
clients can afford $5,000.00, $10,000.00 to appeal a case?" 205 Another remarked: "[Y]ou get into the problem of the resources of this client, because it takes money to file an appeal." 206

Some attorneys testifying before the Task Force expressed frustration at what they perceive as a failure on the part of some judges to keep abreast of new developments in the family law area, thereby not giving litigants the benefit of new trends in the law. 207 One attorney testified: "I don’t know if [judges] read the [advance sheets] or not. I don’t feel the judges follow the law on the issue." 208 Another testified that, in his experience:

[T]here's a tremendous lapse between the change in the law and the judges following the law. And you can hand the Court a trial brief or you can threaten an appeal and, generally speaking, it just doesn’t do any good. 209

Another noted that judges are vested with considerable discretion in determining issues of family law:

[Family law] is different from other areas of law [because of] the vast discretion the trial court has in these matters. And I think that for that reason, because of the scope of appellate review . . . in family law matters, that judges are inclined to follow their own predilections or biases, if you will—I don’t say that cynically—but their own thoughts, rather than what the advance sheets say. 210

The Task Force had no statistical evidence to document how prevalent these opinions may be among attorneys or the extent to which judicial idiosyncrasies may foster gender bias.

respondents (3♀/77♂) reported that husbands do not appeal promising claims due to lack of financial resources:

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>0%</td>
<td>25%</td>
<td>53%</td>
<td>21%</td>
<td>1%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>1%</td>
<td>22%</td>
<td>61%</td>
<td>15%</td>
<td>0%</td>
</tr>
<tr>
<td>Judges</td>
<td>0%</td>
<td>11%</td>
<td>68%</td>
<td>20%</td>
<td>0%</td>
</tr>
</tbody>
</table>

205. Kansas City Hearing at 225.
206. Id. at 214.
207. See, e.g., Kansas City Hearing at 220.
208. Id. at 214.
209. Id. at 251.
210. Id. at 226.
c. Lack of Continuity of Judges

Court practices in the handling of family law cases differ markedly throughout the state. In Jackson County, three judges of the circuit court occupy the designated family law seats for a limited term, whereafter responsibility shifts to three other judges, who may or may not have sat in the domestic division before, who then inherit all pending cases. Motions requiring swift attention may be assigned by the presiding judge to whichever jurist is available. Uncontested cases are heard by associate circuit judges. In St. Louis County, a team of judges hears domestic cases. The judges then rotate on an annual basis and the pending cases are assigned to the new team. Therefore, the judge who hears motions may be different from the judge who conducts the trial, who may again be different from the judge at the time of execution, garnishment, motion to modify, or motion for contempt. In rural areas, continuity is more the norm. There, the judge to whom a case is assigned is more likely to remain with the case through all post-trial proceedings and motions to modify.

The great majority of judges and attorneys believe that family law cases benefit from continuity on the bench.211 Several public hearing witnesses testified that lack of judicial continuity in family law cases can be a significant source of frustration to counsel and clients alike. Because some judges are perceived as "pro-wife" and others as "pro-husband," lawyers may not seek a trial setting until the divisions have rotated and a more congenial judge assigned. Judge-shopping is also common between circuits. One Jackson County attorney testified that she advises her male clients to move from the city to a rural county before filing for dissolution on the grounds that country judges are far less inclined to follow the child support guidelines.212

211. Survey Report at 126, Question No. E53 Attorneys Survey, Question No. E50 Judges Survey. Attorney Survey respondents (208♀/757♂) and Judge Survey respondents (5♀/104♂) reported that family law cases benefit by more continuity on the bench, for example, one judge handling the case from start to finish:

<table>
<thead>
<tr>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>27%</td>
<td>57%</td>
<td>12%</td>
<td>4%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>32%</td>
<td>55%</td>
<td>9%</td>
<td>4%</td>
</tr>
<tr>
<td>Judges</td>
<td>26%</td>
<td>65%</td>
<td>6%</td>
<td>3%</td>
</tr>
</tbody>
</table>

212. Kansas City Hearing at 240.
B. Courts' Determination of Economic Rights

1. Spousal Maintenance

"Spousal maintenance" is the modern statutory substitute for what was long known as "alimony." By Missouri statute, courts are given authority, upon the separation and dissolution of a married couple, to require one spouse to pay all or part of an economically dependent spouse's reasonable living expenses. An economically dependent spouse is not, however, automatically entitled to maintenance, and an award can be indefinite or for a fixed period of time. Thus, a court may grant a maintenance order to either spouse, "but only if it finds that the spouse seeking maintenance:

1) lacks sufficient property, including marital property apportioned to him [her], to provide for his [her] reasonable needs;

2) is unable to support himself [herself] through appropriate employment or is the custodian of a child whose conditions or circumstances make it appropriate that the custodian not be required to seek employment outside the home."

If this threshold to a party's entitlement to spousal maintenance is satisfied, the court may award maintenance "in such amounts and for such periods of time as the court deems just" after considering nine itemized factors and "[a]ny other relevant factors."

214. Id. § 452.335.2.
215. Id. § 452.335.1.
216. Two witnesses cited examples of denials of maintenance for what are plainly impermissible reasons relating to the party's gender. An attorney testified at the Kansas City public hearing that "[w]ithin the past two years, I have been involved in pretrial conferences on the issue of maintenance for a client of mine and I have had two different judges say to me: 'Your client is young and attractive, and she'll remarry. There is no need for maintenance.'" Kansas City Hearing at 193. Similarly, another attorney testified that she represents mostly men, and she has "never had a judge tell me what a good looking male client I have, but I have had them tell me that about my female client, or that they're in very good health and they can get another job or they can get a job." Kansas City Hearing at 211.
217. Under the statute, the itemized factors the court is to consider are:

1) the financial resources of the party seeking maintenance, including marital property apportioned to him [her], and his [her] ability to meet his [her] needs independently,
a. Theoretical Underpinnings

The purpose of spousal maintenance awards has a number of theoretical underpinnings. One theory advocates absolute gender equality and including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(3) the comparative earning capacity of each spouse;

(4) the standard of living established during the marriage;

(5) the obligations and assets, including marital property apportioned to him [her] and the separate property of each party;

(6) the duration of the marriage;

(7) the age and the physical and emotional condition of the spouse seeking maintenance;

(8) the ability of the spouse from whom maintenance is sought to meet his [her] reasonable needs while meeting those of the spouse seeking maintenance; and

(9) the conduct of the parties during the marriage.


218. Courts have made it clear that maintenance is not an automatic incident of dissolution of marriage. A spouse's "reasonable needs" do not necessarily equal the marital standard of living, and a recipient's potential ability to support herself can justify denial of maintenance even where she is not in fact self-sufficient at the time of trial. These legal constraints must be borne in mind in evaluating the merit of complaints that women are sometimes denied maintenance despite demonstrated need relative to the marital standard of living.

A comparison of the reported appellate court decisions granting maintenance on grounds of income disparity with those upholding the denial of maintenance reveals a theoretical disharmony and suggests that the latitude of trial court discretion in applying the maintenance "threshold" is quite broad. Thus, maintenance may be granted by one court under circumstances where it would be denied by another, and either result would be affirmed on appeal.

Absent extensive case analysis, which the Task Force did not undertake, and the ability to discern the extent cases in which appeals were taken are representative of all cases, it is impossible to explain any particular outcome as an instance of "gender bias" against either a husband or a wife.

The Task Force believes that an entitlement formula involving the common variables of marriage duration, earning history, disparity of income, assets, reasonable needs, and other relevant factors can be developed for use in most, if not all, cases when a spouse's entitlement to maintenance is controverted. This approach, analogous to the presumptive child support guideline mechanism, might well be defended on
economic independence; it views maintenance simply as a limited vehicle for accomplishing the economic independence for the economically dependent spouse. Another theory advocates indefinite support of the economically dependent spouse at the marital standard of living. A third, intermediate view provides that maintenance is generally designed to equalize the future incomes of the spouses after separation or dissolution. A fourth, theoretically distinct view is that awards should serve as "restitution" for a spouse's sacrifice of personal development on account of the marriage that cannot be compensated through marital property. The structure and language of the Missouri statute reveals it to be a hybrid of theories advocating economic independence and minimizing disparities (if not providing for equalization) of incomes. 219

b. Appellate Court Recognition of Economic Realities

Appellate courts in Missouri have increasingly recognized the rights of long-term homemakers to maintenance of indefinite duration. Professor Joan Krauskopf, formerly of the University of Missouri-Columbia School of Law, reviewed all reported Missouri appellate decisions relative to maintenance during 1974 to 1984 and found:

When the petitioner has been a homemaker in a marriage of about twenty years or more, is approximately forty-five years old

numerous grounds quite apart from the eradication of "gender bias," but would also tend to make results more predictable and less subject to judicial idiosyncrasies.

219. For example, a claim for maintenance can be invoked only upon a showing by the dependent spouse that he [she] has insufficient property to provide for his [her] "reasonable needs" and that he [she] is unable to support himself [herself] through "appropriate employment." Alternatively, the petitioning spouse must demonstrate that his [her] child-care responsibilities "make it appropriate" for the custodian "not to be required to seek employment outside of the home." This has elements that ostensibly advance economic self-sufficiency (e.g., no maintenance for the party who can provide for "reasonable needs") and reduction of disparity in income (e.g., employment must be "appropriate" and "reasonableness" of "needs" or expenses determined, at least in part, through practical reference to the marital standard of living).

Once the statutory threshold is deemed satisfied and maintenance is determined to be appropriate, the statutory factors for determining amount and duration bespeak of both interests: Criteria revolving around the absolute resources available to each party advance issues of economic self-sufficiency, criteria that consider the relative resources of the parties and the marital standard of living advance interests in reduction of income disparity.

While advocates of one theory or another can parse the statutory language and subsequent judicial interpretations in a manner that appears to support their conclusion, what is self-evident about Missouri's statutory scheme is that basic principles of equity govern the relative rights of parties to a marriage upon its dissolution.
or older, and has not been employed during most of the marriage, awards of any amount are affirmed routinely. This is true even when the obligor will have to adjust his standard of living downward to a relatively equal level with that of the recipient in order to make the payments.\footnote{220}

Notably, Professor Krauskopf found no case reversing an award of indefinite maintenance to a long-term homemaker where the husband was remotely able to pay. In the years since Krauskopf's study, the Missouri appellate courts appear to have continued the prior trend. The Task Force found no Missouri appellate case where the court reversed an award of permanent or indefinite maintenance on the grounds that the award should have been time-limited (where the husband was able to pay).\footnote{221} The appellate courts continue to reverse awards of maintenance for a limited duration where there is not substantial evidence to support a reasonable expectation that the circumstances of the parties will be markedly different in the future.\footnote{222}


\footnote{221. In some cases, the appellate courts have ordered reduction of maintenance awards that exceeded the claimant's proven needs and/or the obligor's ability to pay, \textit{e.g.}, Pemberton v. Pemberton, 779 S.W.2d 8, 9 (Mo. Ct. App. 1989); Arnold v. Arnold, 771 S.W.2d 914, 916 (Mo. Ct. App. 1989); Stoerkel v. Stoerkel, 711 S.W.2d 594, 596 (Mo. Ct. App. 1986). In other cases, awards have been increased on appeal, \textit{e.g.}, Zalar v. Harrington, 786 S.W.2d 883, 885 (Mo. Ct. App. 1990); Misdary v. Misdary, 737 S.W.2d 476, 480 (Mo. Ct. App. 1987); Whitmore v. Whitmore, 732 S.W.2d 572, 573-74 (Mo. Ct. App. 1987); \textit{In re} Marriage of Runez, 666 S.W.2d 430, 433 (Mo. Ct. App. 1983); \textit{In re} Marriage of Morris, 588 S.W.2d 39, 44-45 (Mo. Ct. App. 1979). However, while a close reading of such decisions offers clues as to the boundaries of trial court discretion in determining the amounts of awards, the process is very much fact-driven, and in these cases the appellate court often substitutes its equitable discretion for that of the trial judge.}

Moreover, while limited or temporary maintenance awards have been affirmed in several recent cases, recent appellate decisions suggest that trial courts may now be more inclined to grant indefinite maintenance than they were formerly. The appellate courts also are more frequently reversing the denial of maintenance by the trial courts.

c. Trial Court Recognition of Economic Realities

Notwithstanding increased recognition by Missouri’s appellate courts of the disadvantages older women face in the paid labor market and the need for indefinite maintenance, several witnesses appearing before the Task Force and several survey respondents criticized the manner in which the state’s maintenance laws are being administered on the trial level and noted the frequency of limited maintenance awarded in long-term marriages.

223. See, e.g., York v. York, 823 S.W.2d 45, 45 (Mo. Ct. App. 1991); Reeves v. Reeves, 768 S.W.2d 649, 651 (Mo. Ct. App. 1989); Russell v. Russell, 740 S.W.2d 672, 674 (Mo. Ct. App. 1987); In re Marriage of Dildy, 737 S.W.2d 756, 760-61 (Mo. Ct. App. 1987); Newman v. Newman, 717 S.W.2d 568, 569 (Mo. Ct. App. 1986); L.E.B. v. J.L.B., 768 S.W.2d 638, 640 (Mo. Ct. App. 1989); Estes v. Estes, 767 S.W.2d 370, 372-73 (Mo. Ct. App. 1989); Lampe v. Lampe, 689 S.W.2d 768, 769 (Mo. Ct. App. 1985); Nelson v. Nelson, 720 S.W.2d 947, 955 (Mo. Ct. App. 1986); In re Marriage of Witzel, 727 S.W.2d 214, 215-16 (Mo. Ct. App. 1987). Comparison of these decisions with some of the early cases discussed by Krauskopf suggests that attorneys for prospective maintenance obligors (usually husbands) are doing a better job today than they once did in proving the reasonable likelihood of the dependent spouse’s self-sufficiency within a definite period. Further, the courts have emphasized that "upon dissolution, wife has an affirmative duty to seek full-time employment." Russo v. Russo, 760 S.W.2d 621, 623 (Mo. Ct. App. 1988); Cissell v. Cissell, 573 S.W.2d 722, 725 (Mo. Ct. App. 1978); Beckman v. Beckman, 545 S.W.2d 300, 302 (Mo. Ct. App. 1976); Eckstein v. Eckstein, 748 S.W.2d 945, 947 (Mo. Ct. App. 1988). It may be that the former trend toward unlimited maintenance is slowing, though it is hard to say whether this results from better trial strategy or a new judicial attitude.


226. Survey Report at 116, Question No. E14 Attorneys Survey. Attorney Survey respondents (208Q/761Q) reported that when a homemaker spouse in a long-term marriage seeks an award of maintenance, courts most often award:
Criticism was directed not to whether any maintenance was awarded but, rather, to the duration and amount of maintenance awards.

(1) Amount and Duration of Award

Some witnesses perceived that some trial judges lack a realistic view of an economically dependent spouse’s potential for becoming meaningfully self-sufficient and, thus, the judges award maintenance for an unreasonably short duration. Some attorneys suggested that inadequately short lengths of maintenance may leave the spouses, usually women, in relative poverty upon termination of maintenance. A lawyer who has practiced domestic law for eleven years in Greene County testified that she perceives maintenance as an area with major gender bias problems. A lawyer from Jackson County agreed:

There is a tremendous problem in the area of maintenance. I think the courts have made quantum leaps since I’ve been practicing twenty-three years in the whole area of gender bias. I think the courts just really bend over backwards to not have gender bias. But the system still perpetuates it in many ways, and that certainly is seen in the area of maintenance.

A lawyer who has practiced in the Cape Girardeau area for fifteen years observed:

In my own practice, I have seen many women, strong, good-quality women obtain a dissolution, most of the time not by their choice, but at any rate go through a dissolution and I think, oh, they got what it takes to succeed and the fact is that five or six years later, they are in worse shape than they were at the time of the dissolution.

She added that:

<table>
<thead>
<tr>
<th></th>
<th>Indefinite</th>
<th>Limited</th>
<th>Lump Sum</th>
<th>No Maintenance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>22%</td>
<td>68%</td>
<td>8%</td>
<td>3%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>48%</td>
<td>43%</td>
<td>8%</td>
<td>2%</td>
</tr>
</tbody>
</table>

227. Springfield Hearing at 220.
228. Kansas City Hearing at 248.
Our work force in this area is limited and it is not a situation where women are accepted well and for those women who have skills and who have ability, there simply isn’t much chance for getting much above minimum wage. And so I find women who are unbelievably good employees who are working at Famous Barr without any medical benefits.

Similarly, the project director for the Displaced Homemaker’s Program at St. Louis Community College, which since 1979 has served more than 9000 clients (800 of whom were served in 1990), observed:

Most of [the women] are in a state of shock, numb from their losses. Many get the house as their settlement but that soon goes because they are unable to pay for the upkeep. Usually within five years all maintenance stops and their standard of living decreases significantly. Older women face a double burden of age and lack of recent paid work experiences. They are usually hired at entry level jobs in low paying or part-time work without the benefit of health care insurance. Many end up cleaning houses, doing day work because that’s all they know how to do. The younger divorced women with children face the added pressures of child rearing. Frequently they have inadequate support services including child care.

Although the appellate courts frequently uphold the rights of long-term homemakers to receive indefinite maintenance, attorneys suggest that trial courts do not grant it in many cases where it is needed.

The vast majority of both attorney and judge survey respondents reported that maintenance awards are either "sometimes" or "usually" inadequate in amount or duration. Judges and attorneys, males and females, differed

---

230. Id. at 14.
232. Survey Report at 117, Question No. E20 Attorneys Survey, Question No. E17 Judges Survey. Attorney Survey respondents (159♀/672♂) and Judge Survey respondents (5♀/111♂) reported that when courts award or modify maintenance, the award is inadequate in amount or duration:

<table>
<thead>
<tr>
<th></th>
<th>Usually</th>
<th>Sometimes</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>69%</td>
<td>28%</td>
<td>4%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>30%</td>
<td>66%</td>
<td>4%</td>
</tr>
<tr>
<td>Judges</td>
<td>13%</td>
<td>81%</td>
<td>5%</td>
</tr>
</tbody>
</table>

https://scholarship.law.missouri.edu/mlr/vol58/iss3/1
somewhat on the frequency of perceived inadequate awards.\textsuperscript{233} The Task Force made no effort to correlate perceived inadequacy of awards with the obligor's ability to pay.

Judges and attorneys differed significantly in their views of whether judges have a realistic understanding of the likely future earnings of a displaced homemaker or of the likelihood of the economically dependent spouse being able to support himself through appropriate employment.\textsuperscript{234} Among all of the survey respondents, only 44\% of male attorneys and 13\% of female attorneys perceive that judges "usually" have a realistic understanding of the likelihood of the economically dependent spouse being able to support himself or herself through appropriate employment.\textsuperscript{235} Nearly half of the female attorney respondents (45\%) perceive that judges "seldom" understand the dependent spouse’s job prospects and likelihood of being economically independent.\textsuperscript{236} Of the judges surveyed, 76\% perceive that judges "always" or "usually" have such an understanding.\textsuperscript{237}

One attorney responding to the survey offered this comment:

\textsuperscript{233} Id.
\textsuperscript{234} Survey Report at 116, Question No. E15 Attorneys Survey, Question No. E12 Judges Survey. Attorney Survey respondents (208\%\slash 761\%) and Judge Survey respondents (5\%\slash 111\%) reported that judges have a realistic understanding of the likely future earnings of a homemaker who has been out of the labor force for a long period of time:

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>0%</td>
<td>15%</td>
<td>36%</td>
<td>45%</td>
<td>5%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>2%</td>
<td>43%</td>
<td>36%</td>
<td>19%</td>
<td>1%</td>
</tr>
<tr>
<td>Judges</td>
<td>3%</td>
<td>70%</td>
<td>21%</td>
<td>5%</td>
<td>1%</td>
</tr>
</tbody>
</table>

Survey Report at 116, Question No. E16 Attorneys Survey, Question No. E13 Judges Survey. Attorney Survey respondents (210\%\slash 766\%) and Judge Survey respondents (5\%\slash 111\%) also reported that judges have a realistic understanding of the likelihood of the economically dependent spouse being able to support himself/herself through appropriate employment:

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>0%</td>
<td>13%</td>
<td>39%</td>
<td>45%</td>
<td>3%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>2%</td>
<td>44%</td>
<td>37%</td>
<td>17%</td>
<td>1%</td>
</tr>
<tr>
<td>Judges</td>
<td>2%</td>
<td>74%</td>
<td>22%</td>
<td>3%</td>
<td>0%</td>
</tr>
</tbody>
</table>

\textsuperscript{235} Id.
\textsuperscript{236} Id.
\textsuperscript{237} Id.
I believe that maintenance of adequate amount and duration is rarely awarded. Females are disadvantaged by the years they frequently spend out of the work force, often for family care responsibilities.\(^2\)\(^3\)\(^8\)

Another attorney observed:

[I]t is a matter of perception of whether or not the wife can afford to support herself. You know, the question is "what is support?" Is it being able to pay rent on a $400 a month duplex, is that supporting yourself, when you were living in a $180,000 house?\(^2\)\(^3\)\(^9\)

The views of the attorneys were shared by an employee of New Perspectives, a public school project that services single parents and displaced homemakers, who reported that her organization sees between 300 to 400 people per year and covers 24 counties in southwest Missouri. She testified about the lack of marketable skills divorced homemakers possess and the need to educate judges about the reality these women face, the cost of educating them, and the limited social services available to them. She suggested that the costs for a woman in a rural area may be greater than for a woman in an urban area because of increased transportation costs to go to school and extended child care costs.\(^2\)\(^4\)\(^0\)

(2) Maintenance *Pendente Lite*

Several witnesses before the Task Force also emphasized the difficulty of obtaining a hearing in Missouri on a motion for maintenance *pendente lite* (PDL). Although Missouri law clearly authorizes a motion for temporary maintenance,\(^2\)\(^4\)\(^1\) some judges seem disinclined to entertain such motions, particularly on an expedited basis, because of their view that it may mean "trying the case twice." In some circuits, it is difficult or impossible to obtain a separate pre-trial hearing on such a motion.\(^2\)\(^4\)\(^2\) Attorney and judge respondents to the survey differed significantly in their views of whether the courts grant expeditious hearings in family law cases. While the vast majority of judges believe such hearings are "always" or "usually" available, the vast

\(^{238}\) Survey Comments by Attorneys at 45, Respondent No. 77.
\(^{239}\) Kansas City Hearing at 251.
\(^{240}\) Springfield Hearing at 13-24.
\(^{242}\) Kansas City Hearing at 246.
majority of attorneys believe they are only "sometimes," "seldom," or "never" available.\textsuperscript{243}

When an economically dependent spouse is left without funds for support and is not qualified for employment, an award of temporary maintenance may offer the only hope of support aside from public or private charity. Legal Aid representatives around the state attested that such occurrences are common, although in many cases the husband is also indigent. Regardless of the need for temporary maintenance, such awards simply are not available as a practical matter.

To the extent that economically dependent spouses may be abandoned without resources or employment, the unavailability of maintenance \textit{pendente lite} may work a significant hardship. Because the great majority in this group are wives, the effect of the courts' unwillingness or inability to entertain motions for temporary relief could have a disparate negative impact upon women, particularly where the final judgment fails to compensate by awarding maintenance retroactive to the date of the motion for PDL.\textsuperscript{244}

\begin{table}[h]
\centering
\begin{tabular}{|l|l|l|l|l|}
\hline
          & Always & Usually & Sometimes & Seldom & Never  \\
\hline
Female Attorneys & 2\%     & 22\%    & 36\%      & 36\%   & 4\%    \\
Male Attorneys  & 2\%     & 32\%    & 36\%      & 24\%   & 5\%    \\
Judges         & 11\%    & 55\%    & 29\%      & 4\%    & 0\%    \\
\hline
\end{tabular}
\caption{Survey Report at 113, Question No. E5 Attorneys Survey, Question No. E2 Judges Survey. Attorney Survey respondents (231\%/816\%) and Judge Survey respondents (6\%/108\%) reported that Courts grant expeditious hearings in family law cases:}
\end{table}

\begin{table}[h]
\centering
\begin{tabular}{|l|l|l|l|}
\hline
          & Usually & Sometimes & Never  \\
\hline
Female Attorneys & 19\%     & 67\%    & 14\%    \\
Male Attorneys  & 18\%     & 72\%    & 10\%    \\
Judges         & 31\%     & 67\%    & 2\%     \\
\hline
\end{tabular}
\caption{Survey Report at 117, Question No. E18 Attorneys Survey, Question No. E15 Judges Survey. Attorney Survey respondents (164\%/672\%) and Judge Survey respondents (5\%/111\%) reported that when courts award or modify maintenance, the award is ordered to be retroactive to the date of filing:}
\end{table}

\textsuperscript{243} Survey Report at 113, Question No. E5 Attorneys Survey, Question No. E2 Judges Survey. Attorney Survey respondents (231\%/816\%) and Judge Survey respondents (6\%/108\%) reported that Courts grant expeditious hearings in family law cases:

\textsuperscript{244} See C.M.D. v. J.R.D., 710 S.W.2d 474 (Mo. Ct. App. 1986). Survey Report at 117, Question No. E18 Attorneys Survey, Question No. E15 Judges Survey. Attorney Survey respondents (164\%/672\%) and Judge Survey respondents (5\%/111\%) reported that when courts award or modify maintenance, the award is ordered to be retroactive to the date of filing:
(3) Modification of Awards

Under Missouri law, either spouse may seek modification of a maintenance award "upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable." The Missouri appellate courts have considered literally hundreds of motions to modify, increase, reduce, or terminate such awards because of alleged "changed circumstances." A survey of these decisions reveals that modification of any sort is more frequently denied than granted because of the difficulty in proving a "substantial and continuing" change. Thus, only a very substantial increase in a maintenance recipient's income, persisting over time, can justify reduction or termination of maintenance.

One recent Missouri case, Reeves v. Reeves, is noteworthy on the issue of termination of maintenance upon the obligor's motion. Although the recipient had become self-supporting, substantial income disparity remained between the ex-spouses and the obligor was easily able to continue payments. In Reeves, the ex-wife's income had increased from almost nothing to $40,000 in the 10 years since dissolution, and she had accumulated liquid assets and a retirement plan. Although the husband remained wealthy by comparison, the Court of Appeals reversed the trial court, holding that ex-husband's motion to terminate maintenance should have been sustained on the grounds that the wife had become unarguably self-sufficient. Very rarely has a maintenance obligation been terminated or reduced by 50% or more upon an obligor's motion to modify. However, no case aside from Reeves has involved so dramatic an improvement in wife's economic status.

Another noteworthy decision in this area is Oldfield v. Oldfield, which upheld reduction of maintenance to an ex-wife who had failed to exert reasonable efforts to maintain employment in disregard of her "continuing duty" to do so. Oldfield establishes that even need alone is not enough; need without fault must be shown in order to justify continuation of maintenance long after dissolution.

The implicit theory upon which Missouri's maintenance statute rests is one that presupposes personal autonomy and independence coupled with

246. E.g., Wood v. Wood, 709 S.W. 2d 143, 146-47 (Mo. Ct. App. 1986). It is even more difficult for an obligor to reduce or avoid his obligation on grounds of a reduction in his own means, even where the hardship is considerable. E.g., In re Marriage of Bell, 720 S.W.2d 33, 34 (Mo. Ct. App. 1986).
247. 803 S.W.2d 52 (Mo. Ct. App. 1991)
248. Id. at 53.
249. 767 S.W.2d 134 (Mo. Ct. App. 1989).
250. Id. at 136.

https://scholarship.law.missouri.edu/mlr/vol58/iss3/1
sexual equality. Appealing as this theory once seemed to reformers, the work of Professor Lenore Weitzman suggests that the practical effect of this theory has been the widespread impoverishment of women and the children in their custody.⁵²¹ Her statistics confirm that in the first year after dissolution, the husband’s standard of living, on average, increases by 42%, while the wife’s standard of living falls by 73%.⁵²²

2. Division of Marital Property


By statute, Missouri courts are required to divide the marital property incident to dissolution of marriage "in such proportions as the court deems just after considering all relevant factors."⁵²³ Among the five express statutory factors is "the contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker."⁵²⁴ Although the statute does not declare whether the contribution of a spouse as a homemaker is to be given equal weight with financial contributions, the appellate courts have made it clear that homemaking contributions are at least as weighty as income production.⁵²⁵

Many family law practitioners perceive that courts are increasingly and adequately recognizing the contributions of homemaker spouses to the creation

---

⁵²² Id. The Task Force neither endorses nor disputes Professor Weitzman’s methodology.
⁵²⁴ Id. § 452.330.1(2).
⁵²⁵ In such cases as Goller v. Goller, 758 S.W.2d 505, 508-09, (Mo. Ct. App. 1988), and In re East, 708 S.W.2d 777, 782 (Mo. Ct. App. 1986), the higher courts reversed judgments awarding more than 50% of marital property to husbands whose earnings had been the principal financial contributions to marital partnerships with full-time homemaker wives. By contrast, disproportionate awards of marital property favoring homemaker wives have been routinely affirmed, e.g., Dardick v. Dardick, 670 S.W.2d 658, 669-70 (Mo. 1984); In re Marriage of K.B., 648 S.W.2d 201, 204-05 (Mo. Ct. App. 1983); Scott v. Scott, 645 S.W.2d 193, 195 (Mo. Ct. App. 1982); Stamme v. Stamme, 589 S.W.2d 50, 53 (Mo. Ct. App. 1979); In re Burris, 557 S.W.2d 917, 918 (Mo. Ct. App. 1977); Brueggemann v. Brueggemann, 551 S.W.2d 853, 859 (Mo. Ct. App. 1977).
of marital property. Others testified that, contrary to the statutory mandate, some trial judges appear to give greater weight to financial contributions relative to homemaking contributions when dividing marital property. One attorney testified that judges give greater credibility to a man's testimony about property values even if the parties have equal education and career backgrounds.

b. Division of a Family Business

The Task Force sought the perceptions of bench and bar as to whether dissolution courts treat the homemaking contributions of a spouse as contributions to a "family business." The courts have established that business assets accruing during marriage are divisible as marital property and these assets, in a proper case, may include "good-will." Half of the judges and male attorneys reported that judges usually consider the contribution of a homemaker spouse as a contribution to the business when a family business

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>2%</td>
<td>18%</td>
<td>45%</td>
<td>32%</td>
<td>4%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>0%</td>
<td>10%</td>
<td>28%</td>
<td>50%</td>
<td>12%</td>
</tr>
<tr>
<td>Judges</td>
<td>0%</td>
<td>6%</td>
<td>27%</td>
<td>50%</td>
<td>16%</td>
</tr>
</tbody>
</table>

256. Survey Report at 114, Question No. E8 Attorneys Survey, Question No. E5 Judges Survey. Attorney Survey respondents (193/769) and Judge Survey respondents (62/107) reported that when one spouse's primary role has been as a homemaker, judges award a larger share of the marital property to the income-producing spouse:

257. In the few cases where property divisions disproportionately favoring the income-producing spouse have been affirmed on appeal, factors other than simple financial contribution have been involved, e.g., McDonough v. McDonough, 762 S.W.2d 827, 830 (Mo. Ct. App. 1988) (where the source of all of the marital property apportioned to the high-earning husband was non-marital property). Further, the appellate courts have shown no apparent gender bias in handling this issue, also reversing divisions disproportionately favoring income-producing wives over homemaker husbands, e.g., Michael v. Michael, 791 S.W.2d 772, 773 (Mo. Ct. App. 1990).

258. Springfield Hearing at 210.

259. Hanson v. Hanson, 738 S.W.2d 429, 433-36 (Mo. 1987). See Moody v. Moody, 725 S.W.2d 625 (Mo. Ct. App. 1987), where the trial court's award of $15,000 "maintenance in gross" (a property division by another name) to wife on account of her contribution to the family business was affirmed over husband's appeal. Id. at 626.
is at issue. Female attorneys were more likely to report that this occurs only "sometimes" or "seldom."²⁶⁰

**c. Effect of Sexual Behavior on Marital Property Division**

Some witnesses at the public hearings expressed a perception that Missouri trial judges, largely male, tend to penalize wives for extramarital affairs more heavily than similarly situated husbands. This has been said to exhibit an attitude that "boys will be boys," while stereotypical notions of female "virtue" are applied to the disadvantage of divorcing women. The Task Force was concerned about this perception, which suggests not merely a "disparate impact" of decisional patterns, but actual bias based on a double standard applied to husbands and wives.

Reported Missouri appellate decisions reflect that disproportionate awards of marital property have been made to wives whose husbands were shown to have engaged in extramarital affairs.²⁶¹ Some courts disregard extramarital affairs by husbands in property division where the marriage was of long duration, or where the transgression was perceived as relatively slight, or where such conduct was "offset" by the wife's own conduct, or where the behavior allegedly imposed no additional burden on the wife.²⁶² There also

---

²⁶⁰ Survey Report at 115, Question E10 Attorneys Survey, Question E7 Judges Survey. Attorney Survey respondents (185♀/740♂) and Judge Survey respondents (6♂/109♀) reported that when a family business is at issue, judges consider the contribution of a homemaker spouse as a contribution to the business:

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>1%</td>
<td>18%</td>
<td>44%</td>
<td>35%</td>
<td>2%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>9%</td>
<td>46%</td>
<td>30%</td>
<td>14%</td>
<td>1%</td>
</tr>
<tr>
<td>Judges</td>
<td>7%</td>
<td>59%</td>
<td>27%</td>
<td>6%</td>
<td>0%</td>
</tr>
</tbody>
</table>


²⁶² See, e.g., Russell v. Russell, 740 S.W.2d 672, 674-75 (Mo. Ct. App. 1987); Hahn v. Hahn, 739 S.W.2d 763, 765 (Mo. Ct. App. 1987); Fowler v. Fowler, 732 S.W.2d 235, 238 (Mo. Ct. App. 1987); In re Marriage of Witzel, 727 S.W.2d 214, 217
are some appellate decisions in which the sexual infidelity of wives has been held to justify disproportionate property awards in favor of husbands.263 Extramarital affairs by wives have also been disregarded under circumstances identical to those noted above for husbands.264

The foregoing cases offer an insufficient basis to conclude that the courts treat extramarital affairs by spouses of either sex differently from similar conduct by the other sex for purposes of division of marital property.265 Nevertheless, among survey respondents, female attorneys felt strongly that, in dividing marital property, judges are more likely to penalize females than males for having extramarital affairs.266 This view was not shared by judges or male attorneys, the majority of whom reported no difference by gender in these situations.267


263. See, e.g., Ikonomou v. Ikonomou, 776 S.W.2d 868, 873 (Mo. Ct. App. 1989); Brisco v. Brisco, 713 S.W.2d 586, 592 (Mo. Ct. App. 1986); Fields v. Fields, 643 S.W.2d 611, 618 (Mo. Ct. App. 1982); In re Marriage of Faulkner, 582 S.W.2d 292, 297 (Mo. Ct. App. 1979).


265. In general, punitive divisions disfavoring husbands have been more harsh in percentage terms than those disfavoring wives, perhaps because application of factors specified by MO. REV. STAT. § 452.330 (Supp. 1992) tends to benefit economically dependent spouses (usually wives), so that the overall importance of a wife's "sexual misconduct" is moderated. Indeed, the courts have often declared that property division should be used as a means of providing future support for an economically dependent spouse. Goller v. Goller, 758 S.W.2d 505, 508 (Mo. Ct. App. 1988); In re Marriage of Cornell, 550 S.W.2d 823, 827 (Mo. Ct. App. 1977).

266. Survey Report at 115, Question No. E10 Attorneys Survey, Question No. E7 Judges Survey. Attorney Survey respondents (183♂/725♀) and Judge Survey respondents (69♂/85♀) reported that, in dividing marital property, judges are most likely to penalize a spouse for having extramarital affairs if the spouse is:

<table>
<thead>
<tr>
<th></th>
<th>Male</th>
<th>Female</th>
<th>No Difference by Gender</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>7%</td>
<td>59%</td>
<td>34%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>19%</td>
<td>16%</td>
<td>65%</td>
</tr>
<tr>
<td>Judges</td>
<td>3%</td>
<td>6%</td>
<td>89%</td>
</tr>
</tbody>
</table>

267. Id.
d. Award of Family Home to Child Custodian

Task forces in other states have suggested that courts may sometimes overlook statutory directives favoring apportionment of a marital residence to the spouse who will have primary physical custody of minor children. In the vast majority of reported Missouri appellate cases involving this issue, the courts have either affirmed judgments awarding the marital home or the right to live therein to the custodian spouse (usually the wife) or have reversed judgments that ordered sale of the home and division of proceeds where such sale was not entirely necessary.268

On the other hand, the courts have declared that, while award of the family residence to the custodian spouse is to be "considered," such a distribution is by no means mandatory.269 Finally, the courts have indicated that fathers who obtain custody of minor children have as much claim to receive the marital residence or the right to live there as do custodial mothers.270 Survey respondents generally felt that judges usually award the family home or the right to reside there to the custodial spouse when physical custody of the children is awarded to one spouse.271

---

268. For examples affirming apportionment to custodian, see, e.g., Daniels v. Daniels, 675 S.W.2d 29, 34 (Mo. Ct. App. 1984); Etling v. Etling, 671 S.W.2d 825, 826 (Mo. Ct. App. 1984); Colabianchi v. Colabianchi, 646 S.W.2d 61, 64-65 (Mo. 1983); Smith v. Smith, 561 S.W.2d 714, 718 (Mo. Ct. App. 1978). Reversing orders to sell see, e.g., In re Marriage of Goodding, 677 S.W.2d 332, 336 (Mo. Ct. App. 1984); In re Marriage of Buthod, 624 S.W.2d 119, 121-22 (Mo. Ct. App. 1981).

269. See, e.g., Reed v. Reed, 775 S.W.2d 326, 329 (Mo. Ct. App. 1989). But Reed is unusual; most decisions approving sale of the marital residence or awarding it to the non-custodian can be explained as resulting from the effect of other relevant factors under special circumstances peculiar to the case. E.g., Breda v. Breda, 788 S.W.2d 769, 771 (Mo. Ct. App. 1990); Fairchild v. Fairchild, 747 S.W.2d 641, 642-43 (Mo. Ct. App. 1988).

270. See, e.g., S.E.G v. R.A.G., 735 S.W.2d 164, 167 (Mo. Ct. App. 1987). It does not appear that a Missouri appellate court has ever reversed a judgment awarding the marital residence or the right to live therein to a custodial parent, whether mother or father.

271. Survey Report at 115, Question No. E9 Attorneys Survey, Question No. E6 Judges Survey. Attorney Survey respondents (212♂/794♀) and Judge Survey respondents (6♂/109♀) reported that, when physical custody of children is awarded to one spouse, judges award the family home or the right to live therein to the custodial spouse:
C. Child Support

Concern for child support issues has mounted in recent years as public resources have been strained to provide Aid for Dependent Children (AFDC) and other benefits to custodial mothers who receive little or no contribution from absent and undeclared fathers. If family law courts have failed to use the legal tools at their disposal to reduce the burden of support on mothers, the problem should be identified.

Prior to the adoption of mandatory child support guidelines, courts were instructed to order such amounts for support of children as might appear appropriate after considering a number of express factors and "all other relevant factors." Later this process was augmented by adoption in several Missouri judicial circuits of child support "charts" or guidelines that offered parental income-based formulas for support awards. The Missouri Bar published another "chart" that various judges around the state occasionally employed voluntarily. Finally, effective 1990, the Child Support Guidelines of Missouri Supreme Court Rule 88 became mandatory.

An understanding of the Task Force's concerns in this area depends upon acquaintance with the mechanics of the child support guideline application. The relevant text of Rule 88 provides:

When determining the amount of child support to order, a court or administrative agency shall consider all relevant factors, including:
(a) the financial resources and needs of the child;
(b) the financial resources and needs of the parents;
(c) the standard of living the child would have enjoyed had the marriage not been dissolved;
(d) the physical and emotional needs of the child; and
(e) the educational needs of the child.272

Rule 88 goes on to provide that "[t]here is a rebuttable presumption that the amount of child support calculated," pursuant to a chart known as Civil Procedure Form 14, "is the amount of child support to be awarded in any judicial proceeding for dissolution of marriage, legal separation, or child

<table>
<thead>
<tr>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>4%</td>
<td>69%</td>
<td>25%</td>
<td>2%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>6%</td>
<td>74%</td>
<td>19%</td>
<td>1%</td>
</tr>
<tr>
<td>Judges</td>
<td>2%</td>
<td>77%</td>
<td>22%</td>
<td>0%</td>
</tr>
</tbody>
</table>

272. MO. SUP. CT. R. 88.01.
The amounts prescribed in the chart may be altered if a "court or administrative agency enters in the case a written finding or a specific finding on the record that the amount so calculated, after consideration of all relevant factors, is unjust or inappropriate." The presumptively correct guidelines under Rule 88 are based on averages and, if strictly observed, may result in awards "too high" or "too low" in view of particular factors (other support resources available to the custodial parent or the children; other obligations, such as marital debts of the noncustodial parent, and special needs of children for medical or educational services are illustrative).

While consideration of guideline presumptions is mandatory, strict observance is not, and actual awards may be higher or lower in view of the many factors courts are required to consider in reaching final support orders. Today, the real question is whether courts deviate from the guideline presumptions upward or downward when circumstances warrant (as they should) or deviate from them inappropriately when there is no evidentiary basis for doing so (as they should not) and whether this affects the administration of justice in a gender-neutral way. Judge survey respondents reported:

The support chart is usually the bible.

Child support guidelines are used in lieu of evidence, so inaccuracy is inevitable.

Survey respondents of all groups generally reported that child support awards do not always accurately reflect the costs of rearing the individual child, although roughly 40% felt that awards were sometimes accurate. More than one-half of the female attorneys reported that judges "seldom" deviate upward from the child support guidelines when the ability to pay of the noncustodial parent warrants. Forty-five percent of judges reported

273. Id.
274. Id.
276. Survey Comments by Judges at 6, Respondent No. 9.
277. Survey Comments by Judges at 6, Respondent No. 19.
that they "sometimes" deviate upward in these cases. Male attorneys were evenly divided between the two views.

The majority of judges (56%) and male attorneys (52%), but only 39% of female attorneys, reported that judges "usually" consider day care expenses when they determine the amount of child support to be awarded to the custodial parent working outside of the home. Approximately 40% of all respondents reported that, when fathers were awarded primary physical custody of the children, mothers were required to pay child support. A comparable number reported that this was seldom true. One attorney responding to the survey offered this view:

The biggest problem is that the children's standard of living plummets after dissolution, even if his or her father is financially secure. Once dad is on his own, he seems to believe he has an inalienable right to maximize his own pleasure and resents every penny he may pay towards the needs of his now inconvenient children. He also seems to believe that he has the right to start a brand new family, complete with new babies, and the 'first children are left in the dust. The economic pressure on the mother and child unit is unbelievable. Only the fortunate few women who have money of their own are able to provide a lifestyle comparable to what their children would have experienced had there been no dissolution.

D. Child Custody

1. Custodial Presumptions

Before Missouri's adoption in 1973 of the Uniform Marriage and Divorce Act, the law of dissolution and child custody in this state was largely a matter of court-made law. One common law rule that survived the initial adoption of the Act was the "tender years presumption," which provided:

281. Survey Report at 121, Question No. E36 Attorneys Survey. See, e.g., Mehra v. Mehra, 819 S.W.2d 351, 354 (Mo. 1991) (cannot award support in excess of maximum guidelines amount when income exceeds chart. Evidence is required to prove "special needs" to exceed chart amounts).
284. Survey Comments by Attorneys at 52, Respondent No. 284.
The interest of a very young child is best served by being in its mother's custody, provided she is able to care for this child and provided her character and conduct is such that she is a suitable custodian of her child.\textsuperscript{285}

The Missouri General Assembly formally abrogated this common law rule when it enacted the following statutory provision:

As between the parents of a child, no preference may be given to either parent in the awarding of custody because of that parent's age, sex or financial status, nor because of the age of the child.\textsuperscript{286}

Although the new statute officially nullified the "tender years presumption," public hearing witnesses and survey respondents generally informed the Task Force that some trial judges continue to enforce the presumption as before, automatically placing young children with their mothers irrespective of other facts and circumstances.\textsuperscript{287} The president of Equal Justice for Families of Divorce testified that some courts do not know the "tender years" doctrine has

\begin{center}
\begin{tabular}{l c c c c c}
 & Always & Usually & Sometimes & Seldom & Never \\
\hline
Female Attorneys & 5\% & 53\% & 31\% & 11\% & 0\% \\
Male Attorneys & 10\% & 67\% & 17\% & 6\% & 1\% \\
Judges & 3\% & 38\% & 42\% & 14\% & 4\% \\
\end{tabular}
\end{center}

\textit{See also} Survey Comments by Attorneys at 45, 49, 50, 53, 54, 55, 57, Respondent Nos. 76, 159, 201, 53, 148, 154, 172, 187, 207, 211, and 216; Cape Girardeau Hearing Vol. I at 63-65. The reported cases also confirm that some trial judges continue to observe the "tender years presumption" or otherwise persist in reflexive maternal custody orders, sometimes in the face of strong evidence of the mother's unsuitability as a custodian. \textit{See} Komosa v. Komosa, 776 S.W.2d 424, 427 (Mo. Ct. App. 1989); B.J.H. v. L.H., 779 S.W.2d 777, 780 (Mo. Ct. App. 1989); Rodenberg v. Rodenberg, 767 S.W.2d 594, 595 (Mo. Ct. App. 1989). On the other hand, awards of primary custody to fathers have almost never been reversed on appeal since 1972. \textit{See}, e.g., Adair v. Adair, 760 S.W.2d 544, 546 (Mo. Ct. App. 1988); Mildred v. Daryle, 743 S.W.2d 111, 112 (Mo. Ct. App. 1988); Hartig v. Hartig, 738 S.W.2d 160, 161 (Mo. Ct. App. 1987); \textit{In re} Marriage of Shephard, 588 S.W.2d 174, 176-77 (Mo. Ct. App. 1978).
been abrogated. Some practitioners before urban courts, however, told the Task Force that this behavior has vanished in recent years.

Missouri law now clearly declares, and the Task Force concurs, that gender neutrality must be observed in all child custody cases, so that each case is decided on its objective merits. Just as young children must not automatically be placed with their mother when both parents are fit, adolescents must not automatically be placed with the same sex parent. No witnesses appeared before the Task Force who disputed the wisdom or fairness of gender-neutral custody determinations, and the Task Force found nothing in recent scholarly literature that would support consideration of gender as a factor in such cases. In fact, the evidence was to the contrary. An educational and child psychologist on the staff of Southwest Missouri State University testified about the false perception that males are inferior as parents. He stated:

There is no evidence that maternal custody provisions are inherently in the best interests of the child at any age ... . The majority of children have multiple attachments. They're attached to both parents, they prefer both parents equally so there is no reason to believe that in the early period that there's some attachment to the mother, some bonding to the mother that makes that relationship special. That bonding can occur just as well with the father.

A new gender-neutral presumption has been recommended both by public hearing witnesses and family law scholars. It holds that when both parents seek primary custody, the court should prefer the parent who has served as primary caretaker during the marriage. While the Task Force believes that fair and individualized attention must be given to the custodial interests of each

<table>
<thead>
<tr>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>4%</td>
<td>24%</td>
<td>47%</td>
<td>36%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>2%</td>
<td>24%</td>
<td>38%</td>
<td>32%</td>
</tr>
<tr>
<td>Judges</td>
<td>17%</td>
<td>62%</td>
<td>16%</td>
<td>3%</td>
</tr>
</tbody>
</table>

288. Springfield Hearing at 280. See Survey Report at 120, Question No. E31 Attorneys Survey, Question No. E28 Judges Survey. Attorney Survey respondents (209♀/783♂) and Judge Survey respondents (5♀/111♂) reported that judges give fair and individualized consideration to fathers who seek custody of their children:

289. Survey Comments by Attorneys at 50, Respondent Nos. 177 and 178.
291. Springfield Hearing at 244.
292. Id. at 251-252.
parent, a truly gender-neutral presumption, such as one favoring the "primary caretaker," would not offend the modern notion of gender fairness in family law.293

Both national statistics and the views of public hearing witnesses confirm that mothers most frequently serve as the primary caretakers of young children. The necessary result of a "primary caretaker presumption," therefore, will be placement of children with the mother in most cases where both parents seek custody and both are fit. This, in the view of the Task Force, would not constitute gender bias against fathers; it would merely reflect a general societal pattern upon which people agree during the stability of marriage, a pattern the courts ought not disrupt on account of the adversarial process of dissolution of marriage.

2. Effect of Sexual Behavior on Custody Awards

Missouri courts long have held that a parent's "moral fitness" is a pertinent factor to be considered in determining custody arrangements.294 What courts frequently examine when they consider "moral fitness" as a factor in custody determinations is the parent's alleged sexual behavior. When a parent is sexually active outside of the marriage, particularly when the behavior is not circumspect and occurs with the children's knowledge, this strongly disadvantages the custody claim of the parent in Missouri courts. Irrespective of whether the behavior is circumspect, when a parent is a homosexual, this strongly disadvantages the custody claim of the parent in Missouri courts.295

The majority of cases in this area involve mothers. The issue of alleged sexual misconduct most commonly arises either at trial or on a motion to modify a custody order by a noncustodial father who has acquired evidence of the mother's sexual behavior. Recent cases strongly express the rule that the mere fact a divorced custodial parent is sexually active is no basis to deprive the parent of custody, at least where the behavior is sufficiently discreet. This represents a noticeable break from earlier authority that tended

293. The cases demonstrate that some Missouri courts have applied this factor. See, Riaz v. Riaz, 789 S.W.2d 224, 227-28 (Mo. Ct. App. 1990); In re Marriage of Griswold, 623 S.W.2d 560, 562 (Mo. Ct. App. 1981); In re Marriage of Estelle, 592 S.W.2d 277, 278 (Mo. Ct. App. 1979); Stanfield v. Stanfield, 435 S.W.2d 690, 691-92 (Mo. Ct. App. 1968).


to justify modification of custody upon moral condemnation alone, even absent evidence of any adverse effect on the children. Several recent cases may disturbingly presage a renewal of judicial moralizing to the disadvantage of mothers.296

Among survey respondents, female attorneys perceive that judges are more likely to penalize a female parent (68%) in custody determinations for having an extramarital affair; 27% of male attorneys and 16% of judges agree.297 Twenty-five percent of female attorneys, 58% of male attorneys, and 81% of judges perceive no difference by gender.298

3. Joint Legal and Physical Custody

Missouri courts are not required to grant sole legal custody of children to one parent. When both parents are fit and seek custody, joint legal custody can be ordered. The courts have divided, however, over whether joint legal custody is presumptively preferred.299 Testimony was received to the effect that joint custody is the most important component in recognizing the integrity of the parent-child relationship. A child psychologist testified where there is "joint custody, both legal and physical . . . the research generally supports that children are more satisfied with that arrangement, they get higher self-esteem in that arrangement."

"Joint legal custody" is statutorily defined to mean "the parents share the decision-making rights, responsibilities, and authority relating to the health,

<table>
<thead>
<tr>
<th>Male</th>
<th>Female</th>
<th>No Difference by Gender</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>7%</td>
<td>68%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>16%</td>
<td>27%</td>
</tr>
<tr>
<td>Judges</td>
<td>5%</td>
<td>16%</td>
</tr>
</tbody>
</table>


297. Survey Report at 120, Question No. E33 Attorneys Survey, Question No. E30, Judges Survey. Attorney Survey respondents (209♀/764♂) and Judge Survey respondents (5♀/111♂) reported that, in deciding custody, judges are more likely to penalize a spouse for having extramarital affairs if the spouse is:

298. Id.


300. Springfield Hearing at 254.

https://scholarship.law.missouri.edu/mlr/vol58/iss3/1
education and welfare of the child.\(^{301}\) This arrangement requires, unless the court orders otherwise, that the parents "confer with one another in the exercise of decision-making rights, responsibilities, and authority."\(^{302}\) Clearly, an order for joint legal custody presupposes that the parents are capable of mutual cooperation. When they are not, as after abusive marriages, joint legal custody can have disastrous consequences for the child.\(^{303}\)

"Joint physical custody," on the other hand, is defined as "an order awarding each of the parents significant periods of time during which a child resides with or is under the care and supervision of each of the parents."\(^{304}\) While it is unclear whether there exists a presumption in favor of joint physical custody, the statute declares it "the public policy of this state to assure children frequent and meaningful contact with both parents."\(^{305}\) When this public policy is not realized through a formal order of joint physical custody, it must at least be observed to the extent of an order for reasonable visitation rights in the noncustodial parent, which may only be denied if "the court finds, after a hearing, that visitation would endanger the child's physical health or impair his [or her] emotional development."\(^{306}\)


\(^{302}\) Id.

\(^{303}\) Denial of joint legal custody has been affirmed, or a joint custody order has been reversed, in In re Marriage of Goosetree, 790 S.W.2d 266, 267-68 (Mo. Ct. App. 1990); Wilk v. Wilk, 781 S.W.2d 217, 221 (Mo. Ct. App. 1989); Holt v. Holt, 780 S.W.2d 156, 158 (Mo. Ct. App. 1989); Levesque v. Levesque, 773 S.W.2d 220, 223 (Mo. Ct. App. 1989); Massman v. Massman, 749 S.W.2d 717, 718-20 (Mo. Ct. App. 1988); S.R. v. S.M.R., 709 S.W.2d 910, 915 (Mo. Ct. App. 1986). But see, O.J.G. v. G.W.G., 770 S.W.2d 372, 375 (Mo. Ct. App. 1990) (award of joint custody affirmed over mother's appeal); and In re Marriage of Ross, 772 S.W.2d 890, 892 (Mo. Ct. App. 1989) (trial court's refusal to award joint custody over parents' agreement affirmed).


\(^{305}\) Id. § 452.375.3. Survey Report at 120, Question No. E32 Attorneys Survey, Question No. E29 Judges Survey. Attorney Survey respondents (208♀/788♂) and Judge Survey respondents (52♀/111♂) reported that court-awarded visitation is sufficient to allow meaningful participation in children's lives by noncustodial parents:

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>1%</td>
<td>20%</td>
<td>40%</td>
<td>34%</td>
<td>4%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>1%</td>
<td>24%</td>
<td>38%</td>
<td>32%</td>
<td>6%</td>
</tr>
<tr>
<td>Judges</td>
<td>2%</td>
<td>37%</td>
<td>37%</td>
<td>20%</td>
<td>4%</td>
</tr>
</tbody>
</table>

\(^{306}\) Mo. Rev. Stat. § 452.400.1 (Supp. 1992). In Tucker v. Tucker, 778 S.W.2d 309 (Mo. Ct. App. 1989), it was held that a grant of greater visitation to the noncustodial father than required by law was not error on that account. Id. at 313.
A review of the literature and of reports from other task forces alerted the Task Force to the possibility that denial of joint custody when agreed to by the parents, and orders of joint custody over the objection of a parent, may suggest gender-biased decision-making. In the first case, it would suggest that courts tend to over-prefer sole maternal custody, while in the latter it might suggest insensitivity to a mother’s legitimate interest in sole custody.

However, most Missouri survey respondents indicated that joint legal and physical custody is granted when agreed to by the parents. Respondents also shared the view that "sometimes" or "seldom" is joint legal or physical custody ordered over the objection of one parent.

But in Pulliam v. Sutton, 728 S.W.2d 252 (Mo. Ct. App. 1987), the trial court was held to have erred in increasing the visitation of a father of violent disposition who had mental problems. Id. at 254.

307. Survey Report at 118, Question No. E25 Attorneys Survey, Question No. E22 Judges Survey. Attorney Survey respondents (207/784) and Judge Survey respondents (52/116) reported that joint legal custody is granted where agreed between the parents:

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>39%</td>
<td>56%</td>
<td>5%</td>
<td>0%</td>
<td>1%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>41%</td>
<td>53%</td>
<td>5%</td>
<td>1%</td>
<td>0%</td>
</tr>
<tr>
<td>Judges</td>
<td>31%</td>
<td>64%</td>
<td>4%</td>
<td>1%</td>
<td>0%</td>
</tr>
</tbody>
</table>

Survey Report at 199, Question No. E26 Attorneys Survey, Question No. E23 Judges Survey. Attorney Survey respondents (202/773) and Judge Survey respondents (52/116) also reported that joint physical custody is granted where agreed between the parents:

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>24%</td>
<td>51%</td>
<td>20%</td>
<td>7%</td>
<td>1%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>20%</td>
<td>53%</td>
<td>20%</td>
<td>3%</td>
<td>2%</td>
</tr>
<tr>
<td>Judges</td>
<td>12%</td>
<td>65%</td>
<td>16%</td>
<td>6%</td>
<td>1%</td>
</tr>
</tbody>
</table>

308. Survey Report at 119, Question No. E27 Attorneys Survey, Question No. E24 Judges Survey. Attorney Survey respondents (190/736) and Judge Survey respondents (52/116) reported that joint legal custody is ordered over the objection of one parent:

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>1%</td>
<td>9%</td>
<td>44%</td>
<td>36%</td>
<td>11%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>1%</td>
<td>11%</td>
<td>40%</td>
<td>37%</td>
<td>12%</td>
</tr>
<tr>
<td>Judges</td>
<td>0%</td>
<td>12%</td>
<td>46%</td>
<td>31%</td>
<td>10%</td>
</tr>
</tbody>
</table>
4. The "Wealthier Parent" Preference

Several other task forces have concluded that trial judges in some states have tended in recent years (following the abrogation of maternal custody presumptions) to base decisions on the comparative ability of the parents to support children. Thus, it has been perceived that, when the father has ample income (and has remarried) while the mother is comparatively penurious, courts may tend to place custody in the father for this reason alone.

To the extent that this may occur in Missouri, it would expressly violate a statutory provision that forbids the giving of preference to either parent because of that parent's "financial status."\(^{309}\) Among survey respondents, approximately one-half of the responses indicated that judges "seldom" favor the parent in the stronger financial position; such favoritism sometimes occurs according to 43% of female attorneys, 29% of male attorneys, and 24% of judges.\(^{310}\)

5. Effect of Spousal Violence on Custody Awards

As described in the Task Force's discussion on Domestic Violence,\(^{311}\) children suffer profound psychological harm as a consequence of family violence. The Task Force heard disturbing testimony that courts sometimes allow inappropriate custody or visitation to parents who have been abusive to their spouses. Witnesses expressed concern that judges may be unfamiliar with research tending to establish that violence toward a spouse is a predictor of violence toward children, even when there is no evidence at trial that the

---


311. See Section I, supra.
spouse has committed such abuse against the children. One attorney survey respondent summarized the problem this way:

Judges and attorneys have difficulty believing sex abuse allegations by women and children and sometimes place children back with abusers. In a recent case, the male guardian ad litem didn’t want to believe allegations of sex abuse against the father because ‘he seemed like a nice guy.’ Many men fail to recognize women’s explanations of why alcoholism and abusive behavior by men are dangerous for children. However, I handled a case where a woman’s visitation was severely restricted because in the past she had been involved with an abusive man. Quite a double-standard.

Among survey respondents, more than one-half of female attorneys (52%), more than one-third of male attorneys (37%), and one-fourth of the judges (25%) perceive that judges, when making custody decisions, only "sometimes," "seldom," or "never" take into account one spouse’s violence against the other spouse.

312. In Hart v. Hart, 766 S.W.2d 131, 133 (Mo. Ct. App. 1989), an order placing custody of the parties’ son with the father was affirmed in part on the ground that, although the father had verbally and physically abused his wife in the past, there was no evidence that his behavior was ever directed toward, or that it adversely affected, the child. Of the few reported cases involving this issue, only Hart involved a possible judicial disregard of spousal violence; other results appear to turn on whether evidence of spousal abuse was found to be credible. In re Marriage of Baldwin, 780 S.W.2d 368, 369-669 (Mo. Ct. App. 1989); O.J.G. v. G.W.G., 770 S.W.2d 372, 375 (Mo. Ct. App. 1989).


314. Survey Report at 120, Question No. E30 Attorneys Survey, Question No. E27 Judges Survey. Attorney Survey respondents (201♀/764♂) and Judge Survey respondents (5♀/111♂) reported that, in awarding custody, judges take into account one spouse’s violence against the other spouse:

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>11%</td>
<td>36%</td>
<td>38%</td>
<td>14%</td>
<td>1%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>12%</td>
<td>50%</td>
<td>30%</td>
<td>7%</td>
<td>1%</td>
</tr>
<tr>
<td>Judges</td>
<td>20%</td>
<td>54%</td>
<td>22%</td>
<td>3%</td>
<td>0%</td>
</tr>
</tbody>
</table>
6. Relocation Outside the Forum State

Missouri statutes require that when a custody decree is entered in Missouri custodial parents must obtain authorization of the court or the written consent of the noncustodial parent if they intend to reside outside the state for a period in excess of ninety days.\(^{315}\) When a custodial parent asks permission to relocate over the objection of a noncustodial parent who has rights of substantial visitation or temporary custody, the courts have divided over the advisability of granting such a request. In Samuels v. Samuels, the court held that the custodial parent may obtain permission to remove the child to another state even at the disadvantage or inconvenience of another parent or person having rights of visitation.\(^{316}\)

Although most child custodians are women, the higher-earning parents typically are men. Thus, when fathers are granted primary physical custody, it may be that judges are more inclined to grant requests to move their children outside the state for business or occupational reasons and, thereby, disadvantage visitation rights of the mothers with less resources.

The Task Force was interested to discover whether there is a perceptible difference in the readiness of judges to grant requests of parents of either sex to remove children from the state, whatever the explanation. Survey results indicate that, when the custodial parent requests to relocate the child’s residence outside the state, judges are more apt to approve mothers’ requests (19% judges, 32% female attorneys, 37% male attorneys) than fathers’ requests (2% judges, 22% female attorneys, 6% male attorneys).\(^{317}\) Most survey respondents, however, reported no difference by gender.\(^{318}\) One judge responding to the survey explained the rationale used for determining such request:

Fathers more often have a strong economic justification for moving outside the state and, therefore, are more likely to get an

---

316. 713 S.W.2d 865, 868 (Mo. Ct. App. 1986). Also granting mothers’ requests to move: Flaton v. Flaton, 777 S.W.2d 948, 950 (Mo. Ct. App. 1989); In re Marriage of Cornish, 780 S.W.2d 62, 65 (Mo. Ct. App. 1989); Warrington v. Warrington, 684 S.W.2d 368, 372 (Mo. Ct. App. 1984); Pender v. Pender, 598 S.W.2d 554, 556 (Mo. Ct. App. 1980); Durbin v. Durbin, 573 S.W.2d 146, 148 (Mo. Ct. App. 1978). On the other hand, when the noncustodial father took a "close and active interest" in raising the children, the custodial mother’s request to move was denied. Koenig v. Koenig, 782 S.W.2d 86, 90 (Mo. Ct. App. 1989); O’Leary v. Stevenson, 782 S.W.2d 109, 112 (Mo. Ct. App. 1989); Tucker v. Tucker, 778 S.W.2d 309, 312 (Mo. Ct. App. 1989).
318. Id.
order relocating the children's residence outside the state. Financial need, not gender, determines this.\(^{319}\)

7. Temporary Custody and Visitation

One of several factors a court must consider in its determination of child custody is the child's need for a continuing relationship with both parents.\(^{320}\) Despite this mandate, fewer than one-fourth of attorneys responding to the survey believed that court-awarded visitation is "usually" or "always" sufficient to allow meaningful participation in children's lives by noncustodial parents.\(^{321}\) Slightly more than one-third of all judges felt that such visitation was "usually" or "always" sufficient.\(^{322}\)

Another related problem is the issue of the custodial parent's refusal to provide access to the children. Missouri statutes mandate compliance with orders of visitation by both the custodial parent and the child.\(^{323}\) The law is clear that the custodial parent cannot, without good cause, fail to comply with an order for visitation and temporary custody.\(^{324}\) If such failure occurs, and the noncustodial parent is current in support payments, a court may completely or partially abate future child support or transfer custody.\(^{325}\) The noncustodial parent may also file a motion for contempt. The court may, upon a finding of noncompliance without good cause, specifically define visitation rights in greater detail and provide for compensatory time.\(^{326}\) Reasonable expenses incurred and attorneys' fees and costs may also be ordered.\(^{327}\)

Only one-third of attorneys responding to the survey indicated that courts "usually" or "always" use contempt proceedings to enforce child visitation rights,\(^{328}\) as compared to two-thirds of the judges responding.\(^{329}\) The president of Noncustodial Parents for Equal Rights spoke strongly: "[T]he father is forced to spend thousands of dollars for attorney and legal fees just to obtain visitation rights with his children."\(^{330}\)

---

319. Survey Comments by Judges at 6, Respondent No. 19.
324. Id.
325. Id. § 452.400.4.
326. Id. § 452.400.3.
327. Id. § 452.400.4.
330. Kansas City Hearing at 268.
Criminal remedies are also available. Persons taking or enticing from legal custody any person entrusted by order of a court to the custody of another commit the crime of interference with custody.\textsuperscript{331} Such crime is a class A misdemeanor, unless it involves removal to another state and then it is a class D felony.\textsuperscript{332} Hearing testimony indicated that this law is not being enforced by law enforcement agencies or prosecutors.\textsuperscript{333}

A number of noncustodial parents pointed out that there is no governmental agency charged with the enforcement of visitation rights. The non-custodial parents felt disadvantaged, particularly because of the Division of Child Support Enforcement's presence in enforcing child support obligations. One father spoke of this perceived inequity:

If I fall behind on my child support... my former wife... can get a state or county agency on her behalf to pursue me until I pay the child support I owe. But for an example, let's say that she decides she no longer wants me to see my child for whatever her reasons are, I cannot go downtown and contact an agency or make a phone call and contact an agency and get those rights restored. Even though they were granted in the same decree that granted the child support, I cannot just with a phone call get someone to help me gain my rights as easily as she can get someone to gain or obtain or seek her rights. If that is not a gender bias, I don't know what gender bias is.\textsuperscript{334}

Another father stated:

The State of Missouri, by subsidizing enforcement of child support and not subsidizing enforcement of visitation and temporary custody, violates both the due process and equal protection clauses of the Fourteenth Amendment.\textsuperscript{335}

8. Mediation and Implementation of Rule 88

Effective July 1, 1991, the Missouri Supreme Court adopted Rule 88, which provides in part that any judicial circuit may establish a mediation program for child custody and visitation.\textsuperscript{336} The rule defines the role, duties, and qualifications of the mediator, as well as the procedural

\textsuperscript{87}

\textsuperscript{331} \textit{Mo. Rev. Stat.} \textsection 505.150.1 (Supp. 1992).
\textsuperscript{332} \textit{Id.} \textsection 565.150.2.
\textsuperscript{333} Springfield Hearing at 283.
\textsuperscript{334} Cape Girardeau Hearing Vol. I at 45.
\textsuperscript{335} Kansas City Hearing at 268.
\textsuperscript{336} \textit{Mo. Sup. Ct. R.} 88.02-.03.
requirements when mediation is ordered by the court. A \textsuperscript{337} Approximately 82\% of judges and 71\% of attorneys responding to the Task Force survey indicated that mediation is "sometimes," "usually," or "always" effective as a method for resolving domestic cases.\textsuperscript{338}

The Task Force believes that when custody and visitation are at issue, mediation can be a useful tool in resolving these disputes amicably. One attorney, who practiced in Arizona prior to practicing in Missouri, suggested that Missouri implement both mandatory mediation and mandatory settlement conferences similar to procedures established in Arizona. However, he cautioned that in Arizona:

\begin{quote}
[T]he mediators were trained to... be sensitive to domestic violence issues... and you could get... waivers, if necessary, due to domestic violence.\textsuperscript{339}
\end{quote}

Experts in the field of family violence uniformly oppose mandating mediation when family violence has occurred.\textsuperscript{340} Two important premises of successful mediation are that there is relative equality between the parties and that mediation is based on compromise. These experts stress that no amount of interpersonal skill or training on the part of mediators can equalize the power disparity between parties when domestic violence has occurred.\textsuperscript{341}

Public hearing witnesses shared this view. A director of a shelter for abused women stated:

\begin{quote}
It's very difficult to have a male and female in a room together in an abusive situation... and expect to have anything positive come from it, because the scale is so drastically tipped and, usually, she has no power whatsoever.\textsuperscript{342}
\end{quote}

An attorney, commenting on the lack of power women can feel in both physical and emotional abuse situations, stated:

\begin{quote}
\textsuperscript{337} Id. R. 88.02-.08.
\textsuperscript{338} Survey Report at 114, Question No. E6 Attorneys Survey, Question No. E3 Judges Survey.
\textsuperscript{339} Columbia Hearing Vol. I at 65.
\textsuperscript{340} THE EXCHANGE: NATIONAL WOMAN ABUSE PREVENTION PROJECT, Fall-Winter, 1988-89, at 9.
\textsuperscript{341} Id.
\textsuperscript{342} Kirksville Hearing Vol. II at 42.
\end{quote}

https://scholarship.law.missouri.edu/mlr/vol58/iss3/1
I think, if [mediation] is going to be done, it should be done with the exclusion of where there has been abuse, both physical or verbal.343

Because of the nature of the power imbalance between men and women in abusive situations, it is important that mediators be trained to be sensitive to the inequity created not only by physical abuse, but by emotional abuse as well. Mediation can work well for some parties to a dissolution, but not for everyone. It should not take the place of litigation or settlement discussions between lawyers so that the rights of a physically or emotionally abused spouse are preserved.

Just as there seems to be consensus among adult abuse experts that adult abuse victims should be able to obtain a waiver from mandatory mediation, there also is concern that, where child abuse exists, mediation is not an appropriate method for working out a visitation arrangement. One commentator noted:

Unfortunately, battered women and their children are the victims of mediator error. An Orange County, California man recently tried to kill his two children during a visitation arranged through mediation.344

One concern raised about mandatory mediation is that litigants already are financially strapped by supporting two households on the income that once supported one household. They also must pay attorneys’ fees to obtain a dissolution of marriage. Mandatory mediation could be one more expense that the parties cannot afford, increasing the stress and potential for violence.345

While mediation can be an excellent tool to help parties resolve visitation and custody disputes without the necessity of a contested trial, mediation is not the appropriate method to resolve family violence issues. Therefore, when these issues are raised in the course of mediation, they should be referred back to the court system for resolution.

E. Enforcement of Court Orders

Both men and women who testified before the Task Force expressed dissatisfaction that courts do not enforce their own orders, whether for visitation, child support, or custody. Each felt that the other was able to

345. Springfield Hearing at 217.
obtain enforcement for violations of orders, while their own complaints went unheeded.

Several women litigants testified that the courts were willing to enforce visitation, but not support. The following comment illustrates their point:

[C]ontempt charges were posted against me for stopping visitation. I started [visitation] up with my son again so . . . the contempt charges were dropped. In the last five years, I have received little or no child support payments. I have gone through support enforcement, it's been to the prosecutor's office twice, it's in the second phase of contempt now . . . . I know it's two separate issues between child support and visitation, but the way they enforce visitation, it's unreal . . . the enforcement of child support just isn't there . . . .

An attorney testified similarly to the Task Force:

I hear a lot of women saying, "I want my kids. I am not willing to fight any more . . . . I don't care about child support because I know he is not going to pay it". . . . [E]specially poor women are in this situation now, because they know that, as soon as the child support award is going to get out, it's going to be a bureaucratic nightmare to try to enforce it . . . . Then there has to be a structure for enforcing child support, to make sure they stick.

The Division of Child Support Enforcement establishes and enforces orders of support, yet it does not deal with child custody and visitation issues. This is a problem for both mothers and fathers. The State of Missouri is the petitioner in the enforcement action; the custodial parent is not a party. If a child is snatched by the noncustodial parent from the custodial parent because of collection proceedings by the state, the custodial parent is often unable to obtain an attorney to regain custody of the child. If a counterclaim for custody is filed by the noncustodial parent, the prosecutor will not represent the custodial parent, often the mother, in a custody or visitation action. It is quite possible for the custodial parent to lose custody by default simply because the state initiated a child support action, the respondent's attorney counter files for custody, and the custodial parent is unable to obtain representation.

348. Id. at 17-18.

https://scholarship.law.missouri.edu/mlr/vol58/iss3/1
Another problem affecting compliance with visitation orders occurs when adult abuse has been an issue. If lawyers or judges do not fashion orders that ensure the safety of the abused woman, compliance with the order might result in further violence to the woman.349 Advocates for women who have been abused note that some abusive men are more interested in using visitation to gain control over the woman than in seeing the children.350

Furthermore, many women are concerned that men who have become violent with them may become physically abusive to their children as well. In addition, they are concerned that the man’s violence toward women has a negative effect on the children:

I think that many judges fail to realize the effect that violence in the home has on the children who have witnessed that violence. Many times the abusers are fighting hard for visitation, or even for . . . primary custody of the children, and that a more close look at how that violence has affected the children, and how the children will be affected by further contact with that violent person, I think would be very helpful.351

When a custodial parent is afraid for his or her own safety or the safety of their children and the courts have discounted the very real threat indicated by the behavior of the noncustodial parent, it is quite possible that the visitation orders will become unworkable. Allegations of abuse against fathers by mothers have become a major issue for litigants.

The Task Force heard testimony from lawyers and litigants who perceive gender bias against both men and women in deciding and enforcing custody and visitation orders. Men are discouraged by attorneys from pursuing custody; women are discouraged from raising issues of child or adult abuse as affecting the fathers’ visitation rights. Men believe that they are viewed by judges as not sincere about wanting custody and as less able parents than women; women believe that judges view them as hysterical and vindictive if they attempt to limit visitation rights by raising allegations of child or adult abuse.

351. Id.
F. Need for a Family Court\textsuperscript{352}

The Task Force also heard testimony from a number of attorneys who believe a Family Court system would be a better forum in which to resolve family law issues.\textsuperscript{353} Among survey respondents, 66\% of attorneys and 61\% of judges believed that justice would be improved by the establishment of a Family Court.\textsuperscript{354} The Task Force believes that the conduct of family law cases has a huge effect on the adults that come through the court system and on their children—both now and as they become adults. Creation of a Family Court, with jurisdiction over all family law matters, including juvenile and domestic violence matters, would not only be an important, symbolic confirmation of the courts’ central role in matters relating to the family, but also would ensure that members of the judiciary, with a long-term interest and specialized expertise in matters relating to the family, would be assigned to the family law area.

CONCLUSION

The evidence suggests that a financial hardship is sometimes imposed on the spouse who had the least resources in the marriage, which at times hampers the ability of that party to participate to the fullest extent in the judicial process. In most instances, the economically dependent spouse is the wife. There was a strong feeling among family law practitioners that greater use of orders \textit{pendente lite} (PDL) would enable women to gain greater representation. Use of a PDL for temporary child support is also recommended by the Task Force.

Testimony and survey responses indicate that trial courts throughout Missouri are more inclined to grant indefinite maintenance to an economically dependent spouse than historically has been the case. This judicial response demonstrates an increased recognition of the contribution of the spouse of a long-term marriage who did not work outside the home. Nevertheless, there is a perception that there still are cases in which maintenance is warranted, but not awarded. There also appears to be a perception that maintenance for a fixed period of time, after a long-term marriage in which one spouse has been

\textsuperscript{352} A Family Court division of the circuit courts of the seventh, thirteenth, sixteenth, twenty-first, twenty-second, thirty-first, and any other judicial circuit choosing to do so, was created by Missouri House Bill No. 346 as amended, passed by the 87th Legislative Assembly, First Regular Session of 1993 and signed by Governor Mel Carnahan on June 2, 1993.

\textsuperscript{353} See, e.g., Springfield Hearing at 213-214; St. Louis Hearing at 53.

\textsuperscript{354} Survey Report at 114, Question No. E7 Attorneys Survey, Question No. E4 Judges Survey.
out of the work force for a significant period, may be inadequate. Statistics confirm that, in the first year after dissolution, the husband's standard of living, on average, increases by 42%, while the wife's standard of living falls by 73%. The Task Force learned that Missouri courts are increasingly recognizing homemaking as a contribution to the marriage in the division of marital property.

In determining primary physical custody of the children, Missouri courts have for the most part, but not totally, abandoned the concept of the "tender years" doctrine. The current mandate is that the best interests of the child must be considered. The Task Force advocates that physical custody be given to the "primary caretaker" during the marriage. The Task Force determined that, in some instances, the courts may not consider violence of one spouse against the other when awarding custody. Missouri has no clear preference for "joint legal custody," but courts generally grant joint legal and physical custody when it is agreed to by the parties and seldom order it over the objection of one parent.

Although much progress has been made in the family law area in Missouri in recent decades, many reforms still are necessary to ensure fair and just adjudication by the courts. As with cases involving domestic violence, witnesses testified to a perceived lack of priority given by judges to family law cases. The Task Force believes that the creation of a Family Court is of critical importance. A Family Court would address all matters concerning the dissolution of marriages, division of property, child custody, domestic violence, adoptions, and juvenile matters. Such a court would employ a specialized judiciary committed to understanding the complex factors affecting the administration of family law.

G. Recommendations

1. For the Missouri Supreme Court

a. The Missouri Supreme Court should promote the creation of a Family Court with jurisdiction over all family law matters, including domestic violence matters.355

The Task Force has determined that family law matters are often relegated to "second class" status in the court system. Many judges report that family law is their least preferred judicial assignment, and their distaste for the work is evident to attorneys who specialize in the field. While the unhappy and disturbing elements of family law matters unquestionably test judicial temperament, the failure to accord these matters the importance they deserve

355. See supra note 352.
places impediments to the administration of justice. This is particularly true for parties less financially able to litigate (primarily women) who require judicial intervention for the enforcement of rights. Creation of a Family Court with jurisdiction over all family law matters, including juvenile and domestic violence matters, would not only be an important, symbolic confirmation of the courts’ central role in matters relating to the family, but also would ensure that members of the judiciary with a long-term interest and specialized expertise in matters relating to the family would be assigned to adjudicate family law matters.

b. The Missouri Supreme Court should provide mandatory educational programs for judges that focus on the importance of interim awards of attorneys’ fees PDL to economically dependent spouses during the pendency of litigation and on the importance of sufficient final attorneys’ fees awards.

Impediments to court access would be mitigated in part through instituting procedures that ensure parity in access to counsel through prompt, regularized consideration of awards of attorneys’ fees and litigation expenses during the pendency of litigation. The Task Force has reason to believe that husbands, rather than wives, generally have exclusive or substantial control over family resources at the time of separation. The lack of access to such resources by the economically dependent spouse, usually the wife, materially impedes her ability to retain counsel and actively enforce her rights.

Courts have broad statutory authority to effect parity between the parties through interim awards of attorneys’ fees and litigation costs to the economically dependent spouse, yet courts fail to exercise such discretion in many cases where it is needed. As a consequence, the economically dominant spouse gains an unfair advantage and often adopts a litigation strategy of attrition. Promoting litigation parity through prompt awards of attorneys’ fees and litigation costs would not only enhance meaningful court access and fairness in proceedings, but also would deter attrition strategies and promote rational settlements, thereby conserving judicial resources.

c. The Missouri Supreme Court should provide mandatory educational programs for judges to increase sensitivity to family law issues, such as the need for indefinite maintenance for economically dependent spouses who have not been recently employed in the paid labor market, except where the evidence clearly establishes that the need for maintenance will terminate at an ascertainable time; the legitimacy of a primary caretaker presumption; stereotypes about behavior of men and women as parents, including the tender years presumption; the significance of spousal abuse to child custody and visitation awards;
family violence and its effect on children; child development and the psychological impact of dissolution; and substance abuse.

The evidence suggests that judges would benefit from increased education in the family law area. For example, Missouri’s statutory framework for awards of spousal maintenance provides guidance to ensure that such determinations are fair and equitable to the parties, irrespective of gender. Nevertheless, these laws are not self-executing, and the Task Force discerned that the judiciary—primarily at the trial court level—may be substantially underinformed about matters concerning economically dependent spouses’ opportunities in the paid labor market and the effect of dissolution on the standard of living of both parties. As a consequence, courts may fail to recognize substantial limitations to the spouse’s ability to gain economic self-sufficiency in making awards of spousal maintenance to spouses who have foregone or delayed careers in the paid labor market.

Any court system, whether the current one or the proposed Family Court system, must provide ongoing training for the people making the decisions in family law theory, co-dependency theory, child development theory, family dysfunction theory, family violence and its effect on children, child sexual abuse, and substance abuse. The training provided should also serve to alert judges to stereotypes about women and men as parents and related gender bias issues.

d. The Missouri Supreme Court should encourage the use of mediation in child custody and visitation disputes as provided for in Supreme Court Rule 88, except in cases involving adult or child abuse, and the Court should consider establishing a pilot program in the state as a model for the implementation of Rule 88.

Effective July 1, 1991, the Missouri Supreme Court adopted Rules 88.02-.08 which provides that a court may order mediation of any contested issue of child custody or visitation. The role of the mediator is to assist the parties in identifying the issues, reducing misunderstanding, clarifying priorities, exploring areas of compromise, and finding points of agreement. The Task Force recommends that the various judicial circuits identify persons possessing the qualifications to be mediators, as set forth in Rule 88.05, and take steps to implement mediation programs as soon as possible. If necessary, mediation training programs should be commenced so that Rule 88 can be fully implemented.

Mediators should be trained with regard to domestic violence and all forms of child abuse and neglect, as well as trained in family dynamics, child development, judicial procedures used in domestic relations cases, other resources in the community to which the parties can be referred for assistance, clinical issues relating to children and child development, and the effects of
the dissolution of marriage on children. When family violence is indicated, the mediator should provide suggested referrals for the parties, particularly so that victims of abuse can obtain safety plans.

2. For the organized bar

   a. The organized bar should work with the Missouri Supreme Court to provide educational programs for judges, attorneys, and court personnel in family law issues, particularly issues concerning the economic consequences of dissolution on spouses who are economically dependent during a long marriage.

   b. The organized bar should work with the Missouri Supreme Court to develop mediation training for interested attorneys and judges.

   c. The organized bar should seek sources of funding for delivery of legal services to indigent litigants seeking enforcement of family law rights.

   d. The organized bar should promote legislation to establish a presumption that, where one parent has served as primary custodian of children during marriage, that parent should receive primary physical custody upon dissolution of the marriage.

   e. The organized bar should promote legislation to establish a public policy of this state that parties have equal access to the courts and that PDL awards of counsel fees and costs of experts and investigators should be made in amounts appropriate to the duration and complexity of the case and sufficient to enable both parties to pursue litigation; to establish a standard that PDL maintenance and child support should maintain the status quo of the parties to the extent feasible; to make the homemaker’s lifetime reduced earning capacity an express factor to be considered in the award of maintenance; to clarify that limited duration maintenance is permitted only when a known event will change the circumstances of the parties; and to clarify that the standard of living of the parties during the marriage is the standard by which the adequacy of the maintenance award should be judged and, if a reduction in standard of living is required, it should be shared by both parties.

The evidence suggests that a number of important family law issues may not be well understood in the courts. The Director for the Misplaced Homemakers Program at St. Louis Community College, which has served more than 9000 clients, testified regarding the burdens and hardships that a divorced woman faces. Although the large majority of judges responding to
the survey felt that they have a realistic understanding of these problems, substantially less than one-half of the attorneys responding concurred; nearly one-half of the female attorney respondents reported that judges "seldom" understand the job prospects and the likelihood of being economically independent on the dependent spouse. To remedy these kinds of informational problems, the Task Force believes that a program of education should be instituted so that both judges and lawyers are aware of possible gender bias in family law, which will allow the problems to be more adequately addressed in both trial and settlement of domestic cases.

Even with the creation of a Family Court and regularized awards of attorneys' fees and litigation expenses pendente lite, a substantial number of litigants—primarily women whose economic status after marital separation lagged substantially behind that of men—are unable to retain counsel to effect a dissolution of marriage or to enforce rights to child support and maintenance. Publicly and privately funded legal service organizations provide services to this clientele, but they remain woefully underfunded to meet the need. Accordingly, to promote access unfettered by economic disparity, sources of funding should be identified for delivery of legal services to indigent litigants seeking enforcement of family law rights.

Cultural biases that tend to favor women over men as custodial parents upon dissolution of marriage have been found by the Task Force to substantially and unfairly discriminate against men in obtaining child custody. Such biases cause counsel to dissuade men from seeking custody absent proof of maternal unfitness. A gender-neutral presumption has been recommended by both family law scholars and public hearing witnesses. The presumption holds that, when both parents seek primary custody, the court should prefer the parent who has served as primary caretaker during the marriage. While the Task Force believes that fair and individualized attention must be given to the custodial interests of each parent, a truly gender-neutral presumption such as one favoring the "primary caretaker" would not offend the notion of gender fairness in family law.

The evidence received by the Task Force suggests that legislative changes may be necessary to remedy disparities in access to the courts, and inadequacies in PDL awards, and trial awards of maintenance, child support, and counsel fees.

III. CRIMINAL JUSTICE

A. Gender and the Criminal Justice System

The Task Force heard testimony from past and present prosecutors, public defenders, private defense counsel, trial court judges, law enforcement officers, sociologists, and probation and parole officers as to how gender may affect the criminal justice process in Missouri. They addressed how male and
female criminal activity differ and how gender may affect the charging of the defendant, plea negotiations, judicial and attorney conduct during trials, sentencing decisions, facilities for incarceration and treatment, probation and parole, the system’s treatment of the victims of crime, credibility assessments in criminal cases, and other prosecutorial decisions.

The Task Force also surveyed judges and lawyers regarding criminal justice. Survey questions covered prosecution, bond and sentencing decisions, and detention and incarceration issues. The survey also focused on the specific gender-related offenses of domestic violence, sexual assault, and rape. Of those responding to the surveys, 120 judges and 670 attorneys indicated they had criminal justice experience within the last five years. More than 70% of the judges responding had participated in more than 200 criminal cases in the last 5 years, while most attorneys reported trying fewer than 10 criminal cases. Most attorneys with criminal law experience were in private practice, although 25% were or had been prosecutors, and another 10% were or had been public defenders. A number of the attorneys and judges addressed gender issues in comments included with their survey responses. The Task Force also utilized statistical information compiled by the Missouri Department of Public Safety and provided by the Missouri Department of Corrections. Committee members reviewed sociological literature on relevant subjects and considered the findings of other state task forces investigating similar issues.

In analyzing the possible effects of gender on the administration of criminal justice, the Task Force examined the adult criminal justice system from arrest, bail, and prosecution through conviction, incarceration, and parole, noting which aspects of the system are within the authority of the courts and which are under the jurisdiction of other state and local authorities. The Task Force briefly addressed the roles of local law enforcement and prosecution, as well as state corrections officers, in order to obtain a more complete picture of the criminal justice system and to examine how the actions of one authority may affect other aspects of the system. Although the Task Force recommendations for correcting gender-related problems in the criminal justice system are directed to the Missouri Supreme Court and the organized bar, it is hoped that the observations offered will be instructive for all persons who work within the system.

356. The Missouri state courts exist pursuant to Article V of the Missouri Constitution and, for many purposes, are administered through the central authorities of the Missouri Supreme Court, the Missouri Judicial Conference, and the Office of the State Courts Administrator. The Missouri Department of Corrections operates pursuant to separate state authority and is independent of the Missouri state courts. Local law enforcement, prosecution officials, and county jails operate under local authority and are also independent from the courts.
While the effects of gender on the criminal justice system are not always obvious, the Task Force received evidence that men and women are treated differently in various ways. According to one attorney, "at every point [in the system]—whether it's overt, or purposeful, or not—there is disparate treatment."[357] The views of attorneys and judges who were experienced in criminal law differed, however, as to how gender affects the system. Some of the hearing testimony and survey comments reflect the view that women offenders receive more lenient treatment than men. For example, a public defender in an urban area commented, "This is one area of law where it is to your advantage to be female."[358] Some private practitioners in rural areas concurred with the suggestion that "women are treated more leniently"[359] and "the tender gender gets the breaks."[360] Others suggested that the criminal justice system more severely punishes women for criminal behavior which is "not typically female crime."[361] Others observed that the criminal justice system was designed to handle male offenders and suggested that it has been slow to adapt to the needs of women.[362]

1. Discretion in the Criminal Process

The adult criminal justice system offers multiple opportunities for discretion in the application of statutory authority. Whether a defendant will be arrested depends on the exercise of the police officer's discretion. Whether a defendant will be charged with one crime or another depends on how the prosecutor chooses to exercise discretion. Whether and how much bail will be required is within the discretion of a judge. Whether a plea bargain will be offered the defendant is within the prosecutor's discretion. The jury's or judge's discretion determines what sentence the defendant will receive upon a finding of guilty. The judge has discretion to determine whether the defendant gets probation. The Board of Probation and Parole determines when the incarcerated person will be released. Although state statutes provide objective parameters for some of these decisions, wide latitude exists in the exercise of that statutory authority.

The use of discretion invariably offers the opportunity for preconceived, stereotypical gender notions and beliefs to influence decision making. One witness commented:

---

358. Survey Comments by Attorneys at 69, Respondent No. 260.
359. Survey Comments by Attorneys at 68, Respondent No. 85.
361. Survey Comments by Attorneys at 67, Respondents No. 233 and 258; Survey Comments by Judges at 10, Respondent No. 11.
362. Id.
The body of law made by men and amassed down through history on their behalf codifies masculine bias and systematically discriminates against women by ignoring a woman's point of view. Often that bias shows up at one stage or another of the legal process in the exercise of legal discretion.\textsuperscript{363} Another witness noted that each discretionary stage is dominated by male decision-makers.

2. Lack of Gender-Based Data

The Task Force attempted to examine the influence of gender on decision-makers in the criminal justice system in Missouri. In many cases there was insufficient data maintained by agencies to determine whether there is disparate treatment based on gender. The lack of accessible statistical data hampered the inquiry. One of the Task Force's foremost recommendations in the criminal law area is that statistics for each offense, presented separately by gender and race, be maintained by the appropriate agencies to allow further evaluation and better answers to these questions in the future.

The need for gender and race specific statistics was illustrated by one prosecuting attorney who testified that his first reaction as a prosecutor was to believe there was no gender bias in the criminal justice system, but that the statistics compiled by his office made him reevaluate his belief.\textsuperscript{364} He noted that 81\% of the defendants charged in his jurisdiction were male. Among the convicted male defendants, 29\% were incarcerated. Of those female defendants who were found guilty and sentenced, only 13\% were incarcerated. He believed that the disparity was explained by the different nature of the offenses committed by males and females and not by the result of gender-based differences in sentencing where the offenses were similar.\textsuperscript{365} However, no statistical analysis was available to confirm or refute his theory. Such testimony underscores the need to keep, compile, and analyze gender and race specific statistics presented separately by offense to allow meaningful comparisons of the treatment of men and women and to ultimately improve the system of criminal justice.

\textsuperscript{363} Columbia Hearing Vol. III at 4 (citing ANN JONES, WOMEN WHO KILL (1st ed. 1980)).
\textsuperscript{364} Springfield Hearing at 25.
\textsuperscript{365} Id. at 45.
3. Recent Increases in Women Offenders

In recent years there has been much public and scholarly discussion about women offenders in the criminal justice system. The data clearly shows that the number of women offenders in the United States criminal justice system increased dramatically between 1974 and the mid-1980's. Bureau of Justice statistics show that the number of females arrested increased 203% from 1974 to 1985. The number of women in state prisons jumped 258%, compared to a 199% increase in the number of men during that time. Between 1978 and 1983 the number of women in local jails increased 165%, while the number of men in jail increased 140%.

In Missouri, there has been a similar dramatic increase in the number of women in the state criminal justice system. Between 1985 and 1991, the number of women arrested in Missouri increased 41%. By 1991, women accounted for 19% (49,783) of those arrested in the state. Between 1987 and 1992, the number of women incarcerated in Missouri prisons increased by 81%, while the male population increased by only 42%. The issues that arise as the numbers of women in the criminal justice system increase were considered worthy of investigation in this state, as in others.

B. Arrest, Bond, Prosecution, and Sentencing

1. Arrest

The decision to arrest is entrusted to local law enforcement officials. The Task Force inquiries into the arrest process were not extensive. Public hearing testimony from law enforcement officials was limited, although some witnesses did assert the existence of gender bias in arrest in the area of domestic violence matters.

Statistics on arrests in Missouri are collected under the Federal Bureau of Investigation's Uniform Crime Reporting Program, and they are published by the Missouri State Highway Patrol. According to the 1991 report, 81% of

---

367. MISSOURI STATE HIGHWAY PATROL STATISTICAL ANALYSIS CENTER, 1985 CRIME AND ARREST DIGEST at 26; 1991 CRIME AND ARREST DIGEST at 22.
368. Missouri Department of Corrections. The number of women incarcerated in Missouri increased from 361 in 1985 to 934 in 1992.
369. Other states that have examined gender bias in their criminal justice systems include California, Florida, Illinois, Minnesota, and Washington.
370. For a more complete discussion of how gender may affect arrests in this area, see supra, Section I of the Task Force Report, on Domestic Violence.
persons arrested in Missouri were male and 19% were female. Of the arrests for violent crimes, 87% were male and 13.8% were female. Of the arrests for property crimes, 76% of arrests were male and 24.5% were female. While the total number of arrests for both males and females has increased steadily each year during the past decade, the female proportion of total arrests has increased only slightly (1.8%) since 1982.

2. Bail

Missouri trial court judges have the authority to grant and set bail. Approximately 60% of attorneys and 43% of judges responding to the survey believed that female defendants were more likely than males to be released on their own recognizance at a pretrial hearing. Most other respondents perceived no gender differences in the pretrial bond decision. One outstate public defender suggested that bond for women is set lower in her jurisdiction.

Two important variables, primary child-care responsibility and primary financial responsibility, may influence decisions to release on bond. These factors often are used as an argument by the defense as to why bond ought to be lowered, though neither provides a statutory basis for the initial bond setting. One judge responding to the survey commented, "Female defendants

371. MISSOURI STATE HIGHWAY PATROL STATISTICAL ANALYSIS CENTER, 1991 MISSOURI CRIME AND ARREST DIGEST at 22.
372. Id.
373. Id.
374. MISSOURI STATE HIGHWAY PATROL STATISTICAL ANALYSIS CENTER, 1983 MISSOURI CRIME AND ARREST DIGEST at 17. In 1982, women accounted for 17.6% of all arrests, 10% of violent crime arrests, 20% of property crime arrests.
375. Survey Report at 183, Question No. G19 Attorneys Survey, Question No. G18 Judges Survey. Defendants are more likely to be released on their own recognizance at a pre-trial hearing if they are:

<table>
<thead>
<tr>
<th></th>
<th>% All Judges</th>
<th>% Female Attorneys</th>
<th>% Male Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female</td>
<td>43</td>
<td>56</td>
<td>61</td>
</tr>
<tr>
<td>Male</td>
<td>0</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>No Difference by Gender</td>
<td>57</td>
<td>42</td>
<td>38</td>
</tr>
<tr>
<td>(# analyzed)</td>
<td>(119)</td>
<td>(89)</td>
<td>(548)</td>
</tr>
</tbody>
</table>

376. Springfield Hearing at 328.
are more likely to be released on their own recognizance at a pretrial hearing because they more often have children.\textsuperscript{377}

National estimates suggest that 50 to 70\% of the women in prison are mothers.\textsuperscript{378} However, the Task Force heard testimony that perhaps 85\% of the women in Missouri prisons are mothers.\textsuperscript{379} Because more women are being incarcerated than in the past and because more women than men are the sole or primary child-care givers for their children, the consideration of child-care responsibility in bond setting decisions may have more impact upon female defendants than on males.

The children of inmates are considered high-risk youths. Research indicates that the longer a woman is incarcerated, the more likely it is that her family ties will disintegrate and that her children will not live with her when she is released.\textsuperscript{380} As a consequence of incarcerating offenders who are primary child-care-givers, state and local social service agencies may become responsible for the children of these offenders.\textsuperscript{381} It was suggested that more attention, not less, should be focused on the questions of primary child-care and child support responsibilities in the setting of bail and in the decisions regarding incarceration.\textsuperscript{382}

3. Prosecution

Whether to issue a warrant and whether to pursue prosecution are decisions largely within the control of local prosecutors in Missouri.\textsuperscript{383} In making these decisions prosecutors have considerable latitude. A prosecutor may choose to take no action, take the matter under advisement, issue a warrant, convene a grand jury, or dismiss the case. Gender may be a factor the prosecutor considers in deciding how to handle a case.

According to one Missouri prosecutor, gender biases influence charging decisions, plea negotiations, and the imposition of sentences.\textsuperscript{384} The Task

\textsuperscript{377} Survey Comments by Judges at 10, Respondent No 19.
\textsuperscript{379} Columbia Hearing Vol. III at 13.
\textsuperscript{381} Columbia Hearing Vol. III at 12.
\textsuperscript{382} \textit{Id.} at 11.
\textsuperscript{383} The Missouri courts have no authority over local prosecutors. The Missouri Attorney General’s office maintains an Office of Prosecution Services that serves as a central informational source for prosecutors; however, for the most part prosecutors operate independently at the local level.
\textsuperscript{384} Kansas City Hearing at 153.
Force heard testimony that prosecutors tend to believe juries are more lenient with female defendants than with male defendants where the crime is a non-violent offense. Such beliefs, whether or not based in truth, may influence both prosecution and defense in assessing the relative strengths and weaknesses of their cases and may well influence charging decisions.

a. Reluctance to Prosecute Women

Almost one-half of the attorneys and judges who responded to the survey believed that gender affects prosecution decisions for similarly situated misdemeanor offenders. Among those who believed gender affects such decisions, 43% of female attorneys, 46% of male attorneys, and 43% of judges indicated that men were more likely to be prosecuted. Only 1 to 2% of respondents believed that women were more likely to be prosecuted. When the offense involved was assault, 69% of female attorneys, 64% of male attorneys, and 50% of judges responding believed that male offenders were more likely to be prosecuted. Again, only 1 to 2% of respondents believed that women were more likely to be prosecuted. Several public hearing witnesses testified that they perceived a reluctance to prosecute women in certain circumstances:

I guess there is some deference to ladies, especially if she’s a young lady and she has two young kids and she’s divorced or does not have a husband. I guess I do make a deference probably in not filing charges against her.

<table>
<thead>
<tr>
<th></th>
<th>% All</th>
<th>% Female</th>
<th>% Male</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judges</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Female</td>
<td>1</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Male</td>
<td>43</td>
<td>43</td>
<td>46</td>
</tr>
<tr>
<td>No Difference by Gender</td>
<td>56</td>
<td>55</td>
<td>54</td>
</tr>
<tr>
<td>(# analyzed)</td>
<td>(99)</td>
<td>(99)</td>
<td>(569)</td>
</tr>
</tbody>
</table>

386. Survey Report at 179, Question No. G4 Attorneys Survey, Question No. G3 Judges Survey. In making the decision to prosecute similarly situated offenders for misdemeanors, prosecutors are more likely to prosecute if the offender is:

387. Id.
389. Id.

https://scholarship.law.missouri.edu/mlr/vol58/iss3/1
The one discrimination I do see, I guess, . . . is there seems to be a reluctance to file assault charges on a woman against a man.\(^{391}\)

A university professor testified about a Los Angeles study in which prosecutors were found to be more likely to reject charges against females, more likely to dismiss charges against females before trial, and less likely to prosecute females.\(^{392}\) He testified that the findings are typical of other research on prosecutorial decision making.

\(b. \quad \text{Lack of Jail Facilities for Women Offenders May Influence Prosecutorial Discretion}\)

A rural prosecutor suggested that a lack of local jail facilities for female prisoners may discourage the prosecution of women in rural areas.\(^{393}\) In his county there is only one cell available to house female offenders, which he described as "kind of like isolation." Counties without available facilities for women prisoners must release female offenders or pay another county to house them. He testified that it costs his county thirty dollars a day to house a female in a decent facility that incarcerates only females. The absence of state-wide data on local jail facilities hampered the Task Force's inquiry into the extent that lack of facilities for women may influence prosecutorial decisions.

\(c. \quad \text{Suggestions of More Vigorous Prosecution of Violent Women Offenders}\)

Some witnesses and respondents suggested that prosecution of violent women offenders actually may be more vigorous than the prosecution of violent male offenders. A public hearing witness testified that a study of men and women incarcerated in Missouri for the homicide of an intimate partner demonstrated that phenomenon.\(^{394}\) The author of the 1989 study interviewed eighteen women and twenty-three men, and she was allowed access to Department of Corrections data.\(^{395}\) She found that 39% of the women were

---

391. Springfield Hearing at 325.
392. Id. at 60-62.
394. Columbia Hearing Vol. III at 4 (citing KAREN STOUT, REPORT ON LEGAL AND SOCIAL DIFFERENCES BETWEEN MALE AND FEMALE INTIMATE PARTNERS (1989)).
395. STOUT, supra note 394, at 1.
charged with capital murder, while no men were so charged.\textsuperscript{396} The apparent discrepancy in charging was not explained by prior conviction records.\textsuperscript{397}

The Task Force was unable to undertake a statistical analysis of prosecutorial decision making by local authorities. It is unclear whether the example provided is representative of the treatment of violent female offenders in the criminal justice system. The task force believes further study of this issue is warranted.

\textit{d. Lack of Criminal Non-Support Prosecution and Enforcement}

Several public hearing witnesses voiced their opinions about the use of prosecutorial discretion in declining to pursue criminal non-support actions and the use of judicial discretion in declining to enforce support obligations. An assistant prosecutor testified that she knew of no criminal child support enforcement actions filed in her jurisdiction.\textsuperscript{398} Another prosecutor admitted his reluctance to prosecute criminal non-support cases and testified at length about his reasons for not pursuing such cases, asking "What is a year in the county jail to someone who is $10,000 in arrears in child support?"\textsuperscript{399} He suggested that a criminal non-support conviction required evidence of intent or a statutory amendment to build in a presumption of intent as in bad check cases. Finally, the witness questioned whether the crime of failure to pay child support was constitutional.\textsuperscript{400}

In most potential non-support actions the person who has failed to pay is male, and the person who has not received payment is female. The failure

\begin{tabular}{|c|c|c|c|c|}
\hline
 & Capital Murder & First Degree & Second Degree & Manslaughter \\
\hline
Female & 38.9\% & 11.1\% & 33.3\% & 16.7\% \\
\hline
Male & \text{---} & 21.7\% & 69.3\% & 8.7\% \\
\hline
\end{tabular}

\textsuperscript{396} Id. at 9-10.
\textsuperscript{397} Stout, supra note 394, at 1.
\textsuperscript{398} Cape Girardeau Hearing Vol. II at 32.
\textsuperscript{399} Kirksville Hearing Vol. III at 45.
\textsuperscript{400} Id. at 46, 47.
to pay support has adverse economic consequences for the women to whom
the payments are not made and for the children for whom child support
payments are intended to provide financial support. A prosecutor's decision
not to prosecute an ex-spouse who has financial means to pay thwarts the
intention of the statutory scheme and leaves the economically dependent parent
with only expensive civil remedies which she or he may be unable to afford.
It may also create an added burden on the Division of Child Support
Enforcement, which has an active case load of 190,000 cases of which 90%
involve female custodial parents seeking support. 401

It was suggested that lax prosecution and ineffective judicial enforcement
in this area "add[s] to the perception of bias that a lot of female custodial
parents have." 402 A prosecution policy or practice not to pursue criminal
non-support cases may encourage men to disregard their legal obligations to
pay support. A judicial policy or practice not to enforce support obligations
may have the same effect. Together these practices actually may exacerbate
the financial strain on single and divorced women and their children and
increase the financial burdens on the state. 403

4. Plea Bargains

There are perceptions by some that the gender of a defendant can affect
the disposition of a case by plea bargain. Commentators suggest that nearly
80% of felony cases and 95% of misdemeanor cases are resolved by plea
bargaining and that there is considerable differential treatment of male and
female defendants in the plea bargain process. 404 Unfortunately, the Task
Force was unable to undertake a statistical analysis as records of plea bargains
are not routinely kept, compiled, or published.

Two attorneys, one an urban prosecutor and the other a rural public
defender, testified that female co-defendants are offered more favorable plea
bargains than are males, particularly in exchange for testimony against a male

401. The Director of the Division of Child Support Enforcement for Missouri
tested that his division is only able to collect on about 28% of its cases in a good
month. Columbia Hearing Vol. I at 77. The Director also noted that there are no
effective remedies for recovering support monies from self-employed noncustodial
parents. He suggested that enforcement mechanisms that affect professional licenses
might be an effective means to collect support monies from persons who need state
licenses to earn their livings. Columbia Hearing Vol. I at 78 and 81.


403. See supra Section II, Family Law, for a more extensive discussion of the
Task Force's findings with respect to support obligations and enforcement mechanisms.

404. Donna M. Bishop & Charles E. Frazier, The Effect of Gender on Charge
A lay witness testified to an example of preferential treatment of a female co-defendant in plea bargaining, citing a newspaper report about a married couple, both of whom were convicted of abusing their child. According to the witness, the father was sentenced to five years without probation while the mother accepted a plea bargain and was given two years probation and ordered not to have anything to do with children under age eighteen.

5. Sentencing

Under Missouri law, a convicted defendant will be sentenced by a judge, often upon recommendation by a jury, once a decision is reached. The statutory scheme is designed to allow the imposition of different sentences for persons convicted of similar offenses. The statutes provide minimum and maximum sentences, but allow the sentencing authority discretion to set the length of sentence and to determine whether sentences for multiple counts will run consecutively or concurrently. The exercise of such discretion is to be based upon the individual circumstances presented in the case.

The Task Force asked the Missouri Department of Corrections for sentencing statistics in order to analyze the possible effects of gender on sentences imposed by sentencing authorities in Missouri state courts. The statistical analysis in the following sections is based upon the data provided for male and female inmates admitted to Missouri state prisons in 1987 and 1991. The data and analysis do not account for possible differences in other factors known to affect sentencing decisions, such as prior conviction rates.

The analysis of the sentencing statistics reveals that women in Missouri generally receive shorter sentences than men for a number of crimes. However, for a few specific offenses, women offenders are sentenced to longer terms than men convicted of similar crimes. Finally, for a growing number of offenses, there is a trend toward more equivalent average sentences ordered for men and women.

405. Kansas City Hearing at 157; Springfield Hearing at 321.
406. Kansas City Hearing at 281.
407. The statistics provided and, hence, the analysis performed, did not include life sentences imposed on male or female inmates.
a. Women Receive More Lenient Sentences for Most Offenses

In 1987, the average sentence received by women was shorter than the average sentence received by men in sixteen of nineteen offense categories. Women's average sentences for those categories were 46 to 99% of men's average sentences. In 1991, the average sentences of women were shorter than those of men in sixteen of twenty-one offense categories. Women's average sentences ranged from 58 to 99% of those ordered for men convicted of the same offenses, indicating slightly less disparity in the sentences.

In 1991, the average sentences for women were less than those of men for convictions of assault, burglary, damage to property, drug charges, escape, family offenses, forgery, fraud, homicide, kidnapping, negligent manslaughter, robbery, sexual assault, stealing, stolen property, and stolen vehicles.

The data appear to confirm the impressions conveyed by survey respondents and public hearing witnesses. Seventy-six percent of attorneys and 51% of judges who responded to the survey believed that judges are likely to impose a harsher sentence on a male defendant where male and female offenders are similarly situated and where the crimes are similar. Public hearing testimony and survey comments included the following:

The attorneys in my office have found that generally women fare better in the criminal justice system in terms of sentencing.

I think it's unconscious as far as judges go. I don't think it affects guilt or innocence. I don't think people would find a woman not guilty if facts show she is guilty just based on gender; but I think it, in part, does affect the punishment and whether there is probation.

My experience has been that judges are highly reluctant to incarcerate women, even female repeat offenders.

408. MISSOURI DEPARTMENT OF CORRECTIONS, SENTENCE LENGTHS FOR INMATES ADMITTED TO PRISON, YEAR 1987, Table 1.
409. MISSOURI DEPARTMENT OF CORRECTIONS, SENTENCE LENGTHS FOR INMATES ADMITTED TO PRISON, YEAR 1991, Table 2.
410. Id.
412. Springfield Hearing at 304.
Some witnesses and survey respondents offered possible explanations for the phenomenon of more lenient sentencing of women. One witness suggested that sentencing authorities are influenced by greater remorse demonstrated by female defendants and by a perception that women are better risks for probation.415

Several respondents suggested that a reluctance to break up families and a legitimate concern for the children of female offenders influence the sentencing of women.416 This perception was shared by more than 75% of attorney survey respondents who believed that female offenders who are the primary care-givers are more likely to receive lenient sentences or probation.417 Judges were divided, with 53% of respondents indicating that female offenders who are primary care-givers in a two parent household would be more likely to receive leniency and 31% indicating that equal consideration is given to parental responsibility for males and females.418 In a single parent family, 50% of responding judges indicated equal consideration is given to male or female primary care-givers, while 39% believed that female primary care-givers would receive more lenient sentences.419 A retired judge and former prosecutor offered a candid assessment of his perception that women are and should be treated more leniently in sentencing:

> Where you have a woman who has committed a crime—that you would put a man in jail for—and there she is with some small children. What do you do there? . . . What are you going to do with those children and everything? In a small community—where you don’t have easy access to foster homes and things like that—the best thing to do is just let her go. That’s about the only way you can do. I’ve talked to other prosecutors. That’s—mostly in the rural area that’s what we do. It’s just a practical matter and not much else you can do.420

The phenomenon of more lenient treatment for most female offenders in Missouri tracks a pattern noted in other state task force studies. The Minnesota task force found that fewer females were sentenced to jail and that they served less time in jail. The Minnesota task force concluded that lower imprisonment rates for women were explained, in part, by the lower criminal

415. Springfield Hearing at 321-322.
416. Survey Comments by Judges at 9, Respondent No. 9; Springfield Hearing at 68-69; Columbia Hearing Vol. I at 241.
420. Kirksville Hearing Vol. III at 63-64.
history scores of women. Some witnesses in Missouri suggested that judicial consideration of the role of women as primary caretakers of families was appropriate in sentencing, and they called for more exploration of alternatives to incarceration.

b. Women Receive Harsher Sentences for Some Offenses

The 1987 statistics reflect that women’s average sentences were longer than the average sentences of men in three of nineteen offense categories: family offenses, obstructing police, and weapons offenses. The average sentences of women were 117% to 120% of the average sentences of men convicted for those offenses. More recent 1991 statistics reflect the average sentences received by women were longer than those received by men for five of twenty-one offenses: arson, probation violations, sexual offenses, weapons offenses, and traffic offenses. Average sentences for women ranged from 103% to 169% of men’s average sentences for these offenses, reflecting an increase in the disparity of sentences imposed on women. No explanation for the increase or degree of these disparities is readily apparent.

<p>| OFFENSES FOR WHICH WOMEN RECEIVED LONGER SENTENCES IN 1991 (IN MONTHS) |</p>
<table>
<thead>
<tr>
<th>Arson</th>
<th>Probation Violations</th>
<th>Sexual Offenses</th>
<th>Traffic Offenses</th>
<th>Weapons Offenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean for Women</td>
<td>96</td>
<td>48</td>
<td>48</td>
<td>39</td>
</tr>
</tbody>
</table>

421. REPORT OF THE MINNESOTA TASK FORCE ON GENDER AND RACE at 66.
422. Id. at 67-68.
423. The category "family offenses" is a statistical category used by the NCIC that includes cruelty toward a child or wife, bigamy, non-support of a parent, non-payment of maintenance, contributing to the delinquency of a minor, and neglect of the family.
424. MISSOURI DEPARTMENT OF CORRECTIONS, SENTENCE LENGTHS FOR INMATES ADMITTED TO PRISON IN MONTHS, YEAR: 1987, Table 1.
425. MISSOURI DEPARTMENT OF CORRECTIONS, SENTENCE LENGTHS FOR INMATES ADMITTED TO PRISON IN MONTHS, YEAR: 1991, Table 2.
426. Id.
It is interesting to note that the offenses for which women received longer sentences involved behavior that may be seen as particularly unacceptable in women. Arson, probation violations, sexual assault, sexual offenses, family offenses, felony traffic violations, and weapons offenses all involve aggressive or violent behavior. The longer sentences imposed upon women who commit such crimes may reflect traditional societal views held by sentencing authorities who react to the "deviant" behavior of female offenders by imposing harsher sentences on them than on male offenders convicted of similar crimes.

Attorneys and judges were asked whether women who commit violent offenses receive longer sentences than males who commit violent offenses. The respondents were divided along gender lines in their responses. Ninety-five percent of responding judges and 90% of male attorneys indicated "seldom" or "never" in answer to the question.427 By contrast, only 61% of female attorneys agreed, with 38% indicating "sometimes" or "usually" in response to the question.428 Asked who was likely to receive a harsher sentence for a child abuse conviction, attorneys again differed from judges and female attorneys differed from male attorneys. Fifty-seven percent of female attorneys, 73% of male attorneys, and 41% of judges indicated their belief that male offenders would receive harsher sentences for this crime.429 However,

<table>
<thead>
<tr>
<th>Offenses for Which Women Received Longer Sentences in 1991 (in Months)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arson</td>
</tr>
<tr>
<td>-------</td>
</tr>
<tr>
<td>Mean for Men</td>
</tr>
</tbody>
</table>

427. Survey Report at 182, Question No. G13 Attorneys Survey, Question No. G12 Judges Survey. Women who are violent offenders receive longer sentences than violent male offenders:

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Seldom</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Attorneys</td>
<td>1%</td>
<td>10%</td>
<td>28%</td>
<td>47%</td>
<td>14%</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>0%</td>
<td>1%</td>
<td>8%</td>
<td>56%</td>
<td>34%</td>
</tr>
<tr>
<td>Judges</td>
<td>0%</td>
<td>1%</td>
<td>4%</td>
<td>59%</td>
<td>36%</td>
</tr>
</tbody>
</table>

428. Id.

429. Survey Report at 183, Question No. G8 Attorneys Survey, Question No. G7 Judges Survey. In sentencing offenders convicted of child abuse, who is likely to receive a harsher sentence:
11% of female attorneys, but only 1% of male attorneys and no judges believed that female offenders would receive a harsher sentence for child abuse.

One female prosecutor offered the following assessment of the phenomenon of harsher sentencing of women convicted of certain crimes:

> [W]hen you get into the more serious felony cases, national statistics and studies have shown that female offenders are often treated more sharply by the system, judges and juries, than the male counterparts . . . . When a woman is perceived as having . . . gone bad, look out, because I think that she is going to receive the ire of society.\(^{430}\)

The Task Force did not undertake a study of whether the conviction rates or sentences given to women who kill their spouses has been affected by Missouri’s recent adoption of a statute allowing the introduction of evidence on the battered spouse syndrome.\(^{431}\) A review of the cases of women currently serving time in Missouri’s prisons for murder of a spouse or boyfriend may also be warranted.

c. **Statistics Demonstrate a Trend Toward More Equivalent Sentencing**

Over the last five years there has been a trend toward more equivalent sentencing of men and women. The number of offenses for which the median length of sentence was equivalent for men and women grew from six in 1987 to twelve in 1991. The disparity in average sentences for offenses for which women receive lighter sentences has decreased. The figures seem to demonstrate a growing tendency to sentence women to terms more closely equivalent to the terms ordered for men and reflect a decrease in the disparities between sentences ordered for men and women. There remain, however, a few "non-traditional" offenses where women continue to receive

<table>
<thead>
<tr>
<th></th>
<th>% All Judges</th>
<th>% Female Attorneys</th>
<th>% Male Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female</td>
<td>0</td>
<td>11</td>
<td>1</td>
</tr>
<tr>
<td>Male</td>
<td>41</td>
<td>57</td>
<td>73</td>
</tr>
<tr>
<td>No Difference by Gender</td>
<td>59</td>
<td>32</td>
<td>26</td>
</tr>
<tr>
<td>(# analyzed)</td>
<td>(122)</td>
<td>(82)</td>
<td>(501)</td>
</tr>
</tbody>
</table>

430. St. Louis Hearing Vol. VI at 70.
longer sentences and for which the disparity not only persists, but has actually intensified.

**d. Pregnant Offenders**

The treatment of pregnant offenders was a topic raised in testimony and covered by the surveys. One survey respondent commented:

> Courts give more probation for pregnant defendants and correctly so. At some point the unborn child’s interest in a less traumatic birth outweighs the state’s interest in extracting its pound of flesh.\(^{432}\)

Sixty-one percent of attorneys and 50% of judges who responded to the survey indicated that probation, rather than prison, is ordered for pregnant offenders "always" or "usually."\(^{433}\) Fifteen percent of female attorneys and 11% of judges believed that this was "seldom" or "never" done.\(^{434}\)

One witness cited an incident in which a pregnant offender was sentenced to prison and gave birth prematurely to twins while she was incarcerated.\(^{435}\) Both babies died. The witness suggested this situation may have been exacerbated by the inflexibility of the criminal justice system in dealing with the special needs of this female offender and her babies. Such testimony demonstrates the importance of realistic and individual consideration in sentencing where the health of the offender is an issue. Judicial awareness of the level of funding and resultant lack of medical care in state prisons and county jails may appropriately influence sentencing decisions affecting offenders who have medical conditions requiring care during incarceration.

**C. Incarceration, Probation, and Parole**

It is important to note that the treatment of offenders who are incarcerated and the decisions made with respect to parole are not within the control of the courts. Although the role of the courts ends with the sentencing decision, there is widespread public misperception that the courts have a role in the criminal corrections system. Once convicted and sentenced, the offender leaves the jurisdiction of the courts and becomes a ward of the

---

432. Survey Comments by Judges at 10, Respondent No. 19.
434. Id.
Missouri Department of Corrections or of local county or municipal jail officials.

The Task Force addressed incarceration, probation, and parole in the report because they are an integral part of the criminal justice process and because, in some ways, they may affect prosecution, trial, conviction, and sentencing. It is the view of the Task Force that the role of the courts cannot be examined and understood in isolation from the rest of the criminal justice system. The following data and analysis are offered to assist persons throughout the system and in the public to better understand the relationship of gender to the decisions made at each step of the criminal justice process.

In Missouri, a convicted felon can be sentenced by a judge to serve a term in an adult correctional institution or can be granted probation. Once sentenced, a felon becomes a ward of the Missouri Department of Corrections, which oversees both the Board of Probation and Parole and the sixteen correctional institutions in which inmates may be incarcerated in Missouri. Under Missouri law, only felons who are seventeen years of age or certified as an adult by the circuit court and who are sentenced to one year or more can be committed to the Department of Corrections.436

Offenders convicted of misdemeanors or sentenced to less than one year by the courts are committed to a correctional institution under the jurisdiction of the county or municipality in which they are convicted. These offenders become wards of the correctional institution in the jurisdiction in which they are convicted.

1. Incarceration

   a. State Correctional Facilities

   Between 1987 and 1992 the female inmate population in Missouri state prisons increased by 81%, while the male inmate population increased by only 42%.437 Ninety percent of women committed to the Department of Corrections were found guilty of nonviolent offenses.438 However, women remain a relatively small proportion of the overall prison population. As of late 1992, there were 15,986 inmates housed in Missouri state correctional facilities. Of those, 15,052 were male (94%) and 934 were female (6%).439 These numbers reflect a 1.2% increase in the proportion of women in the overall state prison population since 1987. The Missouri trend is consistent

437. Missouri Department of Corrections.
438. Kirksville Hearing Vol. III at 51; St. Louis Hearing Vol. IV at 85.
439. Missouri Department of Corrections.
with national statistics that reveal a slow, but steady, increase in the proportion of women in the prison population. 440

The Missouri Department of Corrections operates sixteen correctional institutions scattered across the state. The Fulton Reception and Diagnostic Center (FRDC) is the facility at which all inmates, male and female, are received, evaluated, and assigned to serve their sentences in one of the other fifteen facilities. Eleven of the facilities house male inmates and two facilities house female inmates. The two honor centers house both male and female inmates. 441

b. Local Jails

In the course of this study, the Task Force was unable to locate a central data source for information regarding county and municipal correctional facilities. The Task Force was unable to locate any agency in the state that had a listing of the names, locations, and housing capacities of county and municipal jails, or data on the gender of inmates. The lack of state-wide data precluded any meaningful analysis of the possible impact of gender on incarceration in county facilities.


441. There are four security levels for both male and female facilities: minimum, medium, medium high, and maximum. The minimum-security facilities for both male and female inmates are St. Mary's Honor Center, St. Louis, and the KC Honor Center, Kansas City. Both are Custody Level 1 facilities.

There is one medium-security facility for females, the Chillicothe Correctional Center (CCC), Chillicothe, a Custody Level 2-3 facility. There are seven medium-security facilities for men: the Ozark Correctional Center (OCC), Fordland, Custody Level 2; the Tipton Correctional Center (TCC), Tipton, Custody Level 2; the Central Missouri Correctional Center (CMCC), Jefferson City, Custody Level 2-3; the Western Missouri Correctional Center (WMCC), Cameron, Custody Level 2-3; the Algoa Correctional Center (ACC), Jefferson City, Custody Level 3; the Boonville Correctional Center (BCC), Boonville, Custody Level 3; and the Farmington Correctional Center (FCC), Farmington, Custody Level 3-4.

There are no medium-high security facilities for women, but two for men. They are the Missouri Eastern Correctional Center (MECC), Pacific, Custody Level 4, and the Moberly Correctional Center (MCC), Moberly, Custody Level 4.

There is one high-security facility for women, the Renz Correctional Center (RCC), Jefferson City, Custody Level 5. There are two high-security facilities for men: the Jefferson City Correctional Center (JCCC), Jefferson City, Custody Level 5; and the Potosi Correctional Center (PCC), Potosi, Custody Level 5. OFFICIAL MANUAL, STATE OF MISSOURI 290-91 (1991-92); Missouri Department of Corrections.
Data from one jurisdiction, the St. Louis County correctional facilities, is presented here for illustrative purposes. The Task Force does not suggest that St. Louis County data is representative of other local Missouri correctional jurisdictions; the size, location, and capacities of correctional institutions vary greatly across the state. However, the data from St. Louis County suggest certain questions that might be answered by a more comprehensive collection and analysis of data from local correctional facilities.

St. Louis County currently operates four correctional facilities. Of these facilities, two house male inmates and two house both male and female inmates. Between 5% and 10% of the St. Louis County jail population have been convicted and are serving their sentences. The vast majority, 90 to 95%, are in pretrial detention. The 1990 inmate population of the county’s facilities totaled 686, of whom 70 (10.2%) were female. These numbers reflect an increase of 1.5% from 51 females of 586 total inmates in 1987.442

The St. Louis County jail population has a higher proportion of female inmates than the Missouri state correctional institutions do. The higher proportion may be partly explained by the fact that females tend to commit misdemeanors and minor crimes in higher numbers than they commit felonies and other serious crimes. Whether one examines the proportion of female inmates in Missouri state institutions (5.8% in 1992) or the proportion of female inmates in the sample local jurisdiction of St. Louis County (10.2% in 1990), the proportion is significantly lower than the proportion of women arrested (19% in 1991).

c. The Difficulty of Maintaining Family Contact

The Task Force heard testimony that 85% of the women incarcerated in Missouri prisons are mothers.443 Often these women are single mothers.444 Women in prison have difficulty adjusting to being separated from their children. A woman who is incarcerated experiences not only the pain of separation from her children, but also the added anxiety over who will care for her children because in most cases she is the primary care-giver. When discussing concerns about their confinement, women inmates overwhelmingly note that they miss their children.445 While male inmates state that they miss their children and families, they are more likely to report boredom,

442. All St. Louis County correctional data was provided by St. Louis County Justice Services.
443. Columbia Hearing Vol. II at 311.
444. In 1991 almost 75% of the new female admissions to the Missouri Department of Corrections were unmarried. Department of Corrections.
health, noise, and loss of freedom as their primary concerns.\textsuperscript{446} The loss of a parent through incarceration may also exact long-term social costs from the children and from the state. In many cases the state pays not only for the woman’s incarceration, but also for state-subsidized care of her children.\textsuperscript{447}

(1) Female Inmates in Missouri are Isolated from their Children and Families by the Location of Correctional Facilities

The location of female correctional facilities in Missouri inhibits the ability of many female inmates to maintain family contact.\textsuperscript{448} The following information about Missouri state correctional facilities was provided by the Department of Corrections. The largest percent (27\%) of female inmates serving time in Missouri state institutions come from the St. Louis area. The next largest number (15\%) of female inmates come from the Kansas City area.\textsuperscript{449} Yet, the two exclusively female correctional facilities are located in central Missouri—in Chillicothe and Jefferson City. Testimony at the Cape Girardeau hearing indicated most women convicted in Cape Girardeau serve their sentences in Chillicothe.\textsuperscript{450} A St. Louis area attorney noted that most women incarcerated in Missouri go to Chillicothe, which "cuts off contact between women in prison and their children."\textsuperscript{451}

The Chillicothe Correctional Center, located in Livingston County northeast of Kansas City, is approximately 240 miles from St. Louis and 90 miles from Kansas City; it houses nearly 55\% of all females in the Department of Corrections. The Renz Correctional Center, located outside Jefferson City, is approximately 125 miles from St. Louis and 90 miles from Kansas City; it houses 40\% of all females incarcerated in the Department of Corrections. The Kansas City Honor Center located in downtown Kansas City houses only 2\%, and the St. Mary’s Honor Center, in St. Louis City, only 3\% of all females incarcerated in the Department of Corrections. Aside from the St. Mary’s Honor Center, which houses a maximum of 25 female prisoners, no other females are incarcerated within a 100 mile radius of St. Louis.

\textsuperscript{446} STOUT, supra note 394, at 11.
\textsuperscript{447} P. Barinach, Mothering From Behind Prison Walls (1979 Annual Meeting of the American Society of Criminology). In a study of 196 women in 3 prisons, the author found that 81.7\% of the children of incarcerated mothers were being cared for by family members. The remaining 18.3\% of children, presumably, were potential wards of the state.
\textsuperscript{448} Columbia Hearing Vol. II at 308-309.
\textsuperscript{449} Missouri Department of Corrections.
\textsuperscript{450} Cape Girardeau Hearing Vol. II at 36.
\textsuperscript{451} Survey Comments by Attorneys at 70, Respondent No. 270.
The vast majority of male inmates are incarcerated at seven correctional institutions in central Missouri. However, three male correctional facilities are located either within the St. Louis metropolitan area or within eighty miles of St. Louis. There are also male facilities located near the Kansas City area. Finally, the Ozark Correctional Center (OCC), a male correctional center with a capacity of 690 inmates, is located approximately 20 miles east of Springfield.

While 77% of judge respondents, 72% of male attorney respondents, and 59% of female attorney respondents perceived no difference by inmate gender, 39% of female attorneys, 24% of male attorneys, and 22% of judges perceived male inmates had better access to family and counsel than female inmates. Only 2-4% of survey respondents thought that females enjoyed better access. Most judges and attorneys, regardless of region, believe there is no difference by gender in access to Missouri prisons. However, 31% of eastern district attorneys and 20% of western district attorneys indicated that male inmates in their regions had better access to family and counsel.

Because there are more male facilities and because those facilities are more widely scattered across the state, it appears that males have a greater opportunity to be placed in facilities near their homes and family. Recently, there has been some public discussion about building a new correctional facility in the state. In determining the location and function of a new facility and who will be housed therein, the Task force thinks the Department of Corrections should consider whether it would be beneficial to house female inmates who have children and families in the eastern and western part of the state in facilities in closer proximity to those families. A reassessment of the current policy of assigning urban female inmates to rural facilities is also in order.

---

452. MECC, PCC, FCC, and the St. Mary’s Honor Center (with a combined capacity of more than 3300 male inmates) are located in or within 80 miles of St. Louis. Missouri Department of Corrections.

453. WMCC, with a capacity of 1975 inmates, is approximately 50 miles north of Kansas City.


455. Survey Report at 184, Question No. G20 Attorneys Survey.
(2) PATCH and CHIPS Programs Provide Limited Assistance to Male and Female Inmates in Maintaining Family Contact

Programs have been developed to assist both male and female inmates of Missouri state prisons to maintain contact with their children. The Prison Parents and Their Children (PATCH) program was initiated to assist female inmates in maintaining family contact. Approximately 150 women at each of the 2 female facilities presently participate in the program. Approximately 50% of the women who participate in this program are from the St. Louis area; another 25% are from the Kansas City area and the remaining 25% are from outstate Missouri. Mothers who participate in the program are required to sign up for and eventually complete at least three-fourths of a parenting class offered at the correctional facility.

Transportation often is the primary problem facing families of incarcerated females. Many of these families are low income, cannot afford mass transit, and do not have access to personal transportation. The PATCH program provides low cost or free transportation for children of incarcerated women at the Renz Correctional Center and Chillicothe Correctional Center. Transportation is provided largely by volunteers using their own vehicles.

Both the Renz and Chillicothe Correctional Centers have trailer homes available on the prison grounds for purposes of visitation. The home has a kitchen, living room, and game room that female prisoners may use while visiting with their children. In addition, playground facilities are available at both correctional centers. Children can visit for six hours at a time.

The Challenging Incarcerated Parents and Spouses (CHIPS) program is designed to provide similar assistance to male inmates. The program is in place at only one male facility; the Algoa Correctional Center (ACC) in Jefferson City. The men at the Algoa facility must complete and pass a parenting class, a positive mental attitude class, and a marriage encounter weekend prior to participating in the CHIPS program. The Algoa facility also uses a mobile home to create a home-like atmosphere for visitation; however, the Algoa facility does not have a playground facility.

A number of other states have recognized the need to provide assistance in maintaining contact between prison mothers and their children. Kentucky, Nebraska, New Jersey, Washington, and Wisconsin have weekend visitation programs for prison mothers. In California, some female inmates are eligible to be paroled early to a halfway house setting where children under

---

456. Missouri Department of Corrections.
457. Missouri Department of Corrections.
the age of six can live with their mothers. In Washington, a unique foster care program places the children of inmates in foster care homes close to the prison with families who agree to facilitate visitation and contact.

Female inmates in Missouri have great difficulty maintaining contact with their children. The remote location of female facilities and the high percentage of urban woman and single mothers among the female prison population exacerbates this situation. The PATCH program is underfunded and too small to meet the needs of all incarcerated mothers. Missouri could learn from the innovative programs undertaken in other states.

d. Educational, Vocational, and Rehabilitational Programs

The correctional system in Missouri was originally designed for men and has been slow to adapt to the increasing female prison population. The following discussion is based upon information provided to the Task Force by the Department of Corrections. Fewer opportunities exist for the education, vocational training, and rehabilitation of female offenders.

Some post-secondary courses are offered through local colleges at both of the exclusively female institutions and at five of the male institutions. These programs are paid for almost entirely by federal grants. Ten courses are offered for men; only two of those courses are available to women. Male inmates clearly have access to a greater variety of courses. While all females incarcerated in the Department of Corrections have access to the two course offerings, the courses available to female inmates are far more limited in scope and number.

460. Id.
461. Columbia Hearing Vol. II at 309.
462. St. Louis Hearing Vol. VI at 85.
463. Missouri Department of Corrections.
464. The two educational courses available to females are Introduction to Business and Paralegal. The ten courses available to males are Computer Technology, Drafting Technology, Introduction to Business, Computer Information Systems, Paralegal, Applied Technology, Graphic Arts, Vocational Warehousing, Electronics, and Business Management/Microcomputers. Missouri Department of Corrections.
Vocational training also is offered in the correctional system.\(^{465}\) Again, marked gender differences are apparent in the availability of such training. Vocational programs are offered in-house at four medium security male facilities\(^{466}\) and the medium security female facility.\(^{467}\) Men have access to fourteen different vocational programs, while women are offered access to only six vocational programs. None of the vocational programs offered to men is available to women.

Vocational courses available to incarcerated women not only are more limited in number, but the courses offered reflect traditional stereotypes regarding the type of jobs considered to be 'appropriate for women.' The significance of such stereotyping becomes clear when the purpose of rehabilitation is considered. One of the primary goals of the Department of Corrections is to prepare the inmate to function outside prison and to earn a living. This meets the needs of society by helping to prevent future economically motivated crime. In 1991, 50% of the women admitted to Missouri prisons were high school drop-outs. More than 75% were between the ages of eighteen and thirty-four. The majority were convicted of economic crimes.\(^{468}\) The absence of meaningful educational and vocational training for those women defeats the goals of rehabilitation and decreases the women's likelihood of success once paroled.

The information reviewed by the Criminal Committee indicates that, in general, women incarcerated in the Department of Corrections have fewer educational, rehabilitational, and recreational opportunities than men incarcerated in Missouri prisons. More programs are available for men than women.\(^{469}\) Hearing testimony suggested that female inmates have fewer freedoms, less recreation time, and spend more time locked down.\(^{470}\) One witness suggested that female inmates do not enjoy the advantages possible by

\(^{465}\) There are six vocational courses available to females and fourteen available to males. The six available to females are Cosmetology, Data Entry, Office Practice, Culinary Arts, Health Occupations, and Career Guidance. The fourteen available to males are Plumbing, Carpentry, Upholstery, Welding, Air Conditioning, Small Engines, Culinary Arts, Electronics, Horticulture, Auto Mechanics, Building Maintenance, Diesel Mechanics, Heating and Refrigeration, and Career Guidance. Missouri Department of Corrections.

\(^{466}\) Algoa Correctional Center (ACC), Boonville Correctional Center (BCC), Central Missouri Correctional Center (CMCC), and Western Missouri Correctional Center (WMCC).

\(^{467}\) Chillicothe Correctional Center (CCC).

\(^{468}\) Missouri Department of Corrections, Calendar Year 1991 Report of Commitments and Releases.

\(^{469}\) St. Louis Hearing Vol. VI at 76-77.

\(^{470}\) Id.
earning trustee privileges while incarcerated. Witnesses also argued: "Missouri desperately needs more placement-treatment resources, especially for women." There are not enough alternatives to prison, especially for women.

Because of the relatively small number of women in Missouri’s state and local correctional facilities, a small commitment of resources could create programs that would benefit a large percentage of the female population. Cost effective alternatives to incarceration could include drug or alcohol treatment or vocational training provided to inmates while on probation.

2. Probation and Parole

The Board of Probation and Parole is the division of the Missouri Department of Corrections charged with the responsibility for determining when to grant parole to state prison inmates. The Board is also authorized to discharge persons from parole at the expiration of the parole term or to revoke parole in the event of a parole violation. The Task Force reiterates that the Board’s parole decisions are not within the control of the courts. These issues are addressed here because parole decisions are an integral part of the criminal justice process and follow from the court process of trial, conviction, and sentencing. Parole decisions affect the period of an inmate’s actual incarceration.

Although women comprised 5.3% of the 1990 prison population, they totaled 16.4% of persons under the supervision of the Board of Probation and Parole. Hearing testimony suggested that female offenders generally spend less time in prison then do male offenders who are convicted of the same crimes.

The majority of judges and lawyers responding to criminal law questions on the survey believe that gender does not affect the granting of parole.

471. Springfield Hearing at 314.
472. Survey Comments by Attorneys at 67, Respondent No. 129.
474. St. Louis Hearing Vol. VI at 85-89.
476. Missouri Department of Corrections.
477. St. Louis Hearing Vol. VI at 86; Kirksville Hearing Vol. III at 52.
478. Survey Report at 184, Question No. G23 Attorneys Survey, Question No. G22 Judges Survey. Inmates who receive comparable length sentences actually serve shorter sentences if they are:
However, among those respondents who believe that gender is a factor, 30% of judges, 43% of male attorneys, and 23% of female attorneys believed that, when men and women receive comparable sentences, women actually serve less time in prison. However, 25% of female attorneys believe that men actually serve less time.\textsuperscript{479}

The Task Force's analysis of data provided by the Department of Corrections reveals that for most offenses women spend less time incarcerated prior to first release than men convicted of similar offenses. However, for a few offenses, women serve more time in prison than men convicted for similar offenses. Average figures for time served were analyzed for inmates released in 1987 and in 1991. The data were presented separately for males and females by general offense category. It is important to note that the data and analysis do not take into account possible differences in other factors known to affect parole decisions, such as prior conviction rates.\textsuperscript{480}

\textbf{a. Women Serve Less Time than Men in Many Offense Categories}

Of inmates released from prison for the first time in 1987, the average sentence actually served by women was less than that served by men for thirteen of eighteen offense categories for which both male and female figures were available. Women served 33 to 96% of the sentences served by men convicted of the same offenses.\textsuperscript{481} Of inmates released from prison for the first time in 1991, the average sentence actually served by women was shorter than that served by men for fourteen of twenty offense categories for which both male and female figures were available. The average sentences served by women were between 44 and 97% of those served by men in these offense categories.\textsuperscript{482}

\begin{center}

\begin{tabular}{|c|c|c|c|}
\hline
 & \% All \textbf{Judges} & \% Female \textbf{Attorneys} & \% Male \textbf{Attorneys} \\
\hline
Female & 30 & 23 & 43 \\
Male & 3 & 25 & 5 \\
No Difference by Gender & 67 & 52 & 52 \\
(# analyzed) & (63) & (52) & (315) \\
\hline
\end{tabular}

\end{center}

\textsuperscript{479} \textit{Id.}

\textsuperscript{480} The statistics provided and, hence, the analysis performed, do not include life sentences imposed on male or female inmates.

\textsuperscript{481} \textsc{Missouri Department of Corrections, Time Served Prior To First Release in Months, Year: 1987, Table 3.}

\textsuperscript{482} \textsc{Missouri Department of Corrections, Time Served Prior To First Release in Months, Year: 1991, Table 4.}
The 1987 and 1991 Missouri data on releases lends credence to the theory that women are treated more leniently as to time served in Missouri’s prisons than men. The statistics also demonstrate that there has been some decrease in the disparity between the sentences served by men and women in these offense categories between 1987 and 1991. However, in 1991 women served shorter sentences, on average, than men for the crimes of arson, assault, burglary, damage to property, drug charges, escape, family offenses, fraud, homicide, robbery, sex offenses, stealing, stolen property, and traffic offenses.

b. Women Serve Longer Sentences than Men in Some Offense Categories

In 1987, women released from prison actually served longer sentences than men convicted for similar offenses in five offense categories. The average sentences served for women were longer for the crimes of assault, commercial sex, family offenses, probation violations, and stolen vehicle offenses. Women’s average sentences for those crimes were 102% to 203% of men’s average sentences.483

The 1991 statistics show that women continued to serve longer sentences in some offense categories. Women released from prison in 1991 served longer average sentences for six crimes: family offenses, forgery, kidnapping, probation violation, sexual assault, and stolen vehicle offenses. Women’s average sentences served for these crimes ranged from 102% to 111% of men’s average sentences served.484

<table>
<thead>
<tr>
<th>OFFENSES FOR WHICH WOMEN SERVED</th>
<th>LONGER SENTENCES IN 1991 (IN MONTHS)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Probation Violation</td>
<td>Sexual Assault</td>
</tr>
<tr>
<td>Mean for Women</td>
<td>18.17</td>
</tr>
</tbody>
</table>

483. MISSOURI DEPARTMENT OF CORRECTIONS, TIME SERVED PRIOR TO FIRST RELEASE IN MONTHS, YEAR: 1987, Table 3.

484. MISSOURI DEPARTMENT OF CORRECTIONS, TIME SERVED PRIOR TO FIRST RELEASE IN MONTHS, YEAR: 1991, Table 4. Kidnapping is excluded from this comparison because only one woman was released in 1991, after serving 182% of the mean sentence served by 60 men released after serving kidnapping convictions. The inclusion of kidnapping data in the comparison would skew the result severely.
MISSOURI LAW REVIEW

OFFENSES FOR WHICH WOMEN SERVED LONGER SENTENCES IN 1991 (IN MONTHS)

<table>
<thead>
<tr>
<th>Offense</th>
<th>Mean for Men</th>
<th>Sexual Assault</th>
<th>Stolen Vehicle</th>
<th>Forgery</th>
<th>Family Offense</th>
<th>Kidnapping</th>
</tr>
</thead>
<tbody>
<tr>
<td>Probation Violation</td>
<td>16.32</td>
<td>64.99</td>
<td>27.67</td>
<td>20.39</td>
<td>16.28</td>
<td>72.44</td>
</tr>
</tbody>
</table>

c. Statistics Demonstrate Decreased Disparities in Time Served by Men and Women

The statistics over the last five years reveal a decreased disparity in time served by men and women for these crimes. The greatest disparity in time served by men and women for such crimes in 1987 was for commercial sex offenses. Women released from prison in 1987 served, on average, twice as much time (seventeen months for women, eight and one-half months for men) as men released that year for commercial sex offenses. The greatest disparity in time served by men and women released in 1991 was for probation violation. Women released from prison in 1991 served, on average, two months longer (11%) than men served for probation violations. A trend toward more equivalency in time served by men and women is suggested by the data. However, disparities in time served by men and women is still apparent from the 1991 data.

d. Possible Explanations for Disparities in Time Served by Men and Women Offenders

It has been suggested that differences in risk factors between men and women offenders explain lesser sentences and earlier parole for women convicted of many offenses. In determining when to grant parole, the Board of Probation and Parole considers a "salient factor score" based upon factors used to try to predict the individual’s likelihood of success if granted parole. The factors considered include prior arrests and convictions, the age of the offender, and the type of offense committed. A history of drug abuse or

485. MISSOURI DEPARTMENT OF CORRECTIONS, TIME SERVED PRIOR TO FIRST RELEASE IN MONTHS, YEAR: 1987, Table 3. The average sentence served by women was 16.9 months; the average sentence served by men was 8.4 months.

486. MISSOURI DEPARTMENT OF CORRECTIONS, TIME SERVED PRIOR TO FIRST RELEASE IN MONTHS, YEAR: 1991, Table 4. Women served an average sentence of 18.17 months; men served an average sentence of 16.32 months.

487. St. Louis Hearing Vol. VI at 100-101.
current drug abuse by an offender may delay the granting of probation or parole.\textsuperscript{488} Despite its use of the salient factor score, the Board has great discretion in deciding whether to release or to continue to incarcerate inmates.\textsuperscript{489}

Most women have fewer prior convictions\textsuperscript{490} and are older at the time of conviction than their male counterparts.\textsuperscript{491} Women also tend to have less history of drug abuse. Statistics also show that women, as a group, are more successful on probation\textsuperscript{492} and are less likely to recidivate.\textsuperscript{493} All of these factors favor women being granted parole earlier during their period of incarceration than their male counterparts.

Because these factors support the granting of earlier parole to women, it is especially difficult to understand why women serve significantly longer sentences than men for those few crimes earlier identified. The later release of women convicted of nontraditional, violent, or aggressive crimes may reflect traditional societal views held by parole authorities who exercise their discretion in these matters to deny parole to women who are incarcerated for such crimes.

\textsuperscript{488} Of those persons presently under the supervision of the Board of Probation and Parole, 79.18\% of the women have no history of drug abuse in the last year; 65.11\% of the men had no drug problem in the last year. Missouri Department of Corrections.

\textsuperscript{489} A recent study challenges the proposition that probation decisions are based upon an objective scoring system, finding that parole decisions are not correlated to salient factor scores. \textit{See Kimberly Kempf, An Evaluation of Parole Decision-Making in Missouri} (1989); Kimberly Kempf and R. Rosenfeld, \textit{Crowding and Correctional Policy: Exploring Alternatives to Current Programs and Practice in Missouri}, MISSOURI POLICY CHOICES 52 (Kempf et al. eds., 1991).

\textsuperscript{490} Kirksville Hearing Vol. III. at 51; Missouri Department of Corrections. A larger percentage of males under the supervision of the Board of Probation and Parole have a history of prior convictions. Of males under the supervision of the Board of Probation and Parole, 53.95\% have been previously convicted; by contrast only 34.10\% of females under the supervision of the Board of Probation and Parole have previous convictions.

\textsuperscript{491} St. Louis Hearing Vol. VI at 86.

\textsuperscript{492} Id. Of the women whose paroles were completed or terminated during 1990, 74.38\% successfully completed parole while 65.45\% of men successfully completed parole. Missouri Department of Corrections.

\textsuperscript{493} Missouri Department of Corrections.
D. Sexual Assault and Rape

In 1990, 99% of the 778 persons arrested for forcible rape in Missouri were male.494 Of 2634 persons arrested for other sex offenses, 95% were male.495 In 1991, 338 men were convicted of rape or sexual assault in Missouri and 88 more convicted of other felony sex offenses.496 The overwhelming number of victims of sexual assault and rape are female, whether adults or juveniles.

The prosecution of sexual assault and rape cases is an area susceptible to sexual stereotyping and, in some cases, to gender-biased perspectives that may distort the quality of justice afforded to both victims and perpetrators. Task forces from other states and scholars on the issue of rape prosecution have identified a number of gender-related stereotypes that historically have clouded the handling of sexual assault cases. One is the belief that the victim "asked for it" and therefore is responsible for the act. This belief may manifest itself in a rape trial when the defendant presents evidence of "reasonable belief of consent." The victim's dress, demeanor, conduct, associations, and life style may become the focus of the trial, rather than the attacker's threats and use of force.

Unlike the victims of other violent personal crimes, victims of rape and sexual assault are sometimes questioned about whether or how vehemently they resisted the attacker. Lack of physical evidence of a struggle, cuts, bruises, and the like may necessitate a stronger examination by the victim on the element of "forcible compulsion." However, if such questioning is allowed to the extent it badgers the victim unreasonably, it creates an atmosphere that unfairly prejudices the victim. The Task Force was particularly concerned that the misconceptions described above may be perpetuated and institutionalized by the admission of unsubstantiated and even discredited social beliefs into evidence by judges in rape and sexual assault trials. Such evidence could communicate these beliefs to the jury and influence the outcome of a rape or sexual assault case.

Because the victims of rape and sexual assault are almost always women and because the perpetrators are almost always men, the perpetuation of stereotyped gender attitudes by the courts clearly would be detrimental to individuals who come into the system. The Task Force set out to determine

494. 1990 MISSOURI CRIME AND ARREST DIGEST at 22.
495. Id.
496. By contrast, at the same time, only five women were convicted and incarcerated in Missouri for sexual assault or sexual offenses. MISSOURI DEPARTMENT OF CORRECTIONS CALENDAR YEAR 1991 REPORT OF COMMITMENTS AND RELEASES, NEW MALE AND FEMALE ADMISSION STATISTICS.
whether and to what extent gender bias affects the judges, prosecutors, and police of Missouri in handling this area of criminal justice.

1. Reluctance of Victims to Prosecute

Rape is a widely perpetrated, yet underreported, crime.\textsuperscript{497} The victims of sexual offenses are often reluctant to prosecute. It has been estimated that 50 to 80\% of all rapes are never reported. Although the lack of reporting, in part, may be due to a victim’s feeling of embarrassment or fear of retaliation, the manner in which rape cases are investigated, prosecuted, and tried also has a profound effect on the victim’s likelihood of reporting, cooperating with the investigation, and following through with prosecution. Rape victims may feel that police and prosecution will be insensitive to them. Among survey respondents, 97\% of judges and 82\% of male attorneys believed that victims of sexual assault are "usually" or "always" treated with sensitivity by judges and court personnel.\textsuperscript{498} Female attorneys were less convinced, but indicated this was "sometimes" (31\%) or "usually" (52\%) true.\textsuperscript{499}

In their efforts to collect evidence, assess credibility, weigh the strengths and weaknesses of the case, and protect the legitimate rights of the accused, criminal justice authorities may further victimize the victim of rape or sexual assault. The usual procedural complications and delays encountered in the court system may be especially burdensome for the victim of rape or sexual abuse. Continuances, repeated court appearances, and lack of communication between the prosecutor and the victim all provide disincentives for rape victims to cooperate with the prosecution. Rape victims fear, with some justification, that prosecuting the crime through the judicial system may be as emotionally damaging as enduring the crime itself.\textsuperscript{500}

\textsuperscript{497} See generally, Rapes Vastly Undercounted, Study Concludes, L.A. TIMES, April 24, 1992, at 1, col. 3 (estimating that only 16\% of rapes are reported); Record Number of Rapes Reported in U.S. in '90, WASH. POST, March 22, 1991, at A3, col. 4.


\textsuperscript{499} Survey Report at 185, Question No. G25 Attorneys survey.

\textsuperscript{500} In some unfortunate instances, the victims of violent sexual offenses encounter blatant insensitivity in criminal justice personnel in the process. One public hearing witness described a sentencing she attended with two juvenile victims of a rape. The judge, apparently unaware that the victims were present, proceeded to wonder aloud how the "little man" could have committed the acts with which he was charged. According to the witness, the judge used graphic language and acted quite inappropriately. The victims were embarrassed and upset and began crying in the courtroom. After the prosecutor explained the situation to the judge, he apologized for
In some states, gender-biased attitudes by police and prosecutors were found to affect the number of prosecutions for rape and sexual assault. A public hearing witness testified about several studies that found that police and prosecutors failed to pursue large numbers of reported rapes.\footnote{501} A university professor testified to studies showing that police tend to find as "well-founded" only rapes that involve other injury to the victims, the use of a weapon by the perpetrator, or perpetrators who are strangers to the victim; the professor suggested that "date rape" complaints rarely are taken seriously by police, according to such studies.\footnote{502}

2. Missouri's Statutes are Gender Neutral

In Missouri, rape is defined in gender neutral language as "sexual intercourse with another person without that person's consent by the use of forcible compulsion."\footnote{503} In 1991, after several years of debate, Missouri Revised Statute Section 566.085 was enacted to amend Missouri's laws on rape, sodomy,\footnote{504} and sexual abuse in the first degree.\footnote{505} As a result, prosecution of a spouse for those offenses is now possible in Missouri.\footnote{506}

Some legal commentators suggest that the State's burden of proof in a rape case is subject to a different standard than proof of other crimes.\footnote{507} A prosecutor testifying before the Task Force concurred:

If you're robbed, no one is going to ask why you were out on the street at that particular hour of the night or wearing that

\begin{flushright}
\end{flushright}

\begin{flushright}
501. Springfield Hearing at 61. A September 1991, Oakland, California report found that the local police department had dropped, after only minimal investigation, 203 reported rape cases.
\end{flushright}

\begin{flushright}
\end{flushright}

\begin{flushright}
\end{flushright}

\begin{flushright}
504. Id. § 566.060.
\end{flushright}

\begin{flushright}
505. Id. § 566.100.
\end{flushright}

\begin{flushright}
506. Under State v. Thurber, 625 S.W.2d 931 (Mo. Ct. App. 1981), it had been firmly established that the non-marriage of victim and perpetrator was an essential element of the crimes of rape and sodomy. Id. at 933. The recent statutory advances are important steps in achieving criminal justice for married victims who, until 1991, could be victimized by such crimes without legal recourse. Now that the legislature has equalized marital rape and non-marital rape by statute, it is up to the criminal justice system to see that the offense is treated equally as to arrest, prosecution, conviction, and sentencing.
\end{flushright}

\begin{flushright}
507. See generally Susan Estrich, Rape, 95 YALE L.J. 1087 (1986).
\end{flushright}
particular outfit that enticed this person to rob you, but if you’re raped, you’re responsible for it in some way.\textsuperscript{508}

The assumption that the victim may be in some way responsible manifests itself at trial by the argument that she did not resist sufficiently. In Missouri, there is no requirement of utmost \textit{resistance} by a victim of rape in the face of threatened violence.\textsuperscript{509} Yet, where there is doubt about the victim’s resistance, it is sometimes argued that the act was not forcible or that the victim consented to sexual intercourse. One prosecutor asserted that, in a sexual assault case where consent is at issue, the burden of proof for the State is greater due to societal views reflected by juries.\textsuperscript{510} Lack of consent is the most difficult to prove in cases of acquaintance rape or so-called "date rape." Judges and attorneys agreed that prosecution in such a case is less likely.\textsuperscript{511}

The majority of those who responded to the Task Force survey believed that a sentence received by a sexual offender is shorter when the victim and the offender had a prior relationship. Fifty-five percent of judges, 48\% of female attorneys, and 51\% of male attorneys felt this was the case "sometimes," while 26\% of the judges, 39\% of the female and 34\% of male attorneys said this "usually" occurred.

Finally, a rape victim’s credibility may be attacked more aggressively than other victims’ based on a perception that victims lie about rape. A suggestion that the victim is lying taints rape trials. In response to a survey question, 64\% of judges, 65\% of female attorneys, and 71\% of male attorneys indicated that they believe alleged rape victims fabricate complaints "sometimes," but virtually none believe that it happens "usually" or "always."\textsuperscript{512}

3. Rape Shield Law Subject to Uneven Unenforcement

Missouri enacted a rape shield law in 1977 to provide the victims of sexual assault and rape with some protection against inappropriate questioning

\textsuperscript{508} St. Louis Hearing Vol. V at 69.

\textsuperscript{509} State v. Salkil, 659 S.W.2d 330, 333 (Mo. Ct. App. 1983).

\textsuperscript{510} Survey Report at 187. Question No. G35 Attorneys Survey, Question No. G34 Judges Survey. Eighty-four percent of judges and 78\% of male attorneys felt that "sometimes" or "usually" prosecutors were less likely to proceed on date rape charges. Eighty percent of female attorneys agreed with an additional 11\% of male attorneys stating that this is "always" true.

\textsuperscript{511} Kansas City Hearing at 156.

in court. The law proscribes opinion and reputation evidence of the complaining witness's prior sexual conduct, except under certain circumstances where the evidence is relevant to a material fact or issue.\textsuperscript{513} The statute requires defense counsel to file a written motion and make an offer of proof when evidence proscribed under the statute is sought to be introduced.\textsuperscript{514} The trial court is to hold an \textit{in camera} hearing on the admissibility of the proffered evidence.\textsuperscript{515}

The perceptions of attorneys and judges responding to the Task Force survey were split by gender in their views of the enforcement of the statute. Ninety-four percent of judges and 80\% of male attorneys reported that judges "always" or "usually" exercise appropriate control to protect the complaining witness from improper questioning.\textsuperscript{516} Only 52\% of female attorneys responded that this was "always" or "usually" true. Similarly, 91\% of judges and 81\% of male attorneys responded that judges "always" or "usually" interpret the rape shield law strictly, excluding evidence of a victim's prior

\begin{table}
\centering
\begin{tabular}{lccc}
& \% All Judges & \% Female Attorneys & \% Male Attorneys \\
Always & 18 & 8 & 16 \\
Usually & 76 & 44 & 64 \\
Sometimes & 6 & 37 & 18 \\
Seldom & 0 & 8 & 1 \\
Never & 1 & 4 & 0 \\
(# analyzed) & (117) & (79) & (463) \\
\end{tabular}
\end{table}

\textsuperscript{513} MO. REV. STAT. § 491.015 (1986).
\textsuperscript{514} Id. § 451.015.3.
\textsuperscript{515} Id.
\textsuperscript{516} Survey Report at 187, Question No. G33 Attorney Survey, Question No. G32 Judges Survey. Judges exercise appropriate control during trial proceedings to protect the complaining witness from improper questioning.
sexual conduct. Only 54% of female attorneys responded that this was "always" or "usually" true.

Public hearing testimony suggested problems in the administration of the statute by trial court judges. One prosecutor noted that judges do not always hold defense counsel to its requirements. Another prosecutor testified to the "slow erosion of important elements of the rape shield law." Several examples were described by public hearing witnesses. One attorney described a proceeding during which a trial judge allowed questions about the diapers the complaining witness had purchased. These questions ostensibly were used to establish that the witness was returning home from the store, but had allowed the admission of evidence that the victim was an unmarried mother. In the opinion of the attorney, this was an example of the failure of the judge to enforce the statutory protection embodied in the rape shield law.

In another case, the judge informed the prosecutor that he would allow evidence of intercourse that had occurred seven days prior to the date of the alleged rape under the statutory exception allowing evidence of alternative sources of semen. This evidence eventually was allowed despite the fact that the seven day time period had elapsed. The prosecutor in question believes that this was the kind of prejudicial evidence that the rape shield law was enacted to keep out. Finally, a victim's advocate suggested that, despite the protection afforded by the rape shield law, juries are prejudiced simply by hearing the attorneys' objections to such evidence.

The importance of keeping evidence of the victim's sexual activity out of the jury's hearing is underscored by the Task Force survey results. Judges and attorneys responding to the surveys believe that juries are less likely to

<table>
<thead>
<tr>
<th></th>
<th>% All Judges</th>
<th>% Female Attorneys</th>
<th>% Male Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>18</td>
<td>15</td>
<td>21</td>
</tr>
<tr>
<td>Usually</td>
<td>73</td>
<td>39</td>
<td>60</td>
</tr>
<tr>
<td>Sometimes</td>
<td>9</td>
<td>38</td>
<td>17</td>
</tr>
<tr>
<td>Seldom</td>
<td>0</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>Never</td>
<td>0</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>(# analyzed)</td>
<td>(112)</td>
<td>(74)</td>
<td>(415)</td>
</tr>
</tbody>
</table>


519. Springfield Hearing at 34.
520. Cape Girardeau Hearing Vol. I at 27.
521. Id. at 28.
convict a defendant in a rape case when the victim has been sexually active. Ninety percent of judges, 86% of female attorneys, and 84% of male attorneys indicated that is "always," "usually," or "sometimes" true.523

Despite hearing testimony that indicated uneven or lax enforcement of Missouri’s rape shield law at the trial court level, courts have affirmed exclusion of evidence defendants contended was relevant and admissible in a number of appellate decisions.524 In several other cases, trial courts narrowly construing exceptions to the rape shield law have been reversed on appeal by appellate courts holding that excluded evidence was admissible.525

4. Sexual Stereotypes May Taint the Handling of Rape Cases

Although the rape shield law provides some protection for the victim in the courtroom or on appeal, the sexual history of the victim is still the subject of police investigation and may be the basis for a decision not to prosecute a rape case. One rural prosecutor candidly admitted that he does not file on "bad rapes," which he defined as "date rapes" or rapes that involve no other injury to the victim. He described his policy as a resource decision, one that he feels bad about but follows just the same.526

Even if the police bring charges and the prosecutor proceeds on a rape case, judicial pressure may be brought to drop a case that a judge perceives as a "bad rape." One prosecutor testified that she was advised by a trial judge to drop a rape case "because the alleged victim had the reputation of being a prostitute."527 The long-standing cultural belief that "only good girls can be raped" once was embodied by statute, requiring proof of " chastity" as an element in a rape case. Modern Missouri case law has rejected the notion,528 yet it may still affect the assessment of such a case.

524. See, e.g., State v. Madsen, 772 S.W.2d 656 (Mo. 1989); State v. Osterloh, 773 S.W.2d 213 (Mo. Ct. App. 1989); State v. Farmer, 719 S.W.2d 922 (Mo. Ct. App. 1986); State v. Young, 668 S.W.2d 263 (Mo. Ct. App. 1984); State v. Salkil, 659 S.W.2d 330 (Mo. Ct. App. 1983).
525. See, e.g., State v. Ray, 637 S.W.2d 708 (Mo. 1982); State v. Sherman, 637 S.W.2d 704 (Mo. 1982); State v. Gibson, 636 S.W.2d 956, appeal after remand 684 S.W.2d 413 (Mo. 1982); State v. Murray, 842 S.W.2d 122 (Mo. Ct. App. 1992); State v. Douglas, 797 S.W.2d 532 (Mo. Ct. App. 1992).
Several public hearing witnesses testified that female jurors are more skeptical than male jurors of claims of rape and will not convict in rape cases.529 One prosecutor explained that jurors tend to look for reasons why the victim was raped and hold the victim responsible for the crime committed against her.530 However, another prosecutor disagreed with this perception, citing her own jury trial experience. She has obtained rape convictions with juries of ten or more women. Her assessment is that the public and juries can be educated on the difficult issues of consent and "date rape." She agreed that many jurors tend to believe that some rape victims "asked for it," but asserted that education can counteract those ingrained biases.531

5. The Use of Victim Advocates Touted

The use of victim advocacy programs was the subject of considerable testimony at the public hearings. Prosecutors and victim advocates testified that the victims of sexual offenses are often traumatized by their experiences in the court system.532 They agreed that victim advocacy programs are of great help in preventing or overcoming the trauma. One prosecutor spoke about a victim advocacy program funded initially through a grant and now through the county commission.533 He supported the use of victim advocates through the prosecutor’s office. Another prosecutor testified that victim assistance programs are helpful in prosecution, noting that the program in his county is one of only about ten such programs in the state, most of which were started in the last six years.534 Judges and attorneys responding to the survey generally agreed with this perspective, with 86% of judges and 84% of attorneys responding that advocates "always," "usually," or "sometimes" improve the rate of prosecution.535 The variation in responses may be a result of the limited use of such programs in the state and, consequently, the limited experience of judges and attorneys with the programs.

"Victim advocates" or "legal advocates" can provide assistance both to victims and prosecutors. Victims who are fearful of the system can be educated about the procedural steps required to get through the prosecution by advocates working closely with prosecutors. Victims who are in need of

531. Kansas City Hearing at 171.
534. Springfield Hearing at 40.
emotional assistance can gain strength and find empathy through such services. Prosecutors, cooperating with victim advocates, may actually achieve stronger cases and better cooperation from victim witnesses. The availability of victim assistance programs is limited in Missouri, often found only in the larger urban areas.

The increasing use of victim advocates will present some additional issues for legal proceedings. One victim advocate testified that defense attorneys have taken issue with her role in the proceeding. Attorneys have suggested to the judge and the jury that she has "coached" the victim. In one case the defense attorney brought up the victim advocate repeatedly in his argument to the jury. The advocate felt that this practice, which was allowed by the judge, was inappropriate and prejudicial to the victims.536

E. Recommendations

1. For the Missouri Supreme Court

a. The Missouri Supreme Court should direct the courts and encourage state and local authorities to collect and compile data regarding male and female offenders at all stages throughout the criminal justice system. The Missouri Supreme Court should direct the courts and encourage prosecutors, local authorities, and the Department of Corrections to maintain statistics concerning the handling of sexual assault and rape cases (including charging decisions, prosecution rates, conviction rates, sentencing decisions, and probation and parole decisions) and provide for the annual collection and compilation of the data.

Detailed statistics should be kept and collected annually for the criminal justice system by the courts, prosecutors, and local and state enforcement and corrections officers. The data should show gender, race, persons arrested and offense involved, bail set, charges filed, plea bargains, charges dismissed, guilty pleas, jury or bench trial, conviction or acquittal, sentencing by judge or jury, sentence ordered, the facility to which defendant is sent, and sentence served. Much of this information is not compiled or collected. The lack of data hampers inquiries such as those undertaken by the Task Force here, the purpose of which is to examine and improve the quality of justice in Missouri. The routine maintenance of such data would permit periodic comparison and evaluation of the treatment of offenders by jurisdiction, gender, race, and other pertinent factors. The limited data available rarely are presented by gender and race. The absence of such data precludes an

evaluation of gender fairness in the application of criminal justice in this state.

At present, the Missouri State Highway Patrol publishes some state-wide data pertaining to arrests. The Office of State Courts Administrator maintains some state-wide data on criminal court dispositions, but could provide no data on the gender or race of offenders. The Department of Corrections maintains information on offenders incarcerated in the state prison system. No state-wide data is maintained pertaining to incarceration in local jails. The Task Force was unable to locate any data sources for bail decisions, charging, plea bargains, charge dismissals, or guilty pleas.

b. The Missouri Supreme Court should undertake with the organized bar a study of arrest, prosecution, sentencing, and incarceration of female and male offenders; a study of the handling of sexual assault and rape cases to monitor whether the cases are being seriously pursued and whether convicted offenders are appropriately punished and treated; and a study to determine whether men and women receive equivalent treatment in jurisdictions that do not have available jail facilities for females.

The Task Force’s analysis of the limited data available reveals the possibility of unjustified disparate treatment in the prosecution and sentencing of male and female offenders. Women comprise 20% of total arrests statewide, but represent only 6% of state prison inmates and, in one sample jurisdiction, 10% of jail inmates. A review of the average sentences imposed and served also reveals disparities between male and female offenders. For most offenses, females receive shorter sentences and serve less time. The more lenient treatment of women may be explained in part by lower risk factors for women, such as past conviction records and recidivism rates. The leniency may also result from consideration of parental responsibilities. However, for a few offenses that involve violent or aggressive behavior, females receive longer sentences and serve more time. The disparities that indicate harsher treatment of violent or aggressive women offenders may reflect cultural biases based on gender.

The Task Force’s review of the available data suggests that a large number of persons arrested for sexual offenses may not be prosecuted or convicted and that those who are convicted are given lesser sentences than those given to some property crime offenders. Data on charging, plea bargains, prosecution, conviction, sentencing, and parole decisions should be maintained, compiled, and further analyzed.

Testimony suggested that the lack of jail facilities for women in rural jurisdictions may result in failure to prosecute or sentence female offenders. The cost of paying another jurisdiction to incarcerate a female offender may provide a financial disincentive to prosecute and incarcerate women.
c. The Missouri Supreme Court should provide educational programs for judges to increase sensitivity to gender bias in the various stages of the criminal process. The Missouri Supreme Court should require mandatory education for judges on the full range of sentencing choices, including alternatives to incarceration and treatment for substance abuse.

Educational programs are needed to inform and educate the judiciary, prosecutors, defense attorneys, and police about inappropriate gender bias in the criminal justice system. The use of discretion invariably offers the opportunity for preconceived gender notions and beliefs to influence decision making. The Task Force is aware that, in some instances, child care responsibilities and factors such as availability of facilities affect sentencing decisions.

d. The Missouri Supreme Court should require mandatory education for judges concerning sexual assault, spousal assault and rape, acquaintance rape, and rape trauma syndrome, and it should encourage similar education for police and prosecutors. The Missouri Supreme Court should provide educational programs for judges regarding gender stereotypes and rape myths that may be employed in the trial of sexual offenses, consent defense, and the application of the Missouri rape shield statute.

Educational programs are needed to inform and educate the judiciary, prosecutors, and police about how sexual stereotypes may taint the handling of sexual assault and rape cases; lead to traumatization of victims; result in failure to prosecute spousal assault, date rape, and acquaintance rape cases; and send messages that undercut the criminal statutes and the legal process. Several witnesses suggested that judges would benefit from increased education regarding rape and sexual offenses. Myths about sexual assault and rape may taint the trial of these cases. For example, myths may result in an excessive focus on the issue of consent and the victim's conduct, rather than on the issue of force and the defendant's conduct.

Public hearing testimony suggested that the trial courts' enforcement of the rape shield statute is uneven and sometimes lax, despite the standards enunciated in reported appellate decisions. Judges, in determining the appropriate sentence to impose, should examine circumstances of date or acquaintance rapes with seriousness equal to that given to rapes of strangers. Continuances in sexual assault and rape cases should be limited so as to minimize the hardship to the victim.

e. The Missouri Supreme Court and the organized bar should encourage the Department of Corrections to establish correctional
facilities for women in locations close to the counties with the largest populations of female offenders to enable ongoing contact between female prisoners and their children.

The location of prisons in Missouri has a significant negative impact on the ability of incarcerated mothers to maintain desired regular contact with their minor children. The number of female offenders in Missouri is increasing. The majority of females incarcerated in Missouri are mothers who are housed great distances from their children and express great concern for the welfare of those children. The children of incarcerated mothers are often dependent upon the state for financial support and are a high risk for juvenile detention and future criminal activity. Relocating female inmates at correctional facilities close to their homes would allow greater contact between incarcerated mothers and their children and may decrease the need for future juvenile and criminal detention.

Existing male correctional facilities in appropriate locations should be scrutinized to determine whether it is feasible to convert them to the housing of female inmates or to convert portions of the facilities to house women while providing appropriate safeguards for the safety and security of both male and female inmates. Planning for new correctional facilities should include consideration of the benefits of locating incarcerated mothers near their families.

f. The Missouri Supreme Court and the organized bar should encourage the Department of Corrections to institute and fund programs facilitating regular contact between incarcerated parents and their minor children on an equivalent basis to male and female inmates at all state correctional facilities. Local correctional authorities should be encouraged to establish community-based alternative sentencing programs that permit non-violent offenders and their children to have regular contact.

Programs that facilitate familial contact, such as the PATCH program for women and the CHIPS program for men, should be expanded and provided with necessary financial support. Innovative programs such as weekend visitation, prison nurseries, and foster care placement of the children of inmates near correctional facilities have been used successfully in other states. Alternative sentencing programs including drug and alcohol treatment could be conducted in halfway houses that permit young children to live with their mothers. Community-based alternative sentencing programs that allow regular contact between incarcerated mothers and children should be expanded and provided with necessary financial support.
g. The Missouri Supreme Court and the organized bar should encourage the Department of Corrections and local correctional authorities to provide educational, vocational, and rehabilitation programs on an equivalent basis to male and female offenders. Programs should be geared to prepare both male and female inmates for gainful employment and should not be based upon stereotypic notions of appropriate "men's work" and "women's work." The Missouri Supreme Court should encourage the Department of Corrections and local correctional authorities to provide physical and medical resources directed to meet the special needs of both male and female inmates.

There is a disparity of resources, programs, services, and facilities available to male and female inmates. Men and women should have access to the same range of basic educational courses without limitations of traditional job segregation that are based upon gender. Accordingly, a broader variety of prison industry jobs should be opened up for women. Drug and alcohol treatment programs, trustee system privileges, and alternative sentencing programs should also be available on an equivalent basis to men and women.

There are few resources to meet the special needs of institutionalized females. Adequate and appropriate clothing designed for females and provisions for meeting female hygiene as well as gynecological and obstetrical needs should be provided. Appropriate medical care for both male and female inmates with medical needs should be provided.

h. The Missouri Supreme Court should convene a task force to conduct a study of the juvenile justice system in Missouri. The task force should be comprised of experts from the Juvenile Court, Division of Youth Services, Division of Family Services, and other appropriate agencies and organizations to facilitate an informed and critical review of the role of gender and race in the treatment afforded to youth in the juvenile justice system.

The Task Force was unable to undertake a thorough analysis of how gender affects the juvenile justice system. The Task Force did not have sufficient funding or expertise in juvenile matters to adequately investigate and report on this area of the law. However, the need for an informed review is apparent.

A limited amount of data presented through public hearing testimony and survey responses suggested disparities in juvenile justice dispositions. Some witnesses suggested that males are more likely to receive a formal court
hearing while females are more likely to receive informal court handling.\textsuperscript{537} Juvenile justice specialists for the Missouri Department of Public Safety presented data that indicates the majority (78 to 79\%) of youth referred to the juvenile court for both violent and non-violent law violations are male. Racial and gender disparities in the treatment of juveniles were documented by a recent study prepared for the State Juvenile Justice Advisory Group.\textsuperscript{538} The study suggested an alarming disparity from one juvenile court jurisdiction to another, particularly between urban and rural jurisdictions.

Female youth reportedly are referred to the juvenile court in disproportionately high numbers for running away and for abuse or neglect. According to a number of experts in the field of criminology, there is a strong correlation between the two statistics.\textsuperscript{539} The implication is that many young Missouri girls who are physically and sexually abused in their homes run away to escape the abuse. There is a need for the juvenile justice system in Missouri to develop sophisticated responses rather than placing these girls in secure detention.\textsuperscript{540}

Finally, it was suggested that the juvenile justice system does not provide adequate services and treatment for the youth and families who come into the system. Many children reportedly are released after inadequately short periods and are not provided with sufficient treatment and support services. Further study of these and other issues in juvenile justice clearly is needed.

2. For the organized bar

a. The organized bar should undertake with the Missouri Supreme Court a study of the criminal justice system and the impact on male and female offenders.

b. The organized bar should develop educational programs for judges, prosecuting attorneys, and criminal defense attorneys on specific areas of criminal law, including rape and sexual assault. These programs should include filing standards for sexual assault and rape cases; technical skills for prosecuting such cases against strangers, acquaintances, and intimate partners of the victims; and the use of the rape shield law.

c. The organized bar should encourage legislation to establish specialized prosecution units that permit victims to deal with one trained

\textsuperscript{537} Columbia Hearing Vol. I at 268.

\textsuperscript{538} KIMBERLY KEMPFF, ET AL., AN ANALYSIS OF APPARENT DISPARITIES IN THE HANDLING OF BLACK YOUTH WITHIN MISSOURI'S JUVENILE JUSTICE SYSTEM (1990).

\textsuperscript{539} Columbia Hearing Vol. I at 272-273.

\textsuperscript{540} Id.
prosecutor in sexual assault and rape cases. It also should establish a public policy that law enforcement officers and prosecutors pursue sexual offenses committed by a spouse, intimate partner, or acquaintance with the same seriousness given to violent crimes committed by a stranger.

d. The organized bar should encourage the Governor and the Missouri Department of Corrections to conduct a review of sentences of offenders convicted of homicide prior to the adoption of Missouri Revised Statute section 563.033 to determine if appropriate consideration was given at trial or in parole proceedings to evidence of battered spouse syndrome as a mitigating factor or defense.

The evidence suggests a need for statistics to be compiled and analyzed as to the treatment of male and female offenders throughout the criminal justice system. The evidence also suggests that judges, prosecutors, and defense attorneys would benefit from increased education in specific areas of criminal law, including rape and sexual assault.

The use of a specially trained staff and a coordinated vertical approach to the prosecution of sexual offenses can alleviate insensitive treatment of victims by the criminal justice system and increase both the reporting and successful prosecution of such crimes. Significant numbers of serious sex offenses may not be heard in court. The offenses may be viewed as "domestic matters" or as "bad rapes," and prosecution may be discouraged or dropped. Such offenses may be inappropriately pursued only as misdemeanors rather than as felonies. Sexual offenses committed by a spouse, intimate partner, or acquaintance are crimes that deserve the same serious investigation, prosecution, and sentencing by criminal justice personnel as that given to other violent criminal offenses.

Public hearing testimony suggested that there are a disproportionate number of women serving life sentences without parole in Missouri's prisons for killing their spouses and intimate partners. A study of men and women incarcerated in Missouri for such offenses was conducted in 1989. The author found that 89% of the female offenders and 57% of the male offenders reported violence in the relationship prior to the partner's death. The author reports that the most frequent sentence received by the female offenders interviewed was a life sentence with no possibility of parole. The most frequent sentence received by the male offenders interviewed was a life sentence with the possibility of parole.541

In the last few years, there has been widespread recognition of the role of domestic violence in many homicide cases involving spouses and intimate

partners. The governors of several states have commuted the sentences of battered spouses upon finding that the circumstances of the crime did not warrant the sentences imposed. The sentences of two Missouri women, who had been precluded from submitting evidence of the "battered spouse syndrome" at their trials, recently were commuted by former Governor John Ashcroft. A systematic review of the sentences of other battered spouses in Missouri's prisons should be conducted to determine whether others should be granted parole or commutation.

IV. TREATMENT OF JURORS, LITIGANTS, WITNESSES, ATTORNEYS, AND JUDGES IN THE COURTROOM

The Missouri Task Force examined whether gender bias exists in the treatment of jurors, litigants, witnesses, attorneys, and judges in the courtroom. Determining whether and how gender bias occurs in the courtroom is important to the evaluation of gender bias in the judicial system in several respects. The court is unique in the extent of power it may legitimately exercise over the lives and livelihood of citizens. Going to court for most people is serious business and often a traumatic experience. Court, with its mysterious procedures and strange language, may be a frightening and intimidating environment. The confidence of jurors, witnesses, and litigants in the judicial system and their respect for the court are determined in large part by the absence or presence of decorum and professionalism in the courtroom. The Georgia Task Force on Gender Bias concluded:

The treatment accorded attorneys by judges, other attorneys, and court personnel obviously plays a significant role in an attorney's success or failure in the courtroom and affects a client's confidence in an attorney's abilities. The integrity of the judicial system rests in part on the public perception that the judiciary exercises its duties with fairness, impartiality, and compassion.

To determine whether and to what extent gender-biased behavior exists in Missouri's courtrooms, the Task Force utilized several sources of information: testimony from the six public hearings held throughout the

542. Virginia Young, Sentences Cut For 2 Who Killed, St. L. POST-DISPATCH, Dec. 17, 1992, at 1A.
state; state-wide surveys of judges, attorneys, court personnel, circuit clerks, and court administrators; a questionnaire regarding court personnel policies and procedures; a review of court rules concerning the use of gender neutral language; reports from the gender bias task forces from other states; and other relevant legal literature on gender bias in the courtroom. The Task Force’s inquiry into gender bias in the courtroom and by the courts focused on several separate but related areas: the relationship between gender and the selection of jurors and forepersons; the existence of inappropriate and demeaning conduct in the courtroom; the relationship between gender and credibility in the courtroom; the courtroom experience for litigants, witnesses, and jurors; the relationship between gender and the allocation of fees and fee-generating appointments to attorneys; gender representation on court committees; and gender-biased language in court rules and documents.

The disparate treatment reported to the Task Force predominantly favors males over females, but there are times when males are victims of biased treatment in the courts.\(^\text{544}\) The Task Force also received information in a large number of areas in which the same conduct was perceived quite differently by judges, attorneys, court personnel, and by males and females. We concur with other commissions that any and all biased treatment that occurs in the courts or by the courts is of concern to the Task Force because such treatment is unfair and unacceptable in a judicial system that demands actual as well as perceived impartiality.\(^\text{545}\)

A. Selection of Jurors and Forepersons

1. Selection of Jurors

The first area of investigation was whether gender bias exists in the summoning of prospective jurors. Of the 115 circuit clerks and 3 court administrators in the state, only 39 responded to questions concerning the summoning of jurors. They advised the Task Force that the pool of names from which they draw jury panels are, in order of frequency, voter registration (100%), driver’s license registration (64%), welfare registration (49%), and motor vehicle registration (37%).\(^\text{546}\) These circuit clerks and court administrators, when asked to best describe the jury selection process followed in their courts, reported that 85% determine qualifications and then

---

544. Males as victims of gender-biased treatment by the courts is treated more fully e.g. in the section of the Task Force report on child custody in the Family Law section of this report, Section II, supra, and the sections on sentencing and probation in Section III, Criminal Law supra.

545. See, e.g., Georgia Commission Report, supra note 543, at 703.

546. Survey Report at 84, Question No. F1 Court Personnel Survey.
summon prospective jurors, while 15% issue summons and then determine qualifications.\footnote{Survey Report at 85, Question No. F6 Court Personnel Survey.} No additional information was provided about the process of "determining qualifications" prior to issuing summonses to prospective jurors reported by the responding circuit clerks and court administrators.

The responses, albeit from a limited number of clerks and administrators, raise questions concerning what the process of "determining qualifications" involves, whether improper pre-screening of a juror's qualifications occurs, and, if so, whether it impacts on the ultimate gender of jury panels. The determination of qualifications prior to the issuance of a summons would appear to violate the statutory procedures and rules governing jury selection set out in Missouri Revised Statute section 494.415,\footnote{Mo. Rev. Stat. § 494.415 (1986). See State v. Henke, 820 S.W.2d 94, 96 (Mo. Ct. App. 1991).} which mandates that the board of jury commissioners randomly draw prospective jurors to be served summonses for jury service and juror qualification forms. Only after the examination of the juror qualification forms is it permissible for the board of jury commissioners to determine that a person is not qualified to serve as a juror and to so notify the person.

The danger of pre-screening prospective jurors is that subjective biases could be used to exclude persons from jury service on nonstatutory grounds. This includes the potential for gender bias. Subjective exclusion of persons from jury service could result in jury panels that are not as representative of the gender mix of the community as would be expected from random selection.

In response to questions about their summons and qualification practices, the responding circuit clerks and court administrators reported that 75% allow potential jurors to be excused from a term of jury service if the prospective juror is a parent with a child care conflict; 55% if the juror is employed with business conflicts; 18% if the juror is a woman in an advanced stage of pregnancy; and 15% if the juror is disabled.\footnote{Survey Report at 84, Question No. F2 Court Personnel Survey.} Of the responding circuit clerks and court administrators, 50% allow potential jurors to defer their service until later in the court term if the potential juror is a parent with a child care conflict; 55% if the juror is employed with business conflicts; 57% if the juror is a woman in an advanced stage of pregnancy; and 53% if the juror is disabled.\footnote{Survey Report at 85, Question No. F3 Court Personnel Survey.} Eighty-three percent of the responding circuit clerks and court administrators report that a judge, if contacted by or on behalf of a juror, would not excuse or defer someone from a term of service.\footnote{Survey Report at 85, Question No. F4 Court Personnel Survey.}
The danger, again, is the potential for jury panels to be skewed by the informal, subjective bias of circuit court personnel. The resulting jury panels might underrepresent women, employed persons, disabled persons, or parents with young children, depending on the particular subjective criteria applied by court employees.

The information obtained by the Task Force is inconclusive to determine whether, or to what degree, any circuit clerks, court administrators, or court employees pre-screen prospective jurors prior to the issuance of summonses or whether prospective jurors are released from service inappropriately. The responses given are sufficient, however, to alert the Missouri Supreme Court that further inquiry should be made to guarantee that the jury summoning process complies with the law and that the process is not vulnerable to the subjective biases of court personnel.

Some witnesses suggested that the use of peremptory strikes also influences the gender balance of juries. There is the perception that gender is a factor that some attorneys consider in making peremptory strikes. Some believe that criminal defense attorneys prefer women jurors because women are perceived to be more sympathetic and less decisive than men. Some believe that civil attorneys dislike women jurors because women are perceived to be less able to understand complex business litigation. The Task Force did not collect statistical information about the use of peremptory strikes or reach any conclusions, but it does note that case law regarding race and gender bias in the use of peremptory strikes is evolving rapidly.

552. Kansas City Hearing at 24-25; Kirksville Hearing Vol. II at 58.
553. Kansas City Hearing at 31-32.
554. In Batson v. Kentucky, 476 U.S. 79, 86 (1986), the Supreme Court held that a prosecutor’s use of peremptory challenges to exclude African Americans from a jury trying an African-American defendant violated the Equal Protection Clause of the United States Constitution. Subsequent rulings of the Supreme Court have expanded this ruling to criminal cases where the defendant is not a member of a cognizable racial group and to civil cases. A criminal defendant may object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors are of the same race. Powers v. Ohio, 111 S.Ct. 1364, 1373-74 (1991). The United States Supreme Court applied the logic of Batson to civil cases in Edmonson v. Leesville Concrete Co., Inc., 111 S.Ct. 2077, 2081 (1991). Batson also has been expanded recently by the Ninth Circuit to apply to exclusion of venire persons on the basis of gender. United States v. DeGross, 960 F.2d 1433, 1439 (1992).
2. Selection of Forepersons

The Task Force attempted to examine whether gender bias occurs in the selection of jury forepersons. The Office of the State Courts Administrator, however, does not require that records be kept concerning the gender of jurors, only whether a particular case was tried by jury. Thus, the office was unable to provide the Task Force with statistical data of the gender of jury forepersons.

There was a seeming disparity between the opinions of judges and lawyers surveyed concerning how frequently a female is elected as a jury foreperson. When asked whether they had tried a case with a female jury foreperson, 36% of the judges said there were female forepersons in as many as one-half of all of their cases; 43% said there were female forepersons in between one case and one-fourth of all their cases. This seemingly conflicts with the responses of 50% of the attorneys who reported that they had never been involved in a jury trial with a female jury foreperson.

Studies of both real trials and mock juries show that, in the vast majority of cases, juries select male forepersons. They also show that this gender bias in choice of foreperson has changed little over the last forty years. Generally, juries are given little information about what qualifications to look for in a potential foreperson. In most instances, the person who is seated at the head of the table or who claims past experience is awarded the position. Affirmative steps may need to be taken in order to diminish the gender bias. One judge suggested that bailiffs should lay the jury instructions on the middle of the table in the jury room rather than hand the instructions to a member of the jury, because placing the instructions under the control of a particular juror may influence the selection of the jury foreperson.
B. Inappropriate, Demeaning Conduct and Sexual Harassment

When the appearance and sexual activity of a female party, or attorney become the focus of the court's attention, whether by comments by the judge or the lawyer, the impartiality of the court must come into question.\textsuperscript{560}

That the presence or absence of decorum and professionalism influences confidence in and respect for the court is obvious. The general manner of conduct, the attitude, and receptiveness of judges and other court personnel to those persons who appear before the court play an important role in the creation of an environment in which fairness and equity is the norm.\textsuperscript{561}

Several questions were asked in the Missouri Task Force survey relating to inappropriate and demeaning courtroom conduct. Responses to the questions showed that the prevalence and the impact of inappropriate and demeaning conduct in the courtroom is perceived very differently by judges and attorneys and by males and females. Judges consistently were less aware of inappropriate and demeaning conduct; attorneys, female attorneys in particular, were more likely to be aware of such behavior.

According to the survey, 42\% of the responding female attorneys had overheard remarks or jokes demeaning to women in court or in chambers made by judges and 53\% had heard such remarks made by attorneys.\textsuperscript{562} Female attorneys observed such conduct over four times more often than responding male attorneys and seven times more often than responding judges (predominantly male).\textsuperscript{563}

The majority of responding female attorneys reported hearing comments about the physical appearance of women in the courtroom and observed such conduct toward females with far more frequency than responding male attorneys and judges.\textsuperscript{564} The responses to a specific hypothetical on the

\textsuperscript{560} Gender Bias in the Courts: Report of the Maryland Special Joint Committee on Gender Bias in the Courts 113 (1989).
\textsuperscript{561} Georgia Commission Report, supra note 543, at 709.
\textsuperscript{562} Survey Report at 69, Question No. D21 Attorneys Survey, Question No. D20 Judges Survey. Remarks or jokes demeaning to women are made in court or in chambers:
1. By Judges—according to 6\% of all judges, 16\% of male attorneys, and 42\% of female attorneys; and
2. By Counsel—according to 12\% of all judges, 23\% of male attorneys, and 53\% of female attorneys.
\textsuperscript{563} Id.
\textsuperscript{564} Survey Report at 70, Question D22 Attorneys Survey, Question No. D21
survey in which a judge commented on the anatomy of an attorney present in
the courtroom were much closer. That behavior was considered "highly
inappropriate" by 97% of female attorneys, 89% of male attorneys, and 85%
of all judges. An expression of disapproval to the offending judge was
considered the best response by 38% of female attorneys, 33% of male
attorneys, and 42% of all judges; a substantially similar percentage in each
category would mention the incident to the chief judge and ask that something
be done.

Responding female attorneys perceived that female judges and attorneys
are addressed by first names or familiar terms two to four times more often
than responding male attorneys. Female attorneys perceived females
addressed by first names or familiar terms twice as often as males are so
addressed.

In response to a hypothetical on the survey, a higher percentage of
female attorneys (85% of female attorneys, 66% of judges, and 63% of male
attorneys) found it "highly inappropriate" if an attorney in a jury trial
addressed a female witness by her first name or a familiar term but addressed
male witnesses by their titles and last names. Most of the remaining

Judges Survey. Comments about the physical appearance of women in the courtroom
are made:

1. By Judges—according to 17% of all judges, 21% of male attorneys, and
41% of female attorneys; and
2. By Counsel—according to 23% of all judges, 39% of male attorneys, and
57% of female attorneys.

565. Survey Report at 73, Question No. D32a Attorneys Survey, Question No.
D31a Judges Survey.

566. Survey Report at 74, Question No. D32b Attorneys Survey, Question No.
D31b Judges Survey.

567. Survey Report at 69, Question Nos. D19 and D20 Attorneys Survey,
Question Nos. D18 and D19 Judges Survey. Women judges and attorneys are
addressed by first names or familiar terms:

1. By Judges—according to 22% of all judges, 20% of male attorneys, and
47% of female attorneys; and
2. By Counsel—according to 15% of all judges, 22% of male attorneys, and
60% of female attorneys.

Men judges and attorneys are addressed by first names or familiar terms:

1. By Judges—according to 27% of all judges, 21% of male attorneys, and
27% of female attorneys; and
2. By Counsel—according to 20% of all judges, 22% of male attorneys, and
28% of female attorneys.

568. Id.

569. Survey Report at 71, Question No. D28a Attorneys Survey, Question No.
D27a Judges Survey.
respondents found it to be "somewhat inappropriate." Some noted that it might be part of an attorney's strategy. The vast majority of attorneys and judges thought the best response was for the judge to ask counsel to approach the bench and suggest a modification of language; a smaller percentage thought the judge should correct the attorney later in chambers; some male and female attorneys thought the judge should correct the attorney in open court.570

In response to the overall question asked on the survey, female attorneys observed inappropriate treatment of female attorneys at a much higher rate than observed by male attorneys and judges. During the past five years, inappropriate treatment of women was observed in the courtroom by 55% of female attorneys, 16% of male attorneys, and 12% of all judges, and in chambers by 43% of female attorneys, 16% of male attorneys, and 10% of all judges.571 On the other hand, 71% of all judges, 58% of male attorneys, and 19% of female attorneys reported that they had observed no inappropriate treatment of women in these environments in the past five years.572

Testimony given in the public hearings, survey responses, and other information furnished to the Task Force cited specific incidents throughout the state in which female jurors, litigants, witnesses, attorneys, and sometimes judges were belittled or demeaned. The Task Force also heard testimony from fathers who reported being belittled and demeaned by judges when they attempted to gain custody or visitation rights to their children. While this conduct was not widespread, it was reported with disturbing frequency.

Some of the incidents of inappropriate, demeaning conduct toward attorneys, witnesses, and jurors included judges and attorneys addressing counsel in the courtroom as gentlemen, even though women lawyers were present;573 questioning whether a female within the bar was a lawyer;574 calling women by familiar, sometimes demeaning terms, such as "honey,"


572. Id.

573. Kansas City Hearing at 10; Cape Girardeau Hearing Vol. II at 44; St. Louis Hearing Vol. IV at 36; Survey Comments by Attorneys at 27, Respondent No. 186.

574. Columbia Hearing Vol. II at 172. "If you’re not wearing a suit with a little floppy bow tie, they don’t identify you as a lawyer . . . ." Columbia Hearing Vol. II at 172-73. "The first time I appeared before a judge I had never met, he looked me up and down and said, ‘You’re a lawyer?!’" Survey Comments by Attorneys at 18, Respondent No. 81.
"little lady," "lady lawyer," "lawyerette," "girlie," and "girl lawyers;" making sexist comments; and making comments about the anatomy or dress of women lawyers in court. Some suggested that remarks that are perceived as demeaning by the recipient may not be intended by the speaker as negative and may even be intended as a joke, or an expression of friendship, affection, or good will. Others pointed out that in a social, rather than professional setting, the same remark may cause somewhat less

575. Survey Comments by Court Personnel at 7, Respondent No. 66; Survey Comments by Judges at 3-5, Respondent Nos. 4, 10, 12, 18; Survey Comments by Attorneys at 19-37, Respondent Nos. 84, 88, 97, 109, 121, 136, 138, 159, 183, 204, 225, 244, 252, 273; Cape Girardeau Hearing Vol. I at 18; Kansas City Hearing at 254; Columbia Hearing Vol. II at 185; St. Louis Hearing Vol. V at 61-63. One attorney commented, "I still hear judges in our circuit refer to women attorneys as 'lawyerettes' or 'lady lawyers.' I know it is in jest, but the implication is that a real lawyer is a male lawyer." Columbia Hearing Vol. II at 185.

576. A judge stated, "Ladies, I don't want to have to break up a cat fight." Kansas City Hearing at 19. During argument on a post-conviction motion, the judge told a woman attorney, "Honey, I can't do that." When the attorney's male boss made the same argument, the judge granted the relief earlier requested by the woman attorney. St. Louis Hearing Vol. V at 62. Judges always look first to male co-counsel. Kansas City Hearing at 11.

577. A judge asked a witness in open court what she had done to her hair. Cape Girardeau Hearing Vol. II at 14. A woman attorney reported that she had been asked to "turn around" in court so that the judge could get a better view. Another reported that, while appearing before a judge for a trial setting, the judge made inappropriate comments regarding her legs. Another reported that a judge informed her in chambers that he preferred trying cases with female attorneys because they were "better to look at than men." Another heard a judge calling a female attorney "swivel hips." In chambers for a motion, a judge told a male attorney that his argument better be "damn good" because the woman attorney was "better looking." Survey Comments by Attorneys at 17-27, Respondent Nos. 71, 81, 147, 186, 195. A rural judge and two attorneys reported that a judge told an assistant prosecuting attorney, in open court before a jury, that she had "her tit in a ringer." Survey Comments by Judges at 4, Respondent No. 12; Survey Comments by Attorneys at 24-34, Respondent Nos. 102, 153.

578. Some witnesses suggested that male attorneys don't always know how to talk to female attorneys. Thus, they may resort to such comments as "what a lovely outfit." Columbia Hearing Vol. II at 235; Cape Girardeau Hearing Vol. I at 18-19.

579. The court may unthinkingly address male co-counsel first although the female is the lead attorney. Kansas City Hearing at 10-11. It's not a matter of trying to belittle female attorneys; it's more a matter of not knowing what is or is not appropriate. Cape Girardeau Hearing Vol. II at 13; Columbia Hearing Vol. II at 235. Most bias is unintentional and often unconscious. Kansas City Hearing at 255.
discomfort to the recipient.\textsuperscript{580} One witness, however, expressed the view that many times jokes are taken as ridicule of women:

Not only the topics, but the kind of jokes, the ridicule, sometimes the friendly ridicule, but ridicule still to issues or the presence of women.\textsuperscript{581}

Others suggested that many veteran female attorneys have learned to overlook comments, jokes, and subtle bias.

When I first started practicing, I listened to a million war stories, I listened to a million dirty jokes, I was called "babe," I was called "sweetie," you know, I just accepted it and assumed that it was going to get better, and I think it did. There are less war stories, there are less dirty jokes and I'm only called "babe" by a couple of judges now. So it has progressed to a certain extent. It angers me that it exists and I suppose I've accepted it, I've swallowed it, I've inhaled it, I've gotten used to it.\textsuperscript{582}

The Task Force also received some reports of inappropriate, demeaning conduct directed at women judges. While some witnesses felt that female judges generally are accorded the same respect as men in the courtroom, others felt that female judges are accorded less respect by members of the bar,\textsuperscript{583} especially in the discussions that occur outside the courtroom, in courthouse hallways, and in discussions on who is going to be appointed or selected to hear a case.\textsuperscript{584} Some witnesses suggested that female judges sometimes are viewed, without cause, as particularly hard on male attorneys and litigants. According to another, some attorneys change judges rather than appear before a woman because they feel that women judges will not be fair to the man's side. Others noted that some attorneys make stereotypical statements about women judges and suggested that women judges tolerate a

\textsuperscript{580} Kansas City Hearing at 17-17, 29, 255. Social stereotypes in the community may be the biggest continuing factor in gender bias. Kansas City Hearing at 32-33; Cape Girardeau Hearing Vol. I at 18.

\textsuperscript{581} Columbia Hearing Vol. II at 191-192.

\textsuperscript{582} St. Louis Hearing Vol. V at 32.

\textsuperscript{583} According to a former judge: "Females in authority are tested and many times treated differently than males in authority. For instance, a male judge can request or even demand that attorneys follow the rules of the law. Generally attorneys do so without even questioning, generally not resenting, when the male judge does it. But if a female judge does the same, it can prompt [derogatory names and comments from attorneys]." Columbia Hearing Vol. II at 210.

\textsuperscript{584} St. Louis Hearing Vol. V at 53; Columbia Hearing Vol. II at 178, 197.
tremendous amount of sexism. Another suggested that the small number of women judges in Missouri puts women judges under extra scrutiny, observing that a woman who becomes a judge has to be better than any other judge: "Nobody is going to say, 'Well, that's what happens when you put a man on the bench.'"

The Task Force also received a small, but disturbing, number of complaints of persons being subjected to unwelcome verbal and physical advances in the courtroom environment. Several persons noted the two incidents in 1990 and 1991 in which women litigants in one case and women employees in the other complained of being sexually harassed by two judges from mid-Missouri. The first judge resigned before any action was taken against him. The Commission on Retirement, Removal and Discipline of Judges recommended suspension without pay for thirty days for the second judge. He resigned while the matter was being reviewed by the Missouri Supreme Court. No action was taken to revoke or suspend either judge’s license to practice law or to publicly reprimand either judge.

Under Missouri Supreme Court Rule 12.07, after an investigation, the Commission on Retirement, Removal and Discipline of Judges may institute

---

585. Columbia Hearing Vol. II at 226-27; id. Vol. I at 47-48. "I have heard male attorneys and judges comment that the governor has a 'slut' on the court, when a female is appointed." Survey Comments by Attorneys at 25, Respondent No. 158.

586. Columbia Hearing Vol. II. at 200.

587. "A male judge has been known to call female jurors at home, without being welcomed to do so, to ask them to have dates or drinks with him. A male judge has called female jurors into chambers for unannounced private 'conversations' of a personal nature." Survey Comments by Attorneys at 24-25, Respondent No. 156. "I have witnessed a circuit judge try to pick up a woman juror at the close of trial." Survey Comments by Attorneys at 42, Respondent No. 242. "A judge called a female law enforcement officer into his chambers and proceeded to ask her about her personal life." Survey Comments by Attorneys at 23-24, Respondent No. 145.

588. Bill Smith, Women Accuse Judge; Sexual Pressure Cited in Chambers, St. L. POST-DISPATCH, July 13, 1990, at 1, 9; Terry Ganey, Panel Urges Suspension of Associate Judge, St. L. POST-DISPATCH, June 19, 1991, at 4C; Steven Bennish, Penalty Likely to Stand; Judicial Misconduct Runs Gamut of Offenses, COLUM. DAILY TRIB.

589. Some attorneys and judges criticized the response of the Commission on the Retirement, Removal and Discipline of Judges. A judge commented: "The associate circuit judge in [mid-Missouri] allegedly held a knife to an employee's throat and fondled her. [It was recommended that] he be suspended for 30 days. This behavior underscores that he should never sit as a judge at any time and should be permanently removed." Survey Comments by Judges at 4, Respondent No. 12; written comments submitted to St. Louis Hearing.
formal disciplinary proceedings against a judge.590 Removal from office is the most severe penalty available to the Commission.591 The Commission’s decisions are reviewable by the Missouri Supreme Court.592 The appropriate person or entity to initiate a disciplinary action in regard to a lawyer’s license to practice law is the chief disciplinary counsel or a circuit bar committee, both of which function independently of the Missouri Supreme Court.

Several witnesses suggested the need for increased training for judges, lawyers, and court personnel on gender issues, including sexual harassment. One witness noted, "Sometimes [these types of] lectures are afforded great attention; sometimes the lectures are scoffed at, laughed at."593 Another suggested that "contrary to what people expected, the Eighth Circuit Judicial Conference program on ‘Gender Bias in the Courts’ in 1990 was well attended, mostly by white males. Everyone learned something."594 Several suggested that attorneys, judges, and court personnel be provided guidelines by the Missouri Supreme Court or the organized bar for conduct in the courtroom. The Massachusetts and Florida Supreme Courts recently adopted Courtroom Conduct Handbooks that might serve as guides for a Missouri handbook.595 A judge submitted a one-page brochure from another jurisdiction demonstrating a similar, but briefer, approach.596

The Task Force is aware that no single directive or report alone will be successful in eradicating inappropriate behavior based on gender from the courtroom. However, it is imperative that judges, attorneys, and all other court personnel be made aware of inappropriate, gender-biased behavior, and the detrimental effect of such behavior on the Missouri justice system. The Missouri Task Force joins with commissions in other states, which also have reported such behavior in the courts, in recommending that circuit clerks and court administrators develop and conduct regular training for court employees and judges that is designed to increase sensitivity to sexual harassment and to the subtle and overt manifestations of gender bias sometimes directed against attorneys, jurors, witnesses, and litigants. The Task Force also recommends that judges monitor behavior in courtrooms and chambers and swiftly intervene to correct lawyers, court personnel, and others who engage in

590. MO. SUP. CT. R. 12.07(b).
591. Id. 12.07(c).
592. Id. 12.07-23.
593. Columbia Hearing Vol. II at 216.
594. Written statements submitted to St. Louis Hearing.
596. See Hon. Lorenzo Arrendondo, Gender Bias in the Courts: Combatting Stereotypes, CRT. REV. (Fall 1989).
gender-biased conduct. Bar associations must also develop and conduct informational campaigns designed to make members aware of the incidence and consequences of sexual harassment and gender-biased conduct toward jurors, litigants, witnesses, attorneys, and judges.

The Task Force encourages the Missouri Supreme Court to adopt Canons 3B(5) and 3B(6) of the 1990 A.B.A. Model Code of Judicial Conduct:

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge’s direction and control to do so.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.597

Canons 3(B)(5) and 3(B)(6) of the 1990 A.B.A. Model Code attempt to deal with behaviors relating to the duties of the office that display inadvertent bias or sexual harassment. The commentary suggests that a judge must refrain from speech, gestures, or other conduct that could reasonably be perceived as biased or harassing and must require equal standards of conduct to all those subject to the judge’s direction and control.598 Furthermore, the 1990 Code admonishes judges to avoid "facial expression and body language, in addition to oral communication" that reasonably could be perceived as biased or harassing and to be alert to behavior by others in the court that may be perceived as prejudicial.599 This recommendation parallels


599. Id.
recommendations made by other state commissions and task forces on this issue. 600

The Task Force also encourages the Missouri Supreme Court to include a Disciplinary Rule in the Missouri Rules of Professional Conduct for attorneys similar to the following:

In representing a client, a member of the bar shall refrain from engaging in conduct that exhibits or is intended to appeal to or engender bias or prejudice against a person on account of that person's sex, race, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that bias is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers, or any other participants.

This provision is consistent with the proposed amendment to the Judicial Code and similar to that proposed by other state task forces and commissions. 601

C. Credibility

A fact-finding process based on gender considerations is not consistent with a model of justice that requires due process and equal protection of the law for all persons who appear before the court. To the extent that any judge or attorney accords less credibility to the claims of litigants and witnesses because of their gender, the fact-finding process becomes a biased one. 602

In the fact-finding process, the credibility of a participant is crucial in determining success or failure or achieving serious consideration of claims before the court. Whether a person is viewed as believable, and as one who should be taken seriously, should not be influenced or determined by stereotypic views of gender roles or behaviors.


601. See, e.g., Colorado Report, supra note 600, at 119, 131 (1990); Florida Supreme Court Gender Bias Study Commission 37, 236 (1990).

Credibility, defined in its fullest sense, means whether a person is "believable, capable, convincing, someone to be taken seriously."\(^6\) While credibility is a concern for both males and females, "social science research shows that in a variety of contexts, both males and females perceive females as being less credible than males in all senses of the term, and that recent years have by no means eliminated these attitudes."\(^6\) Given the perception of women's lesser credibility, judges and other court personnel must be sensitive to how little it takes to undermine a woman's authority and status in the courtroom.\(^6\)

Several questions were asked in the Missouri Task Force survey relating to the credibility assigned to witnesses, experts, and attorneys based on gender and relating to the impact of gender on case outcomes. Responding female attorneys disagreed with responding judges and male attorneys about whether witnesses, experts, and attorneys are received differently as a result of gender. Judges reported no gender differences in credibility assigned to the opinions of experts or the testimony of witnesses; most male attorneys agreed.\(^6\) However, 60% of female attorneys and 20% of male attorneys


606. Survey Report at 67, Question No. D11 Attorneys Survey, Question No. D10 Judges Survey. Judges assign more credibility to the opinion of experts who are:

<table>
<thead>
<tr>
<th></th>
<th>% All</th>
<th>% Female</th>
<th>% Male</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judges</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Female</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Male</td>
<td>3</td>
<td>60</td>
<td>20</td>
</tr>
<tr>
<td>No Difference by Gender</td>
<td>97</td>
<td>39</td>
<td>79</td>
</tr>
</tbody>
</table>

Survey Report at 67, Question No. D12 Attorneys Survey, Question No. D11 Judges Survey. Judges assign more credibility to the testimony of witnesses who are:
responding believe that judges find male experts to be more credible than female experts. In addition, 37% of female attorneys responding believe that judges find male lay witnesses to be more credible than female lay witnesses. Very few respondents indicated a belief that female witnesses and experts ever were accorded greater credibility than males.

The survey also revealed a disparity between the views of judges and male attorney respondents and those of female attorney respondents concerning the effect of gender bias on credibility assigned to arguments of attorneys and the outcome of lawsuits. Judges overwhelmingly reported they assign no difference in the credibility to arguments of attorneys and no difference in the outcome of cases because of the gender of the attorney; most male attorneys agreed. In contrast, 50% of female attorneys and 12% of male attorneys believe that judges sometimes assign more credibility to the

<table>
<thead>
<tr>
<th></th>
<th>% All</th>
<th>% Female</th>
<th>% Male</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female</td>
<td>2</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Male</td>
<td>1</td>
<td>37</td>
<td>7</td>
</tr>
<tr>
<td>No Difference by Gender</td>
<td>97</td>
<td>61</td>
<td>89</td>
</tr>
<tr>
<td></td>
<td>(134)</td>
<td>(394)</td>
<td>(1343)</td>
</tr>
</tbody>
</table>

607. *Id.*

608. Survey Report at 67, Question No. D10 Attorneys Survey, Question No. D9 Judges Survey. Judges assign more credibility to the arguments of attorneys who are:

<table>
<thead>
<tr>
<th></th>
<th>% All</th>
<th>% Female</th>
<th>% Male</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female</td>
<td>1</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Male</td>
<td>0</td>
<td>50</td>
<td>12</td>
</tr>
<tr>
<td>No Difference by Gender</td>
<td>99</td>
<td>48</td>
<td>87</td>
</tr>
<tr>
<td></td>
<td>(135)</td>
<td>(425)</td>
<td>(1330)</td>
</tr>
</tbody>
</table>

609. Survey Report at 8, Question No. D13 Attorneys Survey, Question No. D12 Judges Survey. The outcome of cases is affected by bias against attorneys who are:

<table>
<thead>
<tr>
<th></th>
<th>% All</th>
<th>% Female</th>
<th>% Male</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female</td>
<td>0</td>
<td>37</td>
<td>9</td>
</tr>
<tr>
<td>Male</td>
<td>2</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>No Difference by Gender</td>
<td>98</td>
<td>62</td>
<td>89</td>
</tr>
<tr>
<td></td>
<td>(133)</td>
<td>(398)</td>
<td>(1296)</td>
</tr>
</tbody>
</table>
arguments of male attorneys. Even more significant, 37% of female attorneys and 9% of male attorneys perceive that case outcome is affected by bias against female attorneys.

Responding judges uniformly reported that they are no more likely to interrupt the presentation of male or female attorneys. Male attorney respondents tended to agree with the judges, but 39% of the female attorney respondents perceive that the judges are more likely to interrupt female attorneys more often than males.

Some public hearing witnesses disputed the effect of gender bias on the credibility of the female attorney and its ultimate effect on the decision in a particular case. However, several others suggested that the perceptions and conduct of judges, opposing counsel, and jurors, even if based primarily on societal stereotypes, have the potential to affect the female attorney’s

<table>
<thead>
<tr>
<th></th>
<th>% All</th>
<th>% Female</th>
<th>% Male</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judges</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Female</td>
<td>0</td>
<td>39</td>
<td>7</td>
</tr>
<tr>
<td>Male</td>
<td>2</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>No Difference by Gender</td>
<td>98</td>
<td>59</td>
<td>86</td>
</tr>
<tr>
<td></td>
<td>(135)</td>
<td>(422)</td>
<td>(1333)</td>
</tr>
</tbody>
</table>

610. *Id.*


612. Survey Report at 67, Question No. D8 Attorneys Survey, Question No. D7 Judges Survey. Judges are more likely to interrupt the presentation of attorneys who are:

613. *Id.*

614. Columbia Hearing Vol. II at 190, 225, 235; Kansas City Hearing at 12-13, 16-17, 26-27, 238 (female litigators treated gender neutral; if well prepared, equal treatment).
ability to represent her client and, thus, affect the outcome of a case. 615
One female attorney noted:

When I am in the courtroom and I am addressed by my first name before a jury, I am stripped of my credibility and I become nothing more than a little girl.

Another stated:

I think when it comes right down to it, the grey-suit man up front just commands more ... initial respect. The judges I practice in front of are courteous to females, but just in terms of ... getting their attention, I think males still have that advantage in the pecking order. 616

Some suggested that a female attorney may have to work harder and be better prepared than her male counterpart to overcome a tacit presumption by the court, 617 opposing counsel, 618 or jury 619 that she is less competent because of her gender 620 and that this presumption occasionally may affect the outcome of a lawsuit, 621 particularly when it is a "close call." 622

615. Columbia Hearing Vol. I at 18, Vol. II at 191, 198, 209-210, 225; Cape Girardeau Hearing Vol. I at 20-22; Kansas City Hearing at 13, 24-25, 30, 32-33. A female attorney considers it akin to malpractice to represent clients in rural areas before older judges because she will not be taken seriously. Cape Girardeau Hearing Vol. II at 44. Female jurors express surprise at female attorneys' competence. Kansas City Hearing at 13. Jurors hold female attorneys to a higher standard, especially when they compare young male and female attorneys. Kansas City Hearing at 24-25. Female attorneys must overcome presumptions held by jurors, parties, attorneys, and judges; all are surprised when a female attorney does a good job. Kansas City Hearing at 31-32. Rural judges treat female attorneys very differently, some had never seen "girl lawyers." Kansas City Hearing at 254. A few judges regard male attorneys more credible, to the extent of losing close calls. Kansas City Hearing at 12-13.

616. Columbia Hearing Vol. II at 19. See also Kansas City Hearing at 30-33; Cape Girardeau Hearing Vol. I at 18.


618. Columbia Hearing Vol. II at 191, 198; Cape Girardeau Hearing Vol. II at 40.

619. Kansas City Hearing at 13, 24-25.

620. Columbia Hearing Vol. II at 172-173; Kansas City Hearing at 32.

621. Columbia Hearing Vol. II at 190, 225.

622. See Kansas City Hearing at 12; but see Kansas City Hearing at 238 (perceiving that bias has no adverse impact on result of cases).

https://scholarship.law.missouri.edu/mlr/vol58/iss3/1
A different problem in courtroom credibility was brought before the Task Force by fathers and father advocates who believe fathers are denied custody or visitation of their children because of gender-biased stereotypic views of parenting. Fathers believe some judges see the father's role only in terms of providing money and mothers as the only logical custodians of minor children. If there is a chilling effect on a father's right to seek custody of his children in Missouri because of a perceived reliance by some judges on stereotypic attitudes about parenting roles that place fathers at a disadvantage, the Task Force believes such gender-biased discrimination must be eradicated.

D. Courtroom Experience for Jurors, Litigants, and Witnesses

The courtroom may be a frightening and intimidating experience for jurors, litigants, and witnesses and a particularly scary experience for victims of crimes who are subpoenaed to testify. As one witness noted:

The courtroom can be an intimidating, very frightening place [for victims]. People speak in a language you do not understand. For many who are not literate, the very act of being faced with filling out a form without someone offering to help you precludes your ability to get the legal protection that is available to you.

Nearly two-thirds of female attorneys responding and one-third of male attorneys responding to the survey perceive that women litigants are at least sometimes more inclined to settle claims because they are more intimidated by the judicial system than men litigants; in contrast, 72% of judges and 68% of men attorney respondents believe this situation "seldom" or "never" occurs.

623. See, e.g., Survey Comments by Court Personnel at 7-8, Respondents Nos. 47, 70; Survey Comments by Attorneys at 20-49, Respondents Nos. 76, 93, 103, 159. The substantive law implications of this issue are addressed in greater length in the Family Law section of this report, Section II, supra.
626. Id. Vol. I at 122.
627. Survey Report at 71, Question No. D27 Attorneys Survey, Question No. D26 Judges Survey. Women litigants are more inclined to settle claims because they are more intimidated by the justice system than men litigants:
Several witnesses noted that courthouses are not always safe and that statutes providing for separate waiting areas for witnesses are not enforced, possibly due to the lack of physical space in many courthouses. Bailiffs are not always present or adequately trained. Some victims are exposed to physical and verbal abuse by being required to have contact with criminal defendants or their abusers in domestic violence cases. Victims and perpetrators often wait for court in the same areas. Women and men have been assaulted in courtrooms and hallways waiting for court cases to proceed.\footnote{628} The May 5, 1992 death of a female litigant and the shooting of her attorney during a domestic proceeding in the St. Louis County Courthouse are extreme examples of the dangers.

The Task Force recommends separate waiting areas in the courthouses and endorses all efforts being made to diminish the frightening aspects of court participation and to increase safety in the courthouses. The Task Force also endorses efforts to provide child care facilities for litigants, witnesses, and jurors. Witnesses and survey respondents commented on the burdens placed on women, who often are the primary caretakers.\footnote{629} The need for adequate child care for children of working parents (either facilities within the courthouse or subsidized off-site child care programs) was recognized by 58\% of the male and 53\% of the female employees,\footnote{630} and by several of the presiding judges who responded to the survey.\footnote{631}

\begin{center}
\begin{tabular}{lccc}
 & \% All Judges & \% Female Attorneys & \% Male Attorneys \\
Always & 0 & 2 & 0 \\
Usually & 3 & 17 & 6 \\
Sometimes & 24 & 46 & 26 \\
Seldom & 31 & 21 & 31 \\
Never & 41 & 14 & 37 \\
\end{tabular}
\end{center}

\footnote{628}{Columbia Hearing Vol. I at 126, 145-46, Vol. II at 177.}
\footnote{629}{Survey Comments by Court Personnel at 2, Respondent No. 37; Survey Comments by Attorneys at 17-22, Respondent Nos. 129, 215; St. Louis Hearing Vol. V at 56.}
\footnote{630}{Survey Report at 81, Question No. C14 Court Personnel Survey.}
\footnote{631}{Court Questionnaire Comments.}
E. Fee Awards and Fee-Generating Court Appointments for Attorneys

1. Fee Awards

The perceptions of survey respondents varied greatly about the relationship between gender and the award of attorneys' fees: 43% of the female attorneys, in contrast to 7% of the male attorneys and 1% of the judges, perceive that judges award higher fees to male attorneys; very few respondents perceive that judges award higher fees to female attorneys.\textsuperscript{632} In response to a related survey question, between one-third and one-half of all respondents agreed that higher attorneys' fees tend to be given if the case involves a female client.\textsuperscript{633}

Some witnesses suggested that fee awards may be affected by inappropriate consideration of the age and sex of the lawyer or the client in addition to such legitimate considerations as the amount of time expended, the complexity and detail of the work, and the necessity of a trial; others suggested that older male attorneys are awarded higher fees than other attorneys.\textsuperscript{634} The Task Force does not have sufficient information to draw firm conclusions about gender influence on attorneys' fees, but would urge

\begin{table}[h]
\centering
\begin{tabular}{ccc}
\hline
 & \textbf{\% All} & \textbf{\% Female} \\
\textbf{Female Judges} & 1 & 0 \\
\textbf{Male} & 1 & 43 \\
\textbf{No Difference by Gender} & 98 & 57 \\
\textbf{(127)} & \textbf{(233)} & \textbf{(1028)} \\
\hline
\end{tabular}
\caption{Court awarded attorneys' fees are higher if the attorney is:}
\end{table}

\begin{table}[h]
\centering
\begin{tabular}{ccc}
\hline
 & \textbf{\% All} & \textbf{\% Female} \\
\textbf{Female Judges} & 32 & 43 \\
\textbf{Male} & 1 & 15 \\
\textbf{No Difference by Gender} & 67 & 42 \\
\textbf{(128)} & \textbf{(226)} & \textbf{(1042)} \\
\hline
\end{tabular}
\caption{Court awarded attorneys' fees are higher if the client is:}
\end{table}

\textsuperscript{632} Survey Report at 68, Question No. D16 Attorneys Survey, Question No. D15 Judges Survey. Court awarded attorneys' fees are higher if the attorney is:

\textsuperscript{633} Survey Report at 68, Question No. D15 Attorneys Survey, Question No. B11 Court Personnel Survey. Court awarded attorneys' fees are higher if the client is:

\textsuperscript{634} Kirkville Hearing Vol. III at 18-20; Written comments to St. Louis Hearing.
sensitivity to the gender concerns raised and urge judges to monitor awards for possible gender bias.

2. Fee-generating Appointments

The Task Force inquired into the relationship between gender and fee-generating court appointments. According to the survey, 34% of male attorneys reported that they had received an appointment to a fee-generating case, as compared to 25% of female attorneys.\footnote{635} Notwithstanding these relatively close figures, judges and male attorneys differed greatly with female attorneys in their perceptions regarding to whom judges are more likely to award fee-generating appointments. While 99% of all judges and 84% of male attorneys perceive that the gender of the attorney makes no difference in the award of fee-generating appointments, nearly 50% of female attorneys believe judges are more likely to award such appointments to men.\footnote{636}

Court administrators and clerks were questioned about the policies and procedures in their circuits for appointment of attorneys to fee-generating assignments. According to the respondents, appointments to fee-generating cases are often made informally, rather than systematically. Less than 3% of circuit clerks and court administrators reported a written policy, and only 30% reported the use of a designated list.\footnote{637} Interestingly, female personnel

---

\footnote{635} Survey Report at 65, Question No. D1 Attorneys Survey. Forty-six percent of judges said that 1-25% of fee-generating appointments were awarded to women; 40% stated that 26-50% of such appointments were awarded to women. Survey Report at 76.

\footnote{636} Survey Report at 67, Question No. D9 Attorneys Survey, Question No. D8 Judges Survey. Judges are more likely to award fee-generating appointments to attorneys who are:

<table>
<thead>
<tr>
<th></th>
<th>% All</th>
<th>% Female</th>
<th>% Male</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Judges</td>
<td>Attorneys</td>
<td>Attorneys</td>
</tr>
<tr>
<td>Female</td>
<td>0</td>
<td>8</td>
<td>3</td>
</tr>
<tr>
<td>Male</td>
<td>1</td>
<td>9</td>
<td>47</td>
</tr>
<tr>
<td>No Difference</td>
<td>99</td>
<td>84</td>
<td>50</td>
</tr>
</tbody>
</table>

\footnote{637} Survey Report at 84, Question No. E21 Court Personnel Survey. "What is the policy or practice of your circuit for allocation of fee-generating appointments:"
perceived far more informality in the process than male personnel.\(^{638}\) To ensure that appointments and fee awards are made equitably, the Task Force recommends that judges make appointments utilizing a formal system, that judges and clerks maintain records of such appointments and fees, and that judges adopt fee schedules for comparable work.

**F. Supreme Court, Circuit Bar, and Other Committees**

Some witnesses questioned whether women judges and attorneys serve on Missouri Supreme Court, circuit bar, and other committees with proportionate frequency as men judges and attorneys.\(^{639}\) The Clerk’s Office of the Missouri Supreme Court reports that as of November 1992, 18 (11%) women judges and 141 (89%) men judges, and 25 (25%) women attorneys and 75 (75%) men attorneys serve on Supreme Court committees. Of the chairs, two (7%) are women and 25 (93%) are men. In addition, there are 41 (19%) women attorneys and 176 (81%) men attorneys serving on various circuit bar committees. At this time, only two (10%) of the nineteen judges on the Executive Council are women and there are no women on the six member Commission on Retirement, Removal and Discipline of Judges.\(^{640}\) It should be noted that the number of women judges and attorneys serving on Missouri Supreme Court and circuit bar committees has increased significantly in the past three years.

<table>
<thead>
<tr>
<th>% Court Administrators</th>
<th>% Male Administrators</th>
<th>% Female Administrators</th>
</tr>
</thead>
<tbody>
<tr>
<td>Written Policy</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>Designated List of Attorneys</td>
<td>30</td>
<td>42</td>
</tr>
<tr>
<td>Judges Choose Attorneys</td>
<td>62</td>
<td>42</td>
</tr>
<tr>
<td>Other Practices</td>
<td>5</td>
<td>8</td>
</tr>
</tbody>
</table>

638. *Id.*

639. Written statements submitted to the St. Louis Hearing. One witness also questioned whether women judges and attorneys are featured with proportionate frequency as men judges and attorneys in educational programs of The Missouri Bar and other bar associations. The Task Force did not investigate this issue, but commends The Missouri Bar for the message included on the cover of MoBarCLE programs, which states: "The Missouri Bar continues to encourage all its members, including women and minorities, to participate in the presentation and preparation of MoBarCLE programs and publications."

G. Language in the Courts

Attorneys, perhaps more than any group of people, recognize the power of language. Perhaps because of this sensitivity, most gender bias task forces have undertaken a review of the use of gender-biased language in statutes, court rules, court forms, jury instructions, manuals, correspondence, orders, judgments, bench orders, and other court documents. The Georgia Commission on Gender Bias, like others, concluded:

To eliminate gender bias in the judiciary, the remedies must challenge the systematic use of traditionally stereotyped language .... [F]airness and objectivity [require discontinuation] of the use of sexist pronouns and other language in rules or annotations, forms, and any other types of documents or written or spoken communication.642

Linguists point out that a number of studies have shown that males are more likely than females to feel included by the generic "he."643 Such findings suggest that: 1) gender-biased language reinforces historical patterns of male dominance in our society; 2) gender-biased language is misleading as well as discriminatory because the use of words such as "man" to mean everyone is a false generic, in that it sometimes includes all people and sometimes includes only males; and 3) the use of masculine pronouns to refer to females runs counter to logic and common usage.644

641. The Task Force wishes to thank Professor Melody Daily, Director, Legal Research and Writing, University of Missouri-Columbia School of Law, who prepared the initial draft of this Section.


644. To illustrate their reluctance to embrace the generic pronoun, Miller and Swift quote C. Badendyck, who wrote the following in response to William Safire's statement in the New York Times Magazine that it is "O.K. to say 'Everyone should watch his pronoun agreement'":

Knowing that he and his can be gender neutral, I shall no longer feel there is an odd image filtering through something like: 'The average American needs the small routines of getting ready for work. As he shaves or blow-dries his hair or pulls on his panty hose, he is easing himself by small stages into the demands of the day.' ... How liberating common sense can be.
During the last decade, many publishers, professional organizations, and academic institutions have adopted guidelines for nonsexist, gender neutral usage. For example, the following statement appears in the University of Missouri-Columbia School of Law Student Handbook:

The Law School encourages all students to use language, in both spoken and written communications, which includes both women and men in illustrations, examples, and hypothetical cases and which treats men and women with equal dignity and status. Today, nearly half of all law students are women, and their numbers in the legal profession are growing rapidly. It is inappropriate to fall into a pattern in which only males appear in legal discussions, or in which women appear only in subordinate roles. [Specific suggestions omitted]. Improving our mode of expression in these ways is not automatic; it requires thought and concentration. But accuracy of expression and fairness to others should be characteristic of every lawyer and law student.

In recent years, the legal profession in Missouri has taken steps to eliminate gender bias in statutes, court rules, and other court documents. The Chief Justice of the Missouri Supreme Court entered an order in November 1992 adopting gender neutral revisions to Rule 2 of the Missouri Code of Judicial Conduct. A Missouri Supreme Court committee, chaired by Judge Charles Shangler, has undertaken a review of the Missouri Rules of Civil Procedure during the past three years. The committee’s report, tentatively approved by the court and currently available for comment, includes gender neutral language revisions. During the 1992 term, the Missouri House of Representatives considered, but did not vote on, proposed legislation that would require gender neutral language in all Missouri statutes. The sponsor, a woman attorney from Jefferson County, has pledged to submit the legislation again next year.

In 1991-92; Professor Melody Daily undertook, with several of her students at the University of Missouri-Columbia School of Law, an examination of local rules and model forms used in Missouri’s forty-four judicial circuits and the special rules of Missouri’s three appellate districts. The student evaluators were asked to look for six specific possibilities:

1. Exclusive use of masculine pronouns. Example: "The attorney shall sign his name to all pleadings."
2. Use of language that suggests gender in a situation where gender is irrelevant. Examples: "mother" rather than "parent"; "wife" rather than "spouse"; "policeman" rather than "police officer."
3. Use of gender-biased stereotypes. Example: A document might suggest that all secretaries are women or that all custodial parents are women.

4. The use of "man" to refer to all people. Example: "The 'reasonable-man' standard will be used."

5. Opportunities to promote gender fairness in the judicial system. Examples: "The rules for courtroom decorum could be amended to assure that all judges, jurors, witnesses, and attorneys are addressed with equal respect regardless of gender; or jury instructions could include directives that juries are to be careful in their deliberations to assure that all jurors have an opportunity to speak and that the statements of a juror not be undervalued simply because a juror speaks quietly or with less assertive language than another."

6. Whether the court's dress code treated males and females differently.

The students evaluated a total of fifty documents: local rules for forty-three circuits (the 20th Circuit submitted no local rules), special rules for the three appellate districts, and four sets of forms. They determined that each set of local rules contained at least one example of language that is gender-biased. At one end of the continuum were four sets of local rules with only one gender bias problem each; at the other end was a set of rules with ninety-two examples of gender bias. Only two documents had no gender-biased language. The remaining documents included a total of 666 examples of gender bias, an average of 13.59 examples per document. Although this quantitative analysis indicates the scope of the problem, it does not afford meaningful comparisons among the different documents because some materials were printed and others were typed. In addition, some documents were much longer than others, ranging from 4 printed pages to 345 typed pages; the longer the document, the greater the opportunity for problems.

According to the study, the vast majority of gender-biased language problems in court rules and forms are caused by pronouns. Two documents (the 16th Circuit's "Adult and Child Abuse Forms" and "Leave and Harassment Policies") include no language that is gender-biased. Of the remaining forty-eight documents, forty-seven (all except the 26th Circuit's local rules) have pronoun difficulties. Forty documents sometimes use masculine pronouns to refer to both genders, and seven documents use masculine pronouns to refer to judges and attorneys, but "he or she" or "she" to refer to clerks, court reporters, secretaries, or juvenile officers. It should be noted, however, that even in many of the documents that display some pronoun difficulties, some of the rules have been revised so that judges, attorneys, clients, and witnesses are referred to as "they" or as "he or she."
Only seven documents contain language, other than pronouns, that shows gender bias. Two sets of rules refer to "workmen's" compensation, rather than "worker's" compensation. One "Juror Questionnaire" asks jurors to identify themselves as "married, single, separated, divorced, widower, or widows." Another example of gender-biased language appears in a document titled "Small Claims Booklet," which is apparently written for potential plaintiffs and defendants. In this document, the hypothetical examples are illustrated with male names only; an unincorporated business or a partnership is listed as "John Doe and James Roe d/b/a Roe's Tractor." Another set of local rules refers to a "bail bondsman." A "Jury Qualification Form" asks potential jurors to circle "Mr.," "Mrs.," or "Miss" before their names; "Ms." is not a choice. Apparently, these titles are not meant to disclose marital status because there is a separate question for that information.

The most troubling example of gender-biased language occurs in the following circuit court "Additional Instructions: Dissolutions":

g. In every dissolution case in which child support is involved, I shall expect my guidelines to be followed except where there are unusual circumstances such as the wife receiving the family home and $100,000 in C.D.s and under which circumstances I might consider an amount of support less than the amount indicated by my guidelines. Generally, if the reason why the wife testifies as to the amount of child support she desires under the amount set by my guidelines is because she has a new "gender," I am not impressed. If the case is not contested I am not going to set child support at a lower amount than my guidelines, even though the woman may have engaged in orgies with half the male population . . . .

In addition to its overt sexism, this is an example of a text that purports to state one message while actually conveying a contradictory meaning. The author of this passage seems to be assuring attorneys that in uncontested cases the court will guarantee fair treatment of both spouses by following its child support guidelines. However, the hypothetical examples that feature women suggest four inaccurate assumptions that may cause the parties to the dissolution to be treated unfairly based on gender: 1) women are always the custodial parents; 2) if either party receives a disproportionate share of the marital property, that party will inevitably be the woman ("such as the wife receiving the family home and $100,000 in C.D.s"); 3) married women are more likely than married men to become involved with new partners before the dissolution has been completed ("because she has a new 'gender'"); and 4) married women are more likely than married men to be promiscuous ("even though the woman may have engaged in orgies with half the male
population"). Such assumptions, if stated explicitly, would be rejected by most readers. However, if those assumptions are merely implied, they may escape critical examination and thus insidiously reinforce damaging negative stereotypes.

The evaluators found seven examples of ways other than language in which men and women are treated differently. Three circuits have one dress code for women and another for men. One rule states: "All male attorneys and court officials shall wear coats and ties while in court. Judicial discretion may be exercised otherwise in extreme cases." Nothing is said about appropriate attire for female attorneys. Another rule states: "All attorneys and courtroom personnel will observe the following dress code: Men—Jacket and tie; Women—Dress or pant-suit with jacket." Another states: "All male attorneys and court officials shall wear coats and ties while in attendance upon the Court, provided judicial discretion may be exercised in otherwise extreme situations." A better approach is illustrated by the 26th Circuit’s rule: "Attorneys appearing before the court and their clients shall be dressed in appropriate attire consistent with professional standards and the dignity of the court."

The evaluators concluded that, while some improvements have been made to Missouri’s local and special rules of court, improvements still are needed. In the 1970’s and 1980’s, when many of the local rules were enacted, the overwhelming majority of Missouri attorneys and judges were men. For that reason, the exclusive use of masculine pronouns may have seemed appropriate. Such is not the case today as increasing numbers of women enter the profession. Several years ago the Missouri Supreme Court, in an attempt to bring uniformity to Missouri’s local court rules, drafted "Model Local Rules" and provided them to all the circuit courts. The evaluators found, however, that these Model Local Rules contain twenty-two instances of pronoun problems and one reference to the particular mode of dress for men and women.

Because language shapes our perception of reality, gender-biased language in statutes, court rules, local rules, court forms, jury instructions, and other court documents subtly reinforces the notions that women are not to be treated equally under the law or that women have no role in the legal profession. The Task Force commends the Missouri Supreme Court for the steps it has taken to make Missouri’s Code of Judicial Conduct and Rules of Civil Procedure gender neutral. The Task Force recommends that the Missouri Supreme Court consider the findings of the subcommittee regarding

645. One of the evaluators, a woman who is a first-year law student, wrote the following comment after evaluating a set of rules that used masculine pronouns to refer to everyone: "When I read this, I felt that only men were attorneys and judges in these counties."
local rules and the Model Local Rules. The Task Force further recommends that the Missouri Supreme Court encourage judges, court clerks, and administrators to review court forms, manuals, correspondence, jury instructions, and other court documents to eliminate gender-biased language. The Task Force further recommends that the organized bar promote legislation requiring gender neutral language in all Missouri statutes.

CONCLUSION

Information received by the Task Force suggests that instances of inappropriate courtroom conduct toward jurors, litigants, witnesses, attorneys, and judges are not widespread, but they do occur. Examination of the data shows that current jury selection methods may warrant further review for possible gender biases. There is a perception that, at times, gender may be a determinant of credibility in the courtroom and a factor in the award of fees and fee-generating appointments. At times, language in Missouri statutes, rules, and other court documents is gender-biased. The Task Force concurs with other state commissions that any and all biased treatment that occurs in the courts or by the courts is of concern to the Task Force. Fairness and public confidence in the judicial system demands actual as well as perceived impartiality.

H. Recommendations

1. For the Missouri Supreme Court

   a. The Missouri Supreme Court should issue an Administrative Order that gender-biased behavior in the court environment by the bench, bar, or court personnel is unprofessional and should be corrected.

   Any biased treatment that occurs in the courts or by the courts is unacceptable. By issuing an Administrative Order, the Supreme Court will underscore the importance of eliminating gender bias and indicate to judges, attorneys, and court personnel that gender-biased behavior is inappropriate and detrimental to our system of justice.

   b. The Missouri Supreme Court should develop and require regular training for judicial and court personnel on gender bias, sexual harassment, and the importance of gender neutral language. It should also direct circuit clerks and court administrators to provide education on such issues for all court personnel.
The evidence from both hearings and the survey reflects instances of gender-biased conduct by court personnel and gender bias in statutes, court rules, forms, and other court documents. Because the prevalence and impact of such conduct is often perceived differently by judges, attorneys, and court personnel and by females and males, regular training is necessary not only to correct overt bias, but also to develop sensitivity to the perceptions of others.

c. The Missouri Supreme Court should encourage judges to monitor gender-biased behavior in chambers, courtrooms, and administrative areas and to take appropriate steps to correct lawyers, witnesses, litigants, and court personnel who engage in gender-biased conduct. The Missouri Supreme Court should amend the Missouri Code of Judicial Conduct to include Canons 3(B)(5) and 3(B)(6) of the 1990 A.B.A. Model Code of Judicial Conduct:

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge’s direction and control to do so.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.646

The evidence from both hearings and surveys reflects instances of gender-biased conduct by judges. Judges must be held to the highest standard of conduct because the judges’ activities and behavior affect those subject to

646. See MILORD, supra note 597, at 74-75. Race, religion, national origin, disability, sexual orientation, and socioeconomic status are outside the scope of the Task Force’s mission, but are included here to reproduce the Judicial Code in its original form.
their direction and control. An amendment to the Missouri Code of Judicial Conduct with the Canons set forth above will set the standard for judicial conduct, indicate to the judiciary the importance of eliminating biased and prejudicial judicial behavior, and indicate to attorneys and the public the importance the judiciary gives this issue.

d. The Missouri Supreme Court should amend the Missouri Rules of Professional Conduct to include a Disciplinary Rule similar to the following:

In representing a client, a member of the bar shall refrain from engaging in conduct that exhibits or is intended to appeal to or engender bias or prejudice against a person on account of that person's sex, race, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that bias is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers, or any other participants.

Evidence from both hearings and surveys reflect instances of gender-biased conduct by attorneys, both in and out of the courtroom. Amendment of the Missouri Rules of Professional Conduct with the above provision is consistent with the proposed amendment to the Missouri Code of Judicial Conduct set forth in Recommendation c and with the provision proposed by the task forces and commissions of other states. Such a disciplinary rule would provide a standard of conduct for attorneys and emphasize the importance of eliminating biased behavior.

e. The Missouri Supreme Court should prepare a Courtroom Conduct Handbook for judges, attorneys, and court personnel, similar to that recently adopted by the Florida Supreme Court and Florida Bar.

A number of states in recent years have developed handbooks in response to recommendations from their commissions that studied gender bias. The Florida Courtroom Conduct Handbook was created in response to the 1990 Report of the Florida Supreme Court Gender Bias Study Commission; it is based on an earlier Massachusetts Courtroom Conduct Handbook. Such handbooks serve as educational resources that are readily available and easily understood. They recognize that the prevalence and impact of gender-biased conduct are perceived differently by judges, attorneys, and court personnel and by females and males. They recognize

that much of the bias that occurs in the courts may be unintentional and may result from habit or tradition. The effect of unintentional gender bias should not be underestimated, however, as the prejudicial effect is the same. Whatever the cause, intentional or unintentional, gender bias must be eliminated if the courts are to assure the principles of fairness, equity, and equality in the judicial process.

f. The Missouri Supreme Court should order gender neutral language to be used in all court rules, court publications, forms, manuals, correspondence, jury instructions, and other court documents; encourage judges to utilize gender neutral language; and direct circuit clerks and court administrators to assist in these efforts.

The Task Force commends the Missouri Supreme Court for the steps it has taken to make the Missouri Code of Judicial Conduct and Rules of Civil Procedure gender neutral. The Task Force recommends that the Missouri Supreme Court revise the Model Local Rules and encourage judges, court clerks, and administrators to review other court forms, manuals, correspondence, jury instructions, and other court documents to eliminate gender-biased language.

Attorneys, perhaps more than any group of people, recognize the power of language. Perhaps because of this sensitivity most gender bias task forces have undertaken a review of the use of gender-biased language in court rules, court forms, jury instructions, manuals, correspondence, orders, judgments, bench orders, and other court documents. We concur with the Georgia Task Force, which, like others, concluded:

To eliminate gender bias in the judiciary, the remedies must challenge the systematic use of traditionally stereotyped language. . . . [F]airness and objectivity [require discontinuation] of the use of sexist pronouns and other language in rules or annotations, forms, and any other types of documents or written or spoken communication. The use of proper language by the courts can help dispel a notion of gender bias.648

g. The Missouri Supreme Court should advise circuit clerks and court administrators of the importance of compliance with Missouri Revised Statute section 494.415 regarding jury selection.

Missouri Revised Statutes section 494.415 mandates that the board of jury commissioners shall randomly draw prospective jurors to be served

summonses for jury service and juror qualification forms. The danger of the failure to comply is that subjective bias, including possible gender bias, could be used to exclude persons from jury service on nonstatutory grounds. Subjective exclusion of persons from jury service could result in jury panels that are not representative of the gender mix of the community that would be expected from random selection.

h. The Missouri Supreme Court should aid the courts in exploring ways to improve safety in the courthouses and encourage judges, circuit clerks, and court administrators to explore ways to improve safety in the courthouses.

The courtroom may be a frightening and intimidating experience for jurors, litigants, and witnesses, particularly for victims of crimes who are subpoenaed to testify. Courthouses are not always safe. Victims and perpetrators often wait for court in the same areas. Statutes providing for separate waiting areas for witnesses are not enforced in some courthouses, and bailiffs are not always present nor sufficiently trained. Efforts should be made to provide separate waiting areas, to diminish the frightening aspects of court participation, and to increase courthouse safety. Training programs for judges and court employees will increase awareness of security needs and develop the skills necessary to address problems with court security. Mandatory training for peace officers, under Chapter 590, Missouri Revised Statutes, should include programs on gender bias sensitivity, courthouse security, and the responsibilities of a bailiff.

i. The Missouri Supreme Court should aid the courts in exploring ways to provide on-site child care or subsidized off-site child care for jurors, witnesses, litigants, and court employees. It should also encourage judges, circuit clerks, and court administrators to explore ways to provide such child care.

Courts should explore the need for child care facilities for jurors, litigants, witnesses, and court employees. Witnesses and survey respondents commented on the burdens placed on women, who often are the primary caretakers. The need for adequate child care for children of working parents (either facilities within the courthouse or subsidized off-site child care programs) was recognized by both male and female employees and by presiding judges who responded to the surveys.
2. For the organized bar

a. The organized bar should develop and provide educational programs to sensitize attorneys to the issues of gender bias and sexual harassment of attorneys, litigants, witnesses, court personnel, and judges.

b. The organized bar should work with the Missouri Supreme Court to amend the Missouri Rules of Professional Conduct for attorneys to include a Disciplinary Rule prohibiting gender-biased conduct in the courtroom.

c. The organized bar should work with the Missouri Supreme Court to develop a courtroom conduct handbook.

d. The organized bar should promote legislation requiring gender neutral language in all Missouri statutes.

The evidence from hearings and the survey reflects instances of gender-biased courtroom conduct. Attorneys should be made aware of inappropriate, gender-biased behavior and its detrimental effect on our system of justice. Because the prevalence and impact of such conduct is often perceived differently by judges, attorneys, and court personnel and by females and males, educational programs should be used not only to correct overt bias, but also to develop sensitivity to the perceptions of others. A Missouri Courtroom Conduct Handbook would serve as an educational resource that is readily available and easily understood. The proposed Disciplinary Rule would provide a standard of conduct for attorneys and emphasize the importance of eliminating biased behavior in the courtroom. The use of gender neutral language in statutes, rules, and court documents would help dispel the notion of gender bias in the courts.

V. TREATMENT OF COURT PERSONNEL

The Missouri Task Force examined the possibilities of gender bias not only in the treatment of lawyers, jurors, litigants, and witnesses, but also in the treatment of court personnel. The term "court personnel" or "court employees" includes both elected and appointed personnel: court administrators, circuit clerks, court clerks, judicial secretaries, and court reporters. Court personnel regularly interact with judges, lawyers, litigants, witnesses, and jurors. Court personnel work both in courtrooms and in less formal office settings in the courthouse.

649. See, e.g., Georgia Commission Report, supra note 543, at 718.

https://scholarship.law.missouri.edu/mlr/vol58/iss3/1
To determine the attitudes, perceptions, and experiences of court employees in Missouri, the Task Force collected information from various sources. Court employees had the opportunity to testify at the six public hearings conducted by the Task Force in the fall of 1990. A confidential survey questionnaire was sent to approximately 3550 employees of the Missouri court system. The questions in the survey fell into two major categories: questions regarding the employees' own experiences and questions regarding the employees' perceptions of the treatment of others within the court system. A questionnaire regarding court rules, policies, and procedures was sent to the forty-four circuit courts and the three appellate court districts throughout the state.

Relatively few court employees testified at the hearings; some employees advised Task Force members that they were uncomfortable testifying because they feared being labeled as disloyal, being retaliated against, or creating bad relations in the courthouse. However, more than 700 court employees responded to the confidential survey (approximately a 20% response rate), with nearly fifty adding written comments. Staff in the three appellate districts and in thirty-four of the forty-four circuits responded to the questionnaire regarding court policies.

The four principal areas of concern brought to the attention of the Task Force were job opportunities and compensation; inappropriate and demeaning conduct toward court employees; family leave; and child care facilities in the courthouses. The reports from other state commissions and task forces reveal similar concerns. The Task Force's examination of these issues suggests that in some cases male and female court employees are treated differently because of their gender. In some ways, the biased treatment favors women employees; in others, it favors men. It is also noteworthy that there were a number of instances in which employees perceived differences that may or may not be accurate.

650. See Survey Report, Table 1: Questionnaires were sent directly to 1853 state-paid circuit court employees. They were sent indirectly to 150 state-paid appellate court employees via the court clerk for each appellate division and to 1550 county-paid circuit court employees via the presiding judge in each circuit.

651. Approximately 707 court employees responded for an overall response rate of 20%. Of the 3118 female employees, 530 responded (17% response rate); of the 435 male employees, 171 responded (39% response rate); of the 409 minority employees, 49 responded (12% response rate).
A. Job Opportunities and Compensation

All non-statutory,652 state-paid employees of the circuit court are compensated under the State Pay Plan. Each such employee is classified according to job function and, under such classification, qualifies for a pay range and scale. Although such an employee could be reclassified upon a change in job responsibilities, generally pay increases for employees under the State Pay Plan are system-wide and dependent upon legislative action.

The administrative arm of the Missouri Supreme Court is the Office of the State Courts Administrator. This office was established by the state constitution; its duties are delineated by statute, by Missouri Supreme Court Rule 82.03, and by a series of administrative rules. The State Courts Administrator’s functions that are pertinent to the court personnel are to: 1) develop and recommend personnel and record-keeping policies and procedures and then administer such policies; 2) collect information and data concerning court operations; 3) prepare the judicial budget and administer state monies appropriated for the judicial system; 4) manage the state-paid judicial personnel; and 5) develop and administer judicial education programs.

Court employees expressed mixed opinions in response to the survey as to the role they perceive gender plays in determining job opportunities and compensation within the Missouri court system. Of the employees responding, 37% of the females perceived that women’s opportunities for job advancement in the court system are limited because of gender, an opinion with which 22% of the males agreed.653 At the same time, however, 23% of the males thought that men’s opportunities are limited because of gender, an opinion with which only 9% of the females agreed.654 Thirty-one percent of women employees perceived that men are given preference in appointments to supervisory positions; 9% of the men employees agreed.655 Twenty-two percent of men perceived that women are given preference; 15% of women agreed.656 Twice as many women as men employees responding thought their opinions on work-related matters were given less weight than those of the opposite gender.657

Some employees responding to the survey suggested the existence of inequities in compensation based on gender. Approximately 32% of the female employees felt that compensation for men employees was on the

652. Statutory employees are judges, circuit clerks, court reporters, and juvenile officers.
average higher than that for women with similar experience, a view shared by 6% of the males.\textsuperscript{658} Seven percent of the males and 3% of the female employees felt that compensation for women employees was on average higher than men.\textsuperscript{659} However, the Task Force was unable to undertake the statistical analysis of salaries that would be necessary to verify the comparative treatment of similarly situated male and female employees.

Segregation and stratification of jobs along gender lines within the court system was noted by some witnesses and survey respondents.\textsuperscript{660} The Task Force did not have sufficient data to make a comparison within job categories and could only evaluate the overall work force of the court system. At the top of the system, both in terms of prestige and compensation, are the state court judges, a position that throughout Missouri is heavily male dominated. Of the 342 state court judges, 317 are male (92.1%) and 27 are female (7.9%). At the other end of the spectrum are the circuit clerks, court administrators, court clerks, court reporters, and secretaries, positions that are heavily female dominated. Of the approximately 3550 non-judge court personnel positions, approximately 3100 are female (88%) and 435 are male (12%). One female employee suggested that "[t]he wheels of justice would truly grind to a halt if every Missouri female court employee would simultaneously fail to report to work."\textsuperscript{661}

Some of the perceptions (or misperceptions) as to discrimination in job opportunities and compensation may result from the lack of objective job criteria and annual merit evaluations. A large majority of all court personnel, 71% of women responding and 58% of men responding, identified a need for more frequent performance evaluations and salary reviews.\textsuperscript{662} The lack of criteria was highlighted by one female court employee who submitted a lengthy affidavit:

\begin{quote}
Since coming to work at the [court] in 1982, I have never had a salary or performance review. No one has ever indicated to me that my work is excellent, mediocre, or poor. No one has ever justified a pay increase or no pay increases . . . . There are no guidelines requiring certain criteria for specific positions. Vacancies are never openly advertised. I am extremely disappointed that there is so little regard for equal opportunity for women.\textsuperscript{663}
\end{quote}

\textsuperscript{658} Survey Report at 79, Question No. C7 Court Personnel Survey.
\textsuperscript{659} Survey Report at 79, Question No. C7 Court Personnel Survey.
\textsuperscript{660} See, e.g., Survey Comments by Attorneys at 22, Respondent No. 129.
\textsuperscript{661} Written statement submitted at Columbia Hearing.
\textsuperscript{662} Survey Report at 82, Question No. C18 Court Personnel Survey.
\textsuperscript{663} Written statement submitted at Columbia Hearing.
As to their claims of inequities in job opportunities and compensation, court employees are protected under Title VII of the Civil Rights Act of 1964, which makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin." The Act covers all aspects of employment opportunities, including hiring, promotions, transfers, firing, and compensation. Title VII governs the conduct of coworkers, supervisors, and judges. Court employees also are protected against discrimination by the Equal Pay Act of 1963 and state employment and discrimination laws.

B. Inappropriate, Demeaning Conduct and Sexual Harassment

The Task Force received a small, but disturbing number of reports of inappropriate and demeaning conduct directed toward court personnel, primarily female employees. Some of the reported conduct included referring to clerks and secretaries as "the girls," "dollie," or "sweetie;" telling rude jokes and saying very demeaning things to clerks; and conversations with sexual overtones with secretaries, clerks,

666. Some of the witnesses and survey respondents identified incidents of alleged sex discrimination in the courts. One incident mentioned involved a female employee of the St. Louis County Circuit Court who was not retained as a hearing officer for the juvenile division and transferred to the legal division. That employee successfully brought suit for sex discrimination under Title VII and 42 U.S.C. § 1983 (1988). See Goodwin v. Circuit Court of St. Louis County, 729 F.2d 541, 544-80 (8th Cir. 1984).
667. In Forrester v. White, 484 U.S. 219 (1988), litigated by an attorney from St. Louis, the court held that judges do not enjoy absolute immunity for administrative, legislative, or executive functions and can be held liable under Title VII when acting in an administrative capacity by discharging an employee. Id. at 227-29.
671. Survey Comments by Attorneys at 26, Respondent No. 179.
672. Survey Comments by Court Personnel at 4-5, Respondent No. 53.
673. Survey Comments by Attorneys at 34, Respondent No. 99.
674. Survey Comments by Judges at 3, Respondent No. 18.
and other related court personnel.\textsuperscript{675} According to both female and male employees, remarks or jokes demeaning to women occur at all levels of the court system: sixty-eight women (14\%) and nine men (6\%) employees said they had witnessed such conduct by judges; eighty-seven women (18\%) and sixteen men (10\%) employees said they had witnessed such conduct by attorneys; forty-nine women (10\%) and sixteen men (10\%) employees said they had observed such conduct by court staff; and seventy-eight women (16\%) and thirteen men (8\%) employees said they had observed such conduct by bailiffs and sheriffs.\textsuperscript{676}

The Task Force also received reports from witnesses and respondents of incidents of unwelcome verbal or physical sexual advances by judges, attorneys, bailiffs, and sheriffs toward court employees in hallways, elevators, chambers, and courtrooms.\textsuperscript{677} When asked by the survey whether they ever had been subjected to unwanted verbal or physical sexual advances or harassment, approximately 150 women (27\%) and ten men (4\%) court employees responded "yes."\textsuperscript{678} One female employee reported:

An elected official in my circuit has threatened to go to my superior and tell him sexually offensive remarks about me if I do not pay him either five or ten dollars. I can't go to my supervisor and tell him about this because they are related and I fear I wouldn't be believed and I would lose my job.\textsuperscript{679}

Several persons noted the incident of the judge from mid-Missouri who resigned after charges were made that he sexually harassed five courthouse employees.\textsuperscript{680}

About one-third of those citing incidents of unwanted verbal or physical sexual advances said they did not file formal complaints because they believed "nothing would be done about it" or they were "afraid of consequences."\textsuperscript{681} When asked if their circuit or county had an effective sexual harassment

\textsuperscript{675} Survey Comments by Attorneys at 43, Respondent No. 246.
\textsuperscript{676} Survey Report at 69, Question No. C17 Court Personnel Survey.
\textsuperscript{677} Survey Comments by Court Personnel at 1-8, Respondent Nos. 26, 28, 45, 49, 51, 62, 66, 69; Survey Comments by Judges at 3-4, Respondent Nos. 4, 12; Survey Comments by Attorneys at 43, Respondent No. 260.
\textsuperscript{678} Survey Report at 80, Question No. C10 Court Personnel Survey.
\textsuperscript{679} Survey Comments by Court Personnel at 7, Respondent No. 69.
\textsuperscript{681} Survey Report at 80, Question No. C12 Court Personnel Survey.
policy pertaining to court employees, 51% of the women and 30% of the men employees replied "No." When asked if grievance procedures within the court system were adequate for resolving sexual harassment or other gender-based problems at work, 56% of the women and 41% of the men employees replied "No."

In Meritor Savings Bank v. Vinson, the U.S. Supreme Court categorized the types of conduct in the workplace that are considered actionable under Title VII of the Civil Rights Act of 1964: (1) "quid pro quo" harassment, where unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature are directly linked to the grant or denial of economic benefits; and (2) "hostile environment" harassment, which has the purpose or effect of unreasonably interfering with an individual's work performance or the creation of an intimidating or offensive working environment. The Court concluded that a hostile work environment may adversely affect employees’ commitment to their job, diminish workplace productivity, and injure the morale and psychological well-being of employees, both male and female.

Missouri Supreme Court Administrative Rules provide protections for state-paid employees of the circuit courts. Rule 7, section B.15 recognizes that sexual harassment is unlawful sex discrimination under Title VII and thereby prohibited. An employee has the right to file a grievance and is protected from consequences as a result of this filing. The rule encourages employees to report cases of sexual harassment and discourages them from engaging in such activities. The rule provides for a grievance procedure and includes disciplinary action, including termination, for violators of this rule. Only a few of the courts responding to the Task Force questionnaire recognized the existence of Missouri Supreme Court Administrative Rule 7; the majority of circuit courts reported having no written policy regarding sexual harassment.

682. Survey Report at 81, Question No. C15 Court Personnel Survey.
684. 477 U.S. 57 (1986). Supervisors, co-workers, and judges are governed by Title VII. In light of the United States Supreme Court’s decision in 1988 in Forrester, employees who are sexually harassed by judges may seek redress under Title VII. Forrester, 484 U.S. at 227-29. See Marina Angel, Sexual Harassment by Judges, 45 U. MIAMI L. REV. 817, 837-38 (1991) (author discusses the new Model Code of Judicial Conduct, passed by the A.B.A. House of Delegates in 1990, which specifically prohibits sexual harassment by judges).
686. See generally, Id. at 64-69. See GENDER BIAS IN THE COURTS: REPORT OF THE MARYLAND SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS 83 (1989) (discussing the decision in the context of court personnel).
County-paid circuit court employees are not covered by Missouri Supreme Court Administrative Rule 7 and are not entitled to utilize the grievance procedures under the rule. County commissions can adopt their own local rules governing county-paid employees of the circuit courts. For example, the Newton County Commission of the 40th Judicial Circuit\(^687\) has adopted a "Code of Business Conduct" as a statement of guidelines for proper and ethical individual conduct for all county employees. The Newton County policy prohibits sexual harassment; defines it as implicit or explicit threats or as insinuations that refusal to submit to sexual advances will or could affect a person’s employment; and forbids unwelcome advances, flirtations, propositions, repeated verbal statements regarding one’s anatomy, and sexually suggestive objects or pictures in the work environment. Violations are to be reported to a supervisor or department head; however, there is no articulated provision for punishment for violations of the policy. It is not clear how many of Missouri’s county courts or commissions have adopted such rules for their county-paid employees.

The Missouri Supreme Court adopted a new Policy Manual, effective April 8, 1992, solely for Supreme Court employees.\(^688\) Policy No. C-7 recognizes that sexual harassment is a form of unlawful sex discrimination under Title VII, provides employees the right to file a grievance for sexual harassment, and provides that employees violating the policy are subject to disciplinary action, including dismissal. Policy No. C-6 provides a grievance procedure for the orderly settlement of differences between management and employees. The introduction to the new manual, articulated in Policy No. A-1, expresses the hope that the manual "can be used as a model and an example for all other judicial offices within the judicial department."

The Task Force survey responses from court employees, as well as the questionnaire responses from the various courts, reflect confusion about and, in some cases, the absence of sexual harassment policies or grievance procedures in the Missouri courts. An administrative order from the Missouri Supreme Court and the adoption of sexual harassment policies and grievance procedures by all the lower courts would underscore the importance of eliminating bias and indicate to judges, attorneys, and court personnel that gender-biased behavior is inappropriate and detrimental to our system of justice. In addition to the adoption of sexual harassment policies and grievance procedures for all of Missouri’s employees, the Task Force endorses the development of educational programs for judges, attorneys, and court personnel.

---

\(^{687}\) Newton and McDonald Counties comprise the 40th Judicial Circuit.

\(^{688}\) There are special provisions for law clerks, research attorneys, and judicial executive assistants who work directly for members of the court and are considered to be the judges’ confidential employees.
The Task Force encourages the Missouri Supreme Court to adopt Canons 3B(5) and 3B(6) of the 1990 A.B.A. Model Code of Judicial Conduct.\textsuperscript{689} This recommendation parallels recommendations made by other state commissions and task forces on this issue.\textsuperscript{690} The Task Force also encourages the Missouri Supreme Court to adopt as a Disciplinary Rule in the Missouri Rules of Professional Conduct for attorneys a provision similar to the one proposed in Section IV, supra.\textsuperscript{691} This provision would be consistent with the proposed amendment to the Missouri Judicial Code and similar to that proposed by other state task forces and commissions.\textsuperscript{692}

The Task Force also recommends that the Missouri Supreme Court and the organized bar develop a Missouri Courtroom Conduct Handbook, similar to that recently adopted by the Florida Supreme Court and the Florida Bar.\textsuperscript{693}

\textbf{C. Family and Medical Leave}

More than one-third of the men and women employees responding to the survey indicated that their circuit or county did not have adequate maternity, paternity, or family leave policies.\textsuperscript{694} In response to the Task Force questionnaire to courts regarding maternity, paternity, and family leave policies, twenty-five of the thirty-four responding circuits reported they had no written policies on such leave; only six noted that the policies articulated in Missouri Supreme Court Administrative Rule 7 apply to all state-paid employees of the circuit courts.\textsuperscript{695}

Missouri Supreme Court Administrative Rule 7, Section C.5 provides a maternity leave policy under which accrued annual leave or accrued sick leave may be used toward maternity leave. Six weeks following the delivery is the maximum time allotted unless a physician certifies that the employee

\begin{footnotes}
\footnote{689. See supra notes 597-600 and accompanying text.}
\footnote{691. See supra note 601 and accompanying text.}
\footnote{692. See, e.g., Colorado Report, supra note 690, at 119, 131; Florida Supreme Court Gender Bias Study Commission 37, 236 (1990).}
\footnote{693. See Florida Court Conduct Handbook: Gender Equality in the Courts (available from the Florida Bar).}
\footnote{694. Survey Report at 81, Question No. C13 Court Personnel Survey.}
\footnote{695. Neither employees nor the courts were surveyed as to other medical leave policies.}
\end{footnotes}
is medically unable to return to work at that time. Any period beyond the six weeks is unpaid. The employee may also apply for leave of absence without pay. However, if an employee does not intend to return to work following maternity leave, the employee is considered to have resigned. The rule provides a similar policy for employees who are adopting a child.

Three circuit courts reported that they had adopted local rules regarding maternity, paternity, and family leave, in some cases providing leave benefits greater than those articulated in Rule 7. The policies vary in breadth of coverage, length, compensation, and job security. The 22nd Judicial Circuit’s leave policy parallels Administrative Rule 7, allowing permanent full-time employees to use accrued sick leave and, in some cases, vacation leave for maternity leave purposes. If sick leave and vacation leave are exhausted, a leave of absence without pay may be approved. Maternity leave is based on the employee’s health needs and the needs of the court, and the employee must fully intend to return to work as soon as possible or after six weeks of absence. Under the 40th Judicial Circuit policy, as incorporated into the “Fringe Benefit” section of the court’s personnel policy, employees are allowed six weeks without pay from the date of the child’s birth or adoption or up to six weeks of accrued sick leave may be utilized for maternity or paternity leave. The local policy adopted by the 16th Judicial Circuit (Jackson County) is broader still in terms of coverage: it provides for maternity, paternity, or adoptive parental leave at the discretion of the appointing authority. Each may be charged against accumulated sick leave or annual leave or may be taken as leave without pay. The policy adopted by the 16th Judicial Circuit also is longer in duration. Maternity leave, which may extend up to sixty days, will be based upon the mother’s capacity to fully resume her duties. Paternity leave is generally limited to five working days for natural delivery and ten working days for delivery by Caesarean section; the duration is based upon the woman’s need for personal care and attention at home.

All three districts of the Missouri Court of Appeals have adopted rules regarding maternity leave; the Western District has also adopted paternity leave. The maternity leave policy adopted by the Court of Appeals, Southern District, provides up to three months leave, with the leave time comprised of either earned annual leave, earned sick leave, or unpaid leave of absence. A leave of absence without pay may be granted before sick leave or vacation leave is exhausted. An absence of more than three months may be approved at the court’s discretion, but the court is not required to restore employees to their former position in such a case.

The maternity leave policy for employees of the Court of Appeals, Eastern District, is similar to that of the Southern District, providing for up

696. This is contained in the Office Policies Manual for Court Personnel.
to ninety days leave, with leave time comprised of sick leave, vacation leave, or unpaid leave. Employees to the judges, secretaries, and law clerks are not covered by this policy.

The maternity leave for the Court of Appeals, Western District, provides a period not exceeding thirty-five working days. The leave includes ten working days granted by the court, accrued annual leave, accrued sick leave, and leave of absence without pay. An absence beyond thirty-five days may be approved by the court. Employees are not guaranteed their prior position; however, they are entitled to preferential consideration for another position that is open for which they are qualified. In January 1992, the Western District adopted paternity leave for new fathers for a period of ten working days. Such leave is charged to annual leave, sick leave, or leave without pay.

Policy No. D-4 of the new Missouri Supreme Court Administrative Policies Manual contains the broadest coverage; it provides that covered female and male employees are eligible for three months family leave:

Sick leave and vacation leave may be used to remain on the payroll. After leave time is exhausted, or at the employee’s request, the employee will be placed on leave without pay. The employee will have retention rights to his or her position while on family leave. The total of sick leave, annual leave, and leave without pay granted shall not exceed three months without the written approval of the Clerk.

Any employee who does not intend to return to work following the period of family leave shall be considered to have resigned effective as of the date the family leave begins or the date the notice to resign is communicated, which ever occurs later. . . . An employee is not required to exhaust accrued sick or annual leave prior to being granted a leave of absence without pay for maternity purposes.

An adoptive parent may use his or her accrued sick leave, accrued annual leave, or leave of absence without pay in the same manner as provided to biological parents to take time off for purposes of arranging for the adopted child’s placement or caring for the child after placement . . . . Adoption leave may be requested by an employee only if the employee is the person who is primarily responsible for furnishing the care and nurture of the child.

All of the policies fall short of the newly adopted Federal Family and Medical Leave Act, passed by the House and the Senate and signed by
President Clinton in early February 1993.\textsuperscript{697} The bill applies to federal, state, and local government employees, in addition to employees of private companies with fifty or more employees.\textsuperscript{698} It allows a worker up to twelve weeks of unpaid leave in any twelve-month period for the birth of a child or an adoption; for caring for a child, spouse, or parent with a serious health condition; or for personally recovering from a serious health condition that makes it impossible to work.\textsuperscript{699} It provides that employees must be returned to their old job or an equivalent position upon returning to work.\textsuperscript{700}

\textbf{D. Child Care in the Courthouse}

The need for adequate child care for children of working parents (either facilities in the courthouse or subsidized off-site child care programs) was recognized by both male and female employees responding to the survey: 58\% of the women and 53\% of the men employees reported a need for child care facilities for the children of employees, litigants, witnesses, and jurors.\textsuperscript{701} Witnesses and survey respondents commented on the burdens placed on women litigants and jurors, who often are the primary caretakers.\textsuperscript{702} The absence of adequate child care has a disproportionate effect upon women court employees, who comprise 88\% of the work force. Several presiding judges also recognized the need for child care facilities at courthouses in their responses to the court policy questionnaire. As one judge stated in response to the questionnaire, "We need it. As soon as you get us the money, we'll get something going."\textsuperscript{703}

\textbf{CONCLUSION}

Although sexual harassment was not perceived to be widespread, the survey evidence indicated that both men and women court employees are subject to inappropriate, demeaning conduct and unwelcome verbal and physical advances. The Task Force recommends that the courts address the


\textsuperscript{698} Id. \textsection 101(2)(B), 107 Stat. 8.

\textsuperscript{699} Id. \textsection 102(a), 107 Stat. 9.

\textsuperscript{700} Id. \textsection 104(a)(1), 107 Stat. 12.

\textsuperscript{701} Survey Report at 81, Question No. C14 Court Personnel Survey.

\textsuperscript{702} See, e.g., Survey Comments by Court Personnel at 2, Respondent No. 37; Survey Comments by Attorneys at 17-22, Respondent Nos. 129, 215; St. Louis Hearing Vol. V at 56.

\textsuperscript{703} Court Questionnaire Comments.
issue of sexual harassment through firmer policies and education. The Task Force also notes the need for courts to address the lack of trust in the grievance procedures and the fear of the consequences that both women and men employees indicated about reporting sexual harassment and discrimination in the workplace.

Gender neutral job descriptions and gender neutral hiring and promotion standards would enhance the perceptions of employees about the fairness of their work environments. Objective performance reviews of court employees are necessary in order to ensure that job opportunities are determined by merit and that employees perceive the system as operating fairly. All court employees throughout the state are entitled to the broadest family leave protection granted by law.

E. Recommendations

1. For the Missouri Supreme Court

a. The Missouri Supreme Court should issue an Administrative Order that gender-biased conduct in the court environment by the bench, bar, or court personnel is unprofessional and should be corrected.

By issuing an Administrative Order, the Supreme Court will underscore the importance of eliminating gender bias and indicate to judges, attorneys, and court personnel that gender-biased behavior is inappropriate and detrimental to our system of justice. Although sexual harassment was not perceived to be widespread, the number of reports of inappropriate, demeaning conduct and unwelcome verbal and physical sexual advances toward court employees was distressing. Any biased treatment that occurs in the courts or is fostered by the courts is unacceptable.

b. The Missouri Supreme Court should direct the State Courts Administrator and all courts to provide gender neutral job descriptions; enforce job requirements without regard to gender; stress gender neutral hiring and promotion; and collect and maintain data regarding applications, hiring, promotion, salary, and terminations with regard to gender.

The survey indicated a perception among court employees that opportunities for job advancement in the court system are affected by gender. Gender neutral job descriptions and gender neutral hiring and promotion standards will improve the perception of employees regarding the fairness of their work environments and the fairness of the system. The collection and maintenance of data regarding hiring and compensation practices will ensure
compliance with Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and the state employment discrimination laws.

c. The Missouri Supreme Court should direct the State Courts Administrator and all courts to review salaries of all court employees by gender; rectify any inappropriate salary differentials; and implement a system of regular performance and salary reviews.

Survey responses indicated a perception among court employees that job compensation was affected by gender. The survey results also indicated that court employees perceived a deficiency in the court procedure regarding performance evaluations and salary reviews and a lack of criteria for evaluation of those factors. Objective performance and salary reviews will ensure that promotion and compensation are based on merit and promote employee confidence in the system.

d. The Missouri Supreme Court should develop and require training programs for circuit clerks and court administrators on equal employment, sexual harassment, family and medical leave, and other topics that disparately impact upon male or female court employees.

It is important that circuit clerks and court administrators recognize employment practices that have disparate impact on gender. It is equally important, however, that circuit clerks and court administrators understand how to eliminate such practices from the work environment and the importance of moving quickly to do so. Training programs will educate and increase awareness among circuit clerks and court administrators, as well as provide them with the skills necessary to address such situations.

e. The Missouri Supreme Court should develop and provide educational programs for judges, attorneys, and court personnel addressing issues of gender bias and sexual harassment.

Survey evidence indicated that both women and men court employees are occasionally subjected to gender bias, including unwanted verbal or physical sexual advances or harassment. Educational programs will raise the awareness of judges, attorneys, and court personnel and provide a frame of reference for identifying gender bias and sexual harassment.

f. The Missouri Supreme Court should advise all court employees of the prohibitions against gender bias and sexual harassment set forth in Title VII of the 1964 Civil Rights Act and advise all covered employees of the policies articulated in Missouri Supreme Court Administrative Rule 7 and Missouri Supreme Court Administrative Policy No. C-7. It should
also issue a memo to all court employees explaining the rules, defining the different types of sexual harassment, and stating that such behavior is illegal and can lead to termination.

The survey responses, as well as the Task Force questionnaire responses, reflect confusion about the existence of sexual harassment policies and grievance procedures in Missouri courts. Missouri Supreme Court Administrative Rule 7 protects all non-statutory, state-paid employees of the circuit courts. Missouri Supreme Court Administrative Policy No. C-7 applies to all Missouri Supreme Court employees. Both recognize that sexual harassment is a form of unlawful sex discrimination under Title VII. The Task Force questionnaire results showed that only a few of the courts responding recognized the existence of Rule 7, and the majority had no other written policy regarding sexual harassment. Advising covered court employees in writing of the type of behavior that constitutes sexual harassment and the consequences of such behavior will clarify the confusion that exists regarding sexual harassment policies and procedures in Missouri courts.

g. The Missouri Supreme Court should encourage all courts with employees not subject to Administrative Rule 7 to adopt standardized fair employment policies and procedures, with particular emphasis on equal employment goals, sexual harassment, family and medical leave, and flexible work schedules. All courts should be required to promulgate written policies in accord with these standards.

As the courts are charged with the enforcement of state employment and discrimination laws, it is imperative that the courts be free from inappropriate or illegal treatment of court employees. Although Administrative Rule 7 generally provides standardized, gender neutral policies and procedures for non-statutory, state-paid employees, it is applicable only to about one-half of the court employees. The remaining court employees may or may not be subject to written policies, and the existing policies are not standardized from one court to the next. The survey responses reflect confusion about sexual harassment policies and grievance procedures within the Missouri courts and a perception that sexual harassment policies are inadequate for resolving sexual harassment or other gender-based problems. Such confusion can be remedied by education to inform employees of existing policies and procedures and by development of standardized, written policies where none exist. Standardized, written policies will provide clear guidelines and expectations so all court employees will understand and be protected on these matters.
h. The Missouri Supreme Court should amend the Missouri Code of Judicial Conduct to include Canons 3B(5) and 3B(6) of the 1990 A.B.A. Model Code of Judicial Conduct:

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's discretion and control to do so.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.704

Hearing and survey evidence reflected instances of gender-biased conduct by judges. Judges must be held to the highest standard of conduct since the judges' attitudes and behaviors affect those subject to their direction and control. Amendment of the Missouri Code of Judicial Conduct to include Canons 3B(5) and 3B(6) will set the standard for judicial conduct and indicate to the judiciary the importance of eliminating biased judicial behavior.

i. The Missouri Supreme Court should amend the Missouri Rules of Professional Conduct for attorneys to include a Disciplinary Rule similar to the following:

In representing a client, a member of the bar shall refrain from engaging in conduct that exhibits or is intended to

704. See MILORD, supra note 597, at 74-75. Race, religion, national origin, disability, sexual orientation, and socioeconomic status are outside the scope of the Task Force's mission, but are included here to reproduce the Judicial Code in its original form.
appeal to or engender bias or prejudice against a person on account of that person’s sex, race, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that bias is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers, or any other participants.

Evidence from the hearings and surveys reflect evidence of occasional gender-biased conduct by attorneys toward court personnel. Amendment of the Missouri Rules of Professional Conduct with the above provision is consistent with the proposed amendment to the Missouri Code of Judicial Conduct set forth in Recommendation h and with the provision proposed by task forces and commissions of other states. Such a disciplinary rule would provide a standard of conduct for attorneys and emphasize the importance of eliminating biased behavior.

j. The Missouri Supreme Court should encourage all courts to provide family and medical leave, for both men and women employees, for natural birth and adoption; for the care of a child, spouse, or parent; and for the worker’s own serious health conditions in conformance with the new Federal Family and Medical Leave Act. The Missouri Supreme Court should review Missouri Supreme Court Administrative Rule 7 regarding maternity leave and Missouri Supreme Court Administrative Policy No. C-7 regarding family leave to ensure conformance with the new Family and Medical Leave Act and advise all covered employees.

All Missouri court employees should be entitled to family and medical leave protection as provided by the new federal law. The State Courts Administrator and all courts should re-evaluate their existing policies regarding family and medical leave to ensure that the policies protect the interests of their employees, that the policies are applied in a gender neutral fashion, and that the policies conform with the new federal law.

More than one-third of both male and female survey respondents indicated that their circuit or county did not have an adequate maternity, paternity, or family leave policy. Twenty-five of the thirty-four circuits that responded to the Task Force questionnaire indicated they had no written policy regarding such leave. Educating those employees subject to Administrative Rule 7 or Administrative Policy No. C-7, as well as formulating written policies for those court employees not covered by such policies, will eliminate misperceptions about leave policies.

k. The Missouri Supreme Court should adopt a Missouri Courtroom Conduct Handbook for judges, attorneys, and court personnel similar to that recently adopted by the Florida Supreme Court and the Florida Bar.
A number of states in recent years have developed handbooks in response to recommendations from their gender bias commissions. The Florida handbook was created in response to the 1990 Report of the Florida Supreme Court Gender Bias Study Commission and modeled after the Massachusetts Handbook. The handbook serves as an educational resource that is readily available and easily understood. It recognizes that much of the bias that occurs in the courts may be unintentional and may result from habit or tradition. The effect of unintentional gender bias should not be underestimated, however, as the unfair effect is the same. Whatever the cause, intentional or unintentional, gender bias must be eliminated to assure fairness and equality.

I. The Missouri Supreme Court should aid the courts in exploring ways to improve safety in the courthouses and encourage judges, circuit clerks, and court administrators to explore ways to improve safety in the courthouses.

The courtroom may be a frightening and intimidating experience for jurors, litigants, and witnesses and a particularly scary experience for victims of crimes who are subpoenaed to testify. Courthouses are not always safe. Statutes providing for separate waiting areas for witnesses are not enforced in some courthouses, and bailiffs are not always present or not sufficiently trained. Victims and perpetrators often wait for court in the same areas. Efforts should be made to diminish the frightening aspects of court participation and to increase courthouse safety. Training programs for judges and court employees will increase awareness of security needs and develop the skills necessary to address problems with court security. The Supreme Court should also suggest that the mandatory training for peace officers, under Chapter 590, Missouri Revised Statutes, include programs on gender bias sensitivity, courthouse security, and the responsibilities of a bailiff.

m. The Missouri Supreme Court should aid the courts in exploring ways to provide on-site child care, or subsidized off-site child care for witnesses, jurors, litigants, and employees. It should also encourage judges, circuit clerks, and court administrators to explore ways to provide child care.

Courts should explore the need for child care facilities for litigants, witnesses, jurors, and employees. Witnesses and survey respondents commented on the burdens placed on women, who often are the primary

705. See Florida Court Conduct Handbook: Gender Equality in the Courts (available from the Florida Bar).
caretakers. The need for adequate child care for children of working parents, either facilities within the courthouse or subsidized off-site child care programs, was recognized by both male and female employees and by presiding judges who responded to the survey.

2. For the organized bar

a. The organized bar should develop and provide educational programs to sensitize attorneys to the issues of gender bias and sexual harassment of court personnel.

b. The organized bar should work with the Missouri Supreme Court to amend the Missouri Rules of Professional Conduct for attorneys to include a Disciplinary Rule prohibiting gender-biased conduct in the courtroom.

c. The organized bar should work with the Missouri Supreme Court to develop a Missouri Courtroom Conduct Handbook.

Hearing and survey evidence reflected instances of inappropriate and demeaning conduct toward court personnel. Attorneys should be made aware of inappropriate gender-biased behavior and its detrimental effect on our system of justice. Because the prevalence and impact of such conduct is often perceived differently by judges, attorneys, and court personnel and by females and males, educational programs should be used not only to correct overt bias, but also to develop sensitivity to the perceptions of others. A Missouri Courtroom Conduct Handbook would serve as a readily available, easily understandable educational resource. The proposed disciplinary rule would provide a standard of conduct for attorneys and emphasize the importance of eliminating biased behavior in the courtroom.

VI. JUDICIAL SELECTION

Determining whether and how gender bias affects judicial selection is important to the evaluation of gender bias in the judicial system in two respects. The first is public perception. "Public belief that the judiciary is unbiased is essential to the effective and orderly functioning of the court system and to the authority the judiciary exercises over society." 706 The second concern is equality of opportunity for qualified applicants who seek judicial office. "Any court system may reasonably be judged by the degree

to which opportunity is afforded to all qualified applicants who seek judicial office, regardless of gender or minority status.\textsuperscript{707}

To determine whether and to what extent gender bias exists in the judicial selection process in Missouri, the Task Force examined the court system and the methods by which judges ascend to the bench. The information for our report was obtained through a variety of means. The Task Force researched and reviewed the election and appointment process for judges in Missouri as it exists now and in the past; reviewed testimony from the public hearings and survey responses from judges, attorneys, court personnel, and judicial nominating commissioners;\textsuperscript{708} and reviewed the procedures of judicial nominating commissions. The Task Force was greatly enlightened by the extensive report and recommendations of the 1986 Missouri Bar Board of Governors Special Committee to Review and Evaluate the Missouri Nonpartisan Court Plan.\textsuperscript{709} The Task Force also relied on statistical records of the Governor’s Office, the Office of the State Courts Administrator, and the Secretary of State’s Office; periodical studies and newspaper articles that address the composition of the bench, judicial elections, and appointments to the bench; and relevant legal literature on judicial selection.

\textbf{A. How Judges are Selected in Missouri}

Missouri has a three-tier court system. Article V of the Missouri Constitution, as amended by the voters in 1976, vests judicial power in a supreme court, which is the state’s highest court and has state-wide jurisdiction; in a court of appeals consisting of three districts established by the General Assembly; and in a system of circuit courts that have original jurisdiction over all cases and matters, civil and criminal.\textsuperscript{710} Effective January 2, 1979, the circuit court system absorbed all former courts of

\textsuperscript{707} Id. at 753.

\textsuperscript{708} The Task Force received responses from 135 judges, 2336 attorneys, and 613 court employees; the Task Force received only ten responses to the questionnaire sent to the twenty-nine then-sitting nominating commissioners.

\textsuperscript{709} The 1986 Missouri Bar Special Committee consisted of three lay members and six lawyers, including Ilus (Ike) Davis of Kansas City, who is also a member of this Task Force. The Missouri Bar Special Committee was headed by former Missouri Supreme Court Judge James A. Finch, Jr. (now deceased). During its year-long investigation, the Committee held public hearings in St. Louis, Kansas City, Springfield, and Jefferson City. The Committee actively solicited testimony from judges, lawyers, lay persons, bar presidents, legislators, and judicial nominating commission members for a ten year period. The Committee also met with experts on judicial selection plans, including representatives of the American Judicature Society.

\textsuperscript{710} MO. CONST. art.V, §§ 1, 3, 13, 14.
limited jurisdiction and became the state's single trial court. There are forty-four judicial circuits in the state. The 342 state court judges in Missouri are selected by partisan elections or Missouri Plan appointment.

1. Partisan Elections

The majority of Missouri's trial judges are elected by the voters in partisan elections: 201 of Missouri's 303 trial judges are elected to the bench. When an elected judge vacates a seat in mid-term due to death, retirement, or resignation, the Governor appoints an interim judge who sits until the next general election.

2. Missouri Plan Appointments

All of the state's 39 appellate judges and the 102 trial judges in St. Louis (City and County) and Kansas City (Jackson, Platte, and Clay Counties) are appointed to the judiciary under the Nonpartisan Selection of Judges Court Plan adopted in 1940. There are three stages in the selection process under the Missouri Plan: nomination by a judicial nominating commission, appointment by the Governor, and a retention election by the public.

Under the Missouri Plan, judicial nominating commissions nominate three persons for each judicial vacancy. The circuit judicial nominating commissions, which recommend nominees for the trial courts, consist of the chief judge of the district of the court of appeals within which the judicial circuit lies, two non-lawyer residents of the circuit appointed by the


712. In the first thirty years of Missouri's statehood, judges were appointed by the Governor with the advice and consent of the Senate. The Constitution was amended in 1849 to provide for the popular election of judges, the system that continues in effect for the majority of Missouri trial court judges today. Id. at 162.

Governor, and two lawyers elected by the lawyers from the circuit. The appellate nominating commission, which nominates candidates for the Missouri Supreme Court and the Missouri Court of Appeals, includes a judge of the Missouri Supreme Court, one non-lawyer resident appointed by the Governor from each of the three appellate districts, and one lawyer elected by the lawyers from each of the three districts.

A vacancy on a court to which the Missouri Plan applies is filled by gubernatorial appointment. The Governor selects one person from the three-person panel nominated by the judicial nominating commission.

A judge appointed under the Missouri Plan must stand for retention in office at the first general election occurring after the judge has been in office twelve months. The judge's name is placed on a separate judicial ballot, without political party designation, and the voters must vote for or against retention in office. Missouri Supreme Court and Missouri Court of Appeals judges serve for twelve-year terms, circuit judges for six-year terms, and associate circuit judges for four-year terms. At these junctures, the judges must stand again for retention.714

Missouri was the first state in the union to adopt the use of merit selection nominating commissions in the judicial selection process, a proposal long favored by the American Judicature Society and the American Bar Association. Commentators suggest that Missouri was "fertile ground" for judicial selection reform because of blatant political abuses in partisan judicial elections by the Pendergast and Shannon factions in Kansas City and by the Dickmann machine in St. Louis in the 1930's.715 While the adoption of merit selection nominating commissions has been described as "the single greatest event in the history of judicial reform in this century,"716 debate about the advantages and disadvantages of appointment versus election of judges, especially for women and minorities, continues to this day.717

714. In the fifty-two-year history of the Missouri Plan, only two judges have been voted out of office. CORSI, supra note 713, at 111; William C. Lohtka and Tim Bryant, Missouri Judge Voted Out for 1st Time in 50 Years, ST. L. POST DISPATCH, Nov. 5, 1992, at 6C.

715. WATSON & DOWNING, supra note 713, at 10.

716. Harry A. Hall, The National Trend for Merit Selection, 6 TRIAL JUDGES' J. 11, 12 (1967) (quoting Glen Winters, Executive Director of the American Judicature Society). Approximately thirty-six states have adopted the merit selection method for the selection of some of their judges. The majority of the states still also use the election method for some of their judges. Most states that adopted merit selection did so in the 1940's, 1950's, and 1960's; relatively few have done so in recent years.

B. Gender Diversity on the Courts

1. Historical Background

The first woman admitted to the practice of law in Missouri was Lemma Barkeloo, who was admitted to The Missouri Bar in 1870, fifty years after the founding of the state.\textsuperscript{718} Missouri was the second state in the country to admit women, following Iowa, which admitted women to the bar in 1869.\textsuperscript{719}

Eighty-five years later the first woman lawyer was elected to a full-time position on the Missouri judiciary. In 1954, the Honorable Margaret Young was elected magistrate judge for Buchanan County, where she served for twenty years.\textsuperscript{720}

In 1979, the first woman lawyer was appointed to the Missouri judiciary under the Missouri Nonpartisan Court Plan. She was the Honorable Anna Forder, appointed to the trial court in St. Louis City (22nd Judicial Circuit) by Governor Joseph Teasdale.\textsuperscript{721} The first African-American woman lawyer appointed to the bench under the Missouri Plan was the Honorable Evelyn Baker, appointed to the trial court in St. Louis City by Governor Christopher Bond in 1983.\textsuperscript{722} The first woman appointed to the appellate


\textsuperscript{719} Lemma Barkeloo, who briefly attended Washington University School of Law in St. Louis, was admitted to The Missouri Bar in 1870. Phoebe Couzins, who entered law school with Barkeloo in 1869, graduated and was admitted to The Missouri Bar in 1871. Barkeloo and Couzins are believed by some to be the nation's first women law students. See Karen L. Tokarz, \textit{A Tribute to the Nation's First Women Law Students}, 68 WASH. U. L.Q. 89, 90-6 (1990).

\textsuperscript{720} \textit{Official Manual, State of Missouri} 276 (1973-74). The first woman reportedly to hold a judicial position in Missouri was Frances Hopkins, who was appointed a temporary probate judge in 1915. It is not clear whether she was a lawyer. Tiera Farrow, a 1903 graduate of the University of Kansas City School of Law, was appointed a temporary municipal judge in Kansas City in 1927. Farrow's career as pioneering lawyer and judge is chronicled in her autobiography, \textit{Tiera Farrow, Lawyer in Petticoats} (1953).


\textsuperscript{722} \textit{Id.} at 224.
court under the Missouri Plan was the Honorable Ann Covington, appointed by Governor John Ashcroft to the Missouri Court of Appeals in Kansas City in 1987 and to the Missouri Supreme Court in 1988.\textsuperscript{723} See Table 1 at the end of this section for a listing of Missouri's women judges, past and present, through January 1, 1993.

As of January 1, 1993, 27 of the 342 judges on the Missouri judiciary were women (7.9%): 3 of the 39 appellate judges; 10 of the 102 appointed trial judges; and 14 of the 201 elected trial judges. There is one woman on the seven-member Missouri Supreme Court; one woman on the fourteen-member Missouri Court of Appeals in St. Louis; and one woman on the eleven-member Missouri Court of Appeals in Kansas City. There are no women on the seven-member Missouri Court of Appeals in Springfield, and thirty of the state's forty-four judicial circuits have no women judges.\textsuperscript{724}

The percentage of women on the bench in Missouri in 1992 (7.9%) is lower than the national average for both elected and appointed judges. According to the American Bar Association and the National Center for State Courts, women nation-wide represent 10-15\% of all state court judges, 23\% of lawyers, 43\% of law students, and 53\% of the population.\textsuperscript{725} Women, first admitted to the bar in Missouri in 1870, have been actively engaged in the practice of law in Missouri since the early 1970's. The population of practicing women lawyers in Missouri today is estimated at approximately 20\%.\textsuperscript{726}

\subsection{2. Current Perceptions}

One of the most significant findings from the Task Force surveys of judges, attorneys, and court personnel was the widely shared belief that gender diversity on a court is beneficial—a belief held by 80\% of attorneys (97\% of females, 75\% of males), 78\% of judges, and 72\% of the court personnel responding to the survey.\textsuperscript{727} Respondents shared similar broad agreement that racial diversity on a court is beneficial—82\% of attorneys

\textsuperscript{723} \textit{Id.} at 169.

\textsuperscript{724} \textit{Id.} at 192-253.

\textsuperscript{725} \textbf{NATIONAL CENTER FOR STATE COURTS, AMERICAN BAR ASSOCIATION REPORT} (Feb. 1992).

\textsuperscript{726} \textit{E.g.}, the membership of the Bar Association of Metropolitan St. Louis in 1991 was 18.3\% women lawyers. \textbf{ST. LOUIS LAWYER} at 5 (Sept. 1991).

(96% of females, 78% of males), 78% of judges, and 69% of court personnel.  

Both female and male attorneys responding to the survey expressed the opinion that diversity on the courts adds different perspectives to the judging process and affects the perceptions of litigants before the courts:

More women and minorities on the bench would bring their unique perspectives to the legal process and would give female and minority litigants a better expectation of receiving equitable treatment in the courts.  

I believe that the gender and race of a judge affect both the perceptions of the litigants and, in some cases, how or how well the judge perceives the case and comprehends the facts.  

More female and minority judges must be appointed or elected to preserve the system, and have the general population represented.  

The opinions of survey respondents are shared by legal commentators who believe that diversity on the bench enhances public confidence in the court system and furthers the goal of equal justice:

If society perceives that judges are selected by a system that discriminates against segments of that society—whether on the basis of gender or otherwise—then society may well regard the judicial system as biased and unjust. At a minimum, the groups discriminated against may question the ability of the judicial system to recognize and deal equitably with their needs, experiences, interests, and demands.  

[W]e need representative minds on the bench. If society makes some minds different from others—because of the way society treats persons based on characteristics such as race or


729. Survey Comments by Attorneys at 1, Respondent No. 73.  

730. Survey Comments by Attorneys at 6, Respondent No. 271.  

731. Survey Comments by Attorneys at 7, Respondent No. 105.  

gender—then the bench should reflect those different perspectives.733

Others suggest that female judges serve to educate their male colleagues on the bench about gender bias:

Women judges, it has been shown, educate their colleagues; they form part of a group of peers that exercises strong influence on its members . . . . [W]omen jurists eventually mitigate the effects that long years of acculturation and training have had on their brethren . . . . [W]omen’s life experiences and perspectives are important in the substantive decision making that forms the daily bread of a judge’s existence, and as important, the presence of women on the bench makes unavoidable the enrichment of perspective necessary for the entire judiciary to do its job.734

Both male and female attorneys expressed the view that gender and racial diversity are beneficial, only if the quality of judges is not lowered to obtain it:

I believe that gender and racial diversity are beneficial only if the qualifications of judges are not lowered just to obtain it.735

While I believe that we should strive for gender and racial diversity, it should not be at the expense of quality. It seems to me that some judges are on the bench because of their race or gender and not their legal skills and knowledge.736

A male attorney responding concurred that competence should be paramount, but criticized its emphasis with women and minorities:

Previous exclusion of women and minorities from the judiciary makes consideration of gender and race in future appointments inevitable. Neither factor, however, should override competence. Of course, considering the quality of some members of the bench appointed long ago, it’s obvious that competence was


735. Survey Comments by Attorneys at 2, Respondent No. 120.

736. Survey Comments by Attorneys at 6-7, Respondent No. 76.
given short shrift long before gender or race became openly discussed issues.\textsuperscript{737}

A female attorney, however, expressed the view that gender and race should not be considered:

Neither gender nor race should be a factor. We do not have "men" laws or "women" laws or "white" laws or "black" laws—just like we do not have "democratic" or "republican" laws.\textsuperscript{738}

\section{C. Gender and the Election of Judges}

\subsection{1. Partisan Elections}

Several respondents, primarily women, complained of explicit or implicit gender bias in the partisan election of judges.\textsuperscript{739} One female rural lawyer reported:

I once ran for a circuit judge position and approached local attorneys asking for their support. I was told that I "didn't have enough experience." When I responded by comparing my experience to the other attorneys who had been appointed to the bench, I was told that this area is "not ready for women judges" . . . A woman friend wanted to be appointed a county prosecutor. She had all the necessary qualifications but was told by her party leadership that a woman would never be appointed in her county.\textsuperscript{740}

Others expressed the following views:

[T]he possibility of more females being elected judge in the southern part of the state is between slim and none.\textsuperscript{741}

\begin{thebibliography}{99}
\bibitem{737} Survey Comments by Attorneys at 9, Respondent No. 181.
\bibitem{738} Survey Comments by Attorneys at 1, Respondent No. 85.
\bibitem{739} There are twenty-four women trial judges in Missouri as of January 1, 1993; four
\end{thebibliography}
In the rural areas of the eastern district, where judges are elected, most women are discouraged by party affiliation from running.\textsuperscript{742}

Notwithstanding the criticisms of the elective process, one female attorney expressed her positive view of the benefits of the elective process for women:

The small number of women judges in the state of Missouri is appalling considering that 51\% of the citizens are women. Missouri's record is one of the worst in the country and everybody knows it, especially the public. The public views the judicial appointment process (both in the cities and in the counties) as a "good old boys" club, by which the governor makes political payoffs. The practicing bar has become cynical as well. Top lawyers do not apply because the selection process is demeaning and because it is no longer considered a prestigious position. Despite its pitfalls, the election process is the only way to give all candidates a fair shot and to create a judiciary that the public believes is representative.\textsuperscript{743}

2. Interim Judicial Appointments

Some of the complaints voiced about gender bias in the election of judges were directed at the interim appointments made by the Governor to fill vacancies in elected judicial positions created by death, retirement, or resignation of a sitting judge. In some counties and circuits, it is a common practice for incumbent judges to resign before the end of their term, allowing the Governor to name an interim judge who then runs as the incumbent. These appointments do not go through any nomination process. In some areas, officials in the local governing party recommend replacements to the Governor. One witness described the process as follows:

Most [elected judges in this area] are initially appointed. Somebody would get promoted and there would be a remainder of an office to fill, or someone would retire or something like that .... That's a disadvantage to the women, because they're not as politically active.\textsuperscript{744}

\textsuperscript{742} Survey Comments by Attorneys at 5, Respondent No. 192.
\textsuperscript{743} Survey Comments by Attorneys at 2-3, Respondent No. 129.
\textsuperscript{744} Cape Girardeau Hearing Vol. II at 52; written materials submitted at St. Louis Hearing.
Interim appointments are extremely important avenues to elective judgeships. Statistics about the percentage of elected judges first reaching the bench through interim appointment in Missouri were unavailable. According to several national studies, however, more than 50% of the elected state court judges in the country initially reach the bench through interim appointment, either to fill a newly created judgeship or to replace a judge who has left office in mid-term, thereby creating a vacancy. During the last seven gubernatorial terms in Missouri, women have received a disproportionately small number of the gubernatorial interim appointments for elective judgeship positions.

<table>
<thead>
<tr>
<th>GOVERNOR</th>
<th>INTERIM APPOMNTMENTS</th>
<th>WOMEN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hearnes (1965-68)</td>
<td>45</td>
<td>1</td>
</tr>
<tr>
<td>Hearnes (1969-72)</td>
<td>43</td>
<td>3</td>
</tr>
<tr>
<td>Bond (1973-76)</td>
<td>52</td>
<td>6</td>
</tr>
<tr>
<td>Teasdale (1977-80)</td>
<td>26</td>
<td>1</td>
</tr>
<tr>
<td>Bond (1981-84)</td>
<td>25</td>
<td>2</td>
</tr>
<tr>
<td>Ashcroft (1985-88)</td>
<td>27</td>
<td>0</td>
</tr>
<tr>
<td>Ashcroft (1989-92)</td>
<td>24</td>
<td>2</td>
</tr>
</tbody>
</table>

At least fourteen states have adopted the use of a Missouri Plan merit nomination process for gubernatorial interim appointments for elective judgeships. Adoption of the Missouri Plan nomination process for interim judicial appointments in Missouri would emphasize merit, de-emphasize party


746. Information provided by the Secretary of State's Office regarding 1965-84; information provided by the Governor's Office regarding 1985 through July 22, 1992.

affiliation, and improve opportunities for women candidates to achieve elective judgeships. 748

D. Gender and the Appointment of Judges

1. Missouri Plan

The majority of male attorneys (75%) and judges (75%) who responded to the survey felt that the gender of an applicant affects the nomination of judicial candidates by Missouri Plan nominating commissions. 749 The view was more widely shared by female attorneys (96%). 750 Sixty-four female and 213 male attorneys responding to the survey reported that they had applied for appointed judgeships under the Missouri Plan. 751 Of the women who applied for judgeships, 59% believe their gender affected the selection process while only 19% of the men who applied for judgeships believe that their gender affected the selection process. 752

While most judges and attorneys believe that gender affects judicial selection under the Missouri Plan, there is considerable disagreement about whether gender, or race, is an advantage or a disadvantage in the process. Nearly 85% of judges (predominantly male) and 76% of male attorneys responding to the survey reported their perceptions that female or racial minority applicants for judgeships are given preference in the selection process.

748. St. Louis Hearing Vol. II at 2; written statement submitted to St. Louis Hearing.

749. Survey Report at 29, Question Nos. B3 and B4 Attorneys Survey, Question Nos. B3 and B4 Judges Survey. The Task Force was unable to obtain reliable statistics on judicial applications of men and women for Missouri Plan judgeships. Six commissioners reported that during their tenure there have been no records kept of the numbers of men and women who have applied for judicial vacancies. Question Nos. B19, B20, and B21 Judicial Nominating Commission Questionnaire. Only two commissioners provided information about the number of male and female judicial applicants for current appointments in recent years. According to their responses, 23 men and 17 women applied for 3 vacancies in 1990; 30% of the men (7 out of 23) and 12% of the women (2 out of 17) were selected for panels. In 1991 in these two circuits, 18 men and 13 women applied for 3 vacancies; 42% of the men (8 out of 18) and 8% of the women (1 out of 13) were selected for panels. At the public hearings, some attorneys testified as to their views on the selection rates for women and minority applicants and the role gender and race play in the judicial selection process.


when not represented on the court; 53% of the female attorneys agreed.\textsuperscript{753} Some survey respondents suggested that women attorneys benefit from gender bias in the selection process:

\begin{quote}
I am of the belief that white males are now overlooked, even though as well-qualified, just to please the political public.\textsuperscript{754}
\end{quote}

Gender and race have become primary considerations for appointment of judges, with little regard for ability or experience.\textsuperscript{755}

Others disagreed:

\begin{quote}
I believe only highly-qualified women and minorities are appointed or elected as judges. White males with minimal qualifications, however, are easily appointed or elected.\textsuperscript{756}
\end{quote}

The overwhelming percentage of women attorneys expressed the perception that gender bias inhibits selection of women candidates. Eighty-four percent of the women attorneys who responded to the survey believe that once a court has at least one female or racial minority member, no more women or minorities will be selected; 31% of judges and 36% of male attorneys agreed with this perception.\textsuperscript{757} Several attorneys, female and male, suggested that "tokenism" reduces the chances of women being nominated or named to a court:

\begin{quote}
I believe that once a woman or minority has been appointed to a particular bench, the governor feels like he's done his duty and placated the female and minority communities. I doubt we will
\end{quote}

\textsuperscript{753} Survey Report at 29, Question No. B5 Attorneys Survey, Question No. B5 Judges Survey. Five of the commissioners said there was no preference for female or racial minority applicants when they are not represented on the court, while two felt that a preference did operate in such circumstances. Question No. B17 Judicial Nomination Commission Questionnaire.

\textsuperscript{754} Survey Comments by Attorneys at 9, Respondent No. 148.

\textsuperscript{755} Survey Comments by Attorneys at 2, Respondent No. 110.

\textsuperscript{756} Survey Comments by Attorneys at 5, Respondent No. 203.

\textsuperscript{757} Survey Report at 30, Question No. B6 Attorneys Survey, Question No. B6 Judges Survey. Seven of the ten commissioners responding reported that in their views, women and racial minority applicants are not disfavored when a court has at least one female or racial minority member. Question No. B17 Judicial Nominating Commission Questionnaire.
ever see the day that two women or two minorities will serve on the Missouri Supreme Court concurrently.\textsuperscript{758}

It appears that the trend exists towards a "female slot" and a "minority slot."\textsuperscript{759}

I have applied for a judgeship on a court where a woman already sits. Many male attorneys have told me there is no chance a second woman will be appointed. It is unfortunate that there is that perception among many males.\textsuperscript{760}

One attorney concluded:

There is definitely a glass ceiling, i.e., one woman on the Supreme Court is enough, one woman on the Court of Appeals is enough, one woman on the trial court in Kansas City is enough. Would anyone ever think one man on the Supreme Court is enough?\textsuperscript{761}

Although it is true that the bulk of women attorneys in Missouri entered the practice of law in the past three decades, some female judicial applicants perceive that they are treated unfairly as compared to males regarding age and experience. One young female attorney complained:

The most common way the commission operates to keep women off the bench is by saying they are too young. The chief judge of the Missouri Supreme Court took the bench at my age, but I've been informed point blank that no one under forty should be a judge.\textsuperscript{762}

Another female attorney concurred:

I have heard a Supreme Court judge make the comment that an applicant (female) was too young to be applying for the position of appellate court judge. The applicant was thirty-nine. The problem with that perception is: 1) there is a thirty-nine-year-old male on the Supreme Court and 2) most women in law are

\textsuperscript{758} Survey Comments by Attorneys at 4, Respondent No. 146.
\textsuperscript{759} Survey Comments by Attorneys at 7, Respondent No. 112.
\textsuperscript{760} Survey Comments by Attorneys at 1, Respondent No. 78.
\textsuperscript{761} Survey Comments by Attorneys at 2-3, Respondent No. 129.
\textsuperscript{762} Survey Comments by Attorneys at 5, Respondent No. 244.
younger so female applicants are always going to be younger than their male counterparts.  

The role of politics in the Missouri Plan process generated the largest number of comments on the survey, although no question directly addressed it. Many attorneys, both male and female, criticized the role of politics, particularly in the nomination stage. Several noted the need for reforms to increase the number of top-quality lawyers willing to apply, to improve the perception that the nomination of judges is based on merit, and to provide equal opportunity for all lawyers—men and women. Some respondents suggested that while political involvement in the selection process disadvantages all lawyers, it has a particularly negative effect on women and other minority applicants who lack political influence:

There are many fine women and minority attorneys who feel they have no chance of being selected and thus do not apply. White males generally tend to select white males.  

My perception is that "old boy" types, basically white males with connections, have a far easier time getting appointed to the bench.  

The judicial selection process is still very political and very much connected with the old boys network, despite the "non-partisan" system.  

Others complained more generally:

The non-partisan plan is not non-partisan . . . the process does not result in quality judges, only judges who can play the game.  

The non-partisan plan should be abolished. It is more political than elections.  

763. Survey Comments by Attorneys at 4-5, Respondent No. 186.  
764. Survey Comments by Attorneys at 10, Respondent No. 254.  
765. Survey Comments by Attorneys at 4, Respondent No. 156.  
766. Survey Comments by Attorneys at 7, Respondent No. 91.  
767. Survey Comments by Attorneys at 4, Respondent No. 156.  
768. Survey Comments by Attorneys at 9, Respondent No. 155.

Some of the criticism received by the Task Force regarding the appointment of judges under the Missouri Plan revolved around the makeup of the nominating commissions and the nominating commission practices and procedures. In evaluating concerns in this area, the Task Force relied heavily upon the extensive report and recommendations of the 1986 Missouri Bar Board of Governors Special Committee to Review and Evaluate the Missouri Nonpartisan Court Plan. While strongly endorsing the merits of the Missouri Plan, the Committee made numerous suggestions for reform. The Task Force concurs in many of the Committee’s findings and recommendations.

a. Need for Training for Commissioners

Information received by the Task Force revealed that the Missouri Plan judicial nominating commissions have no formal procedures for educating new commission members to their roles and responsibilities; no procedures manual; and no written guidelines for recruiting, interviewing, evaluating or voting on applicants. The 1986 Missouri Bar Special Committee found:

Some commissioners indicated that their introduction to their tasks consisted of the judge chairman explaining commission operations at a luncheon or other short meeting—an inadequate approach at best. It is not logical that commissioners charged with nominating members of the judiciary should operate on such a casual, informal basis.

Many states require mandatory training for judicial nominating commission members, such as that provided by the American Judicature Society, an organization based in Chicago whose purpose is to promote and improve the use of merit appointment of judges in the country. Such training, not unlike that expected of persons involved in personnel work of other kinds, would improve the selection process, diminish perceptions about personal and party politics, and reduce possibilities for gender bias within the nomination process.

---

769. Further references to the report and the Committee’s proposed manual will be to the "Missouri Bar Special Committee Report" and "Missouri Bar Special Committee Proposed Manual."

770. Missouri Bar Special Committee Report at 15-16.

The American Judicature Society provides a manual for state and federal judicial selection commissioners. The procedures manual addresses issues deemed relevant, such as roles, responsibilities, and procedures of the commissions; application forms; interviewing methods; criteria for evaluating candidates; voting procedures; recent developments in other states with similar commissions; information on the state of the judiciary in Missouri; and recruiting methods. The manual and accompanying training programs would diminish complaints about lack of uniformity and fairness by commissioners, lack of education by commissioners, and lack of information by both candidates and the public as to how the commissions operate. The Missouri Bar Special Committee proposed that the Missouri Supreme Court adopt a detailed procedures manual for use by the nominating commissions and prepared a forty-five-page proposed manual, with proposed forms, patterned after the American Judicature Society Handbook for Judicial Nominating Commissions.771 The manual has never been formally adopted by the Missouri Supreme Court.

c. Need for Uniform Application Forms and Articulated, Unbiased Criteria

The evidence presented to the Task Force, which mirrors that presented to The Missouri Bar Special Committee, strongly suggests that the lack of articulated criteria, the lack of uniform application forms, and the use of potentially gender-biased questions may hinder the goals of the merit selection process and may detrimentally affect women applicants. An expert in federal employment discrimination law suggested to the Task Force that such a hiring process—one that lacks objective criteria, in which applicants are asked different questions, in which gender-biased inquiries are made, in which no records are kept, and that produces a statistically significant low number of successful women or minorities—"would be subject to significant challenge if Title VII of the 1964 Civil Rights Act, the federal employment discrimination law, were applicable to the selection of state court judges [as it is to other state hiring decisions]."772

The variation in responses from commissioners illustrates the lack of uniform criteria and the potential for negative impact on women applicants. Three of the commissioners responding to the commissioner survey believed that lawyers who practice commercial or civil trial law are better qualified to

771. See Missouri Bar Special Committee Proposed Manual.
772. St. Louis Hearing Vol. IV at 18, 23.
be judges than lawyers in other fields;773 two reported that prosecutors are more qualified;774 three believed that lawyers in private practice are better qualified than public sector lawyers;775 and four reported that lawyers who practiced family or civil liberties law were less qualified than others to sit on the bench.776 "I don't believe divorce or civil liberties lawyers would have a broad enough background," said one commissioner.777 A bias against public sector and family law practitioners or in favor of prosecutors is detrimental to women lawyers who currently are overrepresented in the former group and underrepresented in the latter.

One former Missouri judge pointed out:

The lack of meaningful standards for evaluation of judicial candidates is rather unsettling in view of the emphasis placed upon professional qualifications in merit selection. The primary objective of merit selection is, after all, the selection of judges with superior professional and personal qualifications.778

Only one of the ten commissioners responding to the Task Force inquiries stated that he utilized formal or informal criteria or guidelines for evaluating candidates.779

The evidence also indicates that the application forms that solicit information on judicial applicants vary from circuit to circuit and from commission to commission, giving rise to concerns about the fairness and consistency of the process. In addition, some of the judicial application forms contain inappropriate questions that may inadvertently lead to gender bias in the application process. The Task Force recommends that the application forms be reviewed and revised to eliminate all questions seeking irrelevant or biased information that could be perceived to elicit gender-biased information. For example, questions regarding military record, marital status, and children should be eliminated. Instead, questions requesting the applicant's work history, asking whether the applicants have any responsibilities that might affect their ability to perform the duties of a judge on a full-time basis, or asking whether the applicant has any family relationship that might create a conflict of interest, would be more appropriate.

779. Question Nos. B9 and B10 Judicial Nominating Commission Questionnaire.
The Task Force also recommends that a question be added inquiring whether an applicant belongs to any clubs or organizations that discriminate on the basis of gender. The Task Force concurs with the view adopted in the 1990 A.B.A. Model Code of Judicial Conduct that membership in such clubs presents an appearance of impropriety for judges. Thus, the Task Force encourages the Missouri Supreme Court to adopt Canon 2C of the Model Code. Canon 2 states: "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."780 Canon 2C states: "A judge should not hold membership in any organization that practices invidious discrimination on the basis of sex, race, religion or national origin."781 According to the commentary to Canon 2C of the Model Code, membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired.782

Several states, including California, Colorado, Utah, Virginia, and Wyoming, have adopted Canon 2C.783 Federal judges also are strongly discouraged from holding membership in discriminatory clubs or organizations under Canon 2 of the Code of Conduct for Federal Judges and a question in this regard appears on application forms for federal judgeships. According to the commentary to Federal Canon 2:

The Judicial Conference of the United States has endorsed the principle that it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination. A judge should carefully consider whether membership in a particular organization might reasonably raise a question of impartiality in a case involving issues as to discriminating

781. Id. Canon 2C. Race, religion, and national origin are outside the scope of the Task Force's mission, but are included here to reproduce the Model Code in its original form.
782. LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 13-17, 72-73, 112-13 (1991). In addition to membership, it would be a violation for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of sex, race, religion, or natural origin in its membership or other policies, or for the judge to regularly use such a club. Id. at 73.
against persons on the basis of race, sex, religion, or natural origin.\textsuperscript{784}

d. Need for Group Interviews of Applicants

The evidence from the hearings and surveys reveals that interviewing procedures vary greatly among the commissions. Some commissions use group interviews; others interview individual candidates one-on-one. Three of the ten commissioners, all from the 7th Judicial Circuit, indicated that their commission utilizes group interviews of the candidates.\textsuperscript{785} A commissioner from another circuit, however, expressed his belief that individual interviews give a better overall view of the candidate.\textsuperscript{786}

Several women who had applied for Missouri Plan judicial openings noted that their individual interviews with the nominating commissioners included inappropriate questions and comments. Some women reported that they were asked whether they were married; whether they had children; if so, how the children would be cared for if the women were appointed to the bench; and what their husband’s views were on their applications for judgeships.\textsuperscript{787} These observations came from attorneys from all parts of the state.

One unsuccessful female judicial applicant reported that she was asked about her children, then later told that the commissioner did not vote for her because she was a mother with young children:

After my application for a judgeship, one commission member told another that she didn’t vote for me because I was a mother with young children and she really thought I should be staying at home with my children.\textsuperscript{788}

\textsuperscript{784} CODE OF CONDUCT FOR FEDERAL JUDGES Canon 2, cmt. I-3 (1990).
\textsuperscript{785} Question No. B8 Judicial Nominating Commission Questionnaire.
\textsuperscript{786} Id.
\textsuperscript{787} Survey Comments by Attorneys at 2-8, Respondent Nos. 77, 109, 119, 255, 273, 278; St. Louis Hearing Vol. IV at 17. One judicial commissioner responding to the questionnaire reported that female applicants are asked if their spouses approve and how they intend to handle their families and the job. Another commissioner stated that all candidates are asked how their families will be cared for, while a third stated that all candidates are asked if they have families or other obligations that will limit time they can be present at the courthouse. One lay commissioner responded that frequently a candidate is asked how a judgeship would affect his or her family due to required moves, changes of schools, etc., but assumes candidates have already taken care of such responsibilities as practicing lawyers. Question Nos. B11 and B12 Judicial Nominating Commission Questionnaire.
\textsuperscript{788} Survey Comments by Attorneys at 6, Respondent No. 278.
Others expressed the view that individual interviews allow for inconsistent, inappropriate and biased questions:

I have discussed the process of applying for circuit judge openings with several women attorneys. They described to me how demeaning the personal interviews were and how inappropriate the questions and comments were regarding care of their children, etc.789

I was asked if I planned to have more children, what my child care arrangements were, and whether the arrangements were reliable. I was also told three women on the bench (at the time there were three) was enough. All these questions and comments were by commission members.790

Selection commissioners should not be allowed to individually interview candidates. The commission should interview each candidate en banc. Individual interviews allow for inconsistent and biased questions.791

The use of group interviews, rather than individual interviews, was urged by a number of attorneys, including four former presidents of the Women Lawyers’ Association of Greater St. Louis.792 Some noted that group interviews are used by most federal judicial nominating commissions. The use of group interviews promotes the desirable goal of assuring that all members of the commission have the same base of information concerning all the judicial applicants and serves to diminish the possibility of gender bias in the interview process. The Task Force concurs with The Missouri Bar Special Committee’s conclusion that the benefits of group interviews outweigh the disadvantages:

The current process is time consuming, unnecessarily costly for candidates who must travel over the state to contact individual commissioners, and susceptible to abuse in questioning of candidates.793

789. Survey Comments by Attorneys at 1, Respondent No. 77.
791. Survey Comments by Attorneys at 5-6, Respondent No. 255.
792. St. Louis Hearing Vol. IV at 4-5; written statements submitted in connection with St. Louis Hearing. One of the four, Annette Heller, also served as a member of the 1986 Missouri Bar Board of Governors Special Committee.
793. Missouri Bar Special Committee Report at 18.
e. Need for Record Keeping

Record keeping of applicants is required of private and public employers who are subject to fair employment laws. However, only three of the ten commissioners responding to the survey indicated that any records were kept by their commissions regarding applications for judgeships. The Task Force recommends that such records be kept by each commission and then turned over to the Office of the State Courts Administrator once the nominations are forwarded by the commission to the Governor.

f. Need for Rules of Ethics for Nominating Commissioners

The evidence received by the Task Force suggests that rules of ethics for nominating committees should be adopted by the Missouri Supreme Court. These rules state that all written communications received by an individual Missouri Plan commissioner regarding an applicant shall be forwarded to the other commissioners; that all oral communications shall be reduced to writing and forwarded to other commissioners; that all communications shall be deemed confidential and shall not be disclosed to anyone outside the commission; and that commissioners shall not initiate or receive communications directly or indirectly with or from the Governor or representatives of the Governor about candidates prior to the submission of the final three nominees to the Governor.

The Missouri Bar Special Committee suggested that such rules should be adopted "to avoid the opportunity for, and the appearance of cronism, favoritism, dealmaking, or other improprieties and to encourage a more professional approach to judicial selection."\textsuperscript{794} The evidence reveals that there is a perception, by both men and women, that inappropriate politicking operates behind the scenes during the nomination stage. The proposed rules would serve to enhance the perception, of both lawyers and the public, that merit rather than politics governs which candidates achieve nominations for judgeships under the Missouri Plan.

The Task Force also concurs with The Missouri Bar Special Committee proposal that the rules of ethics for Missouri Plan nominating commissioners should further require impartiality, confidentiality, and sensitivity to conflicts of interest. The Missouri Bar Special Committee suggested that such rules for commissioners would establish standards for conduct and increase public respect for the operation of the Missouri Plan.\textsuperscript{795} The Task Force concurs that commissioners should conduct themselves in a manner that will not reflect discredit upon the judicial selection process or discloses partisanship or

\textsuperscript{794} Id. at 19.

\textsuperscript{795} See Missouri Bar Special Committee Proposed Manual at 23-24, 27.
partiality in the consideration of candidates. Accordingly, commissioners should endeavor to be impartial and objective and should not become an advocate for any candidate, should be mindful of the obligations of confidentiality, should disqualify themselves if a conflict of interest is apparent, and should disclose to other commissioners all personal and business relationships with prospective nominees that may inadvertently influence their decision. The Task Force also recommends that commissioners be strongly discouraged, if not prohibited, from holding membership in clubs or organizations that practice invidious discrimination on the basis of gender.

g. Need for Increased Publicity and Recruitment of Applicants

Only three of ten commissioners responding to the Task Force reported they were aware of efforts by their commissions to publicize openings or to recruit qualified female or minority judicial applicants.\(^{796}\) Four commented that, in their view, a sufficient number of qualified applicants are received under existing processes.\(^{797}\) In contrast, several attorneys suggested that they were frequently unaware of judicial openings and openings on judicial nominating commissions.

Broader advertisement of openings on the judiciary and on the Missouri Plan nominating commissions would increase applications and increase awareness about the operation of judicial selection methods. In recent years, some chief judges and court administrators have undertaken to provide notices of judicial vacancies to lawyers residing within the circuit or district.\(^{798}\) The Task Force recommends a formal rule requiring that notices be sent by mail to all lawyers in the area affected by the vacancy at least sixty days prior to the deadline for filing for judgeships or election as a lawyer member of a commission.

Women and minorities, newcomers to the profession, have faced uphill battles to get interim appointments for elective judgeships or Missouri Plan appointments. The success of women and minority applicants would be enhanced by public messages from the organized bar, the Missouri Supreme Court, and the Governor endorsing judicial diversity and equal opportunity.

\(^{796}\) Question No. B23 Judicial Nominating Commission Questionnaire.

\(^{797}\) Question No. B24 Judicial Nominating Commission Questionnaire.

\(^{798}\) E.g., some personal efforts were made by former Supreme Court Chief Justice Charles Blackmar to increase applications from women, minority, and public interest attorneys.
h. Need for Increased Diversity on the Nominating Commissions

Since the beginning of the Missouri Plan in 1940, the judicial nominating commissions have been heavily dominated by white males. Not until the 1970's were women lay members appointed to the commissions; since then, at most one woman lay person has been named to each commission. No woman attorney was elected to a commission until 1988; one now serves on the 21st Commission and one on the 22nd Commission; no women attorneys serve on the other four commissions. As of January 1, 1993, no woman judge had ever served on a commission. No woman has ever been elected governor. Thus, women have played minimal roles in the two major stages of the Missouri Plan process—the nomination of candidates and the appointment of judges.

A number of states strongly advocate, and some require, gender balance on all state boards and commissions, including their judicial nominating commissions. Some states, like Iowa, statutorily require gender balance for both the appointment of lay persons and the election of attorneys.

799. See, e.g., ILL. COMPILED STAT. ANN. ch. 5 § 310/2 (Smith-Hurd 1993): All appointments to boards, commissions, committees and councils of the State created by the laws of this State and after the effective date of this Act shall be gender balanced to the extent possible and to the extent that appointees are qualified to serve on those boards, commissions, committees and councils. If gender balance is not possible, then appointments shall provide for significant representation of both sexes to boards, commissions, committees and councils governed by this Act and Section 8.1 of the Civil Administrative Code of Illinois. If there are multiple appointing authorities for a board, commission, committee, or council, they shall each strive to achieve gender balance in their appointments.

Appointments made in accordance with this Act should be made in a manner that makes a good faith attempt to seek gender balance based on the numbers of each gender belonging to the group from which appointments are made (emphasis added).

Some states also advocate minority representation. See, e.g., MONTANA CODE ANNOTATED § 2-15-108 (1991):

As vacancies occur and appointments are made, all appointing authorities of all appointive boards, commissions, committees, and councils of state government shall take positive action to attain gender balance and proportional representation of minorities resident in [the relevant district of] Montana to the greatest extent possible (Emphasis added).

800. Section 46.1 of the Iowa Code states:

The governor shall appoint, subject to confirmation by the senate, one eligible elector of each congressional district to the state judicial nominating commission for a six-year term beginning and ending as provided in section 69.19. The terms of no more than three nor less than two of the members...
to their judicial nominating commissions; some states utilize weighted voting for the election of attorneys. In these states, the number of women and minority nominees for judgeships has increased dramatically.

CONCLUSION

There is a perception that gender bias exists in both the election and appointment of judges in Missouri. The percentage of women on the bench in Missouri is lower than the national average. This percentage is not reflective of the percentage of women in the legal profession in Missouri and not representative of the women citizenry in the state. Information presented to and considered by the Task Force suggests that reforms in both the elective and appointment processes would create a more level playing field for the selection of judges, reduce the potential for gender bias, and better serve the ultimate objective of equal justice under law.

<table>
<thead>
<tr>
<th>JUDGE</th>
<th>CURRENT COURT</th>
<th>METHOD OF SELECTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Margaret Young</td>
<td>Retired 1974</td>
<td>1954-Elected</td>
</tr>
<tr>
<td>MARYBELLE D. MUELLER</td>
<td>32nd Cir.</td>
<td>1955-Interim Appt.</td>
</tr>
<tr>
<td>Betty Pine Lockard</td>
<td>Retired 1967</td>
<td>1962-Elected</td>
</tr>
<tr>
<td>Gladys Berger Stewart</td>
<td>Deceased</td>
<td>1966-Interim Appt.</td>
</tr>
<tr>
<td>JOYCE M. OTTEN</td>
<td>2nd Cir.</td>
<td>1969-Interim Appt.</td>
</tr>
</tbody>
</table>

shall expire within the same two-year period. No more than a simple majority of the members appointed shall be of the same gender (Emphasis added).


801. Section 46.2 of the Iowa Code states:
The resident members of the bar of each congressional district shall elect one eligible elector of the district to the state judicial nominating commission for a six-year term beginning July 1 . . . . For the first elective term open on or after July 1, 1987, in the odd-numbered districts the elected member shall be a woman and in the even-numbered districts the elected member shall be a man (emphasis added).

IOWA CODE § 46.2 (1993).
<table>
<thead>
<tr>
<th>JUDGE</th>
<th>CURRENT COURT</th>
<th>METHOD OF SELECTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Janice Pueser Noland</td>
<td>Retired 1974</td>
<td>1970-Elected</td>
</tr>
<tr>
<td>Vera Funk</td>
<td>Retired 1975</td>
<td>1972-Elected</td>
</tr>
<tr>
<td>Deann D. Smith</td>
<td>Retired 1978</td>
<td>1972-Elected</td>
</tr>
<tr>
<td>ELLEN ROPER</td>
<td>13th Cir.</td>
<td>1976-Interim Appt.;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1982-Elected to Cir. Ct.</td>
</tr>
<tr>
<td>BARBARA GALE LAME</td>
<td>43rd Cir.</td>
<td>1976-Interim Appt.</td>
</tr>
<tr>
<td>M. KEITHLEY WILLIAMS</td>
<td>29th Cir.</td>
<td>1976-Interim Appt.</td>
</tr>
<tr>
<td>SUSAN E. BLOCK</td>
<td>21st Cir.</td>
<td>1978-Elected</td>
</tr>
<tr>
<td>Kathie Guyton Dudley</td>
<td>Retired 1990</td>
<td>1978-Elected</td>
</tr>
<tr>
<td>Pam Kline</td>
<td>Deceased 1990</td>
<td>1978-Elected</td>
</tr>
<tr>
<td>ANNA C. FORDER</td>
<td>22nd Cir.</td>
<td>1979-Mo. Plan Appt.</td>
</tr>
<tr>
<td>MARY A. DICKERSON</td>
<td>26th Cir.</td>
<td>1981-Interim Appt.;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1988-Elected to Cir. Ct.</td>
</tr>
<tr>
<td>PATRICIA BRECKENRIDGE</td>
<td>Mo. App., W.D.</td>
<td>1982-Interim Appt.;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1990-Mo. Plan Appt. to Mo. App., W.D.</td>
</tr>
<tr>
<td>LUCY D. RAUCH</td>
<td>11th Cir.</td>
<td>1982-Elected;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1991-Elected to Cir. Ct.</td>
</tr>
<tr>
<td>MARY W. SHEFFIELD</td>
<td>25th Cir.</td>
<td>1982-Elected</td>
</tr>
<tr>
<td>MARGARET M. NOLAN</td>
<td>21st Cir.</td>
<td>1982-Mo. Plan Appt.</td>
</tr>
<tr>
<td>EVELYN BAKER</td>
<td>22nd Cir.</td>
<td>1983-Mo. Plan Appt.</td>
</tr>
<tr>
<td>EDITH MESSINA</td>
<td>16th Cir.</td>
<td>1984-Mo. Plan Appt.</td>
</tr>
<tr>
<td>JUDGE</td>
<td>CURRENT COURT</td>
<td>METHOD OF SELECTION</td>
</tr>
<tr>
<td>-------------------</td>
<td>---------------</td>
<td>----------------------------------------------------------</td>
</tr>
<tr>
<td>PATRICIA SCOTT</td>
<td>26th Cir.</td>
<td>1986-Elected</td>
</tr>
<tr>
<td>SHERRI B. SULLIVAN</td>
<td>22nd Cir.</td>
<td>1989-Mo. Plan Appt.</td>
</tr>
<tr>
<td>MARY K. HOFF</td>
<td>22nd Cir.</td>
<td>1989-Mo. Plan Appt.</td>
</tr>
<tr>
<td>LINDA HAMLETT</td>
<td>12th Cir.</td>
<td>1990-Elected</td>
</tr>
<tr>
<td>NANCY SCHNEIDER</td>
<td>11th Cir.</td>
<td>1991-Interim Appt.</td>
</tr>
<tr>
<td>JODY CAPSHAW ASEI</td>
<td>13th Cir.</td>
<td>1991-Interim Appt.</td>
</tr>
<tr>
<td>JANE PANSING BROWN</td>
<td>7th Cir.</td>
<td>1991-Mo. Plan Appt.</td>
</tr>
<tr>
<td>BARBARA CRANCER</td>
<td>21st Cir.</td>
<td>1992-Mo. Plan Appt.</td>
</tr>
<tr>
<td>CAROL BADER</td>
<td>23rd Cir.</td>
<td>1992-Elected</td>
</tr>
<tr>
<td>CAROLYN WHITTINGTON</td>
<td>21st Cir.</td>
<td>1992-Mo. Plan Appt.</td>
</tr>
</tbody>
</table>

**KEY:**
- CAPITALS = Currently sitting judges
- Lower case = Retired, resigned, or deceased judges
- Interim Appt. = Interim appointment for elected judgeship
- Mo. Plan Appt. = Missouri Nonpartisan Court Plan appointment

**Sources:** OFFICIAL MANUALS, STATE OF MISSOURI (1953-54 to 1991-92) and information supplied by the Governor’s Office and the Secretary of State’s Office. The listing is accurate as of January 1, 1993.

### E. Recommendations

1. For the Missouri Supreme Court

   **a.** The Missouri Supreme Court should by rule provide for the mandatory professional training of Missouri Plan judicial commissioners.

---

802. This recommendation and most of the following recommendations can be implemented by changes in Missouri Supreme Court Rule 10. See proposed rules in Missouri Bar Special Committee Proposed Manual at 14-27.

[https://scholarship.law.missouri.edu/mlr/vol58/iss3/1](https://scholarship.law.missouri.edu/mlr/vol58/iss3/1)
The program should be offered annually and should cover such relevant issues as roles, responsibilities, and procedures of the commissioners; interviewing methods; criteria for evaluating candidates; recent developments in other states with similar commissions; gender and racial bias awareness; information on the state of the judiciary; and a discussion on recruiting methods, including recruiting of qualified women and minority candidates.

Information received by the Task Force and the 1986 Missouri Bar Special Committee reveals that Missouri Plan judicial commissions have no formal mechanisms for educating new commissioners on their roles and responsibilities; no procedures manual; and no written guidelines for recruiting, interviewing, or evaluating judicial applicants. Training of the lawyers, lay members, and judges on the commissions would help to professionalize the role of the commissioners, diminish perceptions about personal and party politics in the nomination process, and eliminate potential gender bias in the process. The seminars could be presented by an outside group such as the American Judicature Society, which provides such educational training for other states, or by other staff designated by the court.

b. The Missouri Supreme Court should by rule promulgate a detailed procedures manual for use by members of the Missouri Plan judicial commissions similar to The Missouri Bar Special Committee Proposed Manual, which is patterned after the American Judicature Society Handbook for Judicial Nominating Commissions. The manual should articulate written criteria by which to screen all judicial applicants regardless of gender; guidelines for application forms; guidelines for recruiting, interviewing, and evaluating applicants; guidelines for record keeping of applicants by gender and race; rules of communication; and ethical rules.

A procedures manual for Missouri Plan commissions would serve as an aid in educating new commissioners, establish a uniform set of procedures for all commissions, and allow both the candidates and the public to understand how the commissions operate. The evidence indicates that there is a perception among some lawyers, both men and women, that gender bias does exist in the nomination of judges under the Missouri Nonpartisan Court Plan. In some instances, it appears that these perceptions of gender bias have been created by instances of inappropriate questions posed to female applicants by commissioners. The Missouri Supreme Court should take appropriate action to formalize the application and nomination process and to educate nominating commission members concerning the nature of their duties and responsibilities, uniform procedures, and the types of inquiries that legally may be made of judicial applicants.
c. The Missouri Supreme Court should by rule adopt a uniform application form for Missouri Plan judicial applicants requesting information emphasizing judicial qualifications and precluding questions that might reflect gender bias.

The evidence indicates that the judicial application forms that solicit personal data on judicial applicants for Missouri Plan positions vary from circuit to circuit and from commission to commission. The Missouri Supreme Court should review and compare the forms to ensure uniformity throughout the state. The evidence also reveals that some of the judicial application forms contain irrelevant or inappropriate questions which may inadvertently lead to gender bias in the application process. The Task Force recommends that the application forms be reviewed and revised to eliminate all questions seeking irrelevant or inappropriate information that could be perceived to elicit gender-biased information. For example, the Task Force recommends that questions regarding military service, marital status, and children be removed. In their stead might be questions requesting the applicant’s work history, asking whether applicants have any responsibilities that might affect their ability to perform the duties of a judge on a full-time basis, or asking whether the applicant has any family relationship that might create a conflict of interest. In addition, the Task Force recommends that a question be added inquiring whether an applicant belongs to any clubs or organizations that discriminate on the basis of gender, race, or other impermissible criteria. The Task Force concurs with the view adopted in Canon 2C of the 1990 A.B.A. Model Code of Judicial Conduct that membership in such clubs presents an appearance of impropriety.

d. The Missouri Supreme Court should adopt Canons 2 and 2C of the 1990 A.B.A. Model Code of Judicial Conduct for judicial applicants and judges. Canon 2 states: "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." Canon 2C states: "A judge shall not hold membership in any organization that practices invidious discrimination on the basis of sex, race, religion or national origin."803

Several states, including California, Colorado, Utah, Virginia, and Wyoming, have adopted Canon 2C of the 1990 A.B.A. Model Code. According to the commentary to Canon 2C, membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge’s impartiality is impaired. In addition to membership, the Code

---

803. Race, religion, and national origin are outside the scope of the Task Force’s mission, but are included here to reproduce the Model Code in its original form.

https://scholarship.law.missouri.edu/mlr/vol58/iss3/1
also suggests that it would be a violation for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of sex, race, religion, or national origin in its membership or other policies or for the judge to regularly use such a club. Federal judges also are strongly discouraged from holding membership in discriminatory clubs or organizations under Canon 2 of the Code of Conduct for Federal Judges, and a question in this regard appears on application forms for federal judgeships. According to the commentary to Federal Canon 2:

The Judicial Conference of the United States has endorsed the principle that it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination. A judge should carefully consider whether membership in a particular organization might reasonably raise a question of impartiality in a case involving issues as to discriminating against persons on the basis of race, sex, religion, or national origin.804

e. The Missouri Supreme Court should promulgate rules of ethics for Missouri Plan nominating commissioners requiring that all written communications received by an individual Missouri Plan commissioner regarding an applicant shall be forwarded to the other commissioners; that all oral communications shall be reduced to writing and forwarded to other commissioners; that all such communications shall be deemed confidential and shall not be disclosed to anyone outside the commission; and that commissioners shall not initiate or receive communications directly or indirectly with or from the Governor or representatives of the Governor about candidates prior to the submission of the final three nominees to the Governor. The rules of ethics for Missouri Plan nominating commissioners should further require impartiality, confidentiality, and sensitivity to conflicts of interest, and they should discourage membership by commissioners in clubs or organizations that invidiously discriminate on the basis of gender.

The Task Force concurs with The Missouri Bar Special Committee that rules of ethics for Missouri Plan commissioners should be adopted "to avoid the opportunity for, and the appearance of cronyism, favoritism, 'deal-making,' or other improprieties and to encourage a more professional approach to judicial selection."805 The evidence reveals that there is a perception, by both men and women, that inappropriate politicking operates

805. Missouri Bar Special Committee Report at 19.
behind the scenes during the nomination stage. Some qualified men and women lawyers do not apply or advance because they are unwilling or unable to engage in extensive electioneering for judgeships. The proposed rules would serve to enhance the perception of both attorneys and the public that merit rather than politics governs which candidates achieve nominations for judgeships under the Missouri Plan.

The proposed rules of ethics for commissioners would establish standards for conduct and increase public respect for the operation of the Missouri Plan.806 No commissioner or judge should conduct themselves in a manner that reflects discredit upon the judicial selection process or discloses partisanship or partiality in the consideration of candidates. Accordingly, commissioners should endeavor to be impartial and objective, not becoming an advocate for any candidate; should be mindful of the obligations of confidentiality; should disqualify themselves if conflict of interest is apparent; and should disclose to other commissioners all personal and business relationships with prospective nominees that may inadvertently influence their decision. The Task Force recommends that commissioners should be strongly discouraged, if not prohibited, from holding membership in clubs or organizations that practice invidious discrimination on the basis of gender, race, religion, or national origin.

f. The Missouri Supreme Court should by rule direct the members of Missouri Plan judicial nominating commissions to conduct group interviews of all judicial applicants.

The evidence reveals that the interviewing procedures utilized by Missouri Plan nominating commissions vary greatly from commission to commission and within commissions. The Task Force recommends that the Missouri Supreme Court require group interviews of judicial applicants. Although some commissioners expressed a desire to retain the one-on-one interviews, the Task Force agrees with The Missouri Bar Special Committee that the disadvantages outweigh the benefits: "The current process is time consuming, unnecessarily costly for candidates who must travel over the state to contact individual commissioners, and susceptible to abuse in questioning of candidates."807 The use of group interviews promotes the desirable goal of assuring that all members of the commission have the same base of information concerning all the judicial applicants and serves to diminish the possibility of gender bias in the interview process.

806. See Missouri Bar Special Committee Proposed Manual at 23-24, 27.
807. Missouri Bar Special Committee Report at 18.

https://scholarship.law.missouri.edu/mlr/vol58/iss3/1
g. The Missouri Supreme Court should by rule provide a mechanism for publicity of vacancies for Missouri Plan judgeships, interim appointments, and lawyer positions on the nominating commissions. It should also affirmatively promote diversity among applicants.

The Task Force survey revealed a widely shared belief that gender diversity on a court is beneficial—a belief held by 88% of attorneys (97% female attorneys, 75% male attorneys), 78% of judges, and 72% of court personnel. However, the evidence reveals that some lawyers lack information about openings for the judiciary, about openings for lawyer positions on Missouri Plan nominating commissions, and about the procedures for appointment and election of judges in Missouri. Broader advertisement of openings on the judiciary and on the nominating commissions would increase applications and increase awareness about the operation of judicial selection methods. In recent years, some chief judges and court administrators have undertaken to provide notices of judicial vacancies to lawyers residing within the circuit or district. The Task Force recommends a formal rule requiring that notices be sent by mail to all lawyers in the area affected by the vacancy at least sixty days prior to the deadline for filing for judgeships or election as a lawyer member of a commission. The success of women applicants would be enhanced by public messages from the Missouri Supreme Court endorsing judicial diversity and equal opportunity.

h. The Missouri Supreme Court should explore with the organized bar, the General Assembly, and the Governor ways to increase diversity in the makeup of the judicial nominating commissions.

A number of states strongly advocate, and some require, gender balance on all state boards and commissions, including judicial nominating commissions. Some states, like Iowa, statutorily require gender balance for both the appointment of lay persons and the election of attorneys to their judicial nominating commissions. Some states utilize weighted voting in the election of attorneys. In states that require or advocate gender balance on all boards and commissions, including their judicial nominating commissions, the number of women nominees for judgeships has increased dramatically.

i. The Missouri Supreme Court should advocate the use of merit nominating commissions for nominations of interim judges for elective judicial positions.

808. See supra note 800.
809. See supra note 801.
The evidence suggests that a substantial number of Missouri's 201 elected trial judges first come into office by way of interim appointments. Both the bar and the public perceive that politics play a role in these appointments and that women are unfairly disadvantaged by their lack of political influence. Women have received a disproportionately small number of interim appointments during the past seven gubernatorial terms. The Task Force recommends the use of nominating commissions in order to bring to the surface the most qualified candidates for Missouri's courts and to increase diversity in the judiciary.

2. For the organized bar

   a. The organized bar should actively promote and encourage gender diversity in the judiciary.

   b. The organized bar should offer informational programs on the appointment and elective methods of selecting judges in Missouri and programs on how to deal with these processes.

   c. The organized bar should explore ways to improve diversity in attorney elections that would increase the participation of women on Missouri Plan nominating commissions.

   d. The organized bar should urge the Governor to increase the gender diversity in the judiciary through interim appointments for elective judgeships and Missouri Plan appointments.

   e. The organized bar should urge the Governor to appoint women lay commissioners to Missouri Plan judicial nominating commissions to advance equal opportunity in the nomination process.

   f. The organized bar should urge the Governor to utilize nominating commissions for interim appointments for elective judgeship positions.

Increased gender diversity in the judiciary would benefit Missouri and its citizens. While improvement has been made in recent years, Missouri still lags behind other states in the number of women on the bench at the trial and appellate levels. The percentage of women on the bench in Missouri is lower than the national average, not reflective of the percentage of women in the legal profession in Missouri, and not representative of the women citizenry of the state. Through its various professional organizations, including the organized bar, the members of the legal profession should commit themselves to the elimination of both actual and perceived gender bias in judicial selection. The organized bar and other professional organizations should
actively promote and encourage gender diversity within the nominating commissions and the Missouri judiciary.

The evidence of gender bias in the appointment of judges is a matter of concern that should be addressed not only by the Missouri Supreme Court and the organized bar, but also by the Governor. The Missouri Supreme Court and the organized bar should encourage the Governor to publicly endorse gender diversity and equal opportunity and to appoint qualified women to the bench, thereby advancing the objectives of equal opportunity for women and men and equal justice under the law. For these same reasons, the Missouri Supreme Court and the organized bar should encourage the Governor to appoint women to nominating commissions and to utilize nominating commissions for interim appointments.

VII. INSTITUTIONALIZING REFORM: IMPLEMENTING THE TASK FORCE RECOMMENDATIONS

At the outset of this Report, the Task Force observed that its examination of the court system in Missouri revealed a high level of understanding among the judiciary, the bar, and court constituent groups of the nature of gender bias in the courts, as well as a genuine commitment to equal justice and opportunity. Throughout this Report, the Task Force has endeavored to illustrate how that commitment has, over the past decade and more, translated into material and tangible progress in ensuring that justice is administered evenlyhandedly among men and women and that court participants are accorded dignity and respect, irrespective of gender. The Task Force has also emphasized that, in many areas, good intentions notwithstanding, the promise of reform has not been fulfilled and that material obstacles to the administration of justice remain.

The Task Force, in its original directive from Chief Justice Blackmar, was instructed to issue a report containing "its findings and recommendations" and "provide a plan for the education of the bench, bar, and public with respect to its findings and recommendations." Throughout its Report, the Task Force has offered recommendations in the particular substantive areas it addressed and has identified areas in which an institutional commitment by the courts and constituent groups would have a most enduring effect on reform.

A. Education and Leadership: The Role of the Organized Bar

The Task Force took seriously its charge to "provide a plan for the education of the bench, bar and public." Every topic the Task Force addressed in this Report identifies "education" as a principal component of reform. In reflecting on how the particular recommendations for education could be translated into the practical "plan" the Executive Council of the
Missouri Judicial Conference requested, the Task Force has concluded that, for the purposes of remedying gender-based impediments to the administration of justice, "education" is in many cases interchangeable with principles of leadership.

The organized bar in Missouri—The Missouri Bar, the women’s bar associations, the minority bar associations, and the many other local and statewide organizations—has a long and distinguished history of providing leadership in many areas of court improvement. The organized bar is uniquely well suited to perform this function because, in approaching court improvement, it integrates all areas of the legal system—the judiciary, practicing attorneys, law schools, legal academics, and community leaders. Like virtually every project intended to improve the administration of justice, fulfilling the promise of reform on the subject of gender and justice will require the participation and commitment from each of these constituent groups.

It appears to the Task Force that the existing apparatus and committees formed by Missouri’s organized bar provide a superior forum for reducing to practical application a large number of the recommendations contained in this Report. The organized bar has a historical commitment to examining domestic violence, family law, criminal law, legal ethics, court administration, and judicial selection, as demonstrated by the bar associations’ standing committees and distinct subcommittees on virtually all of these topics. It is the Task Force’s view that the specialized professional experience that bar committee members can bring to bear will make a distinctive contribution toward practical solutions to problems of gender and justice in the court.

B. Creation of a Family Court

As part of its discussions of Family and Domestic Violence Law, the Task Force has recommended the creation of a Family Court.\textsuperscript{810} No single recommendation made by the Task Force can, in the Task Force’s view, if followed, have a more profound practical effect on achieving fairness and equality between men and women in the administration of laws that are especially susceptible to gender bias. Creation of such a court will, in the first instance, be symbolic of the court system’s understanding of the unique role it plays as arbiter of family-related matters. On a practical level, such a court ideally would employ a specialized judiciary committed to understanding the complex factors affecting the administration of family and domestic violence laws.

\textsuperscript{810} See supra note 352.
C. Legal Services for the Indigent

Access to the courts and the availability of legal services for women and men was determined by the Task Force to be an indispensable component to reform. The Task Force concurs with the Minnesota Supreme Court Task Force for Gender Fairness in the Courts, which observed in its 1989 report that "[t]he question of access is crucial to any meaningful inquiry into gender fairness in the courts. If women and men do not have an equal opportunity to seek relief from the courts, the fairness of the entire system is undermined."\(^{811}\)

In examining the issue of whether such access is denied along gender lines, the Task Force determined that, among the low-income population, a grossly disproportionate number of women lack the financial resources to obtain counsel in family law, domestic violence, and other legal matters and that the inability to obtain counsel affects women more severely than men. As a result, the Task Force has recommended that state resources should be made available for the funding of legal representation for poor people in family law and domestic violence matters.

D. Increased Diversity in the Judiciary

The need for increased diversity in the judiciary was determined by the Task Force to be another indispensable component to reform. The percentage of women on the bench in Missouri is lower than the national average. The percentage is not reflective of the percentage of women lawyers in Missouri and not representative of the women citizenry of the state. As of January 1, 1993, only 27 of the 342 judges on the Missouri judiciary were women. There is one woman on the seven-member Missouri Supreme Court; one woman on the fourteen-member Eastern District Court of Appeals in St. Louis; and one woman on the eleven-member Western District Court of Appeals in Kansas City. There are no women judges on the seven-member Southern District Court of Appeals in Springfield, and thirty of the state’s forty-four judicial circuits have no women judges.

The Task Force concluded that determining how gender bias may affect judicial selection and taking steps to avoid such bias are critical to the administration of justice by Missouri’s courts in two major respects. The first is public perception and trust that the judiciary is unbiased. The second is equality of opportunity for qualified applicants who seek judicial office. The Task Force proposed a number of reforms in both the elective and appointive processes to reduce the potential for gender bias, create a more level playing

field for advancement of women to the judiciary, and better serve the ultimate objective of equal justice under the law.

E. Ethical Rules and Guides to Conduct

In a number of instances, the Task Force concluded that judges, attorneys, court personnel, and judicial nominating commissioners would be greatly aided by clearer articulations of rules of conduct regarding gender bias. Some of those proposed rules require reforms to the Missouri Code of Judicial Conduct and the Missouri Rules of Professional Conduct. Others require the adoption of new rules of conduct.

In addition, and prior to formal rule changes, the Task Force has recommended that the Missouri Supreme Court adopt a Missouri Courtroom Conduct Handbook similar to that recently adopted by other states such as Florida. Such a handbook serves as an educational resource that is readily available and easily understood. Because the prevalence and impact of such conduct is often perceived differently by individuals, the handbook provides a frame of reference for identifying gender bias in the courts.

F. Task Force for Implementation of the Task Force Recommendations

Many of the Task Force recommendations can be implemented, as indicated above, through the leadership and education efforts of the organized bar. However, others may require a task force to assist the Missouri Supreme Court with implementation of the recommendations. We urge the Chief Justice and the Executive Council of the Missouri Judicial Conference to undertake the implementation process as quickly as possible.

G. Task Force on Race and Justice

The Task Force has recommended that the Missouri Supreme Court establish a Task Force on Race and Justice to conduct a study of whether racial bias exists in the administration of justice in Missouri, and, if so, what steps should be taken to remedy it. The Task Force, mindful of the limitations of the charge pursuant to which it operated, did not undertake a full investigation of racial issues. However, the evidence presented to this body, limited as it was, suggested to the Task Force that serious study of

812. See generally, FLORIDA COURT CONDUCT HANDBOOK: GENDER EQUALITY IN THE COURT (available from the Florida Bar). Some individual judges utilize smaller brochures for the same purpose. See Hon. Lorenzo Arrendondo, Gender Bias in the Courts: Combatting Stereotypes, CRT. REV. (Fall 1989).
racial issues is warranted. It is hoped that the information collected by this body may provide some assistance to those who would undertake such a study. The Task Force is aware that a request to convene such a task force has already been made by several local bar associations and supports that request.

CONCLUSION

In an era when social problems are so commonly distinguished by their seeming intractability, it is the Task Force's committed view that solutions to gender bias in Missouri's courts are at hand. As described in detail in the body of this Report, leadership and education are the primary components to fulfilling the promise of reform. These, when combined with other specific recommendations, will move Missouri courts closer to their constitutional mandate:

That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.

Respectfully submitted,

THE MISSOURI TASK FORCE ON GENDER AND JUSTICE

813. An addendum presenting the evidence relating to racial issues is contained in the original report.

MISSOURI TASK FORCE ON GENDER AND JUSTICE

Chairpersons

Janet I. Blauvelt, Attorney, Kansas City
Joseph T. Porter, Jr., Attorney, St. Louis
Honorable James K. Prewitt, Springfield

Members

Nancy S. Barclay, Attorney, Kansas City
Honorable Susan Block, St. Louis
Linda Jane Boles, Springfield
Honorable Patricia A. Breckenridge, Kansas City
Anne-Marie Clarke, Attorney, St. Louis
Ilus W. Davis, Attorney, Kansas City
Elister Dewberry, Attorney, Kansas City
Honorable David H. Dunlap, West Plains
Ben Ely, Jr., Attorney, St. Louis
Leonard J. Frankel, Attorney, St. Louis
Karen A. King, Attorney, Jefferson City
Mary-Louise Moran, Attorney, St. Louis
Timothy D. O'Leary, Attorney, Kansas City
Dale Reesman, Attorney, Boonville
Steven Craig Roberts, Attorney, St. Louis
Edward M. Roth, Attorney, St. Louis
Honorable Mary Sheffield, Phelps County
James A. Snyder, Attorney, Kansas City
Richard B. Teitelman, Attorney, St. Louis
Professor Karen L. Tokarz, St. Louis
J. William Turley, Attorney, Rolla
Professor James E. Westbrook, Columbia
Harold L. Whitfield, Attorney, St. Louis
Lois M. Zerrer, Attorney, Springfield

Liaison to Supreme Court

Honorable Ann K. Covington, Jefferson City

Executive Director

Leslie V. Freeman, Attorney, St. Louis