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## Thirty Years Later: Recalling the Gender Bias Report and Asking "What's Next" in the Legal Profession

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## THIRTY YEARS LATER: RECALLING THE GENDER BIAS REPORT AND ASKING “WHAT’S NEXT?” IN THE LEGAL PROFESSION<sup>1</sup>

HON. PAMELA J. WHITE\*

The front-page newspaper headlines on May 4, 1989 were jolting to read:

“Sex Bias Pervades Md. Courts, Panel Finds: Discrimination Reported by Litigants, Judicial Candidates Alike”;<sup>2</sup>

“Sex bias in courts found to hurt women the most.”;<sup>3</sup>

“Gender Bias Is Widespread in Md. Courts, Study Finds: Committee Urges End to Sex Discrimination”;<sup>4</sup>

“Study finds Maryland courts discriminate by sex; Men and women don’t get equal treatment, panel says”;<sup>5</sup>

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1. The historical review in this Article was first drafted as a “preamble” to a 2020 Symposium at the University of Maryland Carey School of Law: “Advancing Equal Access to Justice by Challenging Gender Bias in the Legal Profession: What’s Next?” A summary description of the Symposium’s contents and participants appears in Section VI of this Article.

\* In 1989, Pamela J. White, was President of the Women’s Bar Association of Maryland, law firm partner of Ober Kaler Grimes & Shriver, and an active member of the Maryland State Bar Association and Bar Association of Baltimore City. She was appointed to the bench-bar Select Committee on Gender Equality and served for more than a decade before and after her term as MSBA President. In 2007, White was appointed by Governor Robert L. Ehrlich to the Circuit Court for Baltimore City, and elected to a fifteen-year term in 2008. In 2014, Judge White received the Robert M. Bell Judge of the Year Award (Maryland Access to Justice Commission) “in recognition of [her] contribution to access to justice.” Judge White currently serves as Chair of the Maryland Judicial Council’s Committee on Court Access and Community Relations. Patrick D. Hanlon, assisted to edit and cite-check this paper while serving as judicial law clerk to Judge Pamela J. White. Hanlon is a 2019 graduate of the Washington and Lee University School of Law and a member of the Bar Association of Baltimore City.

2. Ed Bruske, *Sex Bias Pervades Md. Courts, Panel Finds: Discrimination Reported by Litigants, Judicial Candidates Alike*, WASH. POST, May 4, 1989, at A1 (reporting that “Maryland’s courts are infected with pervasive discrimination against women”).

3. Joel McCord, *Sex Bias in Courts Found to Hurt Women the Most*, SUN, May 4, 1989, at 1B (quoting Chief Judge Robert C. Murphy as saying that gender bias “exists in subtle form throughout our system and threatens to undermine the integrity of the entire judicial process” and promising to “stamp it out totally, conclusively and without delay”).

4. Jef Feeley, *Gender Bias Is Widespread in Md. Courts, Study Finds: Committee Urges End to Sex Discrimination*, MD. DAILY REC., May 4, 1989, at 1 (reporting that “[g]ender-based biases have so permeated Maryland’s courts that they affect how judges are selected, how cases are decided and how lawyers are treated”).

5. Tom Stuckey, *Study finds Maryland courts discriminate by sex; Men and women don’t get equal treatment, panel says*, CAMBRIDGE DAILY BANNER, May 4, 1989.

“Report finds bias against women in courts”;<sup>6</sup>

“Women not getting day in court; Report finds gender bias a serious problem in judicial system”;<sup>7</sup> and

“Report confirms gender bias.”<sup>8</sup>

These news and journal articles described the May 1989 Report of the Special Joint Committee on Gender Bias in the Courts.<sup>9</sup> Following two years of comprehensive study, “the Committee [was] convinced that gender bias ha[d] a major and negative impact on the judicial system of this state.”<sup>10</sup> The 300 page report of findings, case studies, recommendations, and survey results stated, unequivocally, that “gender bias exists in the courts of Maryland, and it affects decision-making as well as participants.”<sup>11</sup> The very appointment of the Committee,<sup>12</sup> the subjects of study, and the Report’s striking conclusions, made manifest the difficulty that judges and lawyers have with recognizing how gender bias affects access to justice for parties, witnesses and lawyers. The importance of the Report appeared in its inalterable findings and critical demands for an educational process for the bench and bar. The action items—recommended for attention by the executive, legislative, and judicial branches, organized bar and community activists, and by legal educators—signaled the urgent need to recognize the existence and consequences of gender bias in court systems.<sup>13</sup>

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6. *Report Finds Bias Against Women in Courts*, STAR DEMOCRAT, May 4, 1989 (noting that the Report of the Special Joint Committee on Gender Bias in the Courts “found considerable evidence that bias results in women being treated unfairly when they seek the protection of the courts against abusive husbands. “Too often judges and court employees deny the victim’s experiences, accuse the victim of lying about her injuries, treat the cases as trivial and unimportant, blame the victim for getting beaten and badger the victim for not leaving the batterer”).

7. Brandon Griggs, *Women Not Getting Day in Court, Report Finds Gender Bias a Serious Problem*, MONTGOMERY J., May 4, 1989.

8. J.B. Pierpoint, *Report Confirms Gender Bias*, BALT. BUS. J., May 8–14, 1989.

9. Hereinafter “Special Joint Committee.”

10. MARYLAND SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS, REPORT OF THE SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS, at xxxix (1989) [hereinafter REPORT]. The year following its release, the *University of Baltimore Law Review* reproduced the report. Maryland Special Joint Committee on Gender Bias in the Courts, *Report of the Special Joint Committee on Gender Bias in the Courts — May 1989*, 20 U. BALT. L. REV. 1 (1990).

11. See REPORT, *supra* note 10, at i.

12. Court of Appeals Chief Judge Murphy appointed and charged members of the Committee, including Judge William H. Adkins II, Judge Rosalyn B. Bell, Judge William D. Missouri, Master Louise G. Scrivener, Professor Karen Czapanskiy, Marvin J. Garbis, Linda H. Lamone, M. Peter Moser, Judge Hilary D. Caplan (who chaired the Committee), and staffer Deborah A. Unitus. Professor Czapanskiy and Tricia D. O’Neill were the Committee’s reporters. *Id.* at 145.

13. The author drew on several of her publications contemporaneous to the Report to offer this retrospective compendium. See, e.g., Pamela J. White, *Gender Bias in Maryland’s*

The Report reflected a nationwide trend to identify “the profound need for judicial reform to eliminate gender bias in our courts.”<sup>14</sup> Maryland was part of an early group of seventeen states that established gender bias task forces to collect data, compile reports, and propound recommendations for implementation.<sup>15</sup> Many recommendations among the dozens offered in the 1989 Report have been addressed by organized bar groups and attorneys in practice, by the Court of Appeals and its Rules Committee, by law schools and through judicial education, in the General Assembly and Executive Orders. Over the decades, female litigants, attorneys, and witnesses have moved steadily toward securing equal access to court systems without presumptive gender bias or unfairness borne of prejudice. But such progress has been painstaking; lessons learned from educational initiatives and evolving professional expectations have not ended the tabloid headlines and social media rants about misbehaving judges and lawyers for their gender biased misconduct without apparent disciplinary consequence.<sup>16</sup>

More than thirty years later, sexism and racism<sup>17</sup> still affect the quality and character of justice in Maryland. Continuing concerns for gender bias in the legal profession and gender-related obstacles to equal access to justice require closer attention to violations of judicial and attorney ethics rules prohibiting discrimination. Successive generations of lawyers now bear responsibility to take the next steps to eliminate gender bias in our courts and achieve equality under the law. The 1989 Report and pioneering Special Joint Committee efforts provided a solid foundation for those next steps.

#### I. THE WORK OF THE SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS

By 1989, the Special Joint Committee’s intensive efforts revealed that gender bias was endemic to Maryland Courts. The goal to eliminate gender bias in Maryland courts was announced only after extended study identified that the consequences of gender bias affected all

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*Courts: The Next Step Toward Its Elimination*, BARRISTER, Summer 1989, at 13–17 (on file with the Bar Association of Baltimore City).

14. Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 ARIZ. ST. L.J. 237, 237 (1989).

15. *Id.* at 247 n.47. Schafran noted that by 1989, five states were implementing the recommendations of their respective gender bias task forces. *Id.* at 247.

16. *See infra* notes 108–111.

17. *See, e.g.*, Patrick Tandy, *MSBA Hosts Inaugural Diversity & Inclusion Conference*, MSBA BAR BULL., Apr. 15, 2019, at 1, 18, <https://www.msba.org/content/uploads/sites/7/2019/04/April-2019-Bar-Bulletin-MSBA.pdf> (discussing the importance of diversity in the legal profession and announcing the “creation of the [MSBA’s] Diversity & Inclusion Committee”).

participants in judicial proceedings. Members of the Special Joint Committee conducted surveys and worked intently to become familiar with dozens of court files and transcripts and the testimony of scores of witnesses appearing at public hearings across the state. That research and the survey results led to the Report's conclusions and recommendations. The Committee's study and its findings focused on several areas of concern for gender bias: domestic violence cases, child custody and visitation, child support, alimony and property disposition, court personnel, judicial selections, and the treatment of women in the courtroom as parties, witnesses, jurors and lawyers.<sup>18</sup> After more than two years of intensive study, the Committee concluded that pervasive gender bias existed in Maryland's judicial system. The Report did not mince words, finding that gender bias exists in four primary respects:

Gender bias exists when people are denied rights or burdened with responsibilities solely on the basis of gender. Gender bias exists when people are subjected to stereotypes about the proper behavior of men and women which ignore their individual situations. Gender bias exists when people are treated differently on the basis of gender in situations where gender should make no difference. Finally, gender bias exists when men or women as a group can be subjected to a legal rule, policy or practice which produces worse results for them than for the other group.<sup>19</sup>

The Report noted that "evidence of racial bias also came to the attention of the Committee. Recent reports have shown that gender and racial bias persist in the legal system and that both must be addressed."<sup>20</sup>

Referring to public testimony and transcripts of court proceedings involving domestic violence complaints, the Report identified situations where court personnel and judges may discredit or ignore the testimony of women victims of violence without understanding a victim's inability to protect herself. The Report was critical of judges who tended to trivialize circumstances of domestic violence: "Gender bias can be seen whenever a battered woman is denied protection from her batterer

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18. REPORT, *supra* note 10, at v.

19. *Id.* at iii. As the task force reports across the nation consistently demonstrated: "Gender bias has three aspects: stereotyping the nature and roles of women and men, society's devaluation of women and what is perceived as women's work, and myths and misconceptions about the social and economic realities of women's and men's lives." Schafran, *supra* note 14, at 238-39.

20. REPORT, *supra* note 10, at i n.1. Contemporaneous with the Special Joint Committee's studies, organized bar groups conducted a 1987 conference "to discuss problems facing minorities in the legal profession and to promote cooperation between legal, governmental and private organizations." REPORT AND RECOMMENDATIONS OF THE CONFERENCE ON MINORITIES IN THE LEGAL PROFESSION 3 (1987).

because the judge finds the testimony of any woman less trustworthy than that of any man.”<sup>21</sup>

Both men and women were found to be disadvantaged by the biased attitudes of some judges.<sup>22</sup> The Report lambasted child custody decisions made by “judges believ[ing] that men are unfit for custody because of their sex, and that men should not become too involved with their children.”<sup>23</sup> Other “judges believe that women are unfit for custody if they engage in sexual conduct, are economically inferior to the father, work outside the home, or do not fulfill the judge’s concept of a perfect mother.”<sup>24</sup>

The Committee found evidence of gender biased treatment of women in the courtroom<sup>25</sup> and detailed instances where case outcomes were affected by stereotypical expectations about the proper conduct and demeanor of both men and women in the courtroom. The Report criticized instances where judges and masters treated the testimony of female witnesses as less credible simply because of their sex.<sup>26</sup> Extensive public testimony described disrespectful and demeaning forms of address and gender-related comments to women attorneys in court.<sup>27</sup>

The Committee’s findings were accompanied by recommended tasks and key priorities to counter the effects of gender bias. For example, the judiciary and court administration were instructed to provide continuing education to all court personnel as to the nature, characteristics, defenses, and impact of domestic violence; to work on legislative and rules changes addressing procedural problems in domestic violence matters and prioritizing civil protective orders; to educate court personnel as to the consequences of gender-biased economic considerations in family courts when addressing child-rearing stereotypes and parental sexual activities; and to identify the need for

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21. REPORT, *supra* note 10, at 131.

22. The Committee made several findings critical of the judicial nominations and appointments process. Among its findings were the paucity of women lawyers appointed to the bench, the irrelevance of gender-biased questions to qualifications for appointment, stereotypical expectations about professional experience, and the hostility of male attorneys to appointments of women. *Id.* at xxix–xxx.

23. *Id.* at xiv.

24. *Id.*

25. The Report reached beyond the courtroom to find that a “majority of female [courthouse] employees occupy the lowest end of the salary scale,” and were subject to “harassment from judges, supervisors, attorneys, [and] co-workers” by “unwelcome requests for sexual . . . favors” and by “hostile work environment[s].” *Id.* at xxvi–xxvii.

26. *Id.* at 10, 127. Masters are now referred to as Magistrates in the Maryland Judiciary.

27. *Id.* at 111 (“Often, female parties and witnesses are treated disparagingly and their credibility is undermined by trivializing or sexually-oriented comments and forms of address.”).

gender neutrality in custody, visitation, alimony and property matters.<sup>28</sup> Significantly, the Report detailed recommendations for continuing education of all judges as to both overt and subtle manifestations of gender bias against women attorneys, witnesses, and litigants. Such recommendations were buttressed by suggested mandates for equal treatment of all persons in the courtroom and the development of confidential reporting and investigation of complaints of gender-biased conduct by judges and attorneys.<sup>29</sup>

The Report concluded with the Committee's observation that "[t]he goal of gender-neutrality in the judicial system is vital and important."<sup>30</sup> A critical recommendation would create a joint bench and bar committee "to encourage, monitor, evaluate, and report on efforts undertaken to carry out the recommendations of this Report relating to litigants, witnesses, jurors, and lawyers."<sup>31</sup> A priority for the new "Gender Equality Committee" was to seek amendment of judicial ethics rules "to provide explicit direction to all members of the bench and similar offices that gender bias is a form of partiality which is beneath the ethical standards appropriate for the judiciary."<sup>32</sup> The Special Joint Committee and Chief Judge Robert C. Murphy emphasized the importance of recommendations to educate the bench and bar because "[a] fair and efficient justice system can ill afford, in its administration, even the slightest perception of purposeful discrimination . . . ."<sup>33</sup> Noting that such concerns for perceptions of bias extended to issues of "discrimination in the legal profession because of sex, race, disability, religion or national origin," the Maryland State Bar Association ("MSBA") also committed to work with the judiciary to eliminate gender bias in the courts.<sup>34</sup>

The Special Joint Committee<sup>35</sup> made dozens of recommendations warranting implementation<sup>36</sup> in light of the Committee's findings. Among those findings:

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28. *Id.* at viii-xi.

29. *Id.* at 128.

30. *Id.* at 133.

31. *Id.*

32. *Id.* at 134.

33. Robert C. Murphy, *Introduction* to REPORT, *supra* note 10.

34. Roger W. Titus, *Introduction* to REPORT, *supra* note 10.

35. Judge Rosalyn B. Bell, Linda H. Lamone, M. Peter Moser, and Deborah Unitus were lauded in 1999 for their unequalled commitment and work with the Special Committee that continued for the next ten years with the Select Committee. No one knew better than these members the importance of the 1989 Report and its 121 action-oriented recommendations for educational and systemic changes.

36. REPORT, *supra* note 10, at 20, 42, 53, 72, 94, 105, and 128.

A widespread perception that gender bias affects the process or outcome of particular cases is important because such bias undermines the image of impartiality which is crucial to the system. Where that perception has a basis in fact, it is imperative that the judicial system eliminate it in order to protect the reputation of the judiciary for impartiality.<sup>37</sup>

For further example:

At its hearings and through its survey, the Committee heard about numerous incidents indicating that some judges still treat women lawyers differently from men, and that the differences make the job of representing their clients more difficult. Judges were reported to have demonstrated an attitude that female lawyers are less important, less entitled to respect, and less competent as a group than male lawyers. Complaints were common, for example, from female and male attorneys who believed that judges assume the women to be less competent than men and who accord female attorneys less credibility because of their sex.<sup>38</sup>

The Committee described specific instances where “[a]ttorneys reported to the Committee that some judges and lawyers do not stop with sexist remarks, jokes, or general comments about the appearance of women lawyers; they make verbal or physical sexual advances in the course of the professional interaction.”<sup>39</sup>

A new Select Committee on Gender Equality was appointed to act on resulting recommendations.<sup>40</sup> Several members of the Special Joint Committee continued on the successor Select Committee on Gender Equality.<sup>41</sup> Those members remained critically focused on both the reality and perceptions of gender bias identified in the Report.

Consequent recommendations encompassed training of attorneys, judges, and court personnel to identify subtle and overt manifestations of gender bias as well as due process consequences; employing gender neutral language in court proceedings; establishing mechanisms to

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37. REPORT, *supra* note 10, at 109.

38. *Id.* at 121.

39. *Id.* at 125.

40. Hereinafter “Select Committee” (distinct from the Special Joint Committee).

41. In June 1989, Chief Judge Murphy and MSBA President Robert W. Titus announced the creation of a new Select Committee on Gender Equality in the Legal System to monitor and pursue many of the actions recommended in the Report. Court of Appeals Judge Lawrence F. Rodowsky would chair the Committee, joined by Judges Rosalyn B. Bell, Clayton Greene, William H. Adkins II, Barbara Kerr Howe, Keith E. Matthews, James S. McAuliffe Jr., Theresa A. Nolan, David Ross, Robert F. Sweeney, and Raymond G. Thieme Jr., with attorneys Lynne A. Battaglia, Edward P. Camus, James C. Chapin, Al Figinski, Eric M. Johnson, Linda Lamone, L. Paige Marvel, M. Peter Moser, Pamela J. White, and Vice-Chair William B. Dulaney. The Select Committee was charged to determine and prioritize how to promote equal access to justice in Maryland courts regardless of gender.

complain and investigate gender bias of judges<sup>42</sup> and attorneys; requiring judges to intervene and correct gender-biased conduct in their courtrooms; and promoting opportunities for women leaders in bar associations and broadening judicial selections.<sup>43</sup> Such recommendations, and revision of the judicial canons since, “have been implemented to effect institutional changes aimed at altering the perception and the reality of gender bias in the [legal] profession.”<sup>44</sup>

## II. THE WORK OF THE SELECT COMMITTEE ON GENDER EQUALITY

The Women’s Bar Association of Maryland (“WBA”), the MSBA, and the Select Committee on Gender Equality led bar groups across the State to act on the Report. For example, the WBA conducted “CourtWatch” in 1992 to determine if gender bias remained manifest in Maryland courtrooms.<sup>45</sup> Both positive and negative judicial behaviors were noted. The WBA observed that “[l]awyers should be reminded that they are officers of the court and that they are expected to conduct themselves ethically and professionally at all times . . . .”<sup>46</sup> The WBA further recommended that “[a] study should be undertaken to determine how gender and racial biases continue to influence the private practice of law.”<sup>47</sup> Efforts of the organized bar generally coordinated educational outreach with the Maryland Judiciary and in collaboration with the Select Committee on Gender Equality.<sup>48</sup>

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42. See, e.g., *Braxton v. Faber*, 91 Md. App. 391, 405, 604 A.2d 543, 550 (1992) (noting that attorneys may face a “Hobson’s Choice” concerning whether and when to complain about a judge’s misconduct).

43. REPORT, *supra* note 10, at 128–29.

44. Opinion, *Gender Equality and Diversity in Maryland’s Courts: 10 Years After the Report*, MD. DAILY REC., Apr. 22, 1999, at 1C.

45. Tricia D. O’Neill & Karen Czapanskiy, *CourtWatch Report*, WOMEN’S BAR ASS’N OF MD., at 36 (May 1993).

46. *Id.* at 36.

47. *Id.* See also Nancy Kercheval, *Partnership Seats Still Tough to Find for Female Lawyers*, MD. DAILY REC., Aug. 1, 1992, at 1; Jef Feeley, *Despite Progressing on Gender Bias, Courts Still Slight Women, Report Says*, MD. DAILY REC., Nov. 18, 1992, at 3. In 1991–92, the MSBA Special Joint Committee on Minorities in the Profession devised a survey intended to follow up on “progress made in implementation of the 1987 Minorities Conference recommendations” and identify initiatives for the organized bar “to see to it that minorities fully participate in the legal profession.” REPORT AND RECOMMENDATIONS OF THE CONFERENCE ON MINORITIES IN THE LEGAL PROFESSION, *supra* note 20, at XX.

48. The primary, educational purpose of the new Select Committee was stated by Chief Judge Murphy: “In consultation with the Maryland Institute for Continuing Professional Education for Lawyers, Inc. (“MICPEL”), and the Judicial Institute of Maryland, to assist in the development and scheduling of educational programs for members of the bench and bar designed to educate attorneys and judges of the means by which gender bias may be eliminated in the Maryland legal system.” Secondarily, the Select Committee was to monitor the efforts of stakeholders in the legal system such as the organized bar and the law schools

At the July 25, 1989 inaugural meeting of the Select Committee on Gender Equality, Chief Judge Murphy committed the judiciary to the new Committee's purpose in implementing the 1989 Report's recommendations, especially the development of education programs for both the bench and bar.<sup>49</sup> Notable efforts followed to encourage and promote civility codes, create a professionalism course for new lawyers, establish guidelines dealing with sexual harassment in courthouses and law offices, launch Judicial Institute courses for judges, create judicial orientation programs, revise the judicial canons, improve operations of the Judicial Disabilities Commission, and add helpful commentary to the lawyers' Rules of Professional Conduct.<sup>50</sup> The primary agenda of the new Select Committee targeted judicial education on domestic violence concerns.<sup>51</sup> Educational presentations would be made to every circuit and district court bench in the state and followed from the 1989 Report's explicit finding that "[m]any judges and court employees lack understanding about and sensitivity to the dynamics of domestic violence and the circumstances of the victim and the batterer."<sup>52</sup>

The Select Committee addressed the context of discriminatory bias in court proceedings and supported revision of judicial ethics rules to

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and "report on the progress in achieving gender equality. Event Program, Ten Years After. . . (1999) (on file with author).

49. The Court of Appeals cited the Report for authority as to the reported existence and adverse consequence of verbal or physical sexual advances by judges to female lawyers due to "the power of the judge." *Surratt v. Prince Georges County*, 320 Md. 439, 463, 578 A.2d 745, 757 (1990).

50. See Janet Stidman Eveleth, *Celebrating Gender Equality*, MSBA BAR BULL., June 1999, at 2, 15. An April 22, 1999 *Maryland Daily Record* editorial recalled a number of initiatives undertaken by the Gender Equality Committee "such as the inclusion of gender issues in programs of the Judicial Institute, educational programs focusing on the problems of sexual harassment in the legal workplace, the inclusion of gender issues in the Professionalism Course for new admittees, the formation of a Complaint Subcommittee and procedure to deal with gender bias complaints in the judicial system, and the formation of an education and advocacy role in addressing family law issues." *Gender Equality and Diversity in Maryland's Courts: 10 Years After the Report*, *supra* note 44, at 1C. The Select Committee on Gender Equality had no rulemaking authority.

51. Judge Rodowsky advised of the Committee's earliest focus in September 1989: "Education concerning domestic violence cases is the highest priority objective of our Committee." Ten Years After, *supra* note 48.

52. REPORT, *supra* note 10, at 20. Committee recommendations for State's Attorneys included trainings with social work support for victims and targeted prosecution units. Recommendations in the Report for the legislature included a provision for 24/7 access to protective orders, funding full service family courts, and allowing evidentiary attention to the battered woman syndrome. Such issues continue to receive close attention in trial and appellate courts. See, e.g., *Elzey v. State*, 243 Md. App. 425, 437 220 A.3d 440 (2019) (to "raise the issue" of Battered Spouse Syndrome, defendant to produce evidence that victim caused defendant to suffer from Syndrome).

prohibit manifest bias by judges.<sup>53</sup> Maryland Rule 18-102.3(b) now requires:<sup>54</sup>

In the performance of judicial duties, a judge shall not, by words or conduct, manifest bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation. A judge shall require attorneys in proceedings before the court, court staff, court officials, and others subject to the judge's direction and control to refrain from similar conduct.<sup>55</sup>

Maryland and American Bar Association ("ABA") leader M. Peter Moser<sup>56</sup> described "What Maryland Lawyers Should Know About The Judicial Conduct Code" in a 1998 Maryland Bar Journal article.<sup>57</sup> He urged Maryland lawyers to become familiar with the judicial canons aimed at "avoiding bias and prejudice in court."<sup>58</sup> He reiterated the fundamental principle in Canon 1<sup>59</sup> of the Maryland and ABA Model Codes: "An independent and honorable judiciary is indispensable to justice in our society."<sup>60</sup> Moser encouraged adoption of Maryland's Canon 2,<sup>61</sup> for example, which prohibits judges from belonging to organizations that discriminate on the basis of race, sex, religion, or national origin, and from engaging in sexual harassment. Moser also expressed that "judges are directed to ensure that lawyers refrain from

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53. Before the judicial canons were revised, "serious personal misconduct" for sexual harassment of an attorney could reasonably lead "to 'the conclusion that the judge's impartiality might reasonably be questioned,'" and warrant the judge's recusal. *Surratt*, 320 Md. at 466, 469, 578 A.2d at 758, 760 (quoting *In re Turney*, 311 Md. 246, 253, 533 A.2d 916, 920, (1987)).

54. REPORT, *supra* note 10, at 128–29 (recommending that court administration "[e]ducate court personnel not to treat male and female attorneys differently and not to assume all men are attorneys and that females must prove they are" and further recommending that judges "[m]onitor behavior in courtrooms and chambers and swiftly intervene to correct lawyers, witnesses, and court personnel who engage in gender-biased conduct"). *Id.* at 94–95 (recommending that "Court Administration and the Judiciary . . . [i]ssue a directive defining the various types of sexual harassment and stating that this type of behavior is illegal, unacceptable, and grounds for termination.").

55. MD. R. 18-102.3(b).

56. Moser, a former MSBA President, was actively engaged in the ABA, serving for four years as Treasurer of the ABA and on numerous committees and projects, including the ABA's 1990 Model Code Revision Project.

57. M. Peter Moser, *What Maryland Lawyers Should Know About the Judicial Conduct Code*, 31 MD. BAR J. 26 (1998). Moser navigated for the Select Committee to address fundamental changes to the canons of judicial ethics, condemning bias of any sort in the courthouse, and adding commentary to the lawyer Rules of Professional Conduct condemning sexual harassment by lawyers.

58. Moser, *supra* note 57, at 28.

59. MD. R. 18-100.4.

60. Moser, *supra* note 57, at 26.

61. MD. R. 18-103.6.

similar manifestations of bias or prejudice in proceedings before them” unless doing so would “preclude a lawyer’s legitimate advocacy in cases where these factors are an issue.”<sup>62</sup> Moser viewed manifestations of bias or prejudice in judicial proceedings as proscribed “conduct prejudicial to the administration of justice,” given the judiciary’s obligation to ensure lawyers refrain from such conduct.<sup>63</sup>

In 1996, the Court of Appeals approved new commentary to Rule 8.4(d) of the Maryland Lawyers Rules of Professional Conduct, which prohibits “conduct that is prejudicial to the administration of justice.”<sup>64</sup> The official Maryland Rules comment provided—and continues to state—that “[s]exual misconduct or sexual harassment involving colleagues, clients, or co-workers may violate section (d) . . . of this Rule.”<sup>65</sup> The survey statistics from the Special Joint Committee’s two-year study detailed in the 1989 Report provided part of the impetus for the comment, for example: almost half of women attorneys surveyed in Maryland had been subjected to verbal or physical sexual advances by other counsel in a litigation setting;<sup>66</sup> and 78% of women attorneys cited sexist remarks and jokes by opposing counsel as a common experience and 35% of male attorneys surveyed agreed.<sup>67</sup>

This information also served to focus attention by the organized bar on educational initiatives to address sexual harassment and other types of gender discrimination in the legal profession.<sup>68</sup> In addition to educational initiatives, legal employers were provided costly lessons in defense and liability for employment discrimination. Larger law firms were subject to Title VII prohibitions of discrimination in the

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62. Moser, *supra* note 57 at 28.

63. *Id.* at 29. See also M. Peter Moser, *Assuring Gender Equality in the Courts*, 25 MD. BAR J. 26 (1992).

64. MD. R. 19-308.4(d).

65. MD. R. 19-308.4 cmt. 3. The ABA Model Rules expanded Comment [3] to Rule 8.4(e) to identify conduct as prejudicial to the administration of justice when lawyers representing clients manifest “bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.” MD. R. 19-308.4(e).

66. REPORT, *supra* note 10, at 84, 125.

67. *Id.* at 124–25. See also Vicki C. Jackson, *What Judges Can Learn from Gender Bias Task Force Studies*, 81 JUDICATURE 15 (1997). Professor Jackson quoted Justice Ruth Bader Ginsburg’s observation that task force reports “enhance public understanding that gender equality is an important goal . . . [and enable courts] to identify, and devise effective means to eliminate, the harmful effects of gender bias.” *Id.* at 16. Similar findings by task forces on court systems nationwide confirmed that “many lawyers think judges should intervene to remedy inappropriate behavior” of this sort. *Id.* at 18.

68. PAMELA J. WHITE, MD. INST. FOR CONTINUING PRO. EDUC. LAWS., CURRENT ISSUES AND DEVELOPMENTS IN SEXUAL HARASSMENT CASES B-1 (1992). MICPEL was created and funded by the Maryland State Bar Association for voluntary educational programs. The Maryland Court of Appeals does not require continuing legal education of lawyers.

workplace.<sup>69</sup> Smaller law firms might see claims for tort liability for sexual harassment.<sup>70</sup>

Members of the Select Committee on Gender Equality encouraged and monitored the development of programs for members of the bench and bar “designed to educate attorneys and judges of the means by which gender bias may be eliminated in the Maryland legal system.”<sup>71</sup> Such courses explicitly identified problematic sexual harassment<sup>72</sup> and other forms of racist and gender-biased behaviors.<sup>73</sup> Court of Special Appeals Judge Rosalyn B. Bell led court-by-court continuing legal education (“CLE”) initiatives to inform each bench about the manifestations and consequences of domestic violence.<sup>74</sup>

Other Select Committee educational projects included adding the subject of family law to the bar examination, monitoring bar efforts to draft guidelines to deal with problems of sexual harassment in courthouses and law offices, consulting with law school faculty to develop effective sexual harassment policies, improving operations of the Judicial Disabilities Commission, and presenting informational programs to the Attorney Grievance Commission. Judicial training programs brought particular problems in the handling of domestic violence cases to light. Legislative changes in family law marked

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69. Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e et seq.

70. Tort theories include intentional infliction of emotional distress, assault, battery, and invasion of privacy. Pamela J. White & Susan R. Matluck, *Conduct Unbecoming a Lawyer: Expanding Tort Remedies for Sexual Harassment*, BRIEF, Summer 1995, at 16–20. In December 1996, a federal jury found Montgomery County attorney Jeffrey R. Schmieler and his law firm liable for sexual harassment, awarding \$80,000 to attorney Elizabeth Zwibel. Sandra Torry, *Jury Awards \$80,000 for Harassment*, WASH. POST (Dec. 31, 1996), <https://www.washingtonpost.com/archive/local/1996/12/31/jury-awards-80000-for-harassment/302e1379-9d9c-47c6-b7e6-cfe6931b2182/>.

71. Peter F. Axelrad, Alan M. Wilner, Ellen L. Hollander, Pamela J. White, William L. Reynolds, Jana Singer, Gordon G. Young, Mary H. Keyes, & Kenneth Turnbull, *Tributes to Judge Lawrence F. Rodowsky*, 60 MD. L. REV. 785, 791 (2001).

72. See Pamela J. White, *Model Policies Condemn Sexual Harassment By Legal Employers*, MD. BAR J., MAR.–APR. 1993, at 40, 41; White & Matluck, *supra* note 70

73. See, e.g., Videotape: Sex Laws and Videotape: Gender Bias in the Legal Profession (Bar Association of Baltimore City 1993); HARRIET E. COOPERMAN, BRUCE S. HARRISON, ALISA H. REFF, STEPHEN M. SILVESTRI & PAMELA J. WHITE, MD. INST. FOR CONTINUING PRO. EDUC. LAWS, SEXUAL HARASSMENT CASES (1991); White, *supra* note 68; White & Matluck, *supra* note 70 at 16; Janet Stidman Eveleth, *Strides in Gender Equality*, MD. BAR J., JAN.–FEB. 2003, at 50; White, *supra* note 13 at 13. Additionally, several cases underscored problematic conduct in the courtroom and were discussed in Judicial Institute courses. See, e.g., *Mullaney*, 126 Md. App. at 644–45, 730 A.2d at 761–63; *Braxton*, 91 Md. App. at 406, 604 A.2d at 550; *Surratt*, 320 Md. at 463–64, 578 A.2d at 757; ARRIE W. DAVIS & PAMELA J. WHITE, JUD. INST. MD., RACIAL, GENDER, AND CULTURAL SENSITIVITY IN THE COURTS (2001).

74. Judge Rosalyn B. Bell’s CLE, family law, and gender bias initiatives were part of an extraordinary career and legacy to advance access to justice unimpeded by gender bias. Judge Bell received numerous awards for her indefatigable leadership, including recognition by the Select Committee, the WBA, and the Women’s Law Center.

dramatic progress to combat domestic violence and gender disparities in family law matters.

Without mandatory attorney attendance at these programs, and without a blackletter rule condemning sexual harassment or discriminatory bias as sanctionable misconduct, civility codes for lawyers and judges were useful to condemn discriminatory bias. The MSBA's aspirational Code of Civility, published in 1997, identified a lawyer's first duty as follows:

We will treat all participants in the legal process, in a civil, professional, and courteous manner and with respect at all times and in all communications, whether oral or written . . . We will refrain from acting upon or manifesting racial, gender, or other bias or prejudice toward any participant in the legal process. We will treat all participants in the legal process with respect.<sup>75</sup>

The Bar Association of Baltimore City's Guidelines on Civility included a "General Code of Conduct for Attorneys" and urged in item 5 that "[a] lawyer should refrain from manifesting, by words or conduct, bias or prejudice."<sup>76</sup> The Codes of Civility were quoted and promoted to new admittees to the Maryland bar in a mandatory professionalism course.<sup>77</sup>

### III. RULES OF CONDUCT FOR MARYLAND LAWYERS

Effective in 1990, Rule 11 of the Rules Governing Admission to the Bar of Maryland required new admittees to attend a day-long professionalism course.<sup>78</sup> Beginning with the inaugural presentation in 1992, course materials developed by the MSBA began to address gender bias in the profession. The November 1994 Report of the Professionalism Course Committee of the MSBA cautioned that the professionalism course did not cover certain gaps in the ethical or

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75. MARYLAND STATE BAR ASSOCIATION CODE OF CIVILITY (May 1997), [https://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2009/2009\\_ethics\\_g.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2009/2009_ethics_g.authcheckdam.pdf). The civility codes of bar associations were described with other MSBA initiatives to promote civility in *Holistic Approach to Professionalism*. Pamela J. White, *Holistic Approach to Professionalism*, MD. BAR J., SEP.-OCT. 2003, at 18, 19-23. That entire issue was devoted to "Preserving Civility in the Legal Profession" and included articles by Judge Albert J. Matricciani, Jr., Andrew Jay Graham, Steven Michael Selzer, Rignal W. Baldwin, Jr., Abraham A. Dash, President Harry S. Johnson, and Editor Janet Stidman Eveleth.

76. BAR ASS'N OF BALT. CITY GUIDELINES ON CIVILITY (May 14, 1996).

77. Rule 11 of the Rules Governing Admission to the Maryland Bar was effective throughout the 1990's. See MD. STATE BAR ASS'N, *Report of the Professionalism Course Committee of the Maryland State Bar Association* (1994).

78. Justice Sandra Day O'Connor was cited as she spoke of the essence of professionalism as encompassing lawyers' "sense of responsibility to the larger legal system [that] strives, however imperfectly, to provide justice for all." MD. STATE BAR ASS'N, *Professionalism Course For New Admittees To The Maryland Bar* 15 (1992).

disciplinary codes by which lawyers are regulated. The 1994 Report noted the publicized import of sexual harassment and gender bias in the legal profession; however, disciplinary consequences for such misconduct were unclear. Course materials eventually encompassed such concerns.<sup>79</sup>

By 1994, a nationwide debate concerned whether lawyers' ethics rules ought to condemn race and gender bias by lawyers as unprofessional conduct. Maryland legal icon Charles H. Dorsey, Jr. urged that the traditional oath of admission<sup>80</sup> was all that was necessary to inform and oblige lawyers to conduct themselves without bias as members of a "noble and learned profession."<sup>81</sup> In contrast, *Maryland Daily Record* headlines on June 4, 1999 described a Court of Special Appeals decision: "No 'Babes' Allowed: CSA Upholds Sanctions for Lawyer's Remarks."<sup>82</sup> Few cases in Maryland appellate courts suggest that lawyers are to be reported or disciplined or properly sanctioned for ignoble conduct.<sup>83</sup> Rather, the organized bar extolled the continuing responsibility of Maryland lawyers "to promote civility and respect for our colleagues, our clients, and our courts . . ."<sup>84</sup> Nevertheless, the potential for prejudicial impact of such misconduct demanded closer attention to such issues affecting equal access to justice and respect for the rule of law.<sup>85</sup>

From 2002 to 2003, the Maryland Judicial Task Force on Professionalism undertook a statewide review of concepts of professionalism and devised aspirational "Ideals of Professionalism," offering that a lawyer should aspire:

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79. See MD. STATE BAR ASS'N, *supra* note 77 (addressing "[c]ourse [l]imitations" and describing gaps in the professionalism course as to "practical problems and disciplinary issues of gender bias and sexual harassment . . ."). See also, e.g. MD. STATE BAR ASS'N, *Professionalism Program for New Admittees to the Maryland State Bar* 45-47 (1996).

80. See MD. CODE ANN., BUS. OCC. & PROF. § 10-212 (West 2020). The first line of the oath requires each admittee to swear or affirm "that I will at all times demean myself fairly and honorably as an attorney and practitioner at law . . ." *Id.*

81. Charles H. Dorsey, Jr. was Executive Director of Maryland Legal Aid and chaired the Maryland Board of Law Examiners until his death in April 1995. See MD. STATE BAR ASS'N, *Professionalism Course for New Admittees* (2006).

82. See *Mullaney*, 126 Md. App. at 639, 730 A.2d at 758. Judge Sally Adkins authored the *Mullaney* opinion. *Id.*

83. Comment [3] to Maryland Rule 19-308.4 was added to cite Attorney Grievance Commission v. Goldsborough, 330 Md. 342, 624 A.2d 503 (1993). MD. R. 19-308.4 cmt. 3 ("Sexual misconduct or sexual harassment involving colleagues, clients, or co-workers, may violate Section (d) or (e) of this Rule. This could occur, for example, where coercion or undue influence is used to obtain sexual favor in exploitation of these relationships.") No further Comment has been offered and no further cases have been cited since the 1990s.

84. See *White*, *supra* note 75 at 19.

85. *Id.* at 23.

to avoid all forms of wrongful discrimination in all of his or her activities, including discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, with equality and fairness as the goals.<sup>86</sup>

Ultimately, the Select Committee on Gender Equality supported<sup>87</sup> a black-letter prohibition of discriminatory bias by lawyers when engaged in a professional capacity.<sup>88</sup> Proposed Rule 8.4(e)<sup>89</sup> built on ABA Model Code revisions and Maryland experiences to advise, specifically, that discriminatory conduct by lawyers can be “prejudicial to the administration of justice.”<sup>90</sup> The Select Committee continued to “stress the importance of avoiding even the appearance of bias . . . to educate the judiciary and the practicing bar . . . [and the] [a]doption of a Model Rule of Professional Conduct that specifically addresses these concerns underscores the importance of this goal. The Rule also clarifies that manifestations of bias may, in appropriate circumstances, give rise to disciplinary action . . . .”<sup>91</sup>

Approved by the Court of Appeals in 2005, current Rule 19-308.4(e) now parallels the language of the judicial canons and instructs:

It is professional misconduct for an attorney to . . . knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice . . . .<sup>92</sup>

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86. MD. R. APP’X 19-B.

87. On February 9, 2004, Select Committee Chair, Judge Kathleen G. Cox, urged Chief Judge Robert M. Bell to adopt Rule 19-308.4(e) of the Lawyers’ Rules of Professional Conduct, as reported in October 2003 by the “Special Ethics 2002 Committee.” The Special Ethics 2002 Committee was appointed to address the results of the ABA’s Ethics 2000 Commission and revisions of the ABA Model Rules of Professional Conduct. That “Rodowsky Committee” offered its proposed revisions in 2003. See REPORT OF THE SELECT COMMITTEE APPOINTED BY THE COURT OF APPEALS OF MARYLAND TO STUDY THE ETHICS 2000 AMENDMENTS TO THE ABA MODEL RULES OF PROFESSIONAL CONDUCT (2003), [https://www.mdcourts.gov/sites/default/files/import/publications/pdfs/lawyersropc\\_finalept03.pdf](https://www.mdcourts.gov/sites/default/files/import/publications/pdfs/lawyersropc_finalept03.pdf). The new Rule 19-308.4(e) was approved by the Court of Appeals in 2005.

88. Judge Cox’s 2004 letter and recommendation, for the Select Committee, referred to the existing prohibition of discriminatory bias in the judicial canons and noted that “no clear, corresponding prohibition is set forth in the existing Rules of Professional Conduct.” Letter from Kathleen G. Cox to Robert M. Bell (Feb. 9, 2004) (on file with author). The Select Committee cited its 2001 Retrospective Report to urge the adoption of Rule 8.4(e): “although progress has been made, there is more that remains to be done to eliminate gender bias.” *Id.*

89. MD. R. 19-308.4.

90. MODEL RULES OF PRO. CONDUCT R. 8.4(d) (AM. BAR. ASS’N 2002).

91. Letter from Kathleen G. Cox to Robert M. Bell, *supra* note 88.

92. MD. R. 19-308.4(e). The ABA’s current Model Rule 8.4(g) would alter the standard introduced in Rule 19-308.4(e), from “knowingly manifest,” to prohibit conduct “that the

Some attorneys condemned the new rule as an infringement on free speech. Others believed that existing rules<sup>93</sup> and the Maryland attorney's oath of admission already committed lawyers to "demean [themselves] fairly and honorably"<sup>94</sup>—without discriminatory bias.<sup>95</sup> Proposed commentary explained a purpose for Rule 19-308.4(e):

Section (e) of this Rule reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal system. As a result, even when not otherwise unlawful, an attorney who, while acting in a professional capacity, engages in the conduct described in section (e) of this Rule and by so doing prejudices the administration of justice commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession.

Attention to the new rule and its purposes was not limited to concerns for gender bias. The rule, the civility codes, and the professionalism courses all contribute to promote equal access to justice and respect for the rule of law by and for all participants in legal process—regardless of race or other personal characteristic.

In the decades since the 1989 Gender Bias Report, judges and lawyers still appear uncertain as to the scope of their responsibilities neither to engage in discriminatory conduct nor to tolerate such unprofessional conduct. Mandatory judicial education may assist to close informational gaps.<sup>96</sup> Nationally, judicial organizations are

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lawyer knows or reasonably should know is harassment or discrimination" on the basis of the same characteristics as well as ethnicity, gender identity and marital status. MODEL RULES OF PRO. CONDUCT 8.4(g) (AM. BAR ASS'N 2002).

93. See Rules Order (2005) (Harrell, J., concurring and dissenting). The Concurring Minority Report as to proposed Rule 19-308.4(e), filed by M. Peter Moser, urged that the "reminder" provision (i.e., that lawyers' manifestation of bias or prejudice constituted professional misconduct) should appear solely in comment and not in black letter text. *Id.* at 5. Judge Glenn Harrell agreed with the Moser position, cited "serious free speech, vagueness, and overbreadth questions raised by Rule 8.4 (e)," and dissented from the Court of Appeals' adoption of the black letter text. *Id.*

94. MD. CODE ANN., BUS. OCC. & PROF. § 10-212 (West 2020).

95. In remarks at the August 1994 ABA annual meeting in New York City, as recalled and recorded by Judge White, Charlie Dorsey admonished that despite "all the ways that we differ, we are bound by the same law and ought to be protected by the same law." He emphasized that "the model we set and that way we treat our employees . . . [and] our clients[] ought to reflect the high ideals which we undertook when each of us was sworn in as a member of this noble and learned profession." Those ideals necessarily include guarding and defending the Constitution applied in our diverse society—diverse by race, gender, language and culture. See also MD. STATE BAR ASS'N, *supra* note 81.

96. In 2020, Chief Judge Mary Ellen Barbera announced, and the Judicial College implemented, a mandatory online course, "Preventing Sexual Harassment" for all judges, magistrates, and judiciary personnel compensated by the State of Maryland.

evaluating “policy reforms taking place in light of the #MeToo era.”<sup>97</sup> Aspirational civility codes explicitly condemn ignoble conduct but are not effective to eliminate sexism or racism in the legal profession.

#### V. A DECADE OF PROGRESS TO BEGIN THE NEW CENTURY

The Select Committee on Gender Equality reflected on its efforts and prospects on its tenth anniversary. Chief Judge Robert M. Bell joined the celebratory awards presentation, but added a cautionary note:

We’ve come a long way—educating the bench, the bar and even the public in gender equality. From the gender perspective, things are much better today than they were ten years ago. Gender bias had to be addressed and attacked. . . . We’ve come a long way, but have yet to reach the end of the journey.<sup>98</sup>

A dozen years after the May 1989 Report and the considerable attention and action by the courts and organized bar to its recommendations, the Select Committee’s “Retrospective Report” noted that pragmatic progress to counter gender bias could be identified with educational initiatives, rulemaking and legislative accomplishments, and ethics and civility codes.<sup>99</sup> However, the Select Committee’s 2001 Retrospective Report<sup>100</sup> identified “troubling perceptions of racism in our justice system”:

Survey results reflect perceptions that our courts are not free of racial and ethnic bias, perceptions that judges afford less credibility to minority lawyers and participants in our courts.

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97. The entire November 2018 ABA Judges Journal addressed “Sexual Harassment & the Courts” and explained that “Courts must be held to the same standards as any workplace when it comes to sexual harassment. Likewise, women . . . ought to be treated with the fairness and integrity that courts strive to provide.” Marla N. Greenstein, *Addressing Sexual Harassment in the Courts*, A.B.A. JUDGES’ J. (Nov. 2018), <https://www.americanbar.org/2roum/iudicia1/publications/iudaesiourna1/2018/fall/>.

98. Eveleth, *supra* note 50, at 15 (quoting Chief Judge Robert M. Bell).

99. Pamela J. White, *Introduction to SELECT COMMITTEE ON GENDER EQUALITY, RETROSPECTIVE REPORT ON GENDER EQUALITY* (2001), <https://mdcourts.gov/sites/default/files/import/publications/pdfs/genderequalityreport2001.pdf> (“[T]he Maryland bar increasingly is aware that bias of any sort, including harassment by lawyers, is unprofessional conduct. Bias will not be tolerated by Maryland practitioners who understand that public trust and respect for the rule of law is undermined whenever justice is seen to deliver less to one group than another, simply because of a personal characteristic.”).

100. In a September 2001 introductory letter to the October 2001 Retrospective Report, the Select Committee Chair, Judge Ann S. Harrington, explained that the Committee worked for two years “to conduct a retrospective study designed to measure changes in attitudes, perceptions and experiences that have occurred over the past ten years. As part of this study, the Select Committee expanded its examination of bias within the judicial system to include issues of racial and ethnic bias.” Ann. S. Harrington, *Introduction to SELECT COMMITTEE ON GENDER EQUALITY*, *supra* note 99.

Such perceptions and their roots require action to eliminate racial and ethnic bias in our courts as well as gender bias.<sup>101</sup>

Chief Judge Bell was encouraged and joined by MSBA leadership to create a new court Commission on Racial and Ethnicity Fairness in the Judicial Process.<sup>102</sup> The MSBA, representing two-thirds of the practicing bar in Maryland, joined with Chief Judge Bell to identify and pursue initiatives to combat racial and ethnic bias in the courts.<sup>103</sup> Bar leadership admonished that “[i]t is economically short-sighted and morally reprehensible when racial and ethnic disparities exist in any respect in the quality of law practice and the quality of justice in this State.”<sup>104</sup> The organized bar was committed to equal access to justice by combatting sexism and racism in our courts:

Because justice matters, because lawyers and judges must serve justice for all citizens, and because bias “erodes confidence in the impartiality of the judicial system,” the Maryland bar will work to renew public confidence in the system by relying on the new Report to identify and promote remedies of problematic behaviors in our courts and law offices.<sup>105</sup>

Organized bar groups identified the need for bench and bar to address bias on the basis of sexual orientation and gender identity. A new Special Committee on Anti-Discrimination Issues<sup>106</sup> consulted with the Select Committee for survey purposes, collaborated with bar groups and the Judicial Institute for educational purposes, and addressed the implementation of Maryland’s Anti-Discrimination Act of 2001, which prohibited discrimination on the basis of sexual orientation in employment, public accommodations, and housing. In December 2000, a Maryland gubernatorial task force expressed concerns that citizens were subjected to unequal access to justice and unfair treatment in courts based on the actual or perceived sexual orientation and gender identify of lawyers and litigants.<sup>107</sup>

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101. White, *supra* note 99.

102. The Chair of the new Committee, Court of Appeals Judge Dale Cathell, was joined by vice-chairs, federal Magistrate Charles Day and Deputy Attorney General Carmen Shepard.

103. See Opinion, *Identifying and Eradicating Bias in Maryland’s Judicial System: A Status Report*, MD. DAILY REC., Oct. 29, 2001, at 1B.

104. White, *supra* note 99.

105. Memorandum from Pamela J. White to Janet Stidman Eveleth (Oct. 1, 2001) (on file with author).

106. Chaired by Circuit Judge Albert J. Matricciani, Jr., members also included Judges Audrey J.S. Carrion, Mary Ellen Barbera, and Martha F. Rasin.

107. LYNN HECHT SCHAFFRAN & NORMA JULIET WIKLER, NAT’L JUD. EDUC. PROGRAM, GENDER FAIRNESS IN THE COURTS: ACTION IN THE NEW MILLENNIUM 38 (2001), <https://www.legalmomentum.org/node/209> (“Sexual orientation bias as it affects lesbians is

## VI. THIRTY YEARS LATER: WHAT'S NEXT?

Thirty years after the seminal Report on Gender Bias in the Courts, the #MeToo era headlines graphically highlight continuing, uncorrected judicial and attorney misconduct:

“Federal judge reprimanded for ‘very serious’ long-term misbehavior involving employees and felon,”<sup>108</sup> ;

“Judge faces salacious allegations of courthouse sex, a threesome request and courthouse drinking,”<sup>109</sup>;

“Judge tells lawyer who sent ‘eat a bowl of dicks’ emails the profession doesn’t need him,”<sup>110</sup>; and

“Lawyer told prosecutor she ‘doesn’t know how to act like a young lady,’ ethics complaint says.”<sup>111</sup>

In January 2019, the California Commission on Judicial Performance cited scores of examples of rude remarks, offensive touching, grabbing, hugging, butt slapping, and squeezing when the disciplined male judge wouldn’t take “no” for an answer from a female judge on the same bench.<sup>112</sup> Economic consequences of gender bias also are familiar; a *Maryland Daily Record* commentary noted that the “[g]ender pay gap persists among Big Law partners.”<sup>113</sup>

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another issue that Implementation/Standing Committees need to address on their own and to monitor in other court initiatives.”).

108. Debra Cassens Weiss, *Federal Judge Reprimanded for ‘Very Serious’ Long-term Misbehavior Involving Employees and Felon*, ABA J. (Oct. 1, 2019), <https://www.abajournal.com/news/article/federal-judge-reprimanded-for-very-serious-long-term-misbehavior-involving-employees-and-felon>.

109. Debra Cassens Weiss, *Judge Faces Salacious Allegations of Courthouse Sex, a Threesome Request and Courthouse Drinking*, ABA J. (Dec. 11, 2019), <https://www.abajournal.com/news/article/judge-faces-salacious-courthouse-allegations-stemming-from-relationship-with-member-of-her-rock-band-courthouse-secretary>.

110. Debra Cassens Weiss, *Judge Tells Lawyer Who Sent ‘Eat a Bowl of Dicks’ Emails the Profession Doesn’t Need Him*, ABA J. (Dec. 17, 2019), <https://www.abajournal.com/news/article/this-profession-doesnt-need-you-judge-tells-lawyer-who-sent-bowl-of-dicks-emails>.

111. Debra Cassens Weiss, *Lawyer Told Prosecutor She ‘Doesn’t Know How to Act Like a Young Lady,’ Ethics Complaint Says*, ABA J. (Feb. 21, 2019), <https://www.abajournal.com/news/article/lawyer-told-prosecutor-she-doesnt-know-how-to-act-like-a-young-lady-ethics-complaint-says> (describing a Michigan lawyer who called the prosecutor a “little girl” who “doesn’t know how to act like a young lady,” and advised her to “know your place.”).

112. Inquiry Concerning Justice Jeffrey W. Johnson: Decision and Order Removing Justice Jeffrey W. Johnson from Office 3–4, 7 (Cal. Comm’n on Jud. Performance June 2, 2020), [https://cjp.ca.gov/wp-content/uploads/sites/40/2020/06/Johnson\\_DO\\_Removal\\_6-2-20.pdf](https://cjp.ca.gov/wp-content/uploads/sites/40/2020/06/Johnson_DO_Removal_6-2-20.pdf).

113. Randi Lewis, *Commentary, Gender Pay Gap Persists Among Big Law Partners*, MD. DAILY REC. (Feb. 12, 2019), <https://thedailyrecord.com/2019/02/12/gender-pay-gap-persists-among-big-law-partners/>.

Chief Justice John Roberts' 2018 year-end report acknowledged "special risks of abuse" for law clerks and problems with "inappropriate workplace conduct . . . within the [federal] [j]udiciary."<sup>114</sup> A proposed change to the codes of conduct in federal courts would now instruct that "[j]udges and judicial employees may not engage in abusive or harassing behavior; must be civil and respectful in dealings with co-workers and subordinates; and may not engage in retaliation against persons who report misconduct."<sup>115</sup>

Continuing gender-related biases in court systems raise foundational concerns for access to justice. Indeed, the conversation on combatting gender bias has broadened over the years. A 2020 Symposium at the University of Maryland Francis King Carey School of Law<sup>116</sup> identified its contemporary subject and critical purpose as "Advancing Equal Access to Justice by Challenging Gender Bias in the Legal Profession: What's Next?"<sup>117</sup> Focused panel discussions and breakout groups addressed problematic identification of gender bias as definitions expand to include non-binary considerations. Challenges to gender-related misconduct by attorneys and judges are compounded by intersectional bias issues. And the utility of rules and rule-making to challenge gender-related bias remains debatable. The Symposium program agenda described:

Current headlines and journal articles reflect continuing concern for gender bias in the legal profession and the need for education to overcome such obstacles to equal access to justice. Symposium panelists will explore: the import of judicial and attorney ethics codes prohibiting discrimination; professional and pragmatic concerns of women in Maryland courts and in law practice; and progress on gender equality initiatives announced thirty years ago with the Report on Gender Bias in the Courts.

The Symposium was organized to identify gender-related misconduct and the tools necessary to combat problematic behaviors in the legal profession.<sup>118</sup> One focused panel discussion questioned: "When

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114. JOHN G. ROBERTS, JR., 2018 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3-4 (2018), <https://www.supremecourt.gov/publicinfo/year-end/2018year-endreport.pdf>.

115. *Id.* at 6-7.

116. Three co-sponsors organized Symposium panels and discussion groups: the Women's Bar Association of Maryland (with Judge Pamela J. White and President Meg Oliver); the Women, Leadership and Equality Program at the University of Maryland Francis King Carey School of Law (with Professor Paula Monopoli); and the Moser Ethics in Action Initiative at the University of Maryland Francis King Carey School of Law (with Dean Donald B. Tobin).

117. Symposium Program Agenda, Advancing Equal Access to Justice by Challenging Gender Bias in the Legal Profession: What's Next? (Mar. 6, 2020) (on file with the *Maryland Law Review*).

118. *Id.*

does Sexual Harassment and Discriminatory Bias Constitute Judicial Misconduct with Disciplinary Consequences?”<sup>119</sup> A second panel asked: “When does Incivility, Bullying, Sexual Harassment, or Free Speech Amount to Unprofessional or Sanctionable Attorney Misconduct?”<sup>120</sup> Speakers<sup>121</sup> and discussion group leaders raised issues such as “[w]hy women leave the law,”<sup>122</sup> “[r]edefining and recognizing gender issues,”<sup>123</sup> the problematic appreciation that “[r]ules are rules,”<sup>124</sup> and “[g]ender violence and consequence.”<sup>125</sup> Each program segment noted both advances and pitfalls to advancing gender equality in court systems and the legal profession. Project lists began to identify action items for further attention by advocacy groups and bar organizations over a broad range of subjects, including:

shortcomings in complaint procedures, investigations in certain courts;<sup>126</sup>

alternatives to formal complaint processes;<sup>127</sup>

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119. *Id.* Panelists included Judge Catherine C. Blake (United States District Court for the District of Maryland), Judge Toni E. Clarke (Circuit Court for Prince George’s County), Glendora C. Hughes, (General Counsel, Maryland Commission on Civil Rights), Professor Margaret E. Johnson (University of Baltimore School of Law), and Judge Paula Xinis (United States District Court for the District of Maryland). *Id.*

120. *Id.* Panelists were Linda H. Lamone, (Chair, Attorney Grievance Commission), Lydia E. Lawless, (Bar Counsel), Thomas E. Lynch III, (Principal, Miles & Stockbridge, P.C.), and Kathleen Howard Meredith, (Partner, Iliff, Meredith, Wildberger & Brennan, P.C.). *Id.*

121. Chief Judge Mary Ellen Barbera provided remarks recalling the work necessary to secure women’s suffrage 100 years ago. *Id.* Closing remarks were invited from Kathleen M. Dumais (Member, Maryland House of Delegates and Senior Counsel, Ethridge Quinn Kemp McAuliffe Rowan & Hartinger). *Id.*

122. *Id.* Panelist Roberta (Bobbi) D. Liebenberg, Esq. (Senior Partner, Fine, Kaplan and Black, R.P.C.) was joined by Reena K. Shah, Esq. (Executive Director, Maryland Access to Justice Commission) and Mary M. Koch, Esq. (Partner, Wais, Vogelstein, Forman & Offutt). *Id.*

123. *Id.* Panelists included Yodeski Acquie, Esq. (Nelson Mullins Riley & Scarborough LLP) and Sam Williamson, Esq., with Pamela Cardullo Ortiz, Esq. (Director, Access to Justice, Administrative Office of the Courts). *Id.*

124. *Id.* Panelist Dolores Dorsainvil, Esq. (Assistant Disciplinary Counsel, D.C. Office of Disciplinary Counsel) was joined by Debra M. Lawrence, Esq. (Regional Attorney, U.S. Equal Employment Opportunity Commission). *Id.*

125. *Id.* Panelists included Professor Leigh Goodmark (University of Maryland Francis King Carey School of Law) and Dorothy Lennig, Esq. (Legal Clinic Director, House of Ruth) with Susan Carol Elgin, Esq. (Kaufman, Ries & Elgin PA). *Id.*

126. The action items identified in 2020 bear a striking resemblance to recommended changes identified 30 years ago. For example, the 1989 Report recommended that the Judiciary should “[e]stablish a system for confidential reporting and investigating incidents of sexual harassment and monitor the outcome of those complaints.” REPORT, *supra* note 10, at 95.

127. The Report recommended that the judiciary “[a]ssure that grievance procedures are available to all employees” and “[e]stablish, in conjunction with the appropriate bar associations, a confidential reporting and investigation process for those who feel they have a gender bias complaint involving a member of the judiciary, master, courthouse employee, or attorney.” *Id.* at 95, 128.

responsibilities of judges and lawyers to report misconduct;<sup>128</sup>  
 negative consequences of non-disclosure agreements;  
 utility and quality of training to prevent discriminatory bias;<sup>129</sup>  
 prohibiting harassment because of gender identity or sexual  
 orientation;<sup>130</sup>  
 evaluating judicial performance;<sup>131</sup>  
 monitoring misbehaving judges;  
 comprehending static or trending statistics on women in private  
 firm law practice;<sup>132</sup>  
 recognizing intersectional biases;  
 overcoming implicit biases;<sup>133</sup>  
 societal “norms” as traditionally gendered, antagonistic to  
 nonbinary individuals;<sup>134</sup>  
 prosecuting crimes of domestic violence and pursuing protective  
 orders;<sup>135</sup> and  
 advancing “diversity”—or promoting “inclusivity.”<sup>136</sup>

A broadening scope of issues warranting attention to challenge  
 gender bias became apparent throughout the 2020 Symposium.<sup>137</sup>

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128. The Report recommended that judges “monitor behavior in courtrooms and chambers and swiftly intervene to correct lawyers, witnesses, and court personnel who engage in gender-biased conduct.” *Id.* at 128. Associations were to “[d]evelop programs to sensitize lawyers to the needs of court personnel, especially women, for increased levels of respect and cooperation.” *Id.* at xxviii.

129. The Report recommended: “Develop education programs for all judicial and court support personnel which address issues of gender bias and sexual harassment . . . [and] [p]rovide training . . .” *Id.* at 95. The judiciary was urged to “[d]evelop and conduct regular training for sitting and newly elected and appointed judges . . .” *Id.* at 128.

130. *See id.* at 95 (“Issue a directive defining the various types of sexual harassment and stating that this type of behavior is illegal, unacceptable, and grounds for termination.”).

131. *See id.* at 43 (“Evaluate judges and masters on a regular basis, taking into account gender neutrality on issues relating to child custody.”).

132. *See id.* at 128 (recommending to “[u]ndertake a study of the extent to which gender bias adversely affects women in the practice of law outside of the courtroom.”).

133. *See id.* at 128 (recommending to “[d]evelop and conduct regular training . . . to make [sitting and newly elected and appointed judges] aware of the subtle and overt manifestations of gender bias . . .”).

134. *See id.* at 94 (recommending to “[p]rovide gender-neutral job descriptions and enforce job requirements without regard to gender.”).

135. The Report’s entire first chapter is dedicated to domestic violence with over 36 recommendations. *Id.* at 20–24.

136. *See id.* at 94 (recommending to “[i]mplement the broadest possible recruitment efforts for all positions on a continuing basis.”).

137. Lydia E. Lawless, one of the Symposium panelists reflected on “what’s next” shortly after the March 6, 2020 event: “My mom and one of her (four) sisters came over on Saturday evening and the Symposium provided for the dinner conversation. We all (including my 9 year old daughter and 6 year old son) talked about bias, sexism, and prejudice that we have experienced or witnessed in our lives in particular and the world in the larger sense. My kids

Thirty years after the Gender Bias Report, gender-related battles remain to be fought for equal access in our justice systems and law practices.<sup>138</sup> The continuing need for advocacy in lawsuits,<sup>139</sup> for education,<sup>140</sup> for disciplinary tools to address gender-related misconduct, and for pragmatic solutions to correct misconduct in the legal profession,<sup>141</sup> is readily apparent more than thirty years after the Gender Bias Report. Every attorney and judge ought to be proactive, not merely reactive, to combat both the perception and reality of gender-related misconduct and other characteristic discrimination<sup>142</sup> that undermines equal access to justice. The ethics norms that underlie non-discrimination mandates are foundational to our justice systems: “a commitment to equal justice under the law lies at the very heart of the legal system.”<sup>143</sup>

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spoke about things they had personally witnessed and we talked about the importance of identifying sexism and prejudice and calling it what it is. They both gave examples of things that they could say or do in specific circumstances to make clear that the behavior would not be tolerated. For me, the question of “What’s Next?” has made me recommit, in both my personal and professional life, to stay vigilant, to speak up, and to support victims. Talking to my mom and her sister, reflecting on my own experiences, and hearing from my kids makes me believe that we are moving forward, slow as it may seem. I’ll try to do my part.” E-mail to Pamela J. White (Mar. 12, 2020) (on file with author).

138. The passing of venerated Justice Ginsburg provoked continued conversation on gender bias issues. Justice Ginsburg, throughout her career on the bench and as a member of the bar, was a stalwart advocate for equality. Her voice will be missed but her vast contributions will support continuing battles for equality under the law.

139. The Supreme Court heard arguments in October 2019 in *Zarda v. Altitude Express, Inc.* and consolidated matters to address whether Title VII includes discrimination based on sexual orientation. See, e.g., Jeffrey J. Sadri, *Title VII’s Prohibition Against Sex-Based Discrimination in the Workplace: How Far Does It Go?*, MSBA BAR BULL., Oct. 15, 2019, at 11. The Supreme Court’s watershed decision followed in *Bostock v. Clayton County*, holding that an employer violates Title VII, which makes it unlawful to discriminate against an individual “because of” the individual’s sex, by firing an individual for being homosexual or being a transgender person. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

140. In 2020, the Administrative Office of the Courts and Judicial College presented a mandatory online course, “Preventing Sexual Harassment,” for all judges and judiciary personnel across Maryland.

141. On September 17, 2019, the Judicial Conference of the United States adopted a new model employment dispute resolution (“EDR”) plan to expand options for addressing workplace misconduct. See JUDICIAL CONFERENCE OF THE UNITED STATES, MODEL EMPLOYMENT DISPUTE RESOLUTION (EDR) PLAN (2019), <https://www.uscourts.gov/file/23635/download>. On March 28, 2019, the Maryland Daily Record renewed a call for the Maryland Judiciary’s Rules Committee “to consider whether the current rules of professional conduct were appropriately comprehensive to reflect issues of harassment and discrimination under Rule 19-308.4.” Editorial Advisory Board, *Federal judicial code of conduct leading the way?*, MD. DAILY REC. (Mar. 28, 2019), <https://thedailyrecord.com/2019/03/28/federal-judicial-code-of-conduct-leading-the-way/>.

142. The work of the organized bar is critical to advancing equal access. See, e.g., Tandy, *supra* note 17, at 1; *Race, Gender & The Law* (February 18, 2020) (Panel Discussion sponsored by the Bar Association of Baltimore City, Alliance of Black Women Attorneys, Baltimore Bar Library, Monumental City Bar Association), <https://abwamaryland.org/events/race-gender-and-the-law/>.

143. MD. R. 19-308.4 cmt. 4.