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# RECENT DEVELOPMENTS

## ACHIEVING EQUAL JUSTICE FOR WOMEN IN THE COURTS

Paul D. Tripodi II\*

### INTRODUCTION

Recently, the California Judicial Council Advisory Committee on Gender Bias in the Courts ("Advisory Committee") completed a comprehensive study of the state judicial system. This Advisory Committee was appointed by the Chief Justice of the California Supreme Court and assigned the task of investigating gender bias in the California courts, gathering information, and making corrective recommendations to the Judicial Council. Beginning in 1987, the Advisory Committee collected and reviewed over three thousand pages of hearing transcripts, two hundred letters of comment, hundreds of articles, summaries, reports, and an extensive survey of the California judiciary. The product of the Committee's labor is a comprehensive report entitled *Achieving Equal Justice for Women and Men in the Courts*, which calls into question the true nature of justice for women in California, especially women of color and women in poverty. This report identifies serious problems present in judicial decision making, court practices and procedures, allocation of judicial resources, and the courtroom environment itself.

Against a background of diminishing resources and increasing case loads, the Advisory Committee proposed that a number of sweeping changes be undertaken. In particular, the Advisory Committee made recommendations with respect to the courtroom environment and certain areas of the substantive law: family law,

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domestic violence, and juvenile and criminal law.<sup>1</sup> The Advisory Committee also made proposals for implementation of its recommendations, and numerous suggestions for judicial education concerning gender bias issues. The Advisory Committee warned that the judiciary must respond definitively in order to ensure gender equality in all of its decisions and practices.<sup>2</sup>

One of the first tasks undertaken by the Advisory Committee was to develop a working definition of gender bias. It determined that gender bias "includes behavior or decision making of participants in the justice system which is based on or reveals (1) stereotypical attitudes about the nature and roles of women and men; (2) cultural perceptions of their relative worth; and (3) myths and misconceptions about the social and economic realities encountered by both sexes."<sup>3</sup>

The Advisory Committee's report identified many instances of intentional gender bias, such as a judge's refusal to hear family law matters in avoidance of female lawyers.<sup>4</sup> But gender bias often occurs in more subtle ways. Gender bias "includes disregard or insensitivity to the needs or characteristics of one sex or the other,"<sup>5</sup> differential treatment,<sup>6</sup> and unequal treatment that fails to recognize immutable differences.<sup>7</sup> Gender bias also includes the use of judicial practices or procedures which have a disparate impact on one sex over the other.<sup>8</sup> The Advisory Committee's report documents numerous manifestations of gender bias throughout the judicial system. The Committee's findings and recommendations for reform are summarized below.

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1. Although not discussed in this Recent Development, the Advisory Committee also addressed gender bias in court administration.

2. CALIFORNIA JUDICIAL COUNCIL'S ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS, ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS § 11, at 1 (draft report, 1990) [hereinafter ADVISORY COMMITTEE REPORT].

3. *Id.* § 1, at 2.

4. *Id.* § 2, at 3.

5. *Id.* § 2, at 4.

6. Differential treatment includes a judge's failure to make eye contact with a female attorney while being congenial and courteous to her male counterpart. *Id.*

7. Unequal treatment includes the failure to provide for pregnancy leave, and the use of restraining hardware and shackles on women prisoners unsuitable for the female anatomy. *Id.*

8. For example, use of child support guidelines as a maximum award rather than as the minimum intended by the legislature has a greater impact on women because they are usually the primary caretakers of children. *Id.*

## I. COURTROOM ENVIRONMENT AND GENDER BIAS

The Advisory Committee began its examination of courtroom dynamics by focusing on judicial conduct. In a survey of the California judiciary conducted by the Advisory Committee, 46.5% of judges reported observing incidents that they considered demeaning to women at least once in the last three years in the courtroom, in chambers, or at professional gatherings.<sup>9</sup> Eleven percent of those judges responded that they observed such incidents either frequently or on occasion.<sup>10</sup>

In support of these perceptions, the Advisory Committee documented several types of courtroom behavior which exhibited gender bias. The Advisory Committee discussed conduct that is openly offensive, hostile, or involved sexual innuendo. Such conduct included incidents such as singling out a female attorney to type an order, or a judge delivering a talk to a professional association in which he referred to women lawyers as “‘menopausal’ dabblers who entered law school only after completing their maternal duties.”<sup>11</sup> A dependency hearing was cited as one example of conduct that resulted in disciplinary action. A judge refused to hear a female attorney’s legitimate objection, commented on the lack of a mother’s credibility and refused to allow the continuation of her testimony, and displayed a similar attitude toward a second female witness.<sup>12</sup> A number of attorneys testifying before the Advisory Committee complained of “being called ‘honey’ or some other familiar term . . . of being called by a first name when opposing counsel was not, and of being singled out and complimented, sometimes in a risqué fashion, for appealing elements of personal appearance.”<sup>13</sup>

The Advisory Committee also documented evidence of negative stereotypes about women which have a serious impact on the female attorney, the female expert witness, and the female litigant. Such stereotypes include the belief that women are too emotional, that men should assume a paternal role toward women, or that female aggressiveness is distasteful. These beliefs may put women in

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9. *Id.* § 4, at 17.

10. *Id.*

11. *Id.* § 4, at 18 n.20 (citing written comments dated February 16, 1989, and March 1, 1989).

12. *Id.* § 4, at 13–14 (citing *Roberts v. Commission on Judicial Performance*, 33 Cal. 3d 739, 190 Cal. Rptr. 910, 661 P.2d 1064 (1983)).

13. *Id.* § 4, at 19.

a "classic 'double-bind' situation."<sup>14</sup> For example, in an article on gender bias in the courts, a female judge wrote: "The female attorney is in a constant dilemma. If she appears too feminine, displays compassion, and is soft-spoken, she is considered too weak to be effective. If she asserts herself and is aggressive, she is condemned for being too pushy and abrasive. Either way she stands to lose."<sup>15</sup>

In addition, discretionary decisions of judges are affected by gender bias. Men benefit from the unequal extension of professional courtesies and the application of a double standard to female advocates. A judge has great discretion to forgive inadvertent errors of counsel such as tardiness, stating objections for the record, late service of documents, and to grant continuances for illness, pregnancy, or calendar conflicts. The unequal treatment of women documented in these areas may partially explain why 62% of the respondents in a recent survey of female lawyers believed that they are not accepted as lawyers by men in the legal profession.<sup>16</sup> Similarly, the Advisory Committee received evidence that some courts refuse to grant continuances of trial to an attorney who is pregnant and about to deliver.<sup>17</sup> One witness suggested that this refusal may induce firms to deny assignment of important and complex cases to women of childbearing years.<sup>18</sup>

Although the Advisory Committee's investigation focused on the conduct of judges, the Committee discovered that attorney conduct is often more offensive and egregious than judicial conduct.<sup>19</sup> As an example of such conduct, the Advisory Committee cited male attorneys' use of gender in trial tactics: name-calling; disparagement of female witnesses, parties, and experts; attempts to dominate discussions in the courtroom or chambers through constant inter-

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14. *Id.* § 4, at 20.

15. *Id.* § 4, at 20 n.23 (citing Caputo, *A Review of Gender Bias in the Courts*, 22 COURT REV. 16-19 (1985)).

16. *Id.* § 4, at 23 n.30 (citing CALIFORNIA STATE BAR COMMITTEE ON WOMEN IN THE LAW, *WOMEN LAWYERS AND THE PRACTICE OF LAW IN CALIFORNIA* 3 (1989), a survey conducted in cooperation with the Employment Law Center/Legal Aid Society of San Francisco).

17. *Id.* § 4, at 26.

18. *Id.* § 4, at 26 n.39.

19. The Committee's conclusion confirmed earlier findings of the State Bar Committee on Women in the Law. In 1985, a questionnaire was distributed to women attorneys in small firms, and the results indicated that "About 40% of the women responding had suffered gender bias in the courtroom. Usually the problems arise from opposing male lawyers, not from the bench. The problems take the form of dirty tricks that border on unethical tactics, interruptions and talking over the women and making patronizing remarks." *Id.* § 4, at 54 n.82 (citing letter from Christine Curtis, former chair, California State Bar Committee on Women in the Law (Sept. 11, 1986)).

ruption of female participants; and manipulation of the perceived sexist attitudes of jurors during jury selection.<sup>20</sup> Even when the judge is not responsible for the biased conduct, the failure of a judge to intervene gives "tacit or explicit approval [that] cloaks the conduct with a mantle of legitimacy not present if the conduct is identified and disapproved of in some manner."<sup>21</sup>

In an effort to remedy these problems, the Advisory Committee proposed the creation of a specific ethical duty requiring judges to refrain from engaging in gender-biased behavior and imposing an affirmative duty to prevent others from engaging in such conduct.<sup>22</sup> This duty would be codified in the existing Code of Judicial Conduct and would also be applied to other bench officers, such as commissioners, referees, arbitrators, temporary judges, private judges, and retired judges sitting on assignment. The ethical duty of attorneys, the Advisory Committee determined, should be identical to that of judicial officers with an exception for legitimate advocacy.<sup>23</sup> In order to preserve the appearance of justice, the Advisory Committee also recommended that the Code of Judicial Conduct be amended to specifically prohibit judicial officers from maintaining memberships in discriminatory clubs.

The creation of an effective mechanism for dealing with incidents of gender-biased conduct in the court is another essential step toward reform. In its report, the Advisory Committee repeatedly noted that judges are often isolated from peers and receive little feedback or criticism. When judicial isolation is combined with reluctance to report incidents of gender bias, early recognition of a potential problem is unlikely.<sup>24</sup> If a locally-based, informal mechanism were developed to deal with "minor" complaints, gender bias problems could be detected earlier, and attorneys affected by such conduct could be protected from reprisals.<sup>25</sup> Among the Advisory Committee's recommendations is the development of pilot projects

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20. *Id.* § 4, at 58.

21. *Id.* § 4, at 26.

22. A number of judges seemed to agree: 48.6% of those judges surveyed believed that a judge should intervene every time behavior exhibiting gender bias occurs in his or her court. *Id.* § 4, at 27.

23. A peremptory challenge against a woman in a jury trial might constitute legitimate advocacy when that challenge is undertaken because the attorney believes that a woman might hold a bias that could hurt her client. *Id.* § 4, at 64.

24. Many attorneys fear retaliation and often prefer not to report incidents of gender bias. *Id.* § 4, at 44.

25. *Id.* § 4, at 46.

in at least three counties designed to hear complaints and provide remedies for aggrieved parties.<sup>26</sup>

The Advisory Committee also recommended additional changes in other areas of civil litigation. It recognized the need for use of gender-neutral language in court rules, forms, and documents and mandated the use of neutral language in all court communications including jury instructions. It also recommended that the Judicial Council encourage equal opportunity and treatment in publicly financed court appointments by adopting written policies.<sup>27</sup> Moreover, the Advisory Committee urged the creation and adoption of a rule of professional responsibility for lawyers that prohibits discrimination in employment decisions and sexual harassment in the law related workplace. In addition, the Advisory Committee recognized the importance of gender diversity in judicial appointments to eliminate gender bias within the courtroom.<sup>28</sup>

Many similar concerns were addressed in the area of court administration. According to the Advisory Committee, the number of women in the work force combined with the lack of statewide standards governing employment create an atmosphere in which gender bias is likely to occur.<sup>29</sup> In order to improve the administration of justice the Advisory Committee recommended that the Judicial Council adopt comprehensive personnel plans and policies on sexual harassment.<sup>30</sup>

## II. SUBSTANTIVE LEGAL ISSUES AND GENDER BIAS

### A. *Family Law*

Unlike many other areas of the law, family law involves an extraordinary amount of judicial discretion concerning child support, child custody, division of assets, and spousal support. Arguably, these decisions are influenced by the judge's personal beliefs, including his or her views on the proper function of families and the

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26. Mendocino County already has such a program which is administered by a Gender Equality Committee. The Committee hears confidential complaints from anyone "who may have experienced gender bias in any aspect of the legal system . . ." The Committee can take direct action on behalf of the aggrieved party or refer them to an appropriate source for assistance. *Id.* § 4, at 46 n.74 (quoting letter and enclosed press release from Mendocino Superior Court Judge Conrad L. Cox, Sept. 19, 1989).

27. *Id.* § 4, at 73-74.

28. *Id.* § 4, at 85-96.

29. For example, 68% of Los Angeles County Superior Court employees are female. *Id.* § 8, at 2 (citing telephone interview with the Personnel Department of the Los Angeles Superior Court, Oct. 13, 1989).

30. *Id.* § 1, at 35.

proper roles of women and men in society. Judges need a more accurate picture of the economic, sociological, and psychological ramifications of their decisions on spouses and children.<sup>31</sup> The judge must exercise his or her discretion in an environment where very little time or resources is allocated to each case.<sup>32</sup> The Advisory Committee made specific findings and recommendations regarding family law in the areas of child support, spousal support, custody, division of assets, family law judges, and mediation.

Basically, the Advisory Committee concluded that child support awards are inadequate, and the duration of payments is too short. Child support award guidelines intended by the legislature as a floor are used by the courts as a ceiling.<sup>33</sup> Because child support obligations can be linked to shared custody, they are often inappropriately used as a bargaining chip in these disputes. In addition, better methods of enforcing child support orders must be developed.<sup>34</sup> The Advisory Committee recommended that the Judicial Council urge that legislation be passed to remove the link between shared custody and child support obligations and require judges to explicitly state the determinative factors when setting child support awards at the minimum levels. Finally, the Advisory Committee urged passage of legislation to assure that children will continue to share in the higher standard of living of the higher income parent and that the termination age of child support obligations be changed from eighteen to twenty-one.<sup>35</sup>

The Advisory Committee also found that spousal support awards are unpredictable and insufficient. Judges traditionally had "a limited appreciation of the economic plight of divorced women and . . . low spousal support awards are a function of the devaluation of homemakers' services."<sup>36</sup> Those most significantly affected by this lack of understanding are the older homemaker with little or no work experience outside the home and the younger woman with

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31. *Id.* § 5, at 4.

32. Judge A. Richard Backus of the Sacramento Superior Court has said: "I sometimes wonder about a system that is willing to spend a week on a personal injury automobile accident case involving a claim of \$10,000 and yet devotes so little resources, comparatively, to things that are really vital to peoples lives. And [those things are] the dissolution of their marriage and the custody of their children . . ." *Id.* § 5, at 84 (quoting from a judicial profile, *L.A. Daily J.*, July 17, 1987, at 1, col. 3).

33. *Id.* § 5, at 14.

34. *Id.* § 5, at 8-9.

35. *Id.* § 5, at 19.

36. *Id.* § 5, at 29 (citing WEITZMAN, *THE DIVORCE REVOLUTION* 143, 143-214 (1985); SENATE TASK FORCE ON FAMILY EQUITY at V-1-V-20 (June 1987)).



minor children who has devoted her time and energy to child rearing.<sup>37</sup>

Although possible remedies for these problems may have already been enacted,<sup>38</sup> the judges' survey indicated that the implementation of corrective legislation may not be uniform due to confusion among judges.<sup>39</sup> Therefore, the Advisory Committee recommended that a monitoring process be initiated to ensure compliance with legislative guidelines.<sup>40</sup>

In the area of child custody, judicial discretion is relatively uncontrolled and inherent biases have an effect on the judges' decisions. Many custody decisions, however, are made by parents, with the assistance of counsel or a mediator. These professionals are just as likely as judges to be influenced by gender stereotypes.<sup>41</sup> The Advisory Committee recommended that judicial protocols be developed to ensure a fair solution for custody disputes. The Advisory Committee also determined that the risks of gender bias in all custody cases can be minimized by educating judges, attorneys, and mediators. In addition, research must be conducted into custody arrangements to determine what arrangements are most beneficial to the children involved. Specifically, the Advisory Committee recommended that the Judicial Council "Fund further research on joint custody and stress in judicial education programs the need to accord the statutory trial preference [granted by the legislature] to custody cases."<sup>42</sup>

Judges prefer to avoid a family law court assignment because of substandard working conditions.<sup>43</sup> The Advisory Committee suggested that the relegation of "women's and children's issues" to the lowest priority is to blame for these inadequate working conditions.<sup>44</sup> It suggested that more attorneys with family law expertise

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37. *Id.* § 5, at 28.

38. CAL. CIV. CODE § 4801(a) (West 1990) relates spousal support to the standard of living in the marriage, and CAL. CIV. CODE § 4390.3 (West 1990) imposes automatic wage assignments in a spousal support order. See ADVISORY COMMITTEE REPORT, *supra* note 2, § 5, at 35.

39. *Id.*

40. *Id.*

41. For example, when a woman makes allegations of child abuse in a custody dispute, there is a tendency to dismiss them as "hysterical or vindictive even when medical evidence corroborates a claim of child abuse." *Id.* § 1, at 14.

42. *Id.*

43. *Id.* § 1, at 15.

44. *Id.*

should be appointed to the judiciary and recommended that more resources be allocated to the family law court.<sup>45</sup>

### B. *Domestic Violence*

Domestic violence is a problem of serious magnitude in California. Because 95% of the adult victims of domestic violence are women, any negative impact that the judicial system has on these victims raises serious issues of gender bias.<sup>46</sup> In 1979, the legislature enacted a comprehensive statutory scheme entitled the Domestic Violence Prevention Act ("DVPA").<sup>47</sup> The DVPA provides for the issuance and enforcement of civil restraining orders and is designed to protect victims of domestic violence. Unfortunately, in spite of the efforts of the legislature and an apparent commitment from the judiciary,<sup>48</sup> the inadequacies and inequities of the judicial system often mean that effective relief will not be granted or enforced.<sup>49</sup>

Consequently, many victims who seek help from the court are further victimized by the process or by their experiences within the judicial system.<sup>50</sup> The Advisory Committee heard numerous accounts of the justice system treating victims of domestic violence as though their complaints were trivial, exaggerated, or somehow their own fault.<sup>51</sup> The Advisory Committee blamed stereotypes and a lack of information concerning the psychological, economic, and social realities of domestic violence victims for this behavior.<sup>52</sup> For example, some judges and law enforcement officers believe that "women, because of their inherent nature, are to be controlled by their husbands and [also that] physical force is a legitimate means of asserting that control . . . ." <sup>53</sup> Consequently, they may dismiss domestic violence complaints as trivial or exaggerated.<sup>54</sup>

In most cases, the first contact that a victim has with the legal system is while seeking a protective order against future abuse. According to California law, these restraining orders are to be available at any time, on any day; but in reality, practical and

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45. *Id.* § 5, at 91.

46. *Id.* § 1, at 22 (citing CAL. PENAL CODE § 273.5 (West 1990)).

47. CAL. CODE CIV. PROC. § 540 (West 1990).

48. ADVISORY COMMITTEE REPORT, *supra* note 2, § 6, at 1.

49. *Id.* § 1, at 22.

50. *Id.*

51. *Id.* § 6, at 5.

52. *Id.*

53. *Id.* § 6, at 4.

54. *Id.* § 6, at 5.

procedural barriers prevent many victims from obtaining relief.<sup>55</sup> For example, some courts limit the hours and the days on which protective orders may be obtained.<sup>56</sup> Restraining orders are often issued after substantial delays.<sup>57</sup> According to the Advisory Committee, all orders should be issued on the same day of the application. Where issuance is truly impossible, the applicant should be told about the availability of an emergency protective order. Another obstacle to the issuance of a restraining order concerns the difficulty that applicants experienced in completing the application itself.<sup>58</sup> The Advisory Committee recommended that comprehensible forms be made available in several languages, and that legible handwritten forms be accepted by the courts.

When victims of domestic violence have children in common with their batterers, the courts must also adjudicate child custody and visitation. Orders that force victims of spousal abuse to share custody often fail to include adequate arrangements to prevent future harm. A batterer's unrestricted access to his children constitutes unrestricted access to his abused spouse.<sup>59</sup> Similarly, where custody and visitation issues are settled by mandatory mediation, the victim is placed in a dangerous situation. On many occasions physically violent behavior, including a stabbing, occurred during or shortly after mediation.<sup>60</sup> The Advisory Committee suggested that separate mediation be utilized to minimize or reduce the danger to the victim.<sup>61</sup>

Judicial officers need to be educated in the area of domestic violence. People involved in the legal system must understand the domestic violence profile: victims are afraid to speak out against their abusers and often reluctant to pursue judicial remedies after the current threat passes. Most importantly, the judicial system must begin to acknowledge the seriousness of the problem of do-

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55. *Id.* § 1, at 23.

56. *Id.* § 6, at 13.

57. One family law attorney testified that a judge told her, "Well, if she's been beaten for seven years, what's the big rush for restraining orders now? Another week or two of beatings certainly can't be any big deal." *Id.* § 6, at 14 n.17.

58. For example, the committee reported that one woman who "wrote that her batterer [had] 'hit her upside the head' was denied an order because the judge said [that] he didn't understand it." *Id.* § 6, at 20-21.

59. *Id.* § 1, at 23.

60. *Id.* § 6, at 41.

61. In separate mediation, the mediator arranges to meet with the parties at different times or separate places to reduce the danger created by requiring the parties to be in the same parking lot, waiting room, or office. *Id.* § 6, at 43.

mestic violence and assume responsibility in ending the cycle of violence against women.<sup>62</sup>

### C. *Juvenile and Criminal Law*

In the area of juvenile and criminal law, the Advisory Committee investigated gender discrimination within the justice system, focusing on the policies and practices in the criminal and juvenile justice system that create a disparate, negative impact on females.<sup>63</sup> There are currently over six thousand women in the California state prison system, the largest female prison population anywhere in the world.<sup>64</sup> The typical female prisoner is between eighteen and forty years old, has not completed high school, and has committed a non-violent crime.<sup>65</sup> A disproportionate share of the available resources and facilities is allocated to adult and juvenile males, resulting in fewer services and programs for women.<sup>66</sup>

Roughly seventy to eighty percent of the female inmates are mothers, the majority of them single.<sup>67</sup> Placement of women in facilities away from their homes seriously limits access to their children. Single mothers were particularly affected because their children became part of the juvenile dependency system. As a remedy, the Advisory Committee suggested that women who committed non-violent crimes be sentenced to community-based alternative sentencing programs so that women and their children could remain in close contact.

Finally, the Advisory Committee requested that the Department of Corrections provide adequate and appropriate clothing, particularly for pregnant women, as well as adequate supplies of personal hygiene products. In addition, appropriate medical care, including prenatal and pregnancy-related services, medically supervised drug detoxification programs, and voluntary AIDS testing were recommended.

### CONCLUSION

The Advisory Committee concluded its report with the acknowledgement that "A report gathering dust in the bookcase of judges and lawyers in California has little benefit to the citizens of

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62. *Id.* § 1, at 24.

63. *Id.* § 1, at 25.

64. *Id.* § 7, at 1.

65. *Id.*

66. *Id.*

67. *Id.* § 1, at 25.

California whose interest it is designed to protect."<sup>68</sup> Therefore, creation of a monitoring and liaison committee is necessary to increase the likelihood of implementation of the Advisory Committee's recommendations.

The Advisory Committee repeatedly cited judicial education as essential to eliminating gender bias and effecting permanent change in the judicial system. The Advisory Committee made specific recommendations addressing curriculum, teaching techniques, and course content designed to minimize judicial resistance while maximizing the educational value of such programs. The Advisory Committee recommended that in areas where the need for education is particularly well documented, such as in family law, these programs should be mandatory.

On November 16, 1990, the draft report of the Advisory Committee along with all of its recommendations and proposals was accepted with only slight modification by the Judicial Council.<sup>69</sup> The Advisory Committee challenged the judiciary to act with "clear, decisive, and immediate action to ensure gender fairness in all of its decisions and practices,"<sup>70</sup> and, apparently, the judiciary has accepted that challenge.

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68. *Id.* § 9, at 1.

69. Telephone interview with Sheila Kuehl, Chair of the Domestic Violence Subcommittee of the Judicial Council Advisory Committee on Gender Bias in the Courts, and Managing Attorney of the Southern California Women's Law Center (Feb. 28, 1991).

70. *Id.* § 11, at 1.